HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: **HCF**
Appellant

and

The Queen
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1.1 It is certified that this submission is in a form suitable for publication on the internet

Part II: Issues the Respondent contends the appeal presents

2.1 The application presents the following issues for consideration:

2.1.1 When faced with a challenge to a verdict based upon misconduct by a juror, an appellate court is required to assess the nature and effect of the conduct in order to determine whether it has resulted in a miscarriage of justice. The Court of Appeal correctly undertook this task. It is not simply the fact of the irregularity that is relevant. It is the effect of the impugned conduct which is relevant to the Court's consideration.

2.1.2 The responses from the five jurors gave relevant insight into the relevant deliberations by the jury as a whole sufficient for the Court to undertake the require analysis in the circumstances of this case.

2.1.3 This was not a proviso case. The circumstances in which it is appropriate for the application of the proviso in any given case is not capable of catergorisation. It is the circumstances of each case, and the effect of the transgression that is relevant to

the question as to whether it is an appropriate case for the application of the proviso.

Part III: Certification regarding s 78B of the *Judiciary Act 1903 (Cth).*

3.1 It is certified that is not required pursuant to s78B of the *Judiciary Act 1903* (Cth).

Part IV: Material Facts

4.1 The facts as summarised in the Appellant's Submissions (at [6] to [17]) are not in dispute, however, the respondent highlights the following further facts in order to give relevant context to impugned conduct of Juror X.

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4.2 At the commencement of the trial, the Appellant was arraigned before the jury on an indictment containing 25 counts relating to allegations made by two complainants, K and E. They were sisters. The Appellant was their uncle.

4.3 The trial issue was whether the alleged sexual offending occurred as alleged. The primary task of the jury therefore was to assess the evidence of each complainant to determine whether they were satisfied that each was credible and reliable in their accounts, beyond a reasonable doubt.

20 4.4 The jury convicted the Applicant on 6 counts. All of those convictions were in relation to allegations made by complainant K. They acquitted the Applicant on all allegations pertaining to Complainant E.

The Charges – Complainant K

4.5 The offences relating to Complainant K were reflected in 18 separate counts on the indictment (counts 1, 3-5, 7, 10-20, 24 and 25). **Count 1** alleged the offence of maintaining a sexual relationship with a child, under the age of 16. The offence included circumstances of aggravation that during the period of the unlawful
30 relationship, (i) the Applicant indecently dealt with K; (ii) the Applicant willfully exposed K to an indecent act; and (iii) the Applicant raped K. The Applicant was convicted of this offence with the circumstances of aggravation identified in (i) and (ii). The jury were unable to agree with respect to circumstances of aggravation

(iii), and they were discharged from further consideration of that circumstance of aggravation.

4.6 K's evidence as to the maintaining count included the particularised occasions as identified in specific counts, but she also disclosed further uncharged acts that spoke to the general nature of the sexual relationship. The first occasion occurred when she was 5 or 6 years of age, with an episode of oral sex[1]. It occurred in a shed, when the family were in Victoria. There were '15 to 20' further occasions when sexual acts occurred by the appellant, which comprised predominantly of touching her vagina on the inside and outside of her pants[2].

4.7 In Queensland, the general conduct alleged was that the appellant would take off all of his clothes late at night, feel her vagina, and ejaculate over her chest, stomach and mouth[3]. He would touch her with his penis. The first time it happened in Queensland was when she was 12[4]. It occurred once a week, or every few weeks, from the time he was able to participate in penile-vaginal penetrative sex with her[5]. It assumed a frequency of a 'few times a week' from the age of 14[6]. It was *'mostly the same thing every few nights…up until* (K) *was nearly 17'*[7]. With respect to the penetrative sex, he would enter her room, take her from her bed to his room, engage in penetrative sex, and return her to her room. He would ejaculate[8].

4.8 The Applicant was convicted of **Counts 3 to 5,** which were all offences of indecent dealing with a child under the age of 16. Those counts were alleged to have occurred on the same occasion although comprised of three distinct particularised acts: touching her vagina with his finger/s **(3)**, rubbing his penis upon K's vagina **(4)** and ejaculating on her stomach **(5)**. This offending was the first time that it had happened in Queensland,[9] such that K appeared to recall the detail in the context of that milestone (or marker). Whilst these counts did not require an element of consent, the complainant was not asked questions as to the degree of any acquiescence, or force used by the appellant.

