HIGH COURT OF AUSTRALIA

BELL, KEANE, NETTLE, GORDON AND EDELMAN JJ

OKS APPELLANT

AND

THE STATE OF WESTERN AUSTRALIA RESPONDENT

OKS v Western Australia
[2019] HCA 10
20 March 2019
P62/2018

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Appeal of the Supreme Court of Western Australia made on 11 April 2018 and in lieu thereof substitute the following orders:*

   (a) appeal allowed;

   (b) the appellant's conviction be quashed; and

   (c) there be a new trial.

On appeal from the Supreme Court of Western Australia

Representation

S A Vandongen SC with S Nigam for the appellant (instructed by Nigams Legal)

A L Forrester SC with K C Cook for the respondent (instructed by Director of Public Prosecutions (WA))

CATCHWORDS

OKS v Western Australia

Criminal practice – Appeal against conviction – Application of proviso that no substantial miscarriage of justice actually occurred – *Criminal Appeals Act 2004* (WA), s 30(4) – Where jury found appellant guilty of indecently dealing with child under 13 years of age – Where credibility and reliability of complainant's evidence central issue at trial – Where complainant admitted and was alleged to having lied – Where trial judge directed jury not to reason that complainant's lies meant that all her evidence dishonest and could not be relied upon – Where Court of Appeal found direction by trial judge was wrong decision on question of law – Where Court of Appeal found no substantial miscarriage of justice occurred – Whether error in application of proviso.

Words and phrases – "misdirection", "natural limitations of proceeding on the record", "no effect upon the jury's verdict", "proviso", "substantial miscarriage of justice", "sufficiency of evidence to prove guilt", "very significant weight", "weight to the verdict of guilty", "wrong decision on a question of law".

Criminal Appeals Act 2004 (WA), s 30(4).

1 BELL, KEANE, NETTLE AND GORDON JJ. The appellant was convicted before the Perth District Court (Judge Stevenson and a jury) of indecently dealing with the complainant, S, a child under the age of 13 years[1]. The trial took place nearly 20 years after the alleged offence. The central issue at the trial was the credibility and reliability of S's evidence. In the course of summing-up the case to the jury, the trial judge directed:

> "[D]o not follow a process of reasoning to the effect that just because [S] is shown to have told a lie or she has admitted she told a lie, that all of her evidence is in fact dishonest and cannot be relied upon" ("the impugned direction").

2 The appellant appealed against his conviction to the Court of Appeal of the Supreme Court of Western Australia (Buss P, Beech JA and Pritchard J) on a ground which contended that the impugned direction was a wrong decision on a question of law[2]. The Court of Appeal was unanimous in concluding that it was[3]. Their Honours held that, even though the ground of appeal might have been decided in the appellant's favour, the appeal should be dismissed under s 30(4) of the *Criminal Appeals Act 2004* (WA) because no substantial miscarriage of justice occurred[4] ("the proviso").

3 On 16 November 2018, Bell, Keane and Nettle JJ gave the appellant special leave to appeal. In issue in the appeal is the correctness of the conclusion that the impugned direction did not occasion a substantial miscarriage of justice. This conclusion largely turned upon reasoning that, in the context of the summing-up as a whole, the impugned direction would have made no difference to the jury's verdict of guilty, which verdict for that reason should be accorded very significant weight[5]. As will appear, it was an error to so conclude. The

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1 *Criminal Code* (WA), s 320(4).

2 *Criminal Appeals Act 2004* (WA), s 30(3)(b).

3 *OKS v Western Australia* (2018) 52 WAR 482 at 507-508 [125] per Buss P, 532 [253]-[255] per Beech JA, 532 [259] per Pritchard J.

4 *OKS v Western Australia* (2018) 52 WAR 482 at 508 [130] per Buss P, 532 [258] per Beech JA, 532 [259] per Pritchard J.

5 *OKS v Western Australia* (2018) 52 WAR 482 at 509-510 [135]-[136] per Buss P, 532 [258] per Beech JA, 532 [259] per Pritchard J.

appeal must be allowed and the appellant's conviction quashed. As the appellant recognises, the appropriate consequential order is that there be a new trial.

