



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
ADELAIDE REGISTRY

BETWEEN:

MATHEW CUCU BRAWN

Appellant

and

THE KING

Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: CERTIFICATION

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

Part II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Miscarriage of Justice (AWS [38]-[74]; RWS [20]-[50]; AR [2]-[5]; Cth [10]; NSW [15]-[29])

1. The respondent embraces the Commonwealth Director's three steps.
2. As to the second step:
 - a. an irregularity that could realistically affect the verdict of guilt is one capable of affecting reasoning to guilt.
 - b. "realistic" distinguishes the "possible" from the "fanciful" or "improbable"; *LPDT JBA Vol 5 tab 39 at p904*, [14]
 - i. this would account for the various categories of case, including: the sleeping Judge, want of procedural fairness, prosecutorial misconduct, incompetence, inadmissible/prejudicial evidence, mis-direction or non-direction.
 - c. the various "verbal formulations" are largely different ways of saying the same thing *Hofer JBA vol 4 tab 26 at [120]*; *Zhou v R [2021] NSWCCA 278 at [22]*.
3. Textual, contextual and purposive support for the existence of a materiality threshold:
 - a. the statutory description of the third-limb – "miscarriage of justice"
 - b. *Weiss* and the Exchequer rule
 - i. the Exchequer rule: *Weiss v The Queen JBA vol 4 tab 32 at p721-722 [16]*, [18]
 - ii. many examples of this Court since *Weiss* applying a materiality threshold: *RWS [37]*, *Hofer [41]*, [47] (Kiefel CJ, Keane and Gleeson JJ), [118], [123] (Gageler J), [130] (Gordon J), *HCF [2]* (Gageler, Gleeson, Jagot JJ), *Edwards [74]* (Edelman and Steward JJ), *Huxley [40]-[44]* (Gordon, Steward and Gleeson JJ)
 - iii. the critical passage in *Weiss* ([18]) should now be understood as a reference to the prevailing English and Australian understanding of the Exchequer rule: *Hofer JBA vol 4 tab 26 p508-511 [103]-[108]*, *Edwards JBA vol 3 tab 22 p389 [74]*

This matter: the undisclosed material and the contest at trial (AWS [17]-[19]; RWS [14]-[17])

4. The appellant's father was a member of the class of possible abusers raised at trial.
5. The use which the appellant could make of the non-disclosed material could not realistically affect the reasoning to guilt in this case (AWS [75]-[77]; RWS [66]-[73]; AR [6]-[20]; NSW [29]-[33])
 - a. There is no evidence that GB maintains her complaint.
 - b. Compelling MB to give evidence would result in a hearsay use.
 - c. Without GB or MB giving admissible evidence that MB abused GB, the defence could not introduce MB's disposition.
 - d. In light of the above, counsel's concession before the CoA was appropriate.
 - e. In the result, all that the defence could do was ask additional questions designed to put MB at the location of SM's abuse. This was done.

The grounds of appeal (RWS [59]-[65]; AWS [75]-[94]; AR [17]-[20])

6. Ground one: reasons [46]-[48] CAB 42.
 - a. the CoA could not find that the non-disclosure could realistically have affected the reasoning to guilt
 - b. the reasons at [83] CAB 49 are confined to a consideration of the use to be made of the non-disclosed material tendered on appeal
 - c. Reasons at [83] must be understood in light of [50], [73], [84]; CAB 42, 47, 49
7. Ground two, the concession: ABFM 37, 44; reasons [50], CAB 42 – the concession was correctly understood.
 - a. the concession reflected the only basis on which the appeal could be considered because of the absence of any evidence of some means to adduce MB's disposition
 - b. the concession was rightly made and not misunderstood by the Court

What is a “decision” for s 158(1)(b)

8. There is a “decision” where there is a determination, where a ruling is made, or a direction is given that reflects a decision – whether requested or not. You do not necessarily have a wrong decision on any question of law where there is nothing to

suggest that a determination has been made: where it “sails through” the entire trial. It cannot be constructive. *Soma*, *Johnson* and *Hamilton* are not impacted.

9. Consistent with the principles of statutory construction, the materiality threshold should also apply to “second-limb” errors, which does not adversely impact the operation of the proviso. (RWS [38]-[48]; AR [3]-[5])

Is the “negative proposition” universal?

10. *Weiss* itself holds, the “negative proposition” cannot displace the statutory test, namely whether there was a substantial miscarriage of justice.
11. *Weiss* JBA vol 4 tab 32 p731 at [43] allows for the possibility that the negative proposition will not apply in every case. If this is correct, it accommodates Gageler J and Edelman J in *Kalbasi*.
 - i. The analysis on the proviso remains directed to the ultimate question of whether the identified error denied the appellant a chance of acquittal which was fairly open: *Kalbasi* per Gageler [71] JBA vol 4 p549
 - ii. An appellate court might find that despite an error having the capacity to have impacted the verdict, on a review of the record, that it would have had no significance in determining the verdict in fact returned, even absent persuasion from the record itself of guilt beyond reasonable doubt. The court’s conclusion remains the verdict was unaffected by the error: *Kalbasi* per Edelman J [158] JBA vol 4 p581

Notice of contention

12. If there is no “materiality threshold” then this is an appropriate case to apply the proviso. On the construction that “any” irregularity is a miscarriage of justice, this irregularity did not have the capacity to impact the result, and as a result, there was no substantial miscarriage of justice. (CAB 59, AWS [96]; RWS [74]-[75])

Dated 4 December 2024



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