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[1] Appellant's BOFM at 55, 37-45.
[2] Appellant's BOFM at 57, 2-20.
[3] Appellant's BOFM at 58, 1-20.
[4] Appellant's BOFM at 58, 20.
[5] Appellant's BOFM at 63, 1.
[6] Appellant's BOFM at 62, 35.
[7] Appellant's BOFM at 1-20, 1.48.
[8] Appellant's BOFM at 63, 5-13.
[9] Appellant's BOFM at 58, 18-41.

4.9 The jury acquitted the appellant of **Count 7**. The particulars of that conduct were said to be the appellant, with his penis exposed, had K seated on top of him, jumping up and down[10]. That evidence was only given by Stephen Boakes, the brother-in-law of the appellant. Notably, K did not give evidence of that event and did not describe conduct occurring to her in a manner that was consistent with what Mr Boakes said he witnessed.

4.10 No evidence was adduced from K in respect of **Counts 10, 11 and 12** as opened by the Crown Prosecutor and his Honour directed a verdict of acquittal in relation to those counts. **Count 13,** a separate specific event, was also a directed verdict of acquittal as no evidence was given by K in relation to it.

4.11 The Appellant was acquitted of **Counts 14, 15 and 16**, all occurring on the same occasion whilst K was subjected to a pornographic film by the appellant. The particulars for the three counts were that the defendant kissed K, that the defendant rubbed his penis on K's vagina, and he ejaculated upon K[11]. The complainant described being kissed (but not where she was kissed). The complainant described the appellant to have '*had sex with me'*. When asked as to the detail of 'sex', she described he '*didn't put his penis inside me. I was too young. He'd just rub it up and down my vagina'*. When asked what occurred after, she described somewhat generally how '*he came, but he would always make sure it went on my chest'*. The complainant, again, was not invited to speak of any force, acquiescence or issues surrounding consent.

4.12 With respect to **Count 17,** the appellant having been charged with rape, he was convicted of the alternative count of unlawful carnal knowledge. K gave evidence that the appellant took her to the bathroom, locked the door and placed her on a bench[12]. The appellant put his 'penis in (her) vagina', which felt 'uncomfortable'. She was asked whether she provided 'permission' to the appellant to perform that act, and she answered '*no'*.[13] There was no other evidence as to consent. K described the mechanism of actual penetration. She recalled the appellant to wear a green shirt, to have blood on it, and that her grandfather had called out as to who was in the bathroom.

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[10] Appellant's BOFM at 157, 40-46.
[11] The conduct is described in the Appellant's BOFM at 59, 22-47.
[12] Appellant's BOFM at 60, 12-15.
[13] Appellant's BOFM at 60, 27.

4.13 The appellant was acquitted of **Count 18,** rape. That conduct was particularised as the penetration of K by the appellant's penis, in her bedroom. K stated 'he came into my room, took my pants and knickers – my pyjamas and knickers off. He took his undies off and got under the blankets with me and put his penis in my vagina and had sex with me'.[14] She added that she was 'maybe' 15 years of age but could be no more specific. What has been quoted was the entire detail provided with respect to that count before K was immediately asked about, and proceeded into, any other occasions of alleged uncharged acts.

4.14 The appellant was acquitted of **Counts 19** (sexual assault)**, 20** (rape) **and 21** (sexual assault). This was the 'one time' where K and Complainant E were in the same room with the appellant. This correlated with **Counts 22** (indecent treatment by exposure)**, 23** (indecent treatment) **and 24** (rape) said to have been perpetrated upon the Complainant E in the room. As can be gleaned, there is some inherent difficulty reconciling the two disclosures in satisfaction of the particulars. K described that she was laid on a bed and undressed, and the appellant placed his penis near her vagina as E watched.[15] K did not describe penetration, although E did, in that she described the appellant and K to be engaged in '*sex*'[16]. K stated she was also made to watch the appellant with E; that included having '*sex with (E)*' or '*moving his penis up and down on her vagina*'[17]. E stated that the only sexual conduct that occurred to her was the pulling down of her underwear.[18] With respect to those counts, the jury would be required to convict in circumstances where each complainant did not corroborate what the other had allegedly observed. Count 23, of which was conduct that only E alleged against herself, was a directed verdict of acquittal as no evidence was elicited.