The course of the trial

4 On 4 April 2016, an indictment was signed charging the appellant that in March 1997 he indecently dealt with S, a child under the age of 13 years, by placing his hand on her vagina on top of her underwear (count one); in December 1998, he indecently dealt with S, a child under the age of 13 years, by placing his penis over her vagina on top of her underwear and moving up and down (count two); on the same date and place as charged in count two, he indecently dealt with S, a child under the age of 13 years, by stroking her vagina on top of her underwear (count three); and on a date between 6 March 1999 and 5 March 2000, he attempted to indecently deal with S, a child under the age of 13 years, by attempting to put his hand down the front of her pants (count four).

5 On 21 November 2016, at the commencement of the trial, the prosecutor applied to amend counts one and three to delete the words "on top of her underwear". Consistently with the amendment, it was S's evidence that the indecent dealing charged in count one involved the appellant placing his hand directly on her vagina. S admitted to having lied to the police in her earlier accounts of this assault. She said that she had been ashamed.

6 S did not give evidence of the incident charged in count three and the jury was discharged from giving a verdict on that count. S's evidence of her age at the date of the offence charged in count four did not establish that she was aged under 13 years and the jury was also discharged from giving a verdict on that count.

7 The prosecution case was opened to the jury on the basis that the appellant moved into the family home in 1997 and began touching S sexually very soon afterwards. It was the prosecution case that the appellant continued to touch S sexually "almost every day or so" from when she was ten until she was about 13.

8 S gave evidence that the offence charged in count one occurred on an occasion when the appellant was lying on the bed in her brother's bedroom, S was lying next to him, her mother was sitting on the end of the bed and her brother, B, was also present. The appellant was tickling S on her back as he told them a story. At some point her mother and B left and the appellant continued telling the story and tickling S. He manoeuvred S so that he could tickle her front. He stroked her chest and ultimately he rubbed her vagina.

9 S gave evidence that the offence charged in count two occurred on an occasion when she was in her mother's bedroom wrapping a Christmas present. The appellant and her mother were lying on the bed. Her mother left the room to answer the telephone. The appellant made S sit on the end of the bed, saying words to the effect of, "I've been waiting for this". He pushed her onto the bed, adjusted his penis so it was over her vagina and simulated sex by moving up and down on S. Both S and the appellant were clothed, but S could see the appellant's erect penis through his shorts.

10 In early 2001, S was interviewed by officers of the Department of Family and Children's Services ("the first Departmental interview") as the result of something she was heard to say while she was at a Naval Cadet camp. In the first Departmental interview S gave an account that the appellant was touching her chest and vagina on the outside of her clothes. In a further interview with other officers of the Department of Family and Children's Services in early 2001, S said that she and the appellant were play-fighting when he touched her on the chest and the touching had not been sexual ("the second Departmental interview"). In her evidence, S said that she had lied in the second Departmental interview.

11 In February 2010, the appellant sent a request to be added to S's Facebook account as her friend. S responded negatively to the suggestion, saying, among other things, "[d]o u have any idea what u did to me as a kid?" After an interval of just over a fortnight, the appellant sent S a message in which he expressed his surprise at her response to his request to be a Facebook friend. There were no further communications between the two until July 2012, when S sent a message to the appellant saying "[j]ust thought I'd give you the heads up, im seeking legal advice!" Following this communication, the appellant and S exchanged Facebook messages with varying frequency until July 2015. The appellant repeatedly expressed his desire to meet S for coffee. S's responses included generalised allegations that the appellant had behaved wrongly towards her and that he was a "sick old man". Defence counsel acknowledged that the appellant's messages to S in 2014 conveyed his interest in engaging in sexual relations with her as an adult but he pointed to passages in the messages in which the appellant denied sexual misconduct with S when she was a child.

12 S said that she had decided to complain to the police about the appellant's sexual abuse after receiving a Facebook message from him wishing her a happy birthday in 2014. S made her first statement to the police about the matter on 13 May 2015.

13 On 16 July 2015, the appellant participated in an electronically recorded interview with the police in which he denied any offending against S. The

interview was tendered in the prosecution case. The appellant did not give or adduce any evidence at the trial. It was his case that S had fabricated her allegations and that he did not commit any of the acts charged.

14 The focus of defence counsel's closing submissions was on inconsistencies in S's evidence and on her admitted, or asserted, lies. Defence counsel submitted that the one issue for the jurors to resolve was whether they were satisfied to the criminal standard of the credibility of S's account. The submission appears to have been based on seven lies, or asserted lies, told by S.

