HIGH COURT OF AUSTRALIA

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File Number:	B72/2023
File Title:	MDP v. The King
Registry:	Brisbane
Document filed:	Form 27D - Respondent's submissions
Filing party:	Respondent
Date filed:	01 Mar 2024

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IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

BETWEEN: MDP

Appellant

and

THE KING

Respondent

RESPONDENT'S SUBMISSIONS

Part 1 Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Issues The Respondent Contends The Appeal Presents

2. The Respondent contends the appellants ground of appeal can be resolved by applying well established principles applied to relationship evidence, propensity evidence, parties being bound by conduct of counsel, miscarriage of justice and application of the proviso.

3. Further, in each instance, whether those principles were correctly and conventionally applied by the Court of Appeal.

Part III: Certification Regarding S 78B Of The Judiciary Act 1903 (Cth).

4. The respondent considers that notice is not required pursuant to section 78B of the Judiciary Act 1903 (Cth).

Part IV: Material Facts Set Out In The Appellant's Narrative Of Facts And Chronology That Are Contested.

Appellants Narrative of Material Facts

5. The appellants narrative statement of relevant facts is accepted except as follows.

6. The allegations of the complainant are not fully captured by the "indictment charges

document" referred to in footnote 3 of the appellant's outline. The actual allegations of the complainant are contained in her statement commencing RFM 5.

7. The most material differences are: **Count 1**,[1] digital penetration of genitals causing pain when 7 or 8 while living at Earlville. **Count 2**,[2] performing oral sex when 8 or 9, penetrating her genitalia with his tongue while living at Earlville. **Count 3**, immediately followed count 2 exposing the appellant's penis and inviting the complaint to suck his penis, while living at Earlville. **Count 4**,[3] when 9, while visiting came to her room and sucked her vagina without penetration, while living at Bungalow. **Count 5**, when 9 or 10, while the complainant and her sister were visiting at Earlville while in bed with her sucked her genitals without penetration. Count 6, immediately followed count 5, the appellant placed the tip of his penis into the complainant's vagina. **Count 7**[4], digital penetration when 10 while appellant visiting at Bungalow residence. **Count 8**, maintaining a sexual relationship incorporating counts 9 to 16 all occurred January to October 2019 when K was 12[12]. **Count 9** [5]when about 12 woke appellant rubbing breast while staying at his residence at Paramatta Park. **Counts 10 and 11**,[6] when rubbing genitals and breasts when 12 appellant visiting the residence at Mount Sheridan. **Counts 12**[7] kissing and sucking lower lip, **13**[8] sucking vagina, **14**[9] sucking breast,**15**[10] sucking vagina and **16** sucking breast at same time, occurred at one time when 12 and appellant baby sitting at the complainants residence at Mount Sheridan. Offending opportunistically between attending other children and while K pretended to be asleep.

8. With reference to paragraph 16, trial counsel stated he did not have difficulty with a sexual interest direction, tactically he was going to use it in "my favour" in a way which would become apparent in his closing.[11] As outline at 21 below it was not used to show apparent desperation.

Material Facts: Appellants Chronology

9. The respondent accepts and adopts the chronology of the appellant but also relies on the following information.

10. 31 October 2019, the complainant[12] (K) made a preliminary complaint[13] making allegations

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[1] RFM 11.10, 12.31,13.39,13.58,16.2 – 42, 18.7-21, 27.15 - 28.

[2] RFM 19.3, 19.24 11.28 - 31,19.10 - 27.11, 11.35,19.10 - 29.21, 22.51.

[3] RFM 30.20 -56, 31.1, 31.5 -19,31.26, 34.26.

[4] RFM 37.27, 40.1 - 41.11.

[5] RFM 56.31- 58, 58.17 59.17 - 20.

[6] RFM 25.37, 53.1 - 54.58.

[7] RFM 61.39.

[8] RFM 69.32.

[9] RFM 69.38-54.

[10] RFM 70.36-39.

[11] AFM 78.10-15.

[12] Aged 12, DOB 21 December 2006.RFM 122.31.

[13] Within the meaning of s4A of the Criminal Law (Sex Offences) (Amendment) Act 1978. Under s4A how and when the any complaint made prior to any formal police

of sexual offences against the appellant. She made that complaint to her mother (MN) and her younger sister (KN).[14]

11. 31 October 2019,[15] K provided a video recorded interview with police.[16] 1 November 2019,[17] KN provided a video recorded interview of 20 minutes duration to the police.[16] 14 December 2020,[18] both K and KN gave evidence as permitted under 21AK of the EA.[19] Trial counsel appeared.[20] The recordings of their 93A statements were tendered at that hearing and a copy of the transcript of each was marked for identification.[21] Copies of the 93A statements of each of K and KN and their evidence recorded on 14 December 2020 were tendered at the trial of the appellant commencing 2 August 2021 without objection or editing.[21]

Material Facts: Additional References.

12. The appellant's counsel spent 16 minutes cross examining KN.[22] Some of that evidence is extracted in the appellant's outline paragraph 11. By way of context:

12.1. KN was 11 years old when interviewed.[23] KN said she was there because her sister told her something.[24]

12.2. About four years previously K had told her something her step dad was doing to her.[25]

12.3. She referred to K telling her few years before[26]that a couple of days before[27], in the unit at Bungalow[28] when KN was seven or eight.[29] The appellant was living at another address at Earlville;[30] he poured a cup of water on her,[31]it kept on happening,[32] licking her private.[33] It was like a day ago it happened[34] the licking and the cup of water.[35] She did not believe her and then she forgot about it.[36]

12.4. But then his phone went off[37] she woke up[38] (she and K slept in different rooms)[39] and she saw the appellant bending down near K's body[40] at the Mount Sheridan[41] residence when the applicant was not living with them, though he was there that night.[42] K was

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statement is admissible as non-narrative evidence.