4.15 The appellant was acquitted of **Count 25,** the last occasion recalled by E. She initially recalled the following sequence of events: '*He came into my room, tried to take my pants off and I kept kicking him and pushing him away and told him I've had enough of it, 'can you just leave me alone?'. And eventually he got really angry and he said 'fuck you then'. And walked out*'[19]. She was asked whether he

[14] Appellant's BOFM at 62, 11-13.
[15] Appellant's BOFM at 61, 5-10.
[16] Appellant's BOFM at 106, 34.
[17] Appellant's BOFM at 62, 16-25.
[18] Appellant's BOFM at 107, 41.
[19] Appellant's BOFM at 61, 40-46.

touched her, and she said '*yes, he touched my vagina.*'[20] There was no clarification as to how she was touched on the vagina in the context of the original description.

The Charges – Complainant E

4.16 The appellant was charged on **Count 2** with maintaining a sexual relationship with the Complainant E. The *only* evidence of sexual contact for that offence comprised the particularised offending disclosed in the specific counts relevant to E[21]. These counts were alleged to have occurred on only three separate occasions. One of those occasions was the (alleged) series of conduct identified in paragraph 4.15, of which the jury could not be satisfied beyond a reasonable doubt. Another was the 'first time' an event was recalled by E, that being **Count 6,** an offence of indecent treatment**.** She recalled the first incident when she was '10 or 11'[22]. She described how she was pulled into a bathroom and touched 'down there', confirming that description as her vagina. She could not recall what happened after, whether anything was said or how long that episode occurred for. The appellant was acquitted. The remaining sexual contact comprised **Count 8** (indecent treatment) **and 9** (rape)**.** There was no evidence adduced for Count 8 and a directed verdict of acquittal was entered. Count 9 was said to encompass penile penetration of E's vagina. E described how she was in the appellant's room, and he had placed his penis in her vagina[23]. The only other detail elicited was that he told her to 'shut up', that it happened prior to her 13th birthday and that he ejaculated on her stomach. The appellant was acquitted.

4.17 The Appellant did not give or adduce any evidence.

The relevant directions of the trial judge

4.18 The jury were tasked with determining whether the Crown had proved beyond a reasonable doubt the particulars on the 19 remaining charges, involving two complainants. Each juror had the particulars document that was capable of reference following the oral and written directions of the trial judge. The trial judge directed the jury to their consideration of the likelihood of the witnesses' account

[20] Appellant's BOFM at 62, 4.
[21] Counts 6, 8, 9, 21, 22 and 23.
[22] Appellant's BOFM at 105, 43.
[23] Appellant's BOFM at 108-110.

and referenced the widely regarded truth indicators to assist them in that task[24]. The jury were directed as to the separate consideration of charges, which included the potential to return mixed verdicts, and (particularly in relation to the complainant K), whether a reasonable doubt on one charge could affect their assessment of another[25]. The jury were directed that the evidence of one complainant's disclosures was capable of supporting that of the other, having regard to the similarities in the conduct towards each as alleged by the Crown[26]. The judge specifically warned the jury, in this context, as to the risk of impermissible reasoning such that they could not reason that his 'bad character' must mean that he was guilty of the offences[27].

The trial Chronology

4.19 In light of this appeal's focus as to the jury's application to their task in the context of the evidence they were to assess, it is also helpful to understand something of the chronology of the trial. As noted by the Court of Appeal, the trial commenced on 13 October 2020. The evidence led by the Crown in the trial concluded on the second day. On 15 October (the third day of trial) a delayed transcript led to an adjournment of the entire day.

The Jury's Deliberations

4.20 On 16 October, the Crown made a successful (and unopposed) application to amend the indictment and particulars[28] to accord with the evidence led at trial. The trial judge directed verdicts of acquittal in relation to 6 counts, and those verdicts were taken. Following the addresses of counsel and the trial judge's summing up, the jury retired to deliberate at 12.50 pm

4.21 The weekend intervened on 17 and 18 October such that the jury returned to deliberate on 19 October at 8.44 am. A further note was received from the jury at 2.27 pm on that day[29]. That note sought clarification as to the legal capability of a child under 16 years to consent to sexual acts. The trial judge directed the jury as to the law on consent, including the provision of the definition within the *Criminal*

[24] Appellant's BOFM at 268, 5-34.
[25] Appellant's BOFM at 271, 12-33. .
[26] Appellant's BOFM at 272, 38 – 275, 26.
[27] Appellant's BOFM at 275, 14-20.
[28] Appellant's BOFM at 226-229. The amendments were handwritten on the original document. The jury also received and recorded the amendments on Day 4, prior to the addresses of counsel.
[29] CAB at 43.