15 The first lie was in a telephone call that S made to the appellant around Mother's Day 2015. S explained that at the time of this call she was in a predicament brought about by her use of, and dealing in, methylamphetamine: her partner's car had been taken by "standover people" who were demanding payment of $3,500 for its return. She had attempted to kill herself with an overdose of some drug just before making the telephone call. Under pressure to raise money to secure the return of the car, S decided to contact the appellant, reasoning "there has to be somebody in this world that owes me this sort of money". S admitted that she lied to the appellant in the telephone call, telling him that she needed $20,000 to repay the debt. S said that she had been under the influence of a large quantity of benzodiazepines at the time and her memory of the call was poor.

16 Allied to the first lie was S's acknowledgment that she lied to the investigating police by telling them that she had asked the appellant for $3,500 and not $20,000. A third lie, if the jury accepted that it was a lie, was one given in evidence at the trial. S said that she had told the investigating detective of her drug dealing. The detective denied that S had told him about that matter. A fourth, admitted lie was S's account in the second Departmental interview. The fifth admitted lie concerned an occasion when S was treated in hospital for a urinary tract infection. S said the account she gave the medical staff – that she had engaged in unprotected sex with a person at a party – was a lie. It was S's evidence that the urinary tract infection occurred after she had sexual intercourse with the appellant at her home. The sixth admitted lie was one S told her mother about an incident involving the appellant. The seventh admitted lie was S's account to the investigating police concerning the nature of the act charged in count one.

17 The trial judge's directions to the jury concerning the approach it was to take to the evidence of S's lies, including the impugned direction, were as follows:

> "Members of the jury, it is for you to decide what significance the suggested lies in relation to the evidence of the complainant have to the issues in this case. The fact that a person has told a lie may be a factor in your assessment of their credibility. That is a matter for you to consider. You may wish to take it into account in assessing whether or not the complainant is telling the truth in relation to the touching the subject of counts 1 and 2 on the indictment.
>
> *But do not follow a process of reasoning to the effect that just because she is shown to have told a lie or she has admitted she told a lie, that all of her evidence is in fact dishonest and cannot be relied upon*. So, members of the jury, if you in your deliberations think she has told a lie or you accept when she says she did tell a lie that she did so, that is a factor you may take into account when you come to assess her credibility in relation to the alleged touching the subject of counts 1 and 2 in the indictment with which you are concerned." (emphasis added)

18 The jury returned a majority verdict of guilty on count one and a verdict of not guilty on count two.

The Court of Appeal

19 As Buss P observed, the impugned direction appears to have been modelled on the direction proposed in *Zoneff v The Queen* as appropriate to a case in which there is a risk that the jury may engage in an impermissible process of reasoning in relation to lies told by an accused[6]. Plainly enough, the giving of such a direction is wholly inappropriate to the assessment in a criminal trial of the evidence of a complainant. Buss P rightly encapsulated the effect of the impugned direction as prohibiting the jury from "engaging in a process of reasoning, favourable to the appellant, in relation to fact-finding concerning S's honesty and reliability as a witness that was open to them"[7]. His Honour observed that it was open to the jury to decide that S was a dishonest and unreliable witness on the basis of lies which she admitted to having told or which the jury found she had told. In such an event, his Honour pointed out, it was open to the jury to find that S's evidence could not be relied upon to support a verdict of guilt on either count without evaluating all of the evidence that was

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6 *OKS v Western Australia* (2018) 52 WAR 482 at 507 [121], citing *Zoneff v The Queen* (2000) 200 CLR 234 at 245 [24] per Gleeson CJ, Gaudron, Gummow and Callinan JJ; [2000] HCA 28.

7 *OKS v Western Australia* (2018) 52 WAR 482 at 507 [124].

relevant to those counts[8]. By giving the impugned direction, Buss P found, the trial judge had "intruded impermissibly on the function of the jury"[9].

20 The respondent did not contend, in its written submissions or on the hearing of the appeal in the Court of Appeal, that if the appellant's challenge to the impugned direction succeeded, the appeal should nonetheless be dismissed under the proviso. Following the hearing, by letter dated 25 October 2017, the Court of Appeal sought further submissions from the parties as to whether, in the event the appellant's challenge was made good, it was open to dismiss the appeal under the proviso. The respondent submitted that in the event the appellant's characterisation of the nature of the impugned direction was accepted, there could not be any scope for the application of the proviso. By letter dated 9 March 2018, the Court of Appeal outlined a basis upon which it might be open to dismiss the appeal under the proviso and invited the parties to make further submissions. The respondent filed a submission in response to this invitation withdrawing its concession as an "erroneously conservative" interpretation as to the non-engagement of the proviso in cases of this type.

