



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

File Number: B50/2022  
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Filing party: Respondent  
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IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY

BETWEEN:

HCF  
Appellant

and

THE QUEEN  
Respondent

## RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

### **Part I: Certification**

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

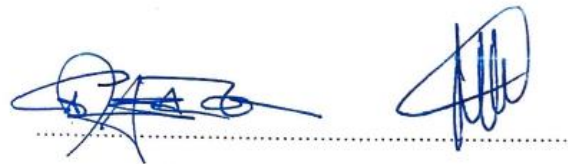
### **Part II: Outline of propositions to be advanced in oral argument**

2. The appellate court is required to assess the nature and effect of the impugned conduct to determine whether it has resulted in a miscarriage of justice. The respondent concedes the irregularity but contend that, when the nature and effect of the irregularity is considered, was not of a type that resulted in a miscarriage of justice.
3. The respondent relies upon the line of authority drawn from *Mraz v The Queen* (and summarised in paragraphs [5.2]-[5.5] in the respondent's outline) as consistent with the principle that a miscarriage of justice must be borne out of a prejudice to the accused. Therefore, not every irregularity will result in a miscarriage of justice. Considering the nature of the irregularity and whether its effect could reasonably have resulted in prejudice to the appellant was the task with which the Court of Appeal undertook in the present case.

4. It is argued by the appellant that that the disobedience of Juror X (in his conduct) and that of the remaining jurors (in not reporting Juror X) was an error or irregularity of such a kind where it cannot be satisfactorily answered that it would have had no effect upon the verdict. That is so because the failure to observe the simple direction of the trial judge as to research, and the failure to observe the obligation to report that to the trial judge, would manifest in the failure of the jury to observe other directions on the law.
5. The respondent submits that contention is undermined by, firstly, the objective examination of the course of the trial and the differing verdicts, and secondly, the responses of the Sheriff's report.
6. The Jury was required to consider the facts of a trial already alive to traditionally prejudicial conclusions; those involving sexual offences and those where two complainants are joined. The jury was also required to consider 25 counts as opened by the Crown, 19 of which remained at the completion of evidence. The jury returned mixed verdicts of guilty, acquittals and those where they could not decide. This extended to a mix of verdicts on the alleged circumstances of aggravation. The chronology of deliberations demonstrates that the jury sought further judicial directions on the law that supports the proposition that this jury were intent on receiving guidance through the legal directions of the court. The jury, when called upon, answered that the verdicts decided were true of the entire jury. The objective assessment of this trial do not demonstrate that the jury compromised in their function.
7. This conclusion is supported by the subjective responses contained within the Sheriff's report. The responses acknowledged the irregularity created by Juror X but that it did not impact the jury's deliberation, materially or otherwise. The collective responses from the 5 jurors fundamentally addressed the dynamics of the 'group' such that they could speak to the function of the jury as a whole. The respondent's contention is that there is no reasonable construction of the responses that operate prejudicially towards the appellant, or against the appellant's interests.

8. Whilst the wording of paragraph [51] of the Court of Appeal's judgment could be read potentially as a conflation of s 668E(1) and the application of the proviso pursuant to s 668E(1A), it is clear from the consideration of Morrison JA that he was assessing whether a prejudice to the appellant resulted from the identified irregularity. He was required to do so under s 668E(1), before the court moved to the potential application of the proviso. Having reconciled that there was no miscarriage of justice (in the context of a prejudice to the appellant), the proviso had no operation.
  
9. The primary contention of the respondent is that this was not a proviso case. But if it was deemed to be, it is submitted that the court is still required to consider the individual circumstances of each case and the effect of the irregularity. It is not helpful to speak of it being a particular 'category' of case. Having regard to *Weiss*, the court must make its own independent assessment of the evidence and determine whether the accused was proved beyond a reasonable doubt to be guilty of the offence on which the jury returned its verdict. Put another way, did the jury convict the appellant of the relevant offences having regard to the evidence in the trial or did the jury act upon extraneous material arising from the irregularity? In the context of this test, the respondent contends that the irregularity only operated to serve the appellant's interests, and could not have reasonably compromised the assessment of the credibility and reliability of the complainant K, such that there was no substantial miscarriage of justice.

Dated: 14 April 2023



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