Code.[30] His Honour also reminded the jury of the evidence in the trial about consent. He then directed the jury that they were capable of returning an alternative verdict of unlawful carnal knowledge to the offences of rape in circumstances where they were not satisfied of consent but were satisfied of penetration. The jury were then directed on a further aspect of their note, apparently as to whether they have to be satisfied of every particular in counts 1 and 2 (the 'maintaining' counts) in order to convict.[31]

4.22 A further note was received from the jury at 3.21 pm[32]. In response, a direction was given as to how a verdict on Count 1 and 2 would be taken (with all of the circumstances of aggravation to be considered separately).

4.23 A further note was received at 4.23pm, indicating that the jury had reached agreement on some, but not all, of the counts on the indictment.[33] The jury were instructed that the court would not receive any verdicts at that time, and they were asked to return the next day to continue their deliberations.

4.24 The jury continued deliberating on 20 October. A note was received at 2.28pm on that day.[34] The note sought clarification as to how the jury would answer the court upon giving the verdict in respect of the rape counts.[35] The note sought further clarification upon the circumstance of aggravation alleged in count 1 (that rape had occurred during the course of the relationship) and how that might relate to the charge of rape in Count 17.[36]

4.26 The jury then returned and delivered their verdicts at 2.49 pm on 20 October. By that time, they had been deliberating for, at least, 17 hours. After each verdict was entered, including the individual components of Count 1, in the usual way, the jury signified their agreement with the verdict announced by the foreperson. No objections were raised by any juror during the course of the verdicts being delivered.

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[30] CAB at 45.
[31] CAB at 48, 35.
[32] CAB at 52.
[33] CAB at 55.
[34] Appellant's BOFM at 293.
[35] Presumably in light of the instruction that they were capable of delivering alternative verdicts.
[36] Again, presumably in circumstances where unlawful carnal knowledge was an available verdict in Count 17 but not comprising a circumstance of aggravation.

4.27 It was the following day (21 October 2021), that 'Juror Y' delivered a letter to the Registrar outlining the observations in relation to the conduct of 'Juror X'.[37]

The Appeal to the Court of Appeal

4.28 The Applicant challenged his conviction on two grounds: that there was a *miscarriage of justice* by reason of a juror conducting investigations and other jurors not reporting the conduct, and there was a *miscarriage of justice* by reason of the juror not disclosing to the Court a stated bias.[38]

4.29 The grounds pleaded raised the question of a '*miscarriage of justice'* in terms of s.668E(1) of the *Criminal Code (Qld).* The Court of Appeal properly considered whether the Applicant was denied a fair trial in light of the conduct of Juror X identified in the note of Juror Y and the subsequent Sheriff's report.

4.30 The Court of Appeal concluded that both the letter from Juror X and the survey responses from five of the jurors referred to in the Sheriff's report, support the conclusion that the conduct of Juror X "*made no difference to the outcome, as least so far as the convictions are concerned"*.[39] This was said to be supported by the chronology of deliberations.[40] The third feature the court concluded to be of some weight was that Juror X was pre-disposed to the Applicant's interests which was said to instill "*a degree of confidence that on those counts where a verdict of guilty was returned, the verdict was not the product of some sort of compromise"*.[41]

4.31 The conclusion of the Court on the issues raised in the appeal appears at [43][42];

> *"A fair reading of the responses, seen in the light of the chronology of deliberations, supports the conclusion that all of the verdicts delivered by the jury were genuinely unanimous and unaffected by the conduct of Juror X. Further, in so far as Juror X announced his position, both at the start of the trial and by his searches, it was a position that favoured the appellant and was contrary to the prosecution's interest. There is no hint in the responses by other jurors that Juror X's stance persuaded them from the path they otherwise*

[37] *R v HCF* [2021] QCA 189, [10].
[38] *Ibid at* [5].
[39] *R v HCF* [2021] QCA 189, [38] & [39].
[40] *R v HCF* [2021] QCA 189, [41]-[42], also summarised in this outline above
[41] *R v HCF* [2021] QCA 189, [49].
[42] *R v HCF* [2021] QCA 189, [43]

would have taken. Once again the responses indicate that the verdicts, both acquittal and conviction, were genuinely unanimous. It cannot be demonstrated that any juror joined in the verdicts as a result of Juror X's conduct, and the presumption that the verdicts were correctly entered is therefore not displaced"[43]

4.32 The court further observed that this was not a case where the lawful constitution of the jury itself was in question and expressed their conclusion at [50][44];

"… However, the material before the court shows that there was no miscarriage of justice, as the verdicts remained true for the whole jury."

