HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, KEANE, GORDON AND EDELMAN JJ

JOHN COLLINS APPELLANT

AND

THE QUEEN RESPONDENT

Collins v The Queen
[2018] HCA 18
9 May 2018
B68/2017

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Appeal of the Supreme Court of Queensland dated 2 June 2017 and in lieu thereof order that:*

   (a) the appellant's appeal to that Court be allowed;

   (b) the appellant's convictions and sentences be quashed; and

   (c) a new trial be had.

On appeal from the Supreme Court of Queensland

Representation

P J Callaghan SC with D K Fuller for the appellant (instructed by Legal Aid Queensland)

M R Byrne QC for the respondent (instructed by Director of Public Prosecutions (Qld))

CATCHWORDS

Collins v The Queen

Criminal law – Appeal against convictions – Jury direction – Prior inconsistent statement – Where appellant indicted for indecent assault, aggravated indecent assault and rape – Where consent main issue at trial – Where complainant made preliminary complaints to mother and others – Where mother gave evidence at committal hearing – Where mother gave different account at trial – Where trial judge directed jury committal evidence could only be used to assess mother's credibility – Where mother confirmed at trial she had given that evidence at committal and her memory was better at committal – Whether mother actually adopted committal evidence – Whether prior inconsistent statement available to jury to assess complainant's credibility – Whether trial judge misdirected jury.

Criminal law – Appeal against convictions – Application of proviso – Where Court of Appeal found erroneous jury direction – Where prosecution disavowed reliance on proviso – Where Court of Appeal applied proviso without notice and notwithstanding disavowal – Whether Court of Appeal bound to put appellant on notice of possibility of applying proviso.

Words and phrases – "preliminary complaint", "prior inconsistent statement", "proviso", "substantial miscarriage of justice".

Criminal Code (Q), ss 337, 349, 352, 668E(1A).

1 KIEFEL CJ, BELL, KEANE AND GORDON JJ. The appellant was tried before the District Court of Queensland (Judge Farr SC and a jury) on an indictment that charged him with indecent assault[1] (count one), aggravated indecent assault[2] (counts two and three) and rape[3] (count four). The offences were alleged to have been committed against the same complainant on the evening of 11 January or the morning of 12 January 2000. The trial commenced on 27 October 2014. On 30 October 2014 the jury returned verdicts of guilty on each count. The appellant was sentenced to a term of nine years and four months' imprisonment on the conviction for rape, and to shorter concurrent sentences on the remaining convictions.

2 The appellant appealed against his convictions to the Court of Appeal of the Supreme Court of Queensland (Gotterson and Morrison JJA and Burns J) on a single ground which challenged the directions given to the jury concerning the use that could be made of the evidence of the complainant's mother, Ms M, of her daughter's preliminary complaint to her. The challenge succeeded. Nonetheless, the Court of Appeal found that the misdirection had not occasioned a substantial miscarriage of justice and the appeal was dismissed under s 668E(1A) of the *Criminal Code* (Q) ("the Code"): the "proviso" to the common form criminal appeal provision. The Court of Appeal did not put the appellant on notice that it was disposed to dismiss the appeal under the proviso. This was so notwithstanding that on the hearing of the appeal the prosecutor had submitted that, if the appellant's challenge succeeded, it could not be said that no substantial miscarriage of justice had actually occurred[4].

3 On 17 November 2017, Gageler, Nettle and Gordon JJ granted the appellant special leave to appeal to challenge the Court of Appeal's determination to dismiss the appeal under the proviso. By notice of contention, the respondent seeks to have the Court of Appeal's order affirmed on the ground that the trial judge's directions concerning Ms M's evidence were correct. For the reasons to be given, the respondent's contention is rejected and the appellant's ground succeeds; it was an error to dismiss the appeal without giving the appellant the

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1 *Criminal Code* (Q), s 337; the provision has since been repealed and the offence of indecent assault is found in s 352 of the Code.

2 *Criminal Code* (Q), s 337(3); see fn above – the offence of aggravated indecent assault is found in s 352(2) of the Code.

3 *Criminal Code* (Q), s 349.

4 *R v Collins* [2017] QCA 113 at [71].

opportunity to address the Court on the reasons why it should not find that no substantial miscarriage of justice had actually occurred.

