



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

File Number: B72/2023  
File Title: MDP v. The King  
Registry: Brisbane  
Document filed: DPP NSW - Outline of oral argument  
Filing party: Interveners  
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#### Important Information

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**Form 27F – Outline of oral submissions**

Note: see rule 44.08.2.

B72/2023

IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY

BETWEEN:

MDP  
Appellant

and

THE KING  
Respondent

**INTERVENER'S OUTLINE OF ORAL SUBMISSIONS  
(DIRECTOR OF PUBLIC PROSECUTIONS (NSW))**

**Part I: Certification as to publication**

1. This oral outline is suitable for publication on the internet.

**Part II: Outline of propositions**

2. In order to establish a miscarriage of justice within the meaning of the common form appeal provision, it is necessary for an appellant to show that the asserted error or irregularity had a “real chance” or “meaningful potential” to impact a verdict, or operated “to the prejudice of the accused”: *Hofer v The Queen* (2021) 274 CLR 351; *Edwards v The Queen* (2021) 273 CLR 585; Intervener’s Submissions for the Director of Public Prosecutions (NSW) (“IS NSWODPP”) [35]-[40].
  - a. The various verbal formulations used by this Court are correct and capable of harmonious application: IS NSWODPP [40].
  - b. Regardless of the formulation used, however, the body of developed jurisprudence for identifiable categories of errors or irregularities remains relevant to the determination of whether an appellant has demonstrated that

a miscarriage of justice has occurred, as demonstrated by a review of decisions by intermediate courts of appeal: IS NSWODPP [43]-[60].

3. There is a difference in focus between the anterior question of whether a miscarriage of justice has occurred (which is on the potential connection between the error or irregularity and the outcome of the trial that was had) and the broader question asked in the application of the proviso (which is whether, notwithstanding the error or irregularity, the appellate court is satisfied having reviewed the whole of the record that no substantial miscarriage of justice occurred, including that the appellate court itself is satisfied of the guilt of the accused beyond reasonable doubt on the admissible evidence): IS NSWODPP [56].
4. The practical result of excluding materiality from the anterior question of whether a second or third limb error has been established is that there will be a substantial increase in the cases in which appellate courts are required to undertake the exercise required by the proviso. This will result in an appreciable rise in matters where the trial by the jury has been substituted by trial by the appellate court, and in a rise in re-trials (including for some non-material errors or irregularities where the nature of the error prevents application of the proviso): Intervener's Supplementary Submissions NSW Director of Public Prosecutions [34]-[35].

Dated: 3 December 2024



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