Part V: Statement of Respondent's argument

5.1 The statement by the Court at [51][45], although perhaps inaccurately expressed, reflects not the application of the proviso, but the court's conclusion of the antecedent question as to whether there had been a miscarriage of justice. As the Court's conclusion, following its assessment of the conduct of Juror X, was that no miscarriage of justice resulted, there was no occasion for the Court to the consider the application of the proviso.

A miscarriage of justice?

5.2 In *Mraz v The Queen*[46], Fullagar J stated:

'It is very well established that the proviso to s 6(1) does not mean that a convicted person, on an appeal under the Act, must show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him being acquitted, there is, in the eye of the law, a miscarriage of justice'.

5.3 In both *Weiss v The Queen*[47] and *Kalbasi v Western Australia*[48], the court, referring to the principle enunciated by Fullagar J, re-formed the proposition as 'consistently

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[43] Citing *Higgins v The Queen* [2018] NSWCCA 258 at [59]-[61].
[44] *R v HCF* [2021] QCA 189, [50]
[45] *R v HCF* [2021] QCA 189, at [51].
[46] (1955) 93 CLR 493 at 514.

with the long tradition of the criminal law, any irregularity or failure to strictly comply with the rules of procedure and evidence is a miscarriage of justice within the third limb of the common form provision'. The majority in *Hofer v The Queen,* in referring to *Weiss,* recognized the departure from a trial according to the law had to be 'to the prejudice of the accused'[49]. That principle, consistent with the observation by Fullagar J that the miscarriage of justice is founded where an accused '*may thereby have lost a chance which was fairly open to him being acquitted'*, is also consistent with the formulation of the principle in *Nudd v The Queen*[50]. There Gummow and Hayne JJ observed that the determination as to whether there has been a miscarriage of justice requires consideration '*of what did or did not occur at 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*'.

5.4 That the finding of a miscarriage of justice must include an assessment of whether there has been a prejudice to the accused is supported in the reasons of Gageler J in *Hofer v The Queen*[51] *(*agreeing with the majority but giving further reasons). He stated;

> [120] *'Terms like 'real chance' have been used in the context of explaining a finding of a miscarriage of justice interchangeably with terms like 'significant possibility', 'perceptible risk' and 'substantial risk'. Often it has been thought enough to refer to the error or irregularity that has given rise to a miscarriage of justice as 'prejudicial' in contradistinction to 'innocuous' or occasioning 'no real forensic disadvantage'. All are different ways of expressing a realistic possibility of a causal connection between one or more identified legal errors or procedural irregularities and the verdict returned by the jury.*
>
> [121] *The terminology is unimportant provided it is understood that the requisite analysis in the context of finding a miscarriage of justice is factual. The inquiry is into the tendency or propensity of an error or irregularity to have affected the basis on which the trial jury actually reached its verdict in the totality of the events that occurred in the trial that was had'.*

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[47] *Weiss v The Queen* (2005) 224 CLR 300 at [18].
[48] *Kalbasi v Western Australia* (2018) 264 CLR 62 at [12].
[49] *Hofer v The Queen* [2021] HCA 36 at [41].
[50] *Nudd v The Queen* (2006) ALJR 614 at 622 [24].
[51] *Hofer v The Queen* [2021] HCA 36 at [120]-[121].

5.5 Gageler J's conclusion at [123] was that an error or irregularity will rise to the level of a miscarriage of justice only if found by the appellate court to be of a nature and degree that could realistically have affected the verdict of guilt.

5.6 This was the task that Morrison JA undertook in the present case. That is, he considered the effect of the irregularity to determine whether there was a miscarriage of justice, and more specifically, whether its effect was prejudicial to the appellant. This was a case in which the jury was properly constituted, and the trial regularly conducted according to law.