4 It is now more than 18 years since the date of the alleged offences. In the circumstances, the parties were agreed that, should the appeal succeed, the matter should not be remitted to the Court of Appeal; this Court should consider for itself whether notwithstanding the misdirection no substantial miscarriage of justice actually occurred. That consideration does not support the conclusion that there has been no substantial miscarriage of justice. It follows that the appeal must be allowed and a new trial ordered[5].

The evidence

5 The following summary of the evidence is drawn largely from Burns J's reasons in the Court of Appeal. The appellant was aged 61 years at the date of these events and the complainant was aged 19 years. The appellant was living on a yacht moored at a marina in Southport. He placed an advertisement in a newspaper for a nanny to accompany him and his partner and their child on a sailing trip to the Whitsundays. The complainant saw the advertisement and contacted the appellant and expressed her interest in the position. It was agreed that she would attend for an interview the following day.

6 The complainant brought her friend AJ and AJ's young son with her to the interview, which was conducted on board the appellant's yacht. After the interview, the appellant took them to a club and bought them some drinks. Later that evening, the appellant telephoned the complainant and suggested that she return to the yacht and spend some time with him in order to see whether "personality wise" they could live together at sea. She declined to do so at that time.

7 The complainant returned for that purpose about a week later on 11 January 2000. On this occasion, she travelled alone. The appellant collected her by car from the train station and they drove to the marina. On the way they stopped at a hotel where they had "a couple of drinks". After this, they purchased supplies of alcohol and groceries. By the time they arrived at the yacht it was dark. They drank some more alcohol before leaving the yacht to go to dinner at a nearby restaurant. The restaurant was fully booked and they returned to the yacht, where the appellant cooked a meal. They ate, talked and continued drinking.

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5 *Criminal Code* (Q), s 669.

8 At about 11:00 pm the complainant was feeling a "bit drunk", a "bit tired" and "ready for bed". She knew that she had had enough to drink and that it was "time to stop". She asked the appellant whether she could shower and he directed her to the bathroom adjoining his bedroom. After she had removed all her clothes, the appellant entered the bathroom and took hold of her and pushed her onto the bed, telling her that he wanted to shave her. The complainant protested. The appellant had hold of a pair of electric clippers and he proceeded to shave her pubic area despite her protests, telling her that he would make her look good. This conduct was charged in the first count.

9 After being shaved, the complainant went back to the bathroom and showered. She then returned to the dining area of the yacht, where she and the appellant had "a couple of drinks". The complainant then said that she would like to go to bed. At this point, the appellant "dragged" her to his bedroom. She tried to stop him, saying that she did not want to go with him but he persisted. He removed her pants and pushed her onto the bed. He took off his trousers and straddled her, placing his penis in her mouth. This conduct was charged in the second count. The appellant then pulled the complainant's legs apart and licked her vagina. This conduct was charged in the third count. The complainant continued to protest and tried to close her legs but the appellant "kept pulling them apart". The appellant then penetrated the complainant with his penis. This conduct was charged in the fourth count.

10 After these events, the appellant told the complainant that she should sleep at the other end of the yacht, as he snored. She did as instructed. On 12 January 2000, when the complainant woke, the appellant was not on the yacht. He sent her a text message asking her to clean up the yacht and telling her that there was a key for the shower at the marina. After cleaning the yacht, the complainant went to the marina and had a shower. While she was there she received a telephone call from AJ. The complainant gave the following account of her conversation with AJ:

> "I told her that [the appellant] raped me last night and that I'm scared and I don't know what I'm doing and I don't know where I am."

11 AJ suggested that the complainant arrange for her to come to Southport. The complainant telephoned the appellant and asked him to collect AJ from the station. The appellant collected AJ and drove her to the yacht. AJ told the appellant that the complainant needed to go home because her "nan" needed her to come back and help her. The complainant and AJ caught a bus to the station and returned home.

12 The complainant telephoned her mother on 12 January 2000 ("the telephone call"). She recalled saying "Mum, he raped me" and she was "pretty sure" that she told her mother that she had been "silly" and that she "shouldn't have gone down [to Southport]". This was all that the complainant could remember of the telephone call. She was not challenged in cross-examination on this aspect of her evidence.

13 The complainant made a statement to the police on 28 January 2000 and, on the same day, the police executed a search warrant on the appellant's yacht. Among the items located were electric clippers and a quantity of alcohol. Scientific examination of the clippers revealed the presence of the complainant's DNA on the blades.

