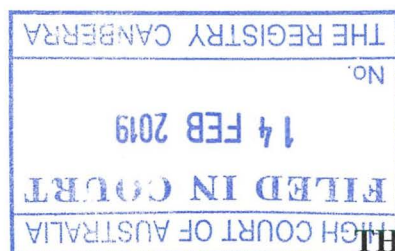


BETWEEN

AND



OKS

Appellant

THE STATE OF WESTERN AUSTRALIA

Respondent

RESPONDENT'S OUTLINE OF ORAL ARGUMENT

PART I – Publication

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

PART II – Outline of oral argument

2. Following its determination of the character of the misdirection in this case, the matter which the court below was obliged to determine was whether the proviso could apply in this case and, if so, whether there was a substantial miscarriage of justice.
3. It is only as part of that process that the court will generally be required to conduct an independent assessment of the evidence, to satisfy itself that the negative proposition does not operate to prevent the application of the proviso.
4. However, the court is not required to make that assessment only by independently reciting and analysing the evidence before the court at first instance. The court is entitled to review the trial record having regard to the issues in the trial and give such weight to the jury's verdict as it considers appropriate in the circumstances.
5. In the present case, the central issue in the trial was the credibility and the reliability of the complainant. There was no dispute that the appellant could not have been convicted in the absence of the jury being satisfied beyond reasonable doubt of the truthfulness and accuracy of the complainant's evidence as to the offence in question. However, the jury also had evidence from sources other than the complainant, from which they could find support for her evidence.

6. After reviewing the trial record, Buss P held that the jury were entitled to be satisfied beyond reasonable doubt as to the truth, accuracy and reliability of the complainant's evidence in relation to count 1.¹ The appellant did not assert to the contrary.
7. Contrary to the appellant's submissions at [37], the first to fifth reasons, and seventh reason, given by Buss P for reaching the conclusion that the proviso should be applied² demonstrate significantly more than satisfaction of the accused's guilt to the requisite standard. They articulate the basis upon which Buss P found that the nature and effect of the error did not give rise to a substantial miscarriage of justice.
- 10 8. Buss P stated that the 'effect' of the error was to *'prohibit the jury from engaging in a process of reasoning, favourable to the appellant, in relation to fact-finding concerning [the complainant's] honesty and reliability that was open to them'*, and thus the trial judge *'intruded impermissibly on the function of the jury'*.³
9. However, he went on to find that, having had regard to the issues the jury were directed to decide and the trial record, he had *'no doubt that the impugned direction would have had no significance in the jury's determination of the verdict of guilty'* and there was *'no reasonable possibility that the jury's verdict on count 1 might have been different if the impugned direction had not been given.'*⁴
- 20 10. Buss P fully articulated the reasons for these findings, including an analysis of the lies said to have been told by the complainant, demonstrating a comprehensive and independent review of the complainant's evidence on the critical issue which was the subject of the misdirection.⁵
11. The impact of the otherwise meticulous and extremely thorough directions to the jury relating to the credibility and reliability of the complainant, including a very strong *Longman* warning, which was given after the impugned direction, was also a factor in the determination by Buss P.⁶
- 30 12. After making that finding, and having independently assessed the evidence, Buss P was entitled to give *'very significant weight to the jury's verdict of guilty'* in determining whether the accused's guilt was proved, to his satisfaction, beyond reasonable doubt.⁷ He was not prevented from doing so by the natural limitations in proceeding wholly on the trial record, in the context of this case.

¹ CAB 122, CA [133].

² CAB 121-124, CA [131]-[139].

³ CAB 120, CA [123].

⁴ CAB 123, CA [134].

⁵ CAB 118-123, CA [113]-[130].

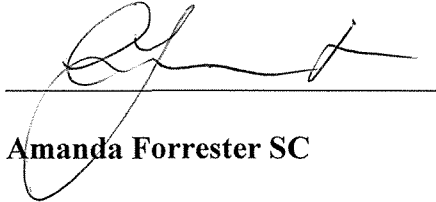
⁶ CAB 123, CA [134].

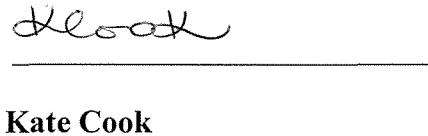
⁷ CAB 123, CA [135].

13. Having made that finding, Buss P determined that the error, in the circumstances of this case, was not such as to constitute such a fundamental breach of the presuppositions of a trial as to preclude the application of the proviso.⁸
14. Reference to authority to establish that the error in this case is so fundamental, or involves such a departure from the essential requirements of a fair trial, as to prevent the application of the proviso, is unhelpful. This court has repeatedly declined to specify any particular category of errors, or type of error, which will fall within such a description. *'The question is always whether there has been a substantial miscarriage of justice, and the resolution of that question depends on the particular misdirection and the context in which it occurred.'*⁹
- 10 15. Buss P found that there was no substantial miscarriage of justice. Additionally, although not the test, he was *'satisfied beyond reasonable doubt that the appellant was not denied a chance of acquittal that was fairly open to him.'*¹⁰
16. The appeal should be dismissed.

Dated: 14 February 2019

20


 Amanda Forrester SC


 Kate Cook

⁸ CAB 124, CA [137].

⁹ *Kalbasi v The State of Western Australia* [2018] HCA 7 [57] (Kiefel CJ, Bell, Keane and Gordon JJ).

¹⁰ CAB 124, CA [138].