HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 03 May 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 27A - Appellant's submissions
Filing party:	Appellant
Date filed:	03 May 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 OFFICE OF THE REGISTRY

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF NEW SOUTH WALES

BETWEEN:

THOMAS HOFER

Appellant

and

THE QUEEN

Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. This appeal concerns a persistent practice in criminal trial process; namely, cross-examination by a prosecutor of a defendant on purported inconsistencies of matters put (and importantly, not put) to prosecution witnesses in cross-examination by a defendant's trial counsel. This appeal has an additional feature; namely, that each of the prosecutor's "eight areas" of cross-examination on issues said to have been "not put" had actually been communicated by the appellant to his trial counsel prior to the commencement of the trial, yet the appellant's trial counsel made almost no effort at trial to remedy the situation. Such limited steps as were taken by trial counsel could

well have confirmed in the juror's mind that the other (six) areas of cross-examination were not the subject of any instructions.

3. In this trial a significant part of the cross-examination of the accused was built on the assertion that his evidence was not consistent with what his counsel had put to prosecution witnesses and was a recent invention; it was also part of the Crown's address. The question whether there was a miscarriage of justice was framed by the majority as requiring that there be three steps taken (see Fagan J at Court of Criminal Appeal ("CCA") [123] CAB 122). Is this approach correct or is the correct one that taken by McFarlan JA (at CCA [44]-[49] CAB 108-109)?

4. Whilst this Court has considered when incompetence of counsel may give rise to a miscarriage of justice in other contexts: *TKWJ v The Queen* (2002) 212 CLR 124, [2002] HCA46; *Ali v The Queen* (2005) 79 ALJR 662, [2005] HCA 8; *Nudd v The Queen* (2006) 80 ALJR 614, [2006] HCA 9, this appeal raises a particular issue relevant to the provision of a fair trial. The incompetence in this case was clear. It meant that the jury never learnt that the accused person had given instructions on the relevant matters. The assertions put to him were in actual fact unfounded and this was known to his own counsel.

5. At trial the prosecutor cross-examined the appellant with regard to eight alleged instances of suggested non-compliance with the principles of *Browne v Dunn* (1893) 6 R 67. The cross-examination was plainly aimed at undermining the appellant's credibility, with the distinct implication that his evidence was a recent invention. The prosecutor put to the appellant that he was making his evidence up as he gave it. Although the prosecutor withdrew this allegation with regard to two of the eight matters (see CCA at [35] CAB 106), the other six instances were maintained. This of itself tended to confirm to the jury that the other six alleged instances of non-compliance with the rule in *Browne v Dunn* were accurate.

6. The prosecutor's address to the jury commenced immediately after he had completed cross-examination of the appellant. During his address the prosecutor referred on three occasions to aspects of the appellant's evidence that had never been raised with

the complainants. (CCA at [36] CAB 106) These submissions were part of the prosecutor's argument as to why the jury would reject the appellant as a witness of truth and why they could accept the prosecution case beyond a reasonable doubt.

7. It was established on appeal that trial counsel had been in possession of instructions from the appellant consistent with each of the eight impugned areas of cross-examination, (CCA at [97] CAB 117) yet other than in two limited respects trial counsel took no steps to address the unfairness of the cross-examination or the use made of the evidence by the prosecutor in his address to the jury. The trial judge was not asked and did not direct the jury as to the alternative explanations that may have existed to explain trial counsel's omission to raise the various matters with the prosecution witnesses. Similarly, his Honour gave no directions to the jury as to what arose from the alleged failure on the part of the appellant's counsel to comply with the rule in *Browne v Dunn.*

8. The appellant contends that the prosecutor's cross-examination and submissions in his address to the jury as to the alleged breach of the rule in *Browne v Dunn,* together with the failure of the appellant's trial counsel to remedy the situation along with the absence of directions to the jury on the issue all contributed to a miscarriage of justice.

Part III: Section 78B of the *Judiciary Act 1903*

9. Consideration has been given to the question whether notice pursuant to s78B of the *Judiciary Act 1903* (Cth) should be given with the conclusion that this is not necessary.