[14] Aged 11 DOB 25 November 2007. RFM 122.33.

[15] RFM 5. MFI B at trial, evidence highlighted by count, otherwise identical to MFI D, see CAB 91.

[16] This recording is admissible to the same extent as direct oral testimony s93A(1) and (2) of the Evidence Act 1977 (Qld), the EA.

[17] AFM 5.

[18] RFM 82.

[19] This this recording may be played as the evidence of a witness see s21AK.

[20] RFM 82, AFM 80.

[21] CAB 90-91.

[22] RFM 112.1, 117.39.

[23] AFM 7.7.

[24] AFM 8.19.

[25] AFM 8.50.

[26] AFM 8.40, 16.18.

[27] AFM 16.23.

[28] AFM 10.31.

[29] AFM 16.43.

[30] AFM 16.30, 17.1.

[31] AFM 9.4.

[32] AFM 9.37.

[33] AFM 9.24.

[34] AFM 10.51.

[35] AFM 12.2.

[36] AFM 11.30.

[37] AFM 11.35.

[38] AFM 11.44.

[39] AFM 12.34.

[40] AFM 11.49.

[41] AFM 12.1.

[42] AFM 12.1-14.

sleeping.[43] Mum came to the door and asked what he was doing.[44] KN went back to sleep.[45]

13. It was immediately after this answer that KN was asked "Okay. Um, and did, has anything else happened like that that you, you've seen or Nuh"[46] as referred to in paragraph 11 of the appellant's outline. KN then volunteers the appellant kept on grabbing K's arm, but she did not know what for.[47] She has not seen anything else.[48]On the same night K told her he kept kissing her, putting his tongue in her mouth[49] on Friday "last week".[50]

14. Trial counsel represented the appellant on 14 December 2020. In cross examination he confirmed that KN had watched her statement,[51] asked some questions about the night the phone alarm went off,[52] confirmed the appellant and mum argued a lot at about that time.[53] Suggested to KN that mum had threatened not to allow the appellant to see the kids which she denied.[54]Apparently accepted K had only told her things twice.[55]Asked some questions about bathing in the laundry washtub.[56]Put the allegations were false, but not at the instigation of MN.[57]Concluded after "double checking my instructions".[58]

15. On 2 August 2021 the prosecutor opened[59] the bottom slapping as general relationship evidence without objection.[60]

> *"... KN is going to speak about a couple of things. First, she's going to tell you about a conversation she had with K ... The second thing KN is going to speak to you about is a time in October 2019 when she saw the defendant in K's bedroom...* ***Third, you're going to hear KN talk about having witnessed the defendant smack K on the bottom, and she'll describe that that occurred when they weren't doing anything wrong; so a non-disciplinary way.*** *Finally, MN is going to recount a conversation she had where K ..."*

16. The prosecution then called MN. Her evidence included the biological father of K and KN was JM.[61]Her relationship with the appellant started in mid-2014 when she moved in with him at an address in Earlville with her children. They lived there until the end of 2014.[62]Her daughter KM fathered by the appellant was born while living there on 23 December 2014.[63]They broke up in September 2015 and she moved to Bungalow.[64] The appellant would visit[65] every week.[66] He would also babysit the girls.[67] He later moved to an address in

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[43] AFM 12.53.
[44] AFM 12.57.
[45] AFM 13.14.
[46] AFM 13.17.
[47] AFM 13.36-44.
[48] AFM 16.14.
[49] AFM 13.45-53.
[50] AFM 14.7.
[51] RFM 112.21.
[52] RFM 113.10-115.15.
[53] RFM 115.35.
[54] RFM 115.43.
[55] RFM 116.4.
[56] RFM 116.6-28.
[57] RGFM 103.27-104.1
[58] RFM 116.30.
[59] RFM 168.43-169.11.
[60] RFM 121.
[61] RFM 122.35.
[62] RFM 122.44-123.10.
[63] RFM 123.5-9.
[64] RFM 125.37-126.1.
[65] RFM 126.35.
[66] RFM 127.29.
[67] RFM 127.10.

Parramatta Park.[68] The children would visit him there [69] maybe once a fortnight.[70] In 2019 she and the girls moved in with the appellant at the Parramatta Park address for about two weeks before they moved to the Mount Sheridan address.[71] She identified the bedrooms occupied by K and KN.[72] The appellant would visit once a week and stay overnight.[73] It was not unusual for him to be at home alone looking after the girls.[74] On 29 October 2019, the appellant stayed overnight and she found him in one of the girls bedrooms after midnight, he said he was looking for his watch.[75] He continued to search for his watch and eventually came back to bed.[76] On the morning of the 29th of October 2019, K disclosed the appellant had been raping her.[77]In a second conversation a little while later K disclosed the appellant had been putting his mouth on her privates, touching her there with his finger, mouth and his private and grabbing her breasts.[78] She subsequently took K to the police.[79]

17. Her cross examination included in September 2019, the appellant told her he had met another woman(Z).[80] They had argued after he said he wanted to go out with that other woman.[81] MN had threatened he would never see the kids again[82] if he broke up with her in the presence of K.[83] The night she found him in K's bedroom he said he was looking for his watch[84] she followed him around yelling at him first to the kitchen and then outside[85] where he told her he was looking for his watch because he wanted to leave her.[86] They spent over an hour outside with her talking.[87] The morning after he was looking for his watch, she had run towards his car and tried to stop him taking KN to school and asked if he was going to see Z again threatening to never let him see the kids again.[88] It was a couple days after he left she took K and KN down to the police to give their statements.[89] When she gave her statement to the police she did not mention the second conversation with K[90] mentioning it for the first time the week before the trial.[91]