21 The basis outlined in the Court of Appeal's letter mirrored Buss P's reasons, with which Beech JA and Pritchard J agreed, for concluding that the impugned direction had not occasioned a substantial miscarriage of justice and that it was appropriate to dismiss the appeal under the proviso[10]. As noted, this conclusion depended on the assessment that the impugned direction would have had no significance to the jury's determination that the appellant's guilt of the offence charged in count one had been proved. This was because other directions given by the trial judge "required the jury to undertake a meticulous examination of S's evidence including by reference to her admitted or alleged lies"[11]. Buss P summarised those directions ("the other reliability directions") as follows[12]:

> "(a) the jury must scrutinise S's evidence with special care;

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8 *OKS v Western Australia* (2018) 52 WAR 482 at 507 [123].

9 *OKS v Western Australia* (2018) 52 WAR 482 at 507 [124].

10 *OKS v Western Australia* (2018) 52 WAR 482 at 508-510 [131]-[139] per Buss P, 532 [258] per Beech JA, 532 [259] per Pritchard J.

11 *OKS v Western Australia* (2018) 52 WAR 482 at 509 [134].

12 *OKS v Western Australia* (2018) 52 WAR 482 at 508-509 [132].

(b) the crucial nature of S's evidence to the State's case, combined with the seriousness of the allegations made against the appellant, required the jury carefully to scrutinise and consider S's evidence;

(c) the fact that S had made prior inconsistent statements was a matter which the jury could take into account when assessing her credibility in relation to the allegations the subject of counts 1 and 2;

(d) if the jury accepted or found that S had told lies, that acceptance or finding could be taken into account by the jury in assessing her credibility in relation to the allegations the subject of counts 1 and 2;

(e) the jury must decide what significance S's admitted or alleged lies had in relation to S's evidence concerning the issues in the case;

(f) the jury could not convict the appellant of a count unless they were satisfied beyond reasonable doubt that S gave truthful, accurate and reliable evidence in relation to that count; and

(g) the jury could act on S's evidence to convict the appellant, if the jury was satisfied beyond reasonable doubt of its truth and accuracy, but it would be unsafe and dangerous to convict the appellant of a count on the uncorroborated evidence of S alone, unless the jury had first scrutinised her evidence with great care, had considered the circumstances relevant to her evidence to which his Honour had referred, and had taken full account of the *Longman* warning his Honour had given them."

22 The differing verdicts returned on counts one and two, in Buss P's opinion, served to indicate the jury's understanding of the directions[13]. Acting upon the assumption that the jury understood and obeyed the other reliability directions and that the jury took full account of the "*Longman* warning"[14], Buss P considered that it was open to give "very significant weight" to the verdict of guilty on count one. And his Honour said the verdict on count one was also

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13 *OKS v Western Australia* (2018) 52 WAR 482 at 509 [133].

14 *Longman v The Queen* (1989) 168 CLR 79; [1989] HCA 60.

entitled to very significant weight given the jury's advantage in having seen and heard S and the other witnesses giving their evidence at the trial[15].

23 Buss P acknowledged the "natural limitations" of appellate review of the sufficiency of evidence to prove guilt to the criminal standard. His Honour's conclusion that the appellant's guilt was established on that standard plainly reflected the weight given to the verdict of guilty as part of the record[16]. The conclusion that there had not been a substantial miscarriage of justice also took into account that the impugned direction did not involve a denial of procedural fairness or some serious breach of the presuppositions of a criminal trial[17].

The submissions

24 The appellant's argument adopts Buss P's analysis of the nature of the impugned direction, namely, that it intruded on the jury's fact-finding function by taking away a legitimate process of reasoning on which the defence relied. In the circumstances, the appellant argues that it was not open to find that the impugned direction would have had no effect on the jury's verdict. It follows, in his submission, that it was also not open to give the jury's verdict "very significant weight" in assessing whether his guilt had been proved beyond reasonable doubt.

25 The respondent supports Buss P's analysis of the application of the proviso, submitting that the effect of the impugned direction was neutralised by the other reliability directions. The respondent also disputes that proof of guilt was wholly dependent on acceptance of S's evidence. While the respondent accepts the necessity for satisfaction of the credibility and reliability of S's evidence of the offence charged in count one, it submits that the appellant's Facebook messages, and one message in particular, substantially bolstered acceptance of S's evidence in this respect.