5.7 The challenge to the verdict in the appeal to the Court of Appeal was based upon what became known of the conduct of Juror X as a result of a note delivered to the court registry following the verdicts by another of the members of the jury. The question then for the Court of Appeal, in terms of s.668E(1), was whether the conduct of Juror X undermined the integrity of the trial so as to result in a trial which was not properly and fairly conducted according to law. The report of the Sherriff, whilst containing responses from only five of the 12 jurors, gave telling insight into the process of reasoning of the jury as a whole in so far as the relevant conduct of Juror X was concerned, and its lack of impact upon the proper deliberations of the jury in relation to the issues in the trial and their assessment of the evidence of the complainant.

5.8 The question for the Court of Appeal therefore was whether the conduct of Juror X resulted in some prejudice to the applicant such that a miscarriage of justice occurred. It was necessary to look at the nature and effect of the conduct of Juror X to determine its impact, if any, on the integrity of the trial and in particular, whether it can reasonably be said to have resulted in some prejudice to the applicant.

5.9 The grounds pleaded in challenge to the convictions in the appeal to the Court of Appeal (even though expressed by reference to two different components, that is bias and improper research) focus on the effect of the conduct of Juror X (by reason of his declared bias and the research he says that he conducted) on the integrity and fairness of the trial. They were appropriately considered by the Court in that way. It is said, by this application, that the Court of Appeal was wrong to conclude that there was no miscarriage of justice in the circumstances raised in this case.

5.10 It is argued that the disobedience of both Juror X (in his conduct) and that of the remaining jurors (in not reporting Juror X) cannot satisfactorily answer the question as to whether the impact of the error or irregularity did not affect the verdict. In

this regard, it is said that the failure by Juror X to follow simple direction as to research, and of the other jurors who failed to alert the judge upon learning of the impermissible conduct by Juror X, would manifest in the failure of the jury to observe other directions on the law. This contention invites speculation and, regardless, is inconsistent with a proper understanding of the course of the trial, the issues raised and the differing verdict.

5.11 This was a case in which the primary issue was as to the credibility and reliability of the complainants. In the circumstances of this case, the combination of features identified by the Court of Appeal could not lead to a conclusion that such an assessment was impacted by the declared bias of Juror X against the complainant, nor the research conducted by Juror X or the apparent reluctance of the jurors to report the conduct of Juror X to the court.

5.12 The course of the trial and, in particular, the deliberations and communication from the jury support the contention that, despite the conduct of Juror X, careful consideration was given by the jury to the issues properly raised in the trial. Whilst it is not suggested that the verdicts of the jury were unreasonable on the basis that they were inconsistent, it can be readily inferred that the verdicts are not an '*affront to logic and commonsense*'[52]. It is not speculation to assume that the jury acted consistently with the directions as to the law given by the trial judge in circumstances where the verdicts were mixed, or that the jury overcame traditionally prejudicial conclusions as to the joinder of two complainants alleging sexual offences.

5.13 The chronology of deliberations objectively reveals a jury with some application and discernment. The jury were united in the verdicts they returned, and in light of the counts about which they were unable to reach agreement, demonstrated they did not compromise. The report of the Sherriff further supports that conclusion and its contents are consistent with the record of the trial and the course of deliberations, and the jury interactions with the Court in seeking re-direction on the law. On any reasonable assessment of the declared position of Juror X and his resulting conduct, it can only have favoured the applicant. Contrary to the contention of the applicant, no reasonable path to an acquittal has been denied to the applicant. Nor, upon the reasonable analysis of the circumstances, can it be said that the Court was wrong to

[52] To adopt the language used in that context; *McKenzie v The Queen* (1996) 190 CLR 348 at 368 (per Gaudron, Gummow and Kirby JJ).

conclude that the conduct of Juror X did not have a prejudicial impact upon the verdict.

5.14 Whilst the principles of law articulated by the Applicant in his outline of argument at [24] and [26] are accepted, the proper consideration of the issues in this case required an assessment of the nature and effect of the conduct of Juror X said to undermine the integrity of the trial. The bias, or the lack of 'impartiality' revealed by Juror X, and even his defiance of the direction to not conduct enquiries, can only have operated, in the circumstances here, to the advantage of the applicant. The question on this appeal is whether there was some prejudice that resulted in a miscarriage of justice. These circumstances, unfortunate though they were, on careful analysis do not reveal any potential prejudice and consequently, no miscarriage of justice.