18. Defence counsel opening on 4 August 2021 included the relationship between the appellant and MN was a volatile even toxic relationship with swearing and arguments and this was "important context", this was how the "complaint culminated" and the children deserved better from both of them.[92] Through the period 2014 to 2019 the MN and the appellant would

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[68] RFM 127.40.
[69] RFM 128.15.
[70] RFM 128.28.
[71] RFM 128.45-129.7.
[72] RFM 129.43-45,130.35.
[73] RFM 131.31-33.
[74] RFM 132.1.
[75] RFM 132.25-45.
[76] RFM 133.7-11.
[77] RFM 133.26-43.
[78] RFM 134.9-23.
[79] RFM 134.28.
[80] RFM 135.22.
[81] RFM 135.44.
[82] RFM 135.47. Not accepted.
[83] RFM 136.5-7.Not accepted.
[84] RFM 137.7.
[85] RFM 138.11-21.
[86] RFM 138.32.
[87] RFM 138.41. Not accepted.
[88] RFM 139.19-37. Denied.
[89] RFM 140.7.
[90] RFM 140.35.
[91] RFM 140.45.
[92] RFM 170.34-39.

break up and then resume their relationship. [93]At one point he noticed when the children were visiting they had worms and possibly scabies and their nails needed trimming while in the care of MN and he bought them treatments.[94] K had phoned him quite worried and a bit scared because of the party going on at home and he came and picked them up.[95] To provide "context" for the slapping evidence, the appellant would smack both children on the backside as discipline and in play, on many occasions, but without there being any sexual connotation.[96] Towards the end of the relationship with MN she started making threats that if he ever left her, she would make sure he would never see the children again.[97] In September 2019 there was a heated telephone conversation between MN and the appellant in which he told her he wanted to move on with his relationship with Z and MN said she wanted their relationship to continue.[98]

19. Evidence was led from the appellant consistent with defence counsel's opening including he had married Z.[99] His relationship with MN was good for the first few months.[100] By 2017 their relationship was on and off.[101] They were arguing constantly.[102] He had a good relationship with both K and KN[103] he loved K as his daughter[104]and his relationship with KN was even better.[105] MN was emotionally unstable.[106] She was swearing all the time.[107] He slapped both girls regularly on the bottom by way of discipline, but "I don't like flogging kids".[108] As the girls got older he stopped kissing them on the lips.[109]In September 2019 he told MN on the telephone "That you know, I'd fallen in love again, I want to move on and that – yeah, that we can still make it work and co-parent with the children, but, you know, I - I deserve to be happy."[110] MN just lost it.[111] MN told him he won't be able to see the kid against unless he committed to their relationship, and she was getting violent.[112] He stayed to the Mount Sheridan house two or three weeks[113] the children were not good, they were malnourished, and MN was stressing out, no food in the fridge, snotty noses, full nappies.[114] On the final night he was waiting for MN to fall asleep so he could sneak away and leave.[115] When MN caught him in K's bedroom looking for his watch, she caught him trying to escape.[116] Once they were outside he told her like, "*I'm – I'm leaving. I'm going. That's why I'm looking for my watch. I'm actually packing up my stuff because I want to go.*"[117] The next morning MN

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[93] RFM 170.40-43.
[94] RFM 171.24-28.
[95] RFM 172.4-8.
[96] RFM 172.19-28.
[97] RFM 172.42-44.
[98] RFM 173.1-6.
[99] AFM 23.1.
[100] AFM 25.1.
[101] AFM 28.42.
[102] AFM 39.19.
[103] AFM 29.38.
[104] AFM 29.46.
[105] AFM 30.4.
[106] AFM 39.23.
[107] AFM 39.30.
[108] AFM 41.1-13.
[109] AFM 42.10.
[110] AFM 42.42-45.
[111] AFM 43.8.
[112] AFM 43.18.
[113] AFM 43.36.
[114] AFM 43.46-47.
[115] AFM 45.10-12.
[116] AFM 48.27.
[117] AFM 50.5.

tried to stop him taking KN to school, she said *"You're just going back to her. You're going back to Z. If you leave, you'll never see the kids again. KN, get out of the car. Get out of the car, KN. And then she started grabbing for the keys"*[118,119] He drove away in the car, did not return to the house and was charged by the police. He has not been able to see his children since then[120] or bury his boy.

20. After trial counsel closed the appellant's case the prosecutor raised reliance on the bottom slapping evidence as sexual interest evidence for the first time.[121] Before counsel delivered their closing addresses the trial judge provided the jury members with individual copies of a question trail which focused exclusively on the elements of each offence.[122]

21. Defence counsel's closing included the oddity of the K reference to the appellant inviting her to suck his penis when his penis was not erect, and he made no attempt to masturbate.[123] leading into:[124]

> *There's no medical evidence led by the prosecution. It's not required, but none has been led. There are no photographs of the units in question. They've got diagrams, but still no photographs. That would have been useful. None of the clothes have been seized from the [Mount Sheridan] house, even though the incident occurred within a matter of weeks before this. There is no evidence from the mother about unexplained bleeding or unnoticed or unusual discharges. Apart from the one incident of his touching KN, that* ***KN says that he touched her on the backside, no one has said anything about anything untoward being witnessed****. Think about this: the Crown – and even though there's a gap, if you look at the charges, of some length that hasn't been explained. There is no evidence of anyone seeing anything. All these years, twice a week sometimes. Nothing. No evidence of any lewd comment being made by him to her. Nothing. If there was such a thing, you would have heard about that. There is no evidence at all of any suggestion of impropriety towards the 12 month – slightly less than 12-month-old other daughter, KN. No evidence about his trying to isolate or control K. It sometimes arises – buying her gifts, singling her out for attention, or the like. Nothing. Why distinguish this between K and also KN in the circumstances where there was no distinguishing features? Or is it the case, in this*