Part IV: Citations

10. *Hofer v Regina* [2019] NSWCCA 244

Part V: Facts

The trial

11. The appellant stood trial from 19 April 2016 charged with 11 counts of having sexual intercourse without consent. Counts 1-8 were allegedly committed against C1 on 29 or 30 October 2014. Counts 9-11 were allegedly committed against C2 on 30 October 2014. The appellant was found guilty on Counts 2, 3, 4, 5, 6, 7 and not guilty on Counts 1 and 8 with regard to offences against C1. He was found guilty on Counts 9 and 11 with regard to offences against C2. There was a verdict by direction on Count 10.

12. On 23 September 2016 the trial judge, Judge Whitford SC, sentenced the appellant to an overall term of imprisonment of 9 years 9 months with a non-parole period of 6 years 6 months. The sentence was backdated to commence on 31 October 2014. The appellant's earliest date of eligibility for parole is 30 April 2021. The sentence expires on 31 July 2024. (CAB 84)

13. The two complainants did not know one another. Both had contacted the appellant in response to an advertisement he had issued seeking a roommate to share a rental property. C1 was 23 years old and on a working holiday from the United States. C2 was 17 years old and had recently moved to Sydney from Queensland. Although the two sets of allegations were heard together, the prosecution did not rely upon either tendency or coincidence evidence.

14. The appellant arranged to meet C1 on the evening of 29 October 2014 to discuss the rental proposal. They went to two bars together and it was alleged the appellant plied C1 with alcohol such that she became intoxicated. They then went to the appellant's flat so that C1 could inspect it. The alleged non-consensual sexual intercourse offences occurred whilst they were inside the flat. Subsequently, the complainant left in a taxi and was observed to be upset. She made an immediate complaint and a formal complaint to police on the following day.

15. C2 met with the appellant on the evening of 30 October 2014, also in response to the advertisement. They met for a meal and then went to the same bar C1 had gone to

with the appellant on the previous evening. C2 also alleged that the appellant plied her with alcohol. She became extremely intoxicated and was then assisted by the appellant to walk to his apartment. C2 alleged there was then non-consensual sexual intercourse. C2 left the apartment and caught a bus to the city. She became distressed on the bus and made an immediate complaint to police.

16. The appellant gave evidence. His evidence was that in both instances the complainants had consented to the sexual intercourse. During cross-examination he was asked about aspects of his evidence relevant to the issue of consent that had not been raised by his counsel when C1 and C2 had given evidence. There were eight identified areas of impugned cross-examination relied upon in the conviction appeal in support of Ground 2; as detailed in the dissenting judgment of McFarlan JA (at CCA [32]-[33] CAB 100-105) and in the judgment of Fagan J (at CCA [140]-[182] CAB 126-136)[1]

17. The essential features of the evidence of the appellant that the Crown Prosecutor identified as not having been raised with either complainant were identified by McFarlan JA (at CCA [34] CAB 105):

    1. C1 had an orgasm during oral sex performed by the appellant on her (T489-90 AFM 283-284).
    2. C2 told him that she was bisexual and did not tell him that she was a lesbian (T498-9, 502-3 AFM 292-3, 296-7).
    3. C2 used her tongue when she and the appellant had kissed (T499, 504-5 AFM 293, 298-9).
    4. C2 performed oral sex on the appellant (T518 AFM 305).
    5. The appellant asked C2 if he could ejaculate inside her (T519 AFM 306).
    6. The appellant and C2 both had an orgasm during sexual intercourse (T519 AFM 306).
    7. Whilst the appellant was having sexual intercourse with C2, she was on the phone to her "unofficial boyfriend" (T523-4 AFM 310-11).
    8. The police had coached the complainants as to their evidence. (T520-1 AFM 307-311).

[1] Fagan J identified the same passages of the cross-examination, however his Honour categorized them into nine categories.

18. Although it was subsequently accepted by the prosecutor that items (4) and (7) had been adequately raised in the cross-examination of the C2, on each occasion when questioning on the subject occurred, the appellant was asked by the prosecutor to agree that he had never heard his counsel put the above propositions to the complainants when they gave their evidence. It was suggested to the appellant on two occasions (T520 AFM 307 and 519 AFM 310 as extracted at CCA [33] CAB 102-105) that he was "just making things up as you go along", and that he was "simply giving evidence and doing the best you can to meet what can be objectively proven by the Crown case."