14 The appellant did not give or call evidence in his defence. He made a formal admission that on the evening of 11 January 2000 or the morning of 12 January 2000 he engaged in sexual intercourse with the complainant. It was the defence case that the complainant had become disinhibited by alcohol and shaved her pubic area before engaging in consensual oral and penile vaginal intercourse with the appellant. The complainant was cross-examined on inconsistencies between her evidence given at the trial and her earlier evidence at the committal hearing before the Magistrates Court in 2007. She was also challenged on inconsistencies between her evidence and statements attributed to her in a newspaper article written by a journalist, Ian Haberfield.

The evidence of preliminary complaint

15 Evidence of the making of a "preliminary complaint" given by the complainant, or the person or persons to whom the complaint was made, is received as an exception to the hearsay rule for the purpose of showing consistency of conduct[6]. A "preliminary complaint" is any complaint other than the complainant's first formal witness statement to a police officer given in, or in anticipation of, a criminal proceeding in relation to the alleged offence[7]. At the trial, evidence of preliminary complaint was given by the complainant and by Ms M, AJ and Ian Haberfield.

16 AJ gave evidence that she telephoned the complainant at about 9:00 am and that the complainant sounded very upset. AJ asked what was wrong and,

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6 *Kilby v The Queen* (1973) 129 CLR 460 at 472 per Barwick CJ; [1973] HCA 30.

7 *Criminal Law (Sexual Offences) Act* 1978 (Q), s 4A(2).

with some prodding, the complainant told her "John had raped her the previous night".

17 Ian Haberfield, who was working for the newspaper which published the appellant's advertisement, interviewed the complainant after Ms M made contact with the newspaper. Mr Haberfield said that the complainant stated in the course of the interview that the appellant had "attacked" and "raped" her.

18 In evidence in chief, Ms M gave an account of the telephone call in these terms: "[the complainant] phoned me to tell me that she had been raped". In cross-examination, Ms M was questioned about her evidence of the telephone call given at the committal hearing in 2007 ("the 2007 account"). In summary, in the 2007 account, Ms M said that the complainant told her: (i) "I think I've been raped", and (ii) "I had some wine and I felt funny and I don't remember every – anything after a certain time".

The limitation on the use of the 2007 account

19 The issue on which the appellant succeeded before the Court of Appeal, and which is the subject of the respondent's notice of contention, concerns the limitation placed on the use the jury could make of the 2007 account. The jury was directed that a prior inconsistent statement made by a witness is not evidence of the truth of what the witness said on the earlier occasion. The trial judge directed that the prior inconsistent statement, if proved, "is relevant to the credibility of that particular witness when you're assessing that person's evidence". His Honour went on to direct:

> "You also, however, heard evidence from the complainant's mother about the complaint that she was given by her daughter the following day. What she told the committal proceeding court seven years ago and what she has said today was said to be different. That direction relates to that as well. That inconsistency between what the mother told the committal court seven years ago and what she told today, depending upon your view of it, impacts, potentially upon the mother's credibility and reliability. *But what the mother said to the committal court seven years ago is not evidence of the fact that the complainant said those things to her*. It's not evidence of the truth of the contents of the statement if you can follow that logic. It impacts upon the particular witness's credibility who's giving the evidence." (emphasis added)

20 The Court of Appeal explained that where a witness adopts parts of a previous statement, those parts form part of the witness's oral testimony at the trial[8]. Their Honours concluded that Ms M had adopted the 2007 account with the result that it formed part of Ms M's evidence and it was for the jury to assess whether it accepted that account or the account given by Ms M in chief[9]. Contrary to the trial judge's direction, their Honours said it was open to the jury to assess the credibility and reliability of the complainant's evidence against the 2007 account of her preliminary complaint. The respondent does not dispute the latter conclusion. The respondent takes issue with the anterior finding that Ms M adopted the 2007 account as accurate.

21 To assess the argument it is necessary to set out the terms of the cross-examination of Ms M at some length:

> "DEFENCE COUNSEL: So – all right. And you've indicated that you can't recall the exact terms of what she said?
>
> A: Well, it was quite some time ago, as you can appreciate.
>
> DEFENCE COUNSEL: Yes. Well, your memory was better back in 2007?
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> A: I would think so.
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> DEFENCE COUNSEL: And you gave evidence about what you recalled at that stage?
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> A: Yes.
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> DEFENCE COUNSEL: And I'd suggest you said, 'I'm not even sure that the words were, "I was raped". I believe she said, "I think I was raped", because she was – she was, "Mum, I think he's drugged me and I think he's raped me."' Do you recall you gave that evidence?