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[118] AFM 51.15.
[119] This version of events was not put to KN RFM 117.
[120] AFM 51.33-45.
[121] AFM 76.43,77.41.
[122] RFM 176-177, 145-162.
[123] AFM 81.15-42.
[124] AFM 86.32-87.6.

particular situation, with respect to KN, that there was a touching on the backside? ***The Crown prosecutor opened that as sexual interest***[125]*."*

22. Defence counsel's penultimate submission was:[126]

"...There's no suggestion that there is any impropriety that was committed to KN. And, at the end of that, they went into the bedroom together, and the next morning he was employed, got offered a job, KN was in the car, confrontation in the car, and he hasn't been at home since after about the Z – ***being threatened about Z. I would ask you to consider that he didn't return to the house in the days following. The mum took the girls down to the police station. Accompanied them when they gave their statements. Not physically present in the room, but took them down, and that's where they still live to this very day.****"*

23. The prosecutors address followed that of defence counsel and emphasised K evidence was central.[127] The prosecutor referred to the slapping evidence once.[128]The last half of his address identified the direct evidence in support of each count. [129]

" Now, KN also recalled how the defendant would smack he on the bum. She described that this would occur when they weren't doing anything wrong. That wasn't challenged in cross-examination. In fact, the defendant admitted it. But clearly, members of the jury, it was more than just an innocent "get out of the way" slap. It wasn't a disciplinary slap. Because KN remembered it. KN found it 40 unusual. KN didn't say the defendant was doing this to all the other kids. It was just K. The Crown says that demonstrates he had a sexual interest in her, and it also demonstrates there isn't some concoction between the two girls, because K didn't actually mention that. KN did witness it, and it wasn't challenged. Maybe K didn't mention it because it pales in comparison to everything else that 45 happened to her. But it does prove independently from K, in my submission to you, that he did have a sexual interest in her, and he was prepared to act on it, and that's what he did on those other occasions."

24. The directions of the trial judge included the appellant should receive the benefit of any reasonable doubt[130]only to draw rational inferences[131] and not to indulge in intuition or guess work [132] a review the direct evidence in support of each count[133] with the aid of the question

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[125] Reformulating the prosecution case. RFM 169.6.

[126] AFM 90.29-36.

[127] AFM 91.30-35.

[128] AFM 95.35-47.

[129] Commencing AFM 97.40.

[130] CAB 12.10.

[131] CAB 12.45.

[132] CAB 13.1.

[133] CAB 8.4-33.34.

trail, before dealing with the slapping evidence in these terms as part of his direction on sexual interest evidence.[134] The trial judge identified the evidence relied upon which included proof of some counts on the indictment, uncharged acts concerning K and the slapping evidence. The jury was directed not to engage in impermissible propensity reasoning and to put the slapping evidence to one side if they were not satisfied beyond reasonable doubt it had occurred, demonstrated sexual interest which the appellant was willing act upon. The trial judge then outlined the submissions of counsel, the prosecution submissions first and then defence submissions, mentioning the slapping evidence once.[135]

24.1. The jury retired at 2:49 pm and no re-directions were sought.[136]

24.2. At 4:45pm two notes were received from the jury.[137]

"Timing of conversation between mother and K when first revealed when K explained in detail of what was happening. Next day/night after [the Appellant] left?"[138]

"Is credibility a binary proposition? If [the Appellant] has some credibility, as well as K, can we still have beyond reasonable doubt?"[139]

24.3. The jury received redirections at 5:09 pm, retired again at 5:20pm and went home for the night at 5:35pm to resume deliberations at 9:00am the following morning.[140]No redirections were sought. The jury returned verdicts of guilty at 10:47am the following day.[141]

Part V: Respondent's Argument in Answer to the Argument of the Appellant:

25. **Sub part (i). Parameter - Court of Appeal Decision**. In the Court of Appeal one of the grounds was there had been a miscarriage of justice because the trial judge had directed that the occasions when the appellant slapped the complainant on the bottom could be used as evidence of sexual interest. MDP's case[142] [23].

26. Henry J delivering the judgement of the court dismissed this ground because it was not obvious it was led as evidence of sexual interest.[29] as opposed to familiarity of the domestic relationship and thus admissible **"per"** s132B of the EA. The directions of the trial judge concerning the slapping evidence were adequate. [31]. At [32] to [41] after correctly stating the Pfennig test questioned whether it applied given, in effect the bottom slapping evidence

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[134] CAB 34.24-36.8.
[135] RFM 190.47-191.3.
[136] RFM 196.
[137] RFM 196.42.
[138] RFM 197.16.
[139] RFM 202.5.
[140] RFM 202.37, 206.1,34-41.
[141] CAB 53.1.
[142] R v MDP [2023] QCA 134 which commences at CAB 70.

was not highly prejudicial which was the remit of the Pfennig test,[143] noting the admissibility of such evidence without satisfying the Pfennig test would require consideration of aspects of HML[144] Concluding at [41] these issues did not have to be resolved because [44]-[47] the appellant had agreed to its admission for tactical reasons. Further, [42] –[43] Henry J held that another reason for dismissing this ground was considering the matters mentioned in [32] to [41] was the bottom slapping evidence was so weak it would not likely meet the Pfennig test and the jury would therefore not likely, acting in compliance with the judge's directions, use it as propensity evidence.

