

BETWEEN:

JOHN COLLINS
Appellant

and

10

THE QUEEN
Respondent

RESPONDENT'S OUTLINE OF ORAL ARGUMENT

Part I:

I certify that this outline is in a form suitable for publication on the internet.

Part II:

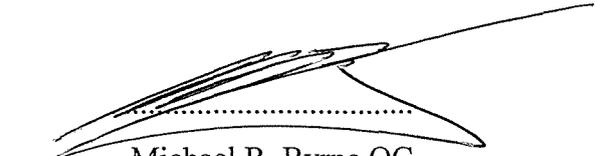
- 20 1. The concession by counsel for the respondent in the Court of Appeal did not bind that Court. This Court has held that an appellate court may apply the proviso of its own motion, but that the parties must be given clear notice that the application of the proviso was under consideration – *Lindsay v The Queen* (2015) 255 CLR 272, [45], [64]. Accordingly any onus carried by a respondent concerning the application of the proviso must be evidential rather than persuasive. (Respondent's submissions [10]-[16])
2. However, *Lindsay* is distinguishable from the present matter. It was decided in circumstances where, seemingly, the appellant had not addressed the proviso until the issue was raised in oral argument. Here the appellant raised the application of
- 30 the proviso first and then decided not to pursue the submission further, no doubt partly as a result of the non-reliance by the respondent's counsel. Nonetheless it was a deliberate decision. (Respondent's submissions [16])
3. Given that deliberate decision by counsel, the issue of whether a miscarriage of justice has been occasioned falls to be considered consistently with the observations of this Court in *TKWJ v The Queen* (2002) 212 CLR 124. (Respondent's submissions [19]-[20])

4. If there was a material misdirection, that fact alone does not necessarily preclude the application of the proviso. The nature of the error or irregularity is an important factor in the consideration of the proviso and the categories of cases in which it can and cannot be applied are not subject to prescription – *Weiss v The Queen* (2005) 224 CLR 300, [44]-[45]
5. In all of the circumstances, and after having independently reviewed the evidence, it was open to the Court of Appeal to have applied the proviso. (Respondent's submissions [22]-[26])
6. If there was an error below, this Court is positioned to properly consider the application of the proviso, and is not precluded from considering the point merely because of the concession below – *Kelly v The Queen* (2004) 218 CLR 216, [56], [123]. (Respondent's submissions [27])

The Notice of Contention

7. When sections 18 and 19 of the *Evidence Act 1977 (Old)* do not apply (as is the case here), there is an important distinction to be drawn between a witness under cross examination accepting that a prior inconsistent statement was made and accepting the truth of that prior inconsistent statement. It is only where both aspects are established by the cross examination that the prior statement becomes evidence of the truth of that former account, and hence available for use by the jury as they see fit. If only the former proposition is established, the fact of the prior inconsistent statement goes only to the witness' credit.
8. The respondent accepts the accuracy of the Court of Appeal's assessment of the law and the authorities on this topic, but submits that it was not fairly open (or it was not reasonably possible) to conclude that the witness accepted, at trial, the truth of the earlier account. The Court of Appeal erred in concluding that Ms M. had accepted the truth of the earlier assertion. (Respondent's submissions [30], [33]-[41])
9. Accordingly, there was no misdirection at trial or, if there was one it was unduly favourable to the appellant. In either case, the appeal to that court should have been dismissed without resort to the proviso. (Respondent's submissions [42]-[43])

Dated: 22 March 2018



Michael R. Byrne QC