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8 *R v Collins* [2017] QCA 113 at [49] citing *The Queen's Case* (1820) 2 Brod & B 284 at 313 per Abbott CJ [129 ER 976 at 988]; *R v Soma* (2003) 212 CLR 299 at 316 [55] per McHugh J; [2003] HCA 13; and *R v CBL and BCT* [2014] 2 Qd R 331 at 374 [146].

9 *R v Collins* [2017] QCA 113 at [52] citing *CB v Western Australia* (2006) 175 A Crim R 304 at 316 [53].

A: Well, if I gave it at that time, then that's how I would have remember [sic] it."

22 Ms M was handed a copy of the transcript of the evidence that she gave in 2007 at the committal hearing and she was asked:

"DEFENCE COUNSEL: Do you agree you gave that evidence?

A: Well, it's written so I must have.

DEFENCE COUNSEL: You accept that?

A: Yes.

DEFENCE COUNSEL: All right. And I'd suggest you also gave evidence further – I don't need you to look at those yet – that she rang up, she was crying, she was hysterical and she said, "'Mum, I think I've been raped. I had some wine and I felt funny and I don't remember every – anything after a certain time, and when I woke up" – I can't remember what she said after that. And I said, "Well, you know, how did this happen?" And she said, "Mum, I don't know. I – we had a glass of wine to celebrate."' Do you agree you gave that evidence?

A: Yes.

DEFENCE COUNSEL: And you went on to say, 'No, she didn't say she was drunk'. And, 'Just that she couldn't understand why she doesn't remember anything because she didn't have that much to drink.' Do you agree you gave that evidence?

A: Yes.

DEFENCE COUNSEL: All right. And does that assist you that whilst you might have taken away from the conversation that she thought she'd been raped, what she actually told you was that she couldn't remember what had happened after a certain point?

A: I can appreciate what you're saying, but what you need to remember is that the phone call happened in 2000.

...

DEFENCE COUNSEL: I appreciate that. I'm not being critical of you. You can't say anything further than, your memory, when you gave evidence back on the 21st of September 2007, was better than it is now?

A: Yes. I would say so, yes.

DEFENCE COUNSEL: And when you gave that evidence, that was the best recollection you could give to the court of what she said to you?

A: Yes. I would say so, yes."

23 The Court of Appeal observed that defence counsel sought to have Ms M: (i) distinctly admit that she had given evidence at the committal hearing relative to the subject matter of the proceeding[10]; (ii) agree that the parts of that evidence that Ms M was taken to were more reliable than her trial testimony because her "memory was better back in 2007"; and (iii) accept that those parts of the evidence given at the committal hearing were true (or accurate), in that they represented "the best recollection [she] could give to the court". Their Honours concluded that all three objectives had been achieved[11] and it followed that the 2007 account formed part of Ms M's oral testimony.

The respondent's contention

24 The respondent is critical of defence counsel's failure to obtain Ms M's acknowledgement of the accuracy of the 2007 account. Her acknowledgement that she had given her best recollection to the court in 2007 is said to fall short of acceptance of the truth or accuracy of the account. In circumstances in which the 2007 account was not given close in time to the telephone call, the respondent contends that there is no sound basis to infer its accuracy. Absent a clear acknowledgement of its accuracy, the respondent submits that the 2007 account went only to Ms M's credit and the directions given to the jury were unimpeachable[12].

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10 *Evidence Act* 1977 (Q), s 18.

11 *R v Collins* [2017] QCA 113 at [59].

12 *Taylor v The King* (1918) 25 CLR 573 at 574-575; [1918] HCA 68; *Driscoll v The Queen* (1977) 137 CLR 517 at 536 per Gibbs J; [1977] HCA 43; *Lee v The Queen* (1998) 195 CLR 594 at 603 [39] per Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ; [1998] HCA 60; *Bull v The Queen* (2000) 201 CLR 443 at 466 [79] per McHugh, Gummow and Hayne JJ; [2000] HCA 24.

25 The respondent's contention rests on the significance that is to be attached to the concluding question and answer extracted above:

> "DEFENCE COUNSEL: And when you gave that evidence, that was the best recollection you could give to the court of what she said to you?
>
> A: Yes. I would say so, yes."

26 On the hearing of the appeal the respondent accepted that, had Ms M's answer to this question been an unqualified "yes", it would have sufficed as an adoption of the 2007 account as accurate. As it stands, the respondent argues, Ms M's qualified answer is consistent with her acknowledgement of giving the 2007 account and with her inability at the date of the trial to be certain in her own mind whether that account or the account given in chief was true.