The appeal to the Court of Criminal Appeal

19. Evidence received by the CCA established that the appellant's trial counsel had received instructions from the appellant in support of matters one to seven listed above. The appellant had also raised the eighth issue in an interview with a forensic psychiatrist. Trial counsel was in possession of that report prior to the commencement of the trial. (CCA [97] CAB 117)

20. Trial counsel gave evidence in the appeal hearing. He accepted he had been in possession of the relevant instructions[2] and that a range of options had been available to address the unfairness of the cross-examination of the appellant and the unfounded accusations that parts of his evidence were a recent invention.[3] Trial counsel accepted he took no steps to remedy the situation.[4] He was unable to provide any explanation for why he had not sought to address the attack on the appellant's credibility.[5]

21. In his closing address, the prosecutor also made reference to these aspects of the appellant's evidence never having been raised by his counsel in cross-examination of the complainants. (CCA [36] CAB 106) The issue was not addressed at all by defence counsel, nor was it referred to in the trial judge's summing up.

---

[2] See T47-50 on 30/8/19; AFM 502-5; CCA [97] CAB 117
[3] See T54-56 AFM 509-511
[4] T56.22 AFM 511
[5] T56.50-57.02, 59.28 AFM 511, 512, 514

22. Fullerton and Fagan JJ concluded (CCA at [123] CAB 122) that the cross-examination of the appellant had not occasioned a miscarriage of justice, for the reason that the three "*Birks* comments" required before recent invention was engaged for the consideration of the jury had not been raised. Such cross-examination, in combination with the prosecutor's address and directions from the trial judge, needed to establish:

(1) a matter was not put to a relevant witness;

(2) defence counsel had a duty to put all relevant matters of which there were instructions;

(3) and defence counsel had fulfilled that duty.

23. Although Fagan J set out (at CCA [125] CAB 123) a summary by Garling J of the principles in his judgment in *Llewellyn v R* [2011] NSWCCA 66 at [136]-[137], concerning cross-examination of an accused about his or her counsel's failure to put matters to prosecution witnesses in cross-examination, his Honour held that three premises must "normally"[6] be established before a "*Birks* comment" regarding an accused's recent invention of evidence could be effectively made. (CCA [123] CAB 122)

24. Leading on from that his Honour held that the cross-examination of the appellant had only addressed item (1). The issue of "recent invention" had not been a feature of the prosecutor's address and the jury had not been explicitly invited to reason that because these matters had not been put to the prosecution witnesses the appellant must have fabricated them. (CCA [130] CAB 124) All the jury would have taken from the cross-examination (it was said) was that the prosecutor was critical of defence counsel's lack of thoroughness. (CCA [117], [132] CAB 121, 124)

25. His Honour considered each of the impugned areas of cross-examination to be inconsequential (CCA [144]-[180] CAB 126-135) and they did not occasion prejudice to the appellant, either individually or in combination. (CCA [188] CAB

[6] Both Fullerton J (at CCA [110] CAB 119) and Fagan J (at CCA [124] CAB 122) acknowledged there may be occasions where the significance of a matter not put to a prosecution witness may be so central to the matters in issue that cross-examination of an accused may carry the clear implication of recent invention before the reasoning has been spelt out.

137) In the absence of explicit cross-examination on all three premises "the questioning went nowhere" (CCA [162] CAB 131); the absence of an explicit assertion that the applicant's evidence had been fabricated meant that such an inference would not have been obvious to the jury (CCA [170] CAB 132); that even direct questions alleging fabrication on the applicant's part had no logical force in the absence of subsequent submissions from the prosecutor and directions from the trial judge (CCA [177] CAB 134 and CCA [182] CAB 136). The impact of the questions would not have led the jury to conclude that the appellant was lying about those aspects of his evidence, because "*Birks* reasoning is not intuitive" (CCA [188] CAB 137) and a jury would not reach such a conclusion in the absence of judicial instruction "about fundamental premises" and the "path of reasoning" involved in a "*Birks* comment on credit." (CCA [187] CAB 137)

26. Fagan J concluded, apparently as a consequence of application of the "three premises" test, that "the sum of these insignificant lines of cross-examination of the applicant is, still, insignificant." (CCA [188] CAB 137) In the alternative, Fagan J considered that if the prosecutor's cross-examination had caused prejudice, there was no substantial miscarriage of justice and he would have applied the proviso. (CCA [189]-[192] CAB 137-138)

27. However (and as a separate later observation) Fagan J said that the prosecutor's cross-examination to be "ill advised" (CCA [202] CAB 140) and should not have been undertaken until the foundations and implications of such questions had been carefully considered. (CCA [203] CAB 140) Defence counsel should have been aware of the steps required to avert the risk of unfair prejudice if fault lay with counsel, as it did in this case. Counsel should have "intimated to the prosecutor" that he had those instructions, with the consequence that the prosecutor may have withdrawn the questions. If not, it was appropriate for defence counsel to call the instructing solicitor to give evidence as to the actual instructions that had been received. (CCA [204] CAB 140) Directions could also have been sought from the trial judge as to the possible explanations for the issue. (CCA [204] CAB 140) Despite none of these things having been addressed, his Honour considered there had been no miscarriage of justice in this instance.

