



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: Respondent's Outline of oral argument
Filing party: Respondent
Date filed: 02 Dec 2024

Important Information

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BETWEEN:

MDP
Appellant

and

THE KING
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

Part II: Outline of the propositions that are to be advanced in oral argument.

1. TALKING POINTS

1. "But he, he, he like smacks on the bum. Randomly. No. We weren't doing anything wrong."
The bottom slapping evidence.

2. APPEAL GROUNDS 3 AND 4

2. This is not evidence of sexual conduct nor opened or led as such, rather as general relationship evidence. It was admissible as such.
3. The Pfennig test does not apply to the mere potential of evidence to show sexual interest disposition disassociated from the issues joined.
4. The trial judge's obligation to ensure a fair trial does not extend to overriding the objectively rational forensic decisions of the parties including the admission of this evidence without objection.
5. Grounds 3 and 4 are not made out, because there was no admission of inadmissible evidence and no decision to permit inadmissible evidence to be led.

3. GROUND 2

6. Out of the blue context issues pertaining to the circumstances of offences are exemplars of this principle, not definitions of it. Relevance is fundamental.

7. At the time of creating this context the appellant's trial counsel, it may be inferred, was always cognisant of the sexual interest potential of this evidence but chose to litigate the trial by introducing the issue of that potential. This was an objectively rational forensic decision.
8. The appellant was entitled to litigate his case on this basis, and it was never the remit of the trial judge to enter the arena and change the area of contest between the parties.
9. The issue is not one of admissibility but adequacy of directions.
10. Here the judge's directions CAB 84.4-31 included those which Hayne J held should be given 767.200 but went further. Because of the manner in which the appellant chose to litigate his trial the trial judge was obliged to give these directions. They were necessary directions.
11. There was no wrong decision on a question of law in giving the impugned directions. Ground 2 is not made out.

4. GROUND 1

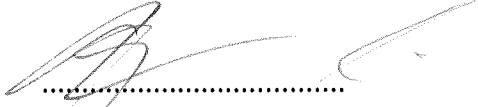
12. The inadmissibility premise is not made out. There was no wrongful admission of propensity evidence or decision to admit that evidence.
13. The appellant made an objectively rational forensic decision to consent to the prosecution's attempt to rely on the remote and weak potential of the backside slapping evidence showing sexual interest disposition. Also to the giving of necessary directions associated with that evidence.
14. The Court of Appeal was correct to conclude in these circumstances no miscarriage of justice occurred.
15. Exercising the appellate function Henry J made his own independent and objective assessment, having regard to the whole circumstances of the case (including weak disposition evidence potential and forensic decisions) and correctly concluded as a matter of fact no miscarriage of justice occurred.
16. Henry J's decision that the backside slapping evidence was admissible as relationship evidence was correct at common law. If he did erroneously rely on s132B his doing so was irrelevant.
17. Ground 1 is not made out.

5. THE PROVISIO

18. Alternatively, no substantial miscarriage of justice actually occurred.
19. Section 668E should be construed as enacted in 1913.
20. Weiss only focused on what gave rise to a substantial miscarriage of justice because only the proviso was under consideration. 1376.8.
21. No single expression of the Exchequer rule prevailed in Australia. At 1379.18 the court did not hold a miscarriage of justice is constituted by "any departure from trial according to law, regardless of the nature or importance of that departure" as asserted by the appellant. Rather that was one expression of the Exchequer rule which had been abolished by the common form provision.
22. The real issue under 668E is influence not materiality.

23. The level of influence may or may not indicate a miscarriage of justice or a substantial miscarriage of justice.
24. Consequently the wrongful admission of evidence does not confer an absolute right to a new trial.
25. Likewise a misdirection on a matter of law may or may not preclude the application of the proviso.
26. The materiality threshold nomenclature proffered by the appellant is inconsistent with Weiss and the wording of s668E(1) and would invariably lead back to the re-adoption of the narrowest expression of the Exchequer rule.
27. Further, degree of influence is a dynamic spectral concept linked to the actual issues litigated and relevant at different levels when considering both a miscarriage of justice and no substantial miscarriage of justice actually occurring. It is not susceptible to collapse as postulated by the appellant.
28. The application of the common form appeal provision is a matter of impression of influence encompassing a range of issues which have recurring and different levels of influence, sometimes in opposite directions in the formation of that impression.
29. Consistently with this view as noted by Nettle J in Kalbasi 953-4.114 the High Court decisions since Weiss have affirmed and elucidated the insights of Weiss and confirmed and reinforced that there is no single universally applicable description of what constitutes a substantial miscarriage of justice. Subsequent High Court decisions have not departed from Weiss but are applications of it 955.121-122.
30. Any perceived disparity in the views of members of this court in decisions subsequent to Weiss reflect differences of impression.
31. Henry J was correct in concluding the appellant made an objectively rational forensic decision to allow the prosecution to attempt to rely on the bottom slapping evidence as sexual interest disposition evidence obliging the trial judge to give the impugned directions.
32. An objective appellate level review of the circumstances of this trial including the verdict of the jury demonstrates the appellant is proved guilty beyond reasonable doubt despite the objectively rational forensic decisions of the appellant.
33. In any guise whatsoever, the backside slapping evidence was trifling and insignificant in influence.
34. No substantial miscarriage of justice actually occurred.

Dated: 2 December 2024


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G J Cummings and S J Muir
Counsel for the respondent