27 The fact that the 2007 account was of a conversation that occurred seven years earlier was relevant to the weight of the evidence but it does not detract from the Court of Appeal's analysis of the status of the evidence. The Court of Appeal did not err in concluding that Ms M's acceptance: (i) that her recollection in 2007 of the telephone call was likely to be better than her recollection of the call in 2014, and (ii) that she had endeavoured to give the court in 2007 her best recollection of the telephone call, sufficed as her adoption of the 2007 account as an accurate account. It follows that the Court of Appeal did not err in holding that the jury should not have been instructed that the only use it might make of the 2007 account was in assessing the credibility and reliability of Ms M's evidence. The 2007 account formed part of Ms M's evidence of the preliminary complaint in the trial[13]. It was not evidence of any underlying fact asserted by the complainant[14] but it was evidence of the terms of her complaint. It was open to the jury to prefer the 2007 account to Ms M's account in chief. In contrast to the latter, the 2007 account did not tend to support acceptance of the reliability of the complainant's evidence.

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13 *Morris v The Queen* (1987) 163 CLR 454 at 469 per Deane, Toohey and Gaudron JJ; [1987] HCA 50; *Sainsbury v Allsopp* (1899) 24 VLR 725 at 728 per Hood J; *R v Thynne* [1977] VR 98 at 100; *CB v Western Australia* (2006) 175 A Crim R 304 at 316 [53].

14 *Jones v The Queen* (1997) 191 CLR 439; [1997] HCA 56; *R v Lillyman* [1896] 2 QB 167.

The proviso

28 Section 668E of the Code is in the common form: on an appeal against conviction the appellate court is to allow the appeal if it is of opinion that the verdict of the jury should be set aside under any of three limbs in sub-s (1) and in any other case the court is to dismiss the appeal. Sub-section (1A) is in familiar terms and provides that the appellate court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in the appellant's favour, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

29 In his written submissions filed in the Court of Appeal, the appellant submitted that, should his ground succeed, his appeal should not be dismissed under the proviso. The prosecution did not submit to the contrary in the written submissions filed on its behalf. As earlier noted, on the hearing of the appeal in the Court of Appeal, the prosecutor made a concession that "if the appellant's argument was accepted, it could not be submitted that there had been no substantial miscarriage of justice"[15]. The Court of Appeal did not accept the prosecution's concession because, after making an independent assessment of the evidence, their Honours were satisfied that the appellant's guilt had been proved beyond reasonable doubt[16]. The appellant submits that it was not open to the Court of Appeal to "override" the prosecution's disavowal of the proviso and dismiss his appeal without warning of the intention to do so and giving him the opportunity to be heard on the matter. The respondent contends that the Court of Appeal's disposition of the appeal was a correct application of the principles governing dismissal under the proviso explained in *Lindsay v The Queen*[17].

30 In *Lindsay*, the Court of Criminal Appeal of South Australia dismissed Lindsay's appeal notwithstanding that the trial judge's directions on the partial defence of provocation were wrong because the Court considered that the partial defence should not have been left for the jury's consideration. The prosecutor at the trial had not submitted that provocation was not raised. In the Court of Criminal Appeal, the prosecution noted that dismissal under the proviso was an available disposition but did not invite the Court to adopt that course. On appeal in this Court, the proposition that in the absence of invitation it was not open to

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15 *R v Collins* [2017] QCA 113 at [71].

16 *R v Collins* [2017] QCA 113 at [72].

17 (2015) 255 CLR 272 at 288-290 [43]-[48] per French CJ, Kiefel, Bell and Keane JJ, 294 [64] per Nettle J; [2015] HCA 16.

the Court of Criminal Appeal to dismiss an appeal under the proviso was rejected. As the joint reasons explained, such a proposition is inconsistent with the text and structure of the common form criminal appeal provision[18]. Importantly, in *Lindsay*, on the hearing in the Court of Criminal Appeal, it had been made plain to Lindsay's counsel that consideration of dismissal under the proviso was a live issue and counsel was given the opportunity to address that possibility[19].