27. **Argument: Sub part (ii). Evidence Admissible "per' 132B [29] and relationship evidence**. It is submitted there was no error on the part of Henry J at [29]. As outlined at 15 the evidence was not opened or led as disposition evidence but came to be relied upon as such after the defence case was closed. It was only after MN was cross examined about taking K and KN to the police couple days after the appellant had left her a 17, the defence opened the disintegration of the MN relationship with the appellant as important context in the making of the complaint 18 and the appellant giving evidence of threats to stop him seeing the children as a consequence of his leaving 19 the prosecutor flagged relying on the evidence as disposition evidence.[145]

28. It is submitted taken in context Henry J did not say the evidence was admissible under s132B. That provision does not refer to "degree of familiarity" evidence and the appellant had conceded it was admissible on that basis but not as demonstrating sexual interest as part of a broader attack on the conduct of trial counsel.[146] Henry J's comment should be read in the context of a line of authority that relationship evidence is admissible at common law and s132B adds little to and does not limit the common law[147] and his being engaged in an exploration of whether the evidence had been led as sexual interest evidence; correctly concluding it had not.

29. It is submitted the defence emphasis for the first time at trial on the appellant leaving MN as the genesis for K's allegations created a relevant context for relationship evidence by strongly insinuating the allegations of K were a very recent invention at the instigation of MN. It is submitted this created an "out of the blue context" which rendered the bottom slapping

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[143] Consistently with BBH v The Queen (2012) 245 CLR 499 per Crennan and Kiefel JJ at 541[132].

[144] HML v The Queen (2008) 235 CLR 334.

[145] AFM 77.41.

[146] RFM 212 footnotes 16 and 17.

[147] R v MAQ and RX; ex parte A-G (Qld) [2006] QCA 355 at [15], R v PAB [2008] 1 Qd R 184 and R v SDU [2022] QCA 176. Henry J delivered the lead judgement in SDU nine months before MDP.

evidence relevant sexual interest relationship evidence which had already been admitted. The slapping evidence was then legitimately available to provide a view of the complainant's relationship with the accused inconsistent with that advanced by the defence. The issue of admissibility was passed and the Pfennig test irrelevant unless and until trial counsel objected to its use as such.

30. It is submitted the Queensland [147]line of authority is supported by a number of decision of this court. In KRM's case[148] McHugh J[149] noted that there were various types of relationship evidence not caught by the by the strictures of Hoch[150] which would later be adopted as the Pfennig test discussed infra. In particular:

30.1. Evidence of bad character led in rebuttal,[151] following BRS' case.[152] 229[22].

30.2. Association with the crime scene. 229[22].

30.3. Association with a criminal venture. 229[22].

30.4. Possession of equipment which might have been used to commit a crime.229[22].

30.5. Evidence which explains the nature of relationship between the accused and the victim and often tends to show the accused is guilty of the offence.229[23]. In support of these last propositions citing Ball's case,[153] Wilson's case[154] and O'Leary's case[155].229[23]. In Wilson's case witnesses gave evidence of the deceased speaking to the accused, her husband, shortly before her death in terms that she knew he wanted to kill her for her money. The court considered this evidence admissible as relationship evidence distinct and different from evidence admissible under Makin principles. As noted by McHugh at 230[23] it was held admissible to show mutual enmity between the parties and this included evidence of uncharged acts. 230[24], citing B's case.[156] As discussed below, in B's case the accused led evidence of prior sexual offending by him against his own daughter, in an attempt to show her most recent allegations were the product of her being a rebellious teenager; a decision which post-dated Hoch's case. The trial judge had not ruled on the admissibility of the evidence. The majority held that the evidence was admissible for the purpose for which it was tendered and, as the prosecution had sought to use it, evidence rendering the further sexual offending against

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[148] KRM v The Queen (2001) 206 CLR 221. Hayne J agreeing.
[149] 228[20]-233[31].
[150] 232[29].
[151] Arguably the appellant led good character evidence.
[152] BRS v The Queen (1997) 191 CLR 275.
[153] R v Ball [1911] AC 47 at 71.
[154] Wilson v The Queen (1970) 123 CLR 334 at 338-9 and 344.
[155] O'Leary v The King (1946) 73 CLR 566 at 574, 575, 577-578, 582.
[156] B v Queen (1992) 175 CLR 599.

the complainant more likely.

30.6. McHugh J noted at 231[26] many of these cases predated the "no rational view test" adopted in Pfennig. However, went on note, the authorities were in some degree of conflict on whether relationship evidence was subject to the Pfennig test. 231[27]-233[30], before concluding at 233[31]:

> *"By reason of the divided reasoning of the majority in Gipp, it cannot yet be said that evidence of uncharged acts of sexual conduct is no longer admissible to prove the relationship between the parties. Until this Court decides to the contrary, courts in this country should treat evidence of uncharged sexual conduct as admissible to explain the nature of the relationship between the complainant and the accused, just as they have done for the best part of a century. But that said, trial judges will sometimes, perhaps often, need to warn juries of the limited use that can be made of such evidence and will have to give a propensity warning concerning it (R v T (1996) 86 A Crim R 293 at 299).*

31. It is submitted relationship evidence may be distinguished from propensity evidence because its focus, so far as relevant, is on the credibility of the complainant. It may for example show the accused has a sexual interest in the complainant and hence render the complainant's narrative more likely because of that interest. This class of evidence was described as motive by Gleeson CJ [157] and also Heydon J.[158] It is distinguishable from propensity evidence because it does not go directly to likelihood of the accused committing a sexual offence against the complainant. That is because while it does prove motive, it says nothing about when or how likely it is that motive will be acted upon, see Heydon J[158] where he noted a motivated person may or may not be act upon a motive, but it remains relevant to credit. As Gleeson CJ made a similar point at 354[11] before holding at 361[33] that evidence of uncharged acts which was not used other than to put the evidence of the complainant in context and was not an essential step in reasoning towards guilt required no specific direction about the standard of proof and all of the evidence in that case fell in that category. By contrast evidence which showed motive for conduct of the kind alleged was propensity evidence which attracted the Pfennig refinement. 358[26]. Heydon J reached a like view where the evidence only demonstrated sexual interest which went to the credit but seemingly accepted sexual attraction

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[157] 351[5], which may also progress to propensity or disposition, 352[7]-353[8]. Crennan and Kiefel JJ noted this dual characteristic potential of motive evidence in BBH v The Queen (2012) 245 CLR 499 at 546[153].