28. Fullerton J also thought that the prosecutor had not exercised forensic caution, nor appreciated the importance of the issue. (CCA [107], [115]-[116] CAB 118, 120-121) Such cross-examination risked driving a wedge between the accused and his counsel, as it might require a waiver of privilege or demonstrate counsel's incompetence or carelessness. (CCA [108] CAB 119) Her Honour also thought that the cross-examination went no further than criticism of defence counsel's thoroughness. (CCA [117] CAB 121) Defence counsel's failure to take steps to avert "the consequences of the prosecutor's misguided cross-examination" was not incompetence of a kind that warranted the overturning of the convictions. (CCA [118] CAB 121)

29. In his dissenting judgment, McFarlan JA considered the impermissible questions "constituted the principle means of attack by the Crown on the appellant's evidence." Whilst it was not a significant feature of the prosecutor's address, "the manner in which the Crown attacked that evidence would have been fresh in the jury's mind as the Crown's closing address commenced immediately after its cross-examination of the applicant concluded". (CCA [46]-[47] CAB 108)

30. His Honour reviewed cases that dealt with the breach of the rule in *Browne v Dunn* at (CCA [39]-[43] CAB 106-107) and concluded that "it is at least ordinarily impermissible" to engage in the course adopted by the prosecutor. This was because of the many alternative reasons why trial counsel did not cross-examine on an issue. For this reason there was no sound basis to draw an inference that the appellant was not telling the truth about those matters. (CCA [44] CAB 108)

31. His Honour considered that the prosecutor's purpose in asking the questions was to demonstrate that the appellant was fabricating his evidence. That the issue was not a major feature of the prosecutor's closing address did not deprive the evidence of significance, given the prosecutor submitted the jury would regard the appellant's evidence as false. It was noted that the prosecutor's address commenced immediately after cross-examination of the appellant had concluded. (CCA [47] CAB 108)

32. McFarlan JA concluded that the trial had miscarried as a consequence of the prosecutor's cross-examination and it was no answer to consider (as did Fullerton and Fagan JJ at CCA [191]-[192] CAB 138) that the complainants' evidence was forceful and strongly supported by complaint evidence. The proviso was not applicable. (CCA [59]-[63] CAB 110)

Part VI: Argument

Ground 1: The trial miscarried as a result of the Crown Prosecutor asking impermissible questions and making improper comments when cross-examining the appellant.

33. The cross-examination by the prosecutor of the appellant on the failure of his trial counsel to raise the eight matters (listed above at AS [17]) with the two complainants was plainly aimed at undermining the appellant's credibility. The cross-examination is extracted in detail in McFarlan JA's judgment (at CCA [32]-[33] CAB 100-105) and included:

> Q: And you never heard any suggestion put to her that she had an orgasm, correct?
>
> A: Correct.
>
> Q: Were you essentially making your evidence up as you went along, Mr Hofer?
>
> A: No, that's not correct. (Extract of T519-520 at CCA [33] CAB 102)
>
> .....
>
> Q: She got dressed and she left and you could see, couldn't you, how upset she was even by that stage?
>
> A: At that time she was not upset whatsoever and you will recall from the CCTV on the bus that she was smiling as she hopped on the bus.
>
> Q: That's so Mr Hofer but you saw, didn't you and we all saw, [C2's] demeanour, a very short time after the bus pulled away didn't you?
>
> A: Around five to ten minutes after the bus turned – pulled away at which time she had been speaking with the person who was her non official boyfriend who had heard her breathing very heavily whilst we were having consensual sex.
>
> Q: I see. Mr Hofer, did you hear that put to [C2] at any stage?
>
> A: No. It was not.

> Q: No it wasn't, was it. Are you just making things up as you go along Mr Hofer?
>
> A: No I am not.
>
> Q: Are you simply giving evidence and doing the best you can to meet what can be objectively proven by the Crown case? (Extract of T523 at CCA [33] CAB 104)
>
> (Emphasis added.)