31 The respondent submits that *Lindsay* is not to be distinguished on the basis that the prosecution did not, as here, disavow reliance on the proviso. The respondent characterises *Lindsay* as a case of non-reliance by omission and the present as a case of non-reliance by express statement. Each, the respondent emphasises, is a case of non-reliance. The respondent seeks to turn its concession in the Court of Appeal to advantage in this Court; the appellant's counsel is said to have been alive to the possibility of dismissal under the proviso, and, having raised the issue in his outline and having not been met by a counter-argument, he chose not to pursue the matter further. This, so the argument goes, was a valid tactical decision because pursuing the issue in oral argument risked raising matters that might be adverse to acceptance of defence counsel's written outline. The submission is apt to fly in the face of the assumption underpinning the conduct of adversarial proceedings that, generally, the parties are responsible for defining the issues.

32 As explained in *Baiada Poultry Pty Ltd v The Queen*, notwithstanding the permissive language of the proviso, where the appellate court concludes that a demonstrated error or irregularity under the second or third limbs of the common form provision has not actually occasioned a substantial miscarriage of justice, it must dismiss the appeal[20]. It remains that the determination of whether an error or other irregularity has occasioned a substantial miscarriage of justice calls for a judgment upon which the parties are entitled to be heard. Absent any indication to the contrary, the prosecution's concession – that in the event the directions on the use the jury might make of Ms M's evidence were wrong, it could not be said

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18 *Lindsay v The Queen* (2015) 255 CLR 272 at 289 [47] per French CJ, Kiefel, Bell and Keane JJ citing *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 103 [24] per French CJ, Gummow, Hayne and Crennan JJ; [2012] HCA 14.

19 *Lindsay v The Queen* (2015) 255 CLR 272 at 288-289 [45] per French CJ, Kiefel, Bell and Keane JJ.

20 *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 103-104 [25]-[26] per French CJ, Gummow, Hayne and Crennan JJ.

that the error did not occasion a substantial miscarriage of justice – relieved the appellant of the need to address this issue. The Court of Appeal was not bound by the prosecution's concession, but it was obliged to put the appellant on notice that, notwithstanding the concession, dismissal under the proviso remained a distinct possibility, and to give the appellant an opportunity to persuade it against taking that course.

A substantial miscarriage of justice?

33 The Court of Appeal considered that the prosecution case was a strong one and their Honours were satisfied that guilt had been proved beyond reasonable doubt. The conclusion took into account three considerations. First, while there were inconsistencies in the complainant's account, these were largely with respect to matters of peripheral detail and otherwise the complainant appeared to have given "a relatively robust and unvarying account of the essential features of the conduct making up the offences"[21]. Secondly, the conclusion took into account the physical evidence of the clippers, which "supported parts of [the complainant's] account"[22]. And, thirdly, the conclusion took into account that preliminary complaints had been made not only to Ms M but also to AJ and Ian Haberfield[23].

34 The Court of Appeal separately identified one further consideration: the two aspects of the 2007 account that were inconsistent with Ms M's evidence in chief were not put to the complainant in cross-examination. Further, their Honours noted that the complainant's account of the telephone call was not challenged. Absent challenge to that account, the Court of Appeal said that the proposition that the jury was deprived of the chance to consider the 2007 account in assessing the complainant's evidence was "considerably weakened"[24].

35 To the extent that the last matter was taken into account in determining that no substantial miscarriage of justice had actually occurred, it was an error. Defence counsel was not bound to put the 2007 account to the complainant; the contents of the telephone call was not a matter upon which counsel had instructions and at the time the complainant was under cross-examination it was

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21 *R v Collins* [2017] QCA 113 at [18].

22 *R v Collins* [2017] QCA 113 at [72].

23 *R v Collins* [2017] QCA 113 at [72].

24 *R v Collins* [2017] QCA 113 at [73].

not known whether Ms M would adopt the 2007 account. Moreover, even if counsel's cross-examination were open to criticism on this account, it is not apparent that the omission bears on the determination of whether no substantial miscarriage of justice actually occurred.

36 The trial was fought on the issue of consent. On the complainant's account, she had consumed a substantial quantity of alcohol in the course of the evening before the subject events. The defence case as summarised by the trial judge was that the complainant's "degree of intoxication on the night in question may very well have affected her behaviour on the night, reduced her inhibitions and affected her memory". The capacity of the 2007 account, if accepted, to affect the jury's assessment of the credibility and reliability of the complainant's account of the offences is apparent. This is significant to the determination of whether the negative condition for dismissal under the proviso is satisfied[25]. Where, as here, 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 to the verdict of guilty which it otherwise might.