5.15 If, contrary to the submission of the Respondent, the court concludes that it is the fact of (and not the effect of) the irregularity which is in itself a 'miscarriage of justice', the proper approach of the Court of Appeal was to find a miscarriage of justice and, only then, consider whether, despite the miscarriage of justice, there had been no 'substantial miscarriage of justice' ('the proviso') pursuant to s.668E(1A).

5.16 Despite the language used by Morrison JA in [51], it is contended that the proviso was not applied to the circumstances of the case where the Court was not required to do so (having regard to its determination on 668E(1)). If this Court concludes there was an error in the approach of the Court of Appeal in dismissing the appeal on the basis that there was no miscarriage of justice demonstrated, it is for this Court to determine whether this is an appropriate case for the application of the proviso, and if so, secondly, whether in the independent assessment of the whole of the record, the Court concludes that there has been no substantial miscarriage of justice. That is, whether the proviso should be applied.

A substantial miscarriage of justice?

5.17 If the error is fundamental and goes to 'the root of the proceedings', the demonstration of that error by the appellant will establish a substantial miscarriage of justice irrespective of whether the Court of Appeal considers that the error could have affected the result of the trial[53]. There is no mechanical approach to that

[53] *R v Awad* [2022] HCA 36 at [77], per Gordon and Edelman JJ.

question; it is a question that falls to be determined on the circumstances of the individual case[54]. It is not satisfactory to conclude broadly that juror misconduct will inevitably give rise to a substantial miscarriage of justice without examining the actual misconduct and its effect upon the trial. That is illustrated by reference to *Glennon v The Queen*[55] in the recent decision of *Awad v The Queen*[56], where the appellate court was required to consider the application of this rule on one of the more fundamental rights, the right to silence. Gordon and Edelman J observed that the court there said that '*although the right to silence is a fundamental right of any accused person, it cannot be said that* any *misdirection on that subject is a fundamental irregularity*'[57], and further, '*a misdirection of that kind is ordinarily one that must be evaluated in the light of the issues in the trial and the way in which the trial was conducted*'[58].

5.18 The respondent highlights those features already addressed in the miscarriage of justice ground. The nature of the verdicts, the observance of those directions applicable to the assessment of both complainants in a sexual matter, the course of the deliberations and the contents of the Sheriff's report that underlined the comments of Juror X were not applied to the verdicts of guilty. Incorporating the statement of principle from *Webb v The Queen*[59], a fair-minded and *informed* member of the public would not apprehend that Juror X, or his fellow jurors, did not discharge its task impartially in reaching the verdicts of guilty. An analysis does not reveal a circumstance where it can be said that the appellant was '*not in reality tried for the offences for which he was indicted*'.[60]

5.19 If the irregularity is not such as to deprive the application of the provision in this case, the court must turn to the consideration as to whether there has been a substantial miscarriage of justice. The test to be applied ~~from the court~~ is articulated in *Weiss.* That is, the appellate court must make its own independent assessment of the evidence and determine whether, making due allowance for the 'natural limitations' that exist in the case of an appellate court proceeding wholly or

[54] *R v Wilde* (1988) 164 CLR 365 at 373, per Brennan, Dawson and Toohey JJ.
[55] (1994) 176 CLR 1.
[56] [2022] HCA 36 at [89].
[57] At 8, per Mason CJ, Brennan and Toohey JJ.
[58] At 12, per Deane and Gaudron JJ.
[59] (1994) 181 CLR 41 at 53.
[60] *Quartermaine v The Queen* (1980) 143 CLR 595 at 601.

substantially on the record, the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict[61].

5.20 There is no single universally applicable description of what constitutes '*no substantial miscarriage of justice*'[62]. Whilst the reference to the 'inevitability' of a conviction may be used to articulate the high degree of satisfaction required in the criminal law, and similarly its converse a '*lost chance of acquittal*', they are not articulations of the test[63].

5.21 It is acknowledged that, consistent with *Kalbasi,* there are some errors that will prevent the appellate court from being able to assess whether guilt was proved to the criminal standard[64]. This includes errors that turn on issues of contested credibility or cases where there has been a failure to properly leave a defence, or there has been a misdirection of substance. All of those examples are focused on the potential contamination of the jury's assessment of the relevant issues such that it cannot be said that the verdict was proven beyond a reasonable doubt.

5.22 The distinction in this case is that whilst the jury were required to assess the credibility of the complainant (in returning verdicts of guilty of those counts), there is no reasonable construction of the impugned conduct of Juror X that could lead a juror to a more favourable position on that assessment of the complainant. In fact, to return verdicts of guilty, both Juror X and his fellow jurors would have had to positively *disregard* that impugned conduct when making their assessment of the complainant's credibility.