34. The impugned passages of cross-examination were not relevant, they were impermissible and unfair. When this line of questioning commenced the appellant's counsel objected on the basis of relevance. (T489 AFM 283) On the second occasion there was a further objection on the basis of relevance, however the trial judge did not stop the questioning. (T498 AFM 292) Thereafter the appellant's counsel did not object. At one point the trial judge directed the appellant to answer the question without the appellant being permitted further explanation, which appeared to be to the effect that he had given his counsel instructions on this matter but his counsel had failed to ask the relevant questions. (T519 AFM 306) This prevented the appellant from explaining himself.

35. The impugned cross-examination was relied on to invite the jury to draw the inference that the evidence of the appellant was untrue and given with embellishment designed to assist him: see *R v Manunta* (1989) 54 SASR 17 at 23. Inviting such a process of reasoning is "fraught with peril" as:

> There may be many explanations of the omission which do not reflect upon the credibility of the witnesses. Counsel may have misunderstood his instructions. The witnesses may not have been fully co-operative in providing statements. Forensic pressures may have resulted in looseness or inexactitude in the framing of questions. The matter may have simply been overlooked.

36. Questions (perforce, repeated questions) about whether the appellant heard his own barrister put particular matters to a witness in cross-examination were in themselves irrelevant.

37. Even if the questions were relevant, they were directed to the appellant's credibility and, as such, were inadmissible by reason of the credibility rule absent a grant of

leave pursuant to s104(2) and subject to s104(3) of the *Evidence Act 1995*. It is noted that leave was not sought to cross-examine the appellant in this way.

38. As Garling J held in *Llewellyn v R* [2011] NSWCCA 66 at [137(d)] in relation to questions inviting an accused to agree that matters were not put in cross-examination to a Crown witness: "Except in the rarest of cases and only where a proper basis exists, cross-examination of the accused in this manner is highly and unfairly prejudicial to the accused, with the potential to undermine the requirements of a fair trial: *Birks* at 703D per Lusher AJ; *R v Dennis* [1999] NSWCCA 23 at [45]-[46] per Spigelman CJ; *Picker v R* [2002] NSWCCA 78 at [41]-[42] per Smart AJ."

39. The observations in *Dennis* and *Picker* apply to this matter. The line of questioning considered in *Picker* at [24], which suggested that the appellant "had recently made up some of his evidence because his counsel had not asked the complainant about those matters in cross-examination", was described by Smart AJ (with whom Beazley JA and Bell J agreed) as "impermissible and highly and unfairly prejudicial to the appellant's case": at [41]-[42]. Smart AJ said that the "gist of the cross-examination was unmistakable, namely because the appellant's counsel had not questioned the complainant about the specified matters, the appellant was telling lies. He had made up his evidence on these points." The impugned cross-examination was put to the same effect in the applicant's case.

40. The impugned cross-examination was unfair, as it required the appellant, if the implication behind the questions was to be addressed, to reveal his instructions to his trial counsel: see *Llewellyn* at [140]. The appellant sought to advance this kind of response when he attempted to explain that his barrister should have put certain matters and that his barrister had a written document; although his answers were cut short by the trial judge. While this may have been explicable on the basis that the trial judge was attempting to protect the appellant from waiving privilege, it highlights the impropriety in asking the question in the first place and the dilemma faced by the appellant who had given instructions to his lawyers that were not put to relevant witnesses.

41. The last segment of the impugned cross-examination was based on the prosecutor's misunderstanding of the evidence and went uncorrected. C2 gave evidence that she had taken a call from Mr Omer Mohamed while the appellant was having sexual intercourse with her (T203.20-203.29 AFM 141). She also gave evidence that she later took a phone call from Mr Mohamed on the bus (T208.45 AFM 146). She said that she was "interested" in Mr Mohamed and believed him to be "interested" in her (T209.8 AFM 147). Her evidence was that she and Mr Mohamed "were seeing each other but not official" (T259.7-8 AFM 197). There was no substantive difference between her evidence and the appellant's evidence. In this instance there was no omission on the part of the appellant's barrister to cross-examine on this issue.