[158] 426[277].

leading to disposition did not always need to satisfy the Pfennig test such as the underwear evidence in HML case. 426[279]. Crennan J reached a like conclusion, 478[426], 485[455], concluding the rationale for the Pfennig test has no application to relationship evidence put forward as context. 486[461], especially where the prosecution case included direct evidence.486[462]. Concluding prejudice could be cured by directions which give a clear explanation of the use the evidence could be put, a clear direction not to substitute the evidence of prior misconduct for direct evidence of the offences and not to engage in propensity reasoning. 489[471]. That is directions of the kind given in this case.

32. The directions given by the trial judge were generally in line with those contemplated by Gleeson CJ and Crennan J as discussed above and unduly favourable to the appellant in regard to the standard of proof for relationship evidence. As outlined, the trial judge directed the jury that if they did not accept the slapping evidence accompanied by a sexual interest beyond reasonable doubt that evidence was to be put to one side.[134] It is submitted directions of this kind were given in this case.

33. Hayne J agreed with McHugh at 263[131] and would later cite these passages from McHugh's judgement in HML 397[166], 400[177] as did Gleeson CJ at 350[2] and 357[22], Heydon 450[330], Crennan J at 486[461], Kiefel 499[505]. It was noted in BBH[159] the applicability of the Pfennig test was not resolved HML's case.

34. It is submitted that rational underpinning of sexual interest relationship evidence is to put the events alleged to give rise to the offences in context, so that the complainant's evidence is assessed in a realistic context and not incorrectly perceived as an allegation out of the blue.[160] The bottom slapping evidence became relevant relationship evidence once the defence introduced very recent invention as an explanation for K's allegations. As the above authorities demonstrate in that guise it did not need to satisfy the Pfennig test and no specific direction were required. Its availability to the jury in this guise could not occasion a miscarriage of justice in the circumstances of this case.

35. **Argument: Sub part (iii). Propensity evidence admissible for tactical reasons [42]-[47], and adequacy of directions [31]**. For the reasons that follow it is submitted that Henry J made no error of law concluding the bottom slapping evidence was properly admitted without satisfaction of the Pfennig test and the giving of the propensity direction did not occasion a

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[159] BBH v The Queen (2012) 245 CLR 499 at 543[140 per Crennan and Kiefel JJ.

[160] Roach v The Queen (2011) 242 CLR 610 per French CJ, Hayne, Crennan and Kiefel JJ at 624[42].

miscarriage of justice.

36. It is submitted that on any view of the evidence the trial counsel made a forensic decision to not object to reliance of the bottom slapping evidence as propensity evidence and to support a propensity evidence direction. This is not a case of inadmissible evidence being placed before the jury.

37. It is submitted this was a considered decision process which inferentially commenced prior to 14 December 2020. It included including trial counsel had deciding the case would on the basis the allegations were false and made by K at the instigation of MN because the appellant had left her. Further, the bottom slapping evidence was of negligible prejudicial[161] effect but would sure up the defence case by demonstrating an absence of observed sexual interaction between K and the appellant. For defence purposes it would be best kept to a minimalist form and not explored in cross examination.

38. In Ratten's case[162] in the context of a contention that a miscarriage of justice had occurred through a failure to call evidence Barwick CJ held a criminal trial is not an inquisition and it is for the parties to determine the issues in contest with the consequence:

> *"...if the proceedings are not blemished by error on the part of the judge, whether it be on a matter of law or in the proper conduct of the proceedings, or by misconduct on the part of the jury, there has been a fair trial."*

39. It is submitted, once admitted it was for the jury to determine whether the propensity evidence did demonstrate sexual interest and a willingness to act upon it[163] and it was not the role of the judge to enter the arena and exclude the evidence. It follows propensity reasoning on admitted propensity evidence does not give rise to a miscarriage of justice.

40. In TKWJ case[164] Gaudron J(Gummow J agreeing) held a decision by counsel which upon objective assessment is capable of rational explanation as being an attempt to gain a tactical advantage does not give rise to a miscarriage of justice if a chance of acquittal is lost by that decision. See also Nudd's case[165] with reference to TKWJ's case Gleeson CJ at 618[9] held in effect such a decision is conclusive against miscarriage as because the issue is the fairness

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[161] GBF v The Queen (2020) 271 CLR 537 at 546[19] per Kiefel CJ, Bell, Keane, Gordon and Edelman JJ.

[162] Ratten v The Queen (1974) 131 CLR 510, per Barwick CJ at 517, McTiernan J, and Stephen J agreeing.

[163] HML case per Hayne J, Gummow and Kirby JJ agreeing at 390[133].

[164] TKWJ v The Queen (2002) 212 CLR 124

[165] Nudd v The Queen (2006) 80 ALJR 614.

of the process not the wisdom of counsel. In Patel case[166] at 562-563[114] French CJ, Hayne J, Kiefel J and Bell J held with reference to a failure to object to evidence objectively explicable as a rational tactical decision precluded unfairness of the process as a consequence of that decision as parties are bound by counsel's decisions and the correctness of those decisions is not in issue. See also In Craig's case[167] at 211-212[23].