5.33 In the context of the assessment that was required to be made, the six guilty verdicts are instructive. That is so because the task of the appellate court, in considering whether guilt has been proved beyond a reasonable doubt on admissible evidence, must do so wholly on the record of the trial. The *whole* of the record of the trial includes the fact that the jury returned a guilty verdict[65]. As was said by the majority in *Weiss*[66]*:*

> *'But there are cases in which it would be possible to conclude that the error made at trial would, or at least should, have had no significance in determining the verdict that was returned by the trial jury. The fact that the*

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[61] *Weiss v The Queen* [2005] 224 CLR 300 at [41].
[62] *Ibid* at [44].
[63] *Kalbasi v The Queen* [2018] 264 CLR 62, [12].
[64] *Ibid.*
[65] *Weiss v The Queen* [2018] 264 CLR 62 at [43].
[66] *Ibid.*

jury did return a guilty verdict cannot be discarded from the appellate court's assessment of the whole record of trial'.

5.34 In *Kalbasi,* Gageler J reiterated the assistance to the appellate court of taking into account such inferences of fact as might appropriately be drawn from the fact that the jury returned a verdict of guilty[67]. Finally, the majority in *Hofer* offered this insight[68]:

> *'To the extent that Fagan J relied upon the verdict of the jury as resolving the contest of credibility between the appellant on the one hand and the complainant on the other, the course was not open to his Honour if it were to be assumed that the jury's verdict may have been affected by the impermissible cross-examination of the appellant'.*

5.35 That is consistent with the decision in *Collins v The Queen*[69], where the High Court observed '*where proof of guilt is wholly dependent on acceptance of the complainant and the misdirection may have affected that acceptance, the appellate court cannot accord the weight of the verdict of guilty which it otherwise might'*. That is not the present difficulty; the irregularity would have no impact upon that assessment, and acceptance, of the complainant's account. Significant weight can be applied to the verdicts of guilt in this case where an assessment of the complainant's credibility is paramount. As the impugned conduct could not have affected that assessment, the appellate court here can be satisfied that guilt was proved beyond a reasonable doubt.

Conclusion and submission

5.36 No error by the Court of Appeal is demonstrated in the consideration of the issues raised in this appeal. Upon a careful analysis of all of the circumstances relating to the verdict and the deliberations of the jury, and the particular nature of the conduct said to have undermined the integrity of the trial, the Court of Appeal concluded that the conduct of Juror X did not result in a defect in the trial that gave rise to a miscarriage of justice and that it remained a trial according to law. There was no miscarriage of justice.

5.37 The appeal should be dismissed.

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[67] *Kalbasi v The Queen* [2018] 264 CLR 62 at [67].
[68] *Hofer v The Queen* [2021] HCA 36 at [21].
[69] *Collins v The Queen* (2018) 265 CLR 178 at [36] per Kiefel CJ, Bell, Keane and Gordon JJ.

Part VI: Notice of contention

6.1 There is no notice of contention filed by the Respondent.

Part VII: Time estimate

7.1 It is estimated that the respondent's argument will take approximately 1 hour.

Dated: 13 January 2023

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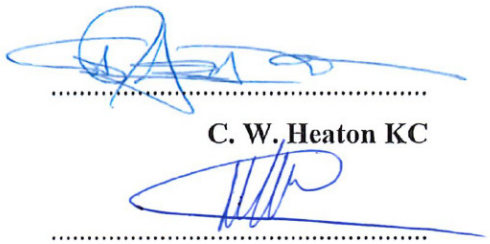

C. W. Heaton KC

N. W. Crane

Counsel for the respondent
Telephone: (07) 3738 9770
Email: DPP-HC-Appeals@justice.qld.gov.au

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IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

BETWEEN: **HCF**

Appellant

and

THE QUEEN

Respondent

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ANNEXURE TO THE SUBMISSIONS OF THE RESPONDENT

Pursuant to Practice Directions No.1 of 2019, the Respondent sets out below a list of statues referred to in these submissions:

No.	Description	Version	Provisions
1.	*Criminal Code Act 1899* (Qld)	Current	s 668(E)(1), 668(E)(1A)
2.	*Judiciary Act 1903 (Cth)*	Current	s 78B