37 The 2007 account had the capacity to affect the assessment of the reliability of the complainant's account regardless of the terms of the complaints made to AJ and Ian Haberfield. As the Court of Appeal recognised, the presence of the complainant's DNA on the blades of the electric clippers did not bear relevantly on the issue of consent. Proof of guilt was wholly dependent on the complainant's evidence. Despite the Court of Appeal's acknowledgement of the natural limitations that apply to appellate review of the record[26], their Honours' conclusion paid insufficient regard to those limitations. It cannot be concluded that no substantial miscarriage of justice actually occurred.

Orders

38 For these reasons, there should be the following orders:

1. Allow the appeal.

2. Set aside the order of the Court of Appeal of the Supreme Court of Queensland dated 2 June 2017 and in lieu thereof order that:

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25 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [44]; [2005] HCA 81.

26 *R v Collins* [2017] QCA 113 at [72].

(a) the appellant's appeal to that Court be allowed;

(b) the appellant's convictions and sentences be quashed; and

(c) a new trial be had.

39 EDELMAN J. For the reasons given in the joint judgment, the Court of Appeal of the Supreme Court of Queensland was correct that the trial judge misdirected the jury. The evidence given by the complainant's mother at the 2007 committal hearing was adopted by her at trial when she gave evidence as part of the prosecution case. The trial judge erred in directing the jury that the evidence from the complainant's mother concerning what she had said in 2007 could not be used to assess the credibility of the complainant. The respondent's notice of contention should be dismissed.

40 The Court of Appeal dismissed the appeal by relying upon the common form proviso to the requirement that an appeal must be allowed if "on any ground whatsoever there was a miscarriage of justice"[27]. Over the many decades that the common form proviso has been in force, there has been much written about its meaning, which is expressed in deceptively simple terms requiring[28] the court to dismiss the appeal "if it considers that no substantial miscarriage of justice has actually occurred"[29]. It is true that the Court of Appeal was not bound by the respondent's concession that if a miscarriage of justice had occurred it would be substantial. But the Court of Appeal was required to give the appellant the opportunity of making submissions on this issue before reaching that conclusion. Since this Court has now heard submissions on the proviso, and since the circumstances described in the joint judgment make it appropriate for this Court to decide the point, the remaining question for this Court is whether a substantial miscarriage of justice occurred.

41 In *Kalbasi v Western Australia*[30], the joint judgment of a majority of this Court held that a negative proposition needed to be satisfied before an appeal court could conclude that no substantial miscarriage of justice had occurred. The necessary condition in that negative proposition, as expressed in *Weiss v The Queen*[31], is that an appeal court cannot dismiss the appeal unless the court, itself, is satisfied beyond reasonable doubt of the appellant's guilt. In my dissenting reasons, I held that this satisfaction should not supplant the basic test for determining whether there was a substantial miscarriage of justice. The basic test applies unless the error is so fundamental that it can be said, without more, to be a substantial miscarriage of justice. That basic test is whether conviction by

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27 *Criminal Code* (Q), s 668E(1).

28 *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 103-104 [26] per French CJ, Gummow, Hayne and Crennan JJ; [2012] HCA 14.

29 *Criminal Code* (Q), s 668E(1A).

30 (2018) 92 ALJR 305; 352 ALR 1; [2018] HCA 7.

31 (2005) 224 CLR 300 at 317 [44]; [2005] HCA 81.

the jury, acting reasonably, was inevitable. Or, as Gageler J said in *Kalbasi*, "the ultimate question ordinarily to be addressed in the application of the proviso is whether the jury's verdict might have been different if the identified error had not occurred"[32]. This basic test of "inevitability of conviction" has been expressed in numerous decisions of this Court prior to[33] and since[34] *Weiss*.

42 It has been suggested that there are "oddities"[35] arising from the contrast between the negative proposition in *Weiss* and the inevitability of conviction formulation. It is unnecessary in this case to consider whether there is any difference in theory or application between the two formulations, including whether the negative proposition could be seen merely as a necessary

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32 (2018) 92 ALJR 305 at 320 [64], see also at 321-322 [71] per Gageler J, 331 [124], 334 [135] per Nettle J; 352 ALR 1 at 19, see also at 21-22, 34, 38.