41. Regardless of the actual intentions of trial counsel an objective assessment of the conduction of the trial shows the failure to object to the bottom slapping evidence as propensity evidence and the giving of a propensity evidence direction are capable of being rational decisions in an effort to seek a tactical advantage. As such neither the use of the backside slapping evidence nor the giving or the propensity direction gives rise to a miscarriage of justice as Henry J correctly concluded.

42. It is further submitted that even if evidence were correctly classified as propensity evidence, liable to exclusion by the trial judge if it did not meet the Pfennig test and it does not meet the Pfennig test, it was not rendered inadmissible in the circumstances of this case. In HML's case supra, Hayne J with whom Gummow and Kirby JJ agreed was clearly of the view that relationship evidence like disposition or propensity evidence must satisfy the Pfennig test 383[106],[109],398[169] unless tendered without objection. Hayne J held that if propensity is demonstrated only through acceptance of an equivocal view of a chain of evidence the Pfennig test could not be satisfied. 384[111]. Hence in HML's case part of the evidence relied upon was buying the complainant G string underwear as a demonstration of sexual interest in her.395[157]. This was discreditable conduct even if it did not constitute an offence and its admissibility was determined by applying the Pfennig test.396[161]-[162]. Because such evidence is a step towards guilt proof to the criminal standard was required.397[164. However, the reasons for buying the underwear were controversial and hence the evidence could not satisfy the Pfennig test.399[173]-400[175]. Consequently, even if considered in context the judge would normally be required to exclude that evidence. 386[111], 398[169].

43. However, Hayne J held that underwear evidence had never been objected to. 394[153]-[154] and ultimately concluded at 400[176]:

> *"176 No objection having been made at trial to the reception of the evidence, presumably on the basis that it would provide a context for the complainant's account of events, there*

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[166] Patel v The Queen (2012) 247 CLR 531.

[167] Craig v The Queen (2018) 264 CLR 202.

was no ruling about its admissibility. There was no wrong decision in this respect of a point of law at trial. In this appeal the question that then arises in relation to the evidence about the gift of underwear is confined to the sufficiency of the trial judge's directions about using this evidence and the other evidence of sexual conduct and events other than those charged."

44. At 407[201] Hayne J concluded the directions were adequate and consequently the admission of this evidence did not warrant upholding the appeal. It is submitted the those directions were the same in substance to those given by the trial judge in this case.[134] It is submitted that Hayne J held in effect that where propensity evidence is admitted without objection and without limitation it can be used for any relevant purpose even though it would have been excluded if the court been called upon to apply the Pfennig test.

45. It is submitted that Hayne J's approach is consistent with the earlier decision of B.[168] In B's case the accused tendered evidence of his previous sexual offending against his daughter. His case was the offences for which he was being tried and which related to the same daughter were made by a rebellious daughter trying to exploit his past offending(at 605). Brennan J[169] held that the evidence could not be confined to the purpose for which the accused had tendered it. In reaching this conclusion Brennan J was referred to a line of authority including Hoch.[170]

46. It is submitted in this case the bottom slapping evidence having been admitted and trial counsel's deliberate and binding tactical decision to not object to its use as propensity evidence rendered it admitted propensity evidence regardless of whether it satisfied the Pfennig test. From that point it was available for use as propensity evidence and the directions were appropriate. Further, no miscarriage of justice arose from the parties reliance upon it as such nor the propensity direction concerning it use.

Argument: Sub part (iv): Weakness of evidence and unlikely misuse [42]-[43] -Miscarriage of Justice ?

47. It is submitted that Henry J made no error. Rather consistently with principle Henry J was correctly considering whether the admission of the bottom slapping evidence in the circumstances of this case occasioned a miscarriage of justice.

48. In Mraz's case[171] it was held in relation to a proviso that every accused was entitled to a trial

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[168] B v Queen (1992) 175 CLR 599.

[169] Mason CJ and Deane J agreeing.

[170] At 608 footnote 36.

[171] Mraz v The Queen (1955) 93 CLR 493 at 514.

in which the relevant law is correctly explained, the rules of procedure and evidence strictly followed and there will be miscarriage of justice if the accused has lost a chance of acquittal fairly open. These principles were reformulated in Weiss' case.[172] In Craig's case supra this court held at 214[32] the onus is on the appellant to prove the trial was not a fair trial.

49. In Nudd's case supra in relation to the proviso Gleeson CJ said at 617[6] with reference to both Ratten and Weiss emphasised irregularities in the face of a strong prosecution case may or may not give rise to a miscarriage of justice.

50. In Weiss' case the court was dealing with inadmissible evidence tendered over objection.304[3]. It is submitted this is relevant to the application of the principles stated in that case though not the principles themselves. The court approached the issue as one of statutory construction, 305[9] in particular the phrase found in s668E(1A) …that no **substantial** miscarriage of justice has **actually** occurred".

51. This terminology distinguished such provisions from the Exchequer Rule which applied in absolute terms.308[18]. Consequently, the wrongful receipt of evidence is not conclusive under s668E(1A), but it was under the Exchequer rule.314[36]. The court did not consider reference to perceptions of the jury by an appellate court as automatically indicative of error e.g. it may be the application of practical wisdom. 315[38]. Moreover the issue was not the reference to the jury but leading back to the absolutism of the Exchequer Rule because ultimately the proviso would always be applied if there was a factual controversy.315[39].

52. The court went on the hold that the proper approach was to ask whether on the whole of the evidence properly admitted the court of appeal was satisfied of the guilt of the appellant beyond reasonable doubt. 317[44]. The matter was remitted to the Court of Appeal because it had not undertaken that exercise.

53. It is submitted the exercise remains one of statutory construction and application of the statute as construed. It is submitted that substituting another gloss on the wording of the provision, such as "materiality threshold" and seeking to draw distinctions between irregularities and errors of law diverts from the fundamental issue.

