HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 12 Aug 2021 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S37/2021
File Title:	Hofer v. The Queen
Registry:	Sydney
Document filed:	Form 27F - Outline of oral argument
Filing party:	Appellant
Date filed:	12 Aug 2021

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
BETWEEN:

No. S37 of 2021

THOMAS HOFER
Appellant
and
The Queen
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. The appellant certifies that this outline is in a form suitable for publication on the internet.

Part II: Propositions to be advanced

<u>The trial miscarried by reason of impermissible/improper cross examination of the accused (Ground 1)</u>

2. Cross examination on apparent breach of *Browne v Dunn* (1893) 6 R 67 is a fraught exercise, and liable to involve significant unfairness and prejudice to an accused person. This has long been recognised by the authorities and, in Australia, at least since *R v Birks* (1990) 19 NSWLR 677. The assumption that a failure to put a relevant matter to a witness occurred because no instructions were given on that subject, so as to support the allegation of lying based on "recent invention", may well prove to be unfounded. There may be other explanations for any such suggested failure: in the present case, for example, much of the responsibility lay with defence counsel and, except in one instance, remained uncorrected. In addition, and relatedly, such cross examination inevitably impinges the privileged relationship between counsel and client.

3. Cross examination of this kind is directed to credit only (*Evidence Act* NSW S101A). Absent an endeavour to establish a prior inconsistent statement, it is impermissible without leave (S104 (3)(c)) which can only be given in confined circumstances not presently relevant. The three premises: "proposition not put", "duty to put" and "duty fulfilled" (identified at CCA [123] CAB 122) were integral to Fagan J's reasoning,[1] which Fullerton J adopted (CCA [103] CAB 118). Although said by the majority (and embraced by the respondent) to be required for such a comment, the premises are really no more than preconditions for any legitimate reliance on the failure to put matters to

[1] At CCA [123]-[124], [130], [133], [144]-[150], [162]-[166], [170]-[171], [177]-[178], [183], [185]-[188] at CAB 122-137.

relevant witnesses. They have nothing to say about the illegitimate conduct of such cross examination or the circumstances of this case.

4. The eight areas of the appellant's evidence that the prosecutor put during cross examination as having never been raised by the appellant's counsel with the relevant Crown witnesses were identified at CCA [34] CAB 105-6 and set out at AS [17]. The allegation of recent invention was unmistakable, explicit and repeated.[2] Questioning on propositions (i), (ii) and (iii) was prominent in the last portion of cross examination on 29 April 2016 (AFM 283-4, 292-3, 296-9). Items (i) and (ii) were made the subject of explicit address in the prosecutor's closing submissions (AFM 321, 329). When the jury returned on 3 May 2016, cross examination on items (iv) to (viii) was the dominant feature of the remaining questioning and a general allegation of recent invention was spelt out.[3]

5 The prosecutor chose to cross examine in this risky and impermissible way and made a feature of it in his address, in so far as it involved his (admittedly brief) dismissal of what the accused had to say (AFM 321, 329). The form of questioning was a central part of the cross examination, leading to an allegation of lying and recent invention, and it can hardly be said that the jury would not have had regard to it when that was the very invitation they were given. Contrary to Fagan J's analysis (at CCA [130], [185]; CAB 124, 136), that the prosecutor did not heavily emphasise the issue in his address was of no moment given the address followed immediately after cross-examination concluded.

6 The majority were wrong to dismiss the significance of the cross-examination as ineffectual and insignificant.[4] The matters not put, as detailed at CCA [34] CAB 105, were each relevant to the appellant's defence that he had an honest belief on reasonable grounds that both complainants had consented. The unambiguous, general allegations of recent invention tell against the majority's view that the jury would have understood the questioning as suggesting no more than that defence counsel had not been thorough.[5]

7 The second and third "premises" would normally not even be appropriate for cross examination of an accused (although in *Birks* the accused happened to know of the second). The failure of the trial judge to spell the subject out hardly assists the

---

[2] See AS at [33]; also extracted in the judgment of Mcfarlan JA at CCA [32]-[33] CAB 100-105.
[3] See Macfarlan JA at CCA [46] CAB 108 and T518-520, AFM 305-307
[4] See Fullerton J at CCA [117], Fagan J at CCA [187], [188]; CAB 121, 137
[5] See Fullerton J at CCA [117], Fagan J at CCA [132] CAB 121, 124

respondent. Cross examination the subject of item (viii) was wholly misconceived. Allegations of "coaching" are not normally matters for instructions and depend on quite different forensic considerations before such matters may be legitimately put to witnesses.

Incompetence of the accused's counsel contributed to the trial miscarrying (ground 2).

8 Defence counsel had instructions on all of the matters put as recent inventions, but only corrected one (item (iv)), which tended to reinforce the cross examiner's point on the others. There is no rational explanation for his failure to intervene and correct matters. The reasoning of Macfarlan JA on this subject was correct; see CCA [93]-[98]; CAB 117-118.

Miscarriage of justice

9 The impermissible and unfair cross examination was, in itself, productive of a miscarriage of justice. Macfarlan JA at CCA [49] CAB 109, citing *Weiss v The Queen* [2005] HCA 81; (2005) 224 CLR 300 at [18]. The jury was invited (directly and by clear implication) to conclude that the failure to cross examine Crown witnesses on pertinent subjects was of real significance and supported the proposition that the appellant was lying because he had recently invented a good deal of his evidence ("making it up as he went along"). It is not to the point to say that jury should not have reasoned in this way: c/f Fagan J at CCA [196] CAB 139; *Lane v The Queen* [2018] HCA 28; (2018) ALJR 689 at [40], [48].

The proviso

10 Macfarlan JA was correct to decline to apply the proviso: CCA [51]-[62], CAB 109-110. In addition to his Honour's reasoning, the impermissible cross examination, containing within it a series of false premises, deprived the appellant of a fair trial: *TKWJ v The Queen* [2002] HCA 46; (2002) 212 CLR 124 per Gleeson CJ at [16]. The adversarial system carries implicit assumptions about the responsible conduct of advocates: *Birks* at p683-684 (JBA 428-429). Failures of the kind that occurred in this case result in a "significant denial of procedural fairness": *Weiss v The Queen* [2005] HCA 81; (2005) 224 CLR 300 at [45].

Tim Game
Forbes Chambers
12 August 2021

David Barrow