33 *Gallagher v The Queen* (1986) 160 CLR 392 at 412-413 per Dawson J; [1986] HCA 26; *Wilde v The Queen* (1988) 164 CLR 365 at 372 per Brennan, Dawson and Toohey JJ; [1988] HCA 6; *Festa v The Queen* (2001) 208 CLR 593 at 631 [121] per McHugh J, 636 [140] per Kirby J, 661 [226] per Hayne J; [2001] HCA 72; *Conway v The Queen* (2002) 209 CLR 203 at 226 [63] per Gaudron ACJ, McHugh, Hayne and Callinan JJ; [2002] HCA 2; *Arulthilakan v The Queen* (2003) 78 ALJR 257 at 269 [62], 270-271 [68]-[69] per Kirby J; 203 ALR 259 at 275, 276-277; [2003] HCA 74; *Kamleh v The Queen* (2005) 79 ALJR 541 at 547 [29] per Kirby J, 549 [39] per Heydon J; 213 ALR 97 at 104, 106; [2005] HCA 2. See also *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J; [1955] HCA 59; *Driscoll v The Queen* (1977) 137 CLR 517 at 524-525 per Barwick CJ; [1977] HCA 43; *R v Storey* (1978) 140 CLR 364 at 376 per Barwick CJ; [1978] HCA 39.

34 *Darkan v The Queen* (2006) 227 CLR 373 at 402 [95] per Gleeson CJ, Gummow, Heydon and Crennan JJ, 407 [117] per Kirby J; [2006] HCA 34; *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 106-107 [35]-[38] per French CJ, Gummow, Hayne and Crennan JJ; *Baini v The Queen* (2012) 246 CLR 469 at 481-482 [33], 484 [40] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; [2012] HCA 59; *Lindsay v The Queen* (2015) 255 CLR 272 at 276 [4] per French CJ, Kiefel, Bell and Keane JJ, 301-302 [86] per Nettle J; [2015] HCA 16; *Castle v The Queen* (2016) 259 CLR 449 at 472 [65] per Kiefel, Bell, Keane and Nettle JJ, Gageler J agreeing at 477 [82]; [2016] HCA 46; *R v Dickman* (2017) 91 ALJR 686 at 688 [4]-[5], 697 [63] per Kiefel CJ, Bell, Keane, Nettle and Edelman JJ; 344 ALR 474 at 476, 488; [2017] HCA 24. See also *Pollock v The Queen* (2010) 242 CLR 233 at 252 [70] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; [2010] HCA 35; *Filippou v The Queen* (2015) 256 CLR 47 at 55 [15] per French CJ, Bell, Keane and Nettle JJ; [2015] HCA 29.

35 Mildren, *The Appellate Jurisdiction of the Courts in Australia*, (2015) at 89.

requirement for one technique by which an appellate judge might assess whether conviction by the jury was inevitable. It suffices to make two observations.

43 The first observation is that, on any view, the ultimate question must be whether there was a substantial miscarriage of justice. The second observation is that, as a matter of application, there may be very few cases where there could be any difference in result between asking (i) whether conviction by the jury, acting reasonably, was inevitable, and (ii) whether the appeal court, or perhaps more accurately the individual appeal judge, is satisfied beyond reasonable doubt of the appellant's guilt. The prospect of any difference in result is also reduced substantially by the requirement that the appeal judge take into account the verdict of the jury when assessing whether he or she is satisfied of guilt beyond reasonable doubt[36]. This requirement means that the two approaches might generally align in the case of a "harmless error"[37] that did not affect the trial in any fundamental way and that was so insignificant that there was no reasonable possibility that it could have led a jury to acquit[38]. This would be so, even if the natural advantages of the jury meant that the appellate judge's satisfaction of guilt beyond reasonable doubt was dependent upon his or her conclusion that the jury's verdict could not have been affected by the error.

44 The misdirection by the trial judge that prevented the jury from using the evidence from the complainant's mother concerning what she had said in 2007 to assess the credibility of the complainant was not so fundamental that it could be said, without more, that there was a substantial miscarriage of justice. Nevertheless, the error was significant. As the joint reasons explain, the evidence given by the complainant's mother in 2007 could have affected the jury's assessment of the reliability of the complainant. Particularly due to the natural limitations of appellate review where issues of credibility are involved, it was not inevitable that the jury, acting reasonably, would have convicted without the misdirection. The appeal should be allowed and orders made as proposed in the joint judgment.

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36 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [43].

37 *Libke v The Queen* (2007) 230 CLR 559 at 581-582 [52]-[53]; [2007] HCA 30.

38 See also *Kalbasi v Western Australia* (2018) 92 ALJR 305 at 312 [14]; 352 ALR 1 at 8.