42. The question: "Are you simply giving evidence and doing the best you can to meet what can be objectively proven by the Crown case?" (T523-524 AFM 310-11) suggested that the appellant had an onus to meet the Crown case. More fundamentally, repeated and persistent cross-examination of the appellant on his counsel's failure to put relevant matters to the complainants is apt to suggest that the appellant had an obligation to prove something in the case: see *SY v The Queen* [2018] NSWCCA 6 at [56]. No such onus or obligation lies upon an accused in a criminal trial.

43. In *MWJ v The Queen* (2005) 80 ALJR 329 Gummow, Kirby and Callinan JJ said (at 340 [41]):

> The position of an accused who bears no onus of proof in a criminal trial cannot be equated with the position of a defendant in civil proceedings. The rule in *Browne v Dunn* can no more be applied, or applied without serious qualification, to an accused in a criminal trial than can the not too dissimilar rule in *Jones v Dunkel.* In each case it is necessary to consider the applicability of the rule (if any) having regard to the essentially accusatory character of the criminal trial in this country.

44. See also: *RPS v The Queen* (2000) 199 CLR 620 at [27]-[29] and *Dyers v The Queen* (2002) 210 CLR 285 at [120]-123].

45. The impugned cross-examination was directed, unfairly, to undermining the appellant's credibility. The appellant's credibility was an important issue in the trial.

The questions were largely asked without objection. They were sustained and repetitive. The impugned cross-examination was also unfairly prejudicial in that it implied that the appellant's defence had been conducted in an unfair manner, when the appellant was not in a position to control or direct the questioning by his own counsel.

46. The identification by the majority of the three legs to a "*Birks* comment" (at CCA [123] CAB 122) represents a misunderstanding of the decision in *R v Birks* (1990) 19 NSWLR 677; 48 A Crim R 385 and represents a significant departure from principles established in other, earlier cases, as identified by Garling J in *Llewellyn v R* [2011] NSWCCA 66 at [136]-[137].

47. It is incorrect to say that a jury could usually only draw an adverse inference against an accused when the three features identified by Fagan J (at CCA [123] CAB 122) had been established. Ordinarily the second and third "legs" could never be put to an accused during cross-examination, because to do so would imply that an accused had a prior knowledge of the intricacies of criminal procedure. In *Birks* those matters were simply features of the case then under consideration.

48. In *Birks* Gleeson CJ observed at 685:

> "The relevant principles, may be summarised as follows:
>
> 1. A Court of Criminal Appeal has a power and a duty to intervene in the case of a miscarriage of justice, but what amounts to a miscarriage of justice is something that has to be considered in the light of the way in which the system of criminal justice operates.
>
> 2. As a general rule an accused person is bound by the way the trial is conducted by counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence.
>
> 3. However, there may arise cases where something has occurred in the running of a trial, perhaps as the result of "flagrant incompetence" of counsel, or perhaps from some other cause, which will be recognised as involving, or causing, a miscarriage of justice. It is impossible, and undesirable, to attempt to define such cases with precision. When they arise

they will attract appellate intervention."

49. Fullerton J and Fagan J erred in concluding that the cross-examination did not have an adverse impact upon the jury's assessment of the appellant's credibility. Their Honours erred in concluding that the jury would not have appreciated the significance of the failure of the appellant's trial counsel to raise the issues with the two complainants, when considering whether the appellant's evidence gave rise to a reasonable doubt about the prosecution case.

50. The implication of recent invention raised by the cross-examination was unmistakable. The cross-examination was clearly intended to persuade the jury that the appellant's evidence was not credible and should be rejected. To suggest that the cross-examination was simply to the effect that the appellant's trial counsel was poorly prepared is not consistent with the record, and it is submitted, not capable of acceptance. The prosecutor conducted a pointed cross-examination and then submitted that the appellant had fabricated his evidence. The connection between these two considerations was obvious.