54. It is submitted that the variation in approach the appellant contends is apparent in the cases cited reflects little more than what was recognised in the plurality judgment in Kalbasi's

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[172] Weiss v The Queen (2005) 224 CLR 300 in particular at 318[18].

case[173] at 71[15]-[16] where Kiefel CJ, Bell, Keane and Gordon JJ held:

55. *".... It is not possible to describe the metes and bounds of those wrong decisions of law or failures of trial process that will occasion a substantial miscarriage of justice notwithstanding the cogency of proof of the accused's guilt (62). As was established in Weiss, the fundamental question remains whether there has been a substantial miscarriage of justice. That question is not answered by trying to identify some classes of case in which the proviso can be or cannot be applied. Classifications of that kind are distracting and apt to mislead."*

56. As the plurality noted in that case at 70[13] conviction of a person whose guilt is not proved beyond reasonable doubt on admissible evidence will always be a substantial miscarriage of justice, but an appellate court satisfaction of guilt while supporting a no substantial miscarriage of justice conclusion is not conclusive. The apparent intention of the provision was to do away with the formalism of the Exchequer Rule which is equivalent to the no materiality threshold postulated by the appellant.

57. In Hofer's case[174] Gageler J, after agreeing with Kiefel CJ, Keane and Gleeson JJ that while there had been a miscarriage of justice no substantial miscarriage of justice actually occurred and broadly with the reasons they expressed 375[80] went on to hold there was a broader version of the Exchequer Rule under which a miscarriage of justice only occurred through wrongful admission of evidence if it admission operated to the prejudice of the person against whom it was tendered.385[106].

58. At 377[84] Gageler J explored the differences between the pre and post reformulation in Weiss' case, noting there had been some lapses to pre-Weiss terminology at 378[85] and then noting 378[86] concluded the difference would make no practical difference in most cases. It is submitted this is such a case. .

59. At 391[120] 392[123] Gageler J held:[175]

"[120]… The terminology is unimportant provided it is understood that the requisite analysis in the context of finding a miscarriage of justice is factual… Except in the case of an error or irregularity so profound as to be characterised as a "failure to observe the requirements of the criminal process in a fundamental respect" (178), an error or irregularity will rise to the level of a miscarriage of justice only if found by an appellate court to be of a nature and degree that

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[173] Kalbasi v Western Australia (2018) 264 CLR 62.

[174] Hofer v The Queen (2021) 274 CLR 351.

[175] My emphasis.

could realistically have affected the verdict of guilt that was in fact returned by the jury in the trial that was had. Only if that threshold is met is a miscarriage of justice established. …"

60. It is submitted that read in light of these principles it is clear that Henry J was considering whether the admission and potential uses of the bottom slapping evidence, in the context of this trial, occasioned a miscarriage of justice as he was required to do. It is submitted the assertion of error mistakes the form of Henry J consideration of this issue with its substance. Its substance reveals no error. Henry J correctly concluded there had been no miscarriage of justice in this case.

Argument: Sub part (v): No Substantial Miscarriage Actually Occurred

61. It is submitted the following factors demonstrate no substantial miscarriage of justice occurred in this case.

62. The bottom slapping evidence is not prejudicial. Especially when considered in the context of K's allegations. As outlined at 7 above the jury were exposed to graphic evidence of sexual offences. There is no likelihood the jury would disregard the clearest of directions, ignore the direct evidence of the complainant and prejudicially reason to guilt because of the backside slapping evidence. Their questions show they did not reason in this way.

63. The jury engaging in permissible propensity reasoning cannot give rise to a miscarriage of justice in the circumstances of this case. That is in keeping with their role. Hoefer's case supra per Gageler J at 377[85].

64. In DeJesus case[176] as cited in footnote 39 of the appellant outline it was held the impermissible joinder which led to inadmissible evidence being led would have been unobjectionable had the joinder occurred without objection for tactical reasons. Further in Hamilton's case[177] at 553-554 [43] (Kiefel CJ, Keane and Steward JJ), held (my emphasis):

> *"... But there is no absolute rule that in such cases the risk of impermissible tendency reasoning is such as always to necessitate the giving of an anti-tendency direction. The risk of tendency reasoning is not present in every case to the same extent; rather, the*

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[176] De Jesus v The Queen (1986) 61 ALJR 1.

[177] Hamilton (a pseudonym) v The Queen (2021) 274 CLR 531.

extent of the risk will depend upon the issues presented by the parties and the other directions given by the trial judge."

65. It is submitted given the nature of the bottom slapping evidence in the context of the evidence in this case, there was no realistic risk of impermissible tendency reasoning, as Henry J correctly found.

66. It is illogical to contend the jury would follow the trial judge's directions about the use of evidence proving actual offences and misuse in a prejudicial fashion evidence of bottom slapping.

66.1. As already outlined the more correct view of the reasoning of Henry J was he was seeking to assess whether there was a miscarriage of justice, not postulating how some hypothetical jury might have reasoned. Moreover, the issue of how the jury reasoned was specifically raised by the appellant.[178] The direction contemplated in Hamilton's case supra at 563 [76] per Edelman and Gleeson JJ was an anti-tendency warning which was given in this case.[134]

67. The appeal should be dismissed.

Part VI Notice of Contention Argument: Not applicable.

Part VII. Time estimate

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

Dated 1 March 2024

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[178] RFM 209.7, see also the trial judge's directions at 24.

ANNEXURE

Pursuant to Practice Direction No 1 of 2019, the Respondent sets out below a list of the statutes and provisions referred to in these submissions:

No.	Description	Version	Provision
1	Criminal Law (Sexual Offences) Act 1978 (Qld)	Reprint current from 3 October 2023	s4A
2	Evidence Act 1977 (Qld)	Reprint current from 5 July 2021	s93A(1), s93A(2)