51. Fullerton J and Fagan J were also wrong to dismiss the prejudice caused by the cross-examination by reasoning that the jury, unaware of the obligations of trial counsel to put their instructions to relevant witnesses and unguided by any directions by the trial judge, would not have used the evidence adversely against the appellant. (CCA at [123] CAB 122) The conclusion (as to the absence of prejudice occasioned by the cross-examination) disregarded the capacity of a jury to evaluate and apply the evidence adduced in the trial. It ignored the fact that the Crown repeatedly and assertively sought to attack the appellant's credibility and invited the jury to reject the appellant's evidence because it was not credible. It was a failure of judicial method for the majority to so conclude, as it supplanted the majority's subjective assessment for that of the jury, in circumstances where it was impossible to know what impact the impugned and obviously inappropriate cross-examination had on the jury verdicts. By contrast, McFarlan JA concluded (CAB 110):

> [60] In these circumstances it would be no answer to the applicant's appeal to conclude that the complainants' evidence was forceful and strongly supported

> by complaint evidence. Absent an impermissible usurpation of the jury's function (or a conclusion that the applicant's evidence was obviously false) this Court would have to rely upon the jury's verdicts of guilty if it were to conclude that the applicant's evidence was not reasonably possibly true, in the same way that it would have to rely on the guilty verdicts to hold that the complainants' evidence ought to be accepted.
>
> [61] The jury's verdicts cannot however be relied upon in this way because they were impugned by the Crown's impermissible cross-examination and by the absence of any attempt by the judge or the applicant's counsel to have the prejudice to the applicant which flowed from that cross-examination rectified.

52. The majority conclusion was also at odds with cases such as *R v Adballah* [2001] NSWCCA 506, 127 A Crim R 46; *R v Birks* (1990) 19 NSWLR 677; 48 A Crim R 385 and *Manunta v R* (1989) 54 SASR 17 where it was considered that where this type of cross-examination has occurred it is necessary for the trial judge to draw the attention of the jury to other possible causes of such an inconsistency. In *Abdallah* it was observed by Sheller J at [24]:

> "Otherwise there is a real danger that the jury, lacking any detailed knowledge of the process of trial preparation, may assume that the cause of the inconsistency must be that the accused has changed his or her story."[7]

Ground 2: The trial miscarried on account of the incompetence of the appellant's counsel.

Principles

53. Gleeson CJ said, authoritatively, in *R v Birks* (at 685D-F):

> A Court of Criminal Appeal has a power and duty to intervene in the case of a miscarriage of justice, but what amounts to a miscarriage of justice is something that has to be considered in light of the way in which the system of criminal justice operates.
>
> As a general rule an accused person is bound by the way the trial is conducted by counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence.

---

[7] See also *Birks v R* (1990) 19 NSWLR at 691G-692A

> However, there may arise cases where something has occurred in the running of a trial, perhaps as the result of 'flagrant incompetence' of counsel, or perhaps from some other cause, which will be recognised as involving, or causing, a miscarriage of justice. It is impossible, and undesirable, to attempt to define such cases with precision. When they arise they will attract appellate intervention.

54. In *Birks* flagrant incompetence was established in two respects. First, defence counsel failed to cross-examine on a matter going to the issue in dispute in relation to one of the charges. Secondly, defence counsel left the appellant in an invidious position of not correcting a wrong impression or suggestion that his evidence differed from the instructions he had given to his lawyers. Defence counsel did not object to the relevant questions. Nor did he make it clear in the presence of the jury that the omission was his and not that of his client.

55. The relevant issue is whether the trial and its process was fair: *Nudd v The Queen* (2006) 80 ALJR 614. In *TKWJ v The Queen* (2002) 212 CLR 124 Gleeson CJ said:

> "It is the fairness of the process that is in question; not the wisdom of counsel.... The nature of the adversarial system, and the assumptions on which it operates, will lead to the conclusion, in most cases, that a complaint that counsel's conduct has resulted in an unfair trial will be considered by reference to an objective standard, and without an investigation of the subjective reasons for that conduct.

56. In *Nudd*, Gummow and Hayne JJ emphasised (at [24]):

> Alleging that trial counsel was incompetent does not reveal what is said to be the miscarriage of justice. That requires consideration of what did or did not occur at the trial, of whether there was a material irregularity in the trial, and whether there was a significant possibility that the acts or omissions of which complaint is made affected the outcome of the trial.

57. In *Ali v The Queen* (2005) 79 ALJR 662 Hayne J, relying on what McHugh J said in *TKWJ* at [79], said (at 665):

> As McHugh J pointed out in *TKWJ v The Queen* 'the critical issue in an appeal like the present is not whether counsel erred in some way but

> whether a miscarriage of justice has occurred'. The conduct of counsel remains relevant as an intermediate or subsidiary issue because the issue of miscarriage of justice in such a case as the present requires consideration of two questions which McHugh J identified in *TKWJ*. Did counsel's conduct result in a material irregularity in the trial? Is there a significant possibility that the irregularity affected the outcome? But the ultimate question is whether there has been a miscarriage of justice.

58. Gleeson CJ observed that "where an understanding of why something happened, or did not happen ... may reveal that there is no explanation for what occurred other than counsel's ineptitude or inexperience, courts of criminal appeal do not overlook the possibility that the conduct of counsel may result in such a failure of process that there is a miscarriage": *Nudd* at [15]. His Honour went on to cite *Birks* as a good example of the failure of the trial process: *Nudd* at [18].

59. In the subject appeal Fagan J observed that the ground of appeal relied upon the assertion that trial counsel should have remedied the unfair and prejudicial cross-examination and that his failure to do so occasioned a miscarriage of justice. (CCA at [206]-[207] CAB 141) Fagan J rejected the ground on the basis that the impugned cross-examination was "ineffective and insignificant" for the reasons earlier explained. Fullerton J agreed with Fagan J. (CCA [103] CAB 118)

60. As noted above, a substantial part of the cross-examination of the appellant was based upon the false premise that he had not provided the relevant instructions to his legal representatives and that his evidence was a recent invention. Despite being in possession of relevant instructions, the appellant's trial counsel did nothing to rectify the situation. This included doing nothing at a point in the cross-examination when the appellant was asked (CAB 103.04):

> Q: Did you ever hear at any stage of the cross-examination of [C2] a suggestion that you said to her, is it okay for me to come inside of you, and she said yes?
>
> A: That was not put to her by my barrister and again it should have been, and in front of my barrister is notes that I wrote on –
>
> HIS HONOUR

> Q: The question you were asked was did you ever hear a suggestion in the [course] of [C2's] evidence that something occurred, the answer presumably is yes or no, it's not calling for some volunteering of additional information.
>
> A: Okay, just a yes or no answer. The answer is no.

61. Despite being in possession of the relevant instructions and being aware that the prosecutor's questions were based upon a false premise, trial counsel made no effort to remedy the situation, either by objecting to the cross-examination, alerting the prosecutor to the fact of the instructions, raising the issue with the appellant in re-examination, calling evidence from his instructing solicitor to prove the relevant instructions had been received or advising the trial judge that there had been an oversight on his part in not raising the relevant matters with the prosecution witnesses.[8] The excerpt above at AS [60] had the capacity to be particularly damaging to the appellant's credibility, as he had asserted that he had provided instructions to his trial counsel consistent with his evidence, yet trial counsel made no effort to ensure the jury became aware of this.

62. A necessary presupposition of the criminal trial is that when an accused person gives evidence they are able to explain themselves fully, particularly in the context of a probing cross-examination on credit. The conduct (omission) of defence counsel effectively prevented that from occurring.

63. Trial counsel also took no steps to seek directions from the trial judge that may have served to provide an alternative explanation for his failure to put the impugned matters to the witnesses. Instead, the false implication of recent invention by the appellant during his sworn evidence was left for the jury to consider, without access to the true situation and without judicial instruction as to alternative possibilities such as the exercise of forensic judgment or an oversight by trial counsel.

64. The appellant was left in the "invidious" position described by Gleeson CJ in *Birks* at 685G-686C.

---

[8] See evidence of trial counsel at T54-56 AFM 509-511

The proviso

65. The appellant adopts the analysis of McFarlan JA (at CCA [59]-[63] CAB 110) and submits that if either ground of appeal is established the proviso to s6(1) of the *Criminal Appeal Act 1912 NSW* is inapplicable.

Part VII: Orders sought

66. Appeal allowed. Set aside the orders of the Court of Criminal Appeal and in lieu thereof allow the appeal, quash the appellant's convictions and order that there be a retrial.

Part VIII: Time estimate

67. The appellant seeks no more than two hours for the presentation of oral argument.

Dated: 30 April 2020

Tim Game

Forbes Chambers

Email: timgame@forbeschambers.com.au

Tel: (02) 92683111

Fax: (02) 92683168

David Barrow

Forbes Chambers

davidbarrow@forbeschambers.com.au

IN THE HIGH COURT OF AUSTRALIA

SYDNEY OFFICE OF THE REGISTRY

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF NEW SOUTH WALES

BETWEEN:

THOMAS HOFER

Appellant

and

THE QUEEN

Respondent

ANNEXURE

Statute referred to in the submissions:

1. *Criminal Appeal Act 1912* (NSW) section 6 (current)