26 In her evidence of the events leading up to the count one offence, S said that the appellant was telling a story about an occasion when he and other school boys set fire to some hay bales. When challenged about the cause of the fire they had put it down to "spontaneous combustion". S said that in 2015 at the suggestion of the police she recorded a telephone call with the appellant. During the call she asked whether he remembered the first story he told her, lying on her

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15 *OKS v Western Australia* (2018) 52 WAR 482 at 509 [135].

16 *OKS v Western Australia* (2018) 52 WAR 482 at 509-510 [136].

17 *OKS v Western Australia* (2018) 52 WAR 482 at 510 [137].

brother's bed in the end bedroom of the family home. After this call the appellant sent S a Facebook message saying, "OH,,,Sorry [S].. i forgot,.....'Spontanious [sic] Combustion'..". An explanation for the differing verdicts, in the respondent's submission, is that this message provided independent support for acceptance of S's evidence of the offence charged in count one.

A substantial miscarriage of justice?

27 The central issue at the trial was the capacity of S's evidence to support the appellant's conviction for either offence in circumstances in which her credibility was under challenge. S admitted telling lies including to: the police with respect to the nature of the indecent dealing charged in count one; officers of the Department of Family and Children's Services with respect to the appellant's conduct; and the appellant with respect to the amount demanded of her by the "standover people". It was a matter for the jury to assess the significance of these lies to the credibility and reliability of S's evidence of the offences. There was an inconsistency between S's account that she told the investigating detective about her drug dealing and the detective's evidence on that subject. There may be more than one explanation for the inconsistency. Nonetheless, it was open to the jury to find S deliberately lied about that matter in evidence. It was within the jury's province to find that S's admitted lies or, if it so found, the lie given in evidence, without more, precluded acceptance of her evidence of the commission of the offences beyond reasonable doubt. It was that process of reasoning which the impugned direction took away.

28 It is difficult to reconcile Buss P's recognition that an appellate court must act upon the assumption that jurors understand and obey the directions of law given by the trial judge[18] with his Honour's conclusion that the impugned direction had no significance to the jury's determination[19]. Contrary to his Honour's analysis, the impugned direction qualified each of the other reliability directions. The jury was instructed that it could take into account a finding that S had told a lie or lies in assessing the credibility of her account of the offences charged in counts one and two, but that direction was to be understood as subject to the preclusion on reasoning from the fact of S's lies to a conclusion that S was

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18 *OKS v Western Australia* (2018) 52 WAR 482 at 507 [120], citing *Gilbert v The Queen* (2000) 201 CLR 414 at 420 [13] per Gleeson CJ and Gummow J, 425 [31] per McHugh J; [2000] HCA 15 and *Dupas v The Queen* (2010) 241 CLR 237 at 248 [28]-[29]; [2010] HCA 20.

19 *OKS v Western Australia* (2018) 52 WAR 482 at 509 [134].

a dishonest witness whose evidence as a whole could not be relied upon. So, too, was the injunction to scrutinise S's evidence with special, or great, care subject to the same restriction. In confining the approach to the assessment of S's evidence in this way, the impugned direction was apt to lessen the weight which it was otherwise open to the jury to give to any finding made about S's lies including any finding that S lied in her evidence given at the trial.

29 The conclusion that the impugned direction would not have affected the jury's verdict of guilty on count one was critical to Buss P's satisfaction that guilt had been established beyond reasonable doubt. That satisfaction was a necessary condition for the engagement of the proviso[20]. It was only by giving "very significant weight" to the verdict that his Honour was able to be so satisfied. There is evident difficulty in giving weight to the verdict of guilty in circumstances in which the prosecution case was dependent on the credibility of S's evidence and the jury's assessment of her credibility was wrongly circumscribed by the directions of law[21].

30 The respondent's reliance on the appellant's Facebook messages does not overcome the difficulty. Notably, Buss P made no reference to the Facebook messages. Whatever view might be taken of their content, they do not provide independent support for the occurrence of the indecent dealing charged in count one. The "Spontanious [sic] Combustion" message acknowledged an occasion when the appellant told a story while lying on a bed with S in the end bedroom of the family home. It was not an admission of having indecently dealt with S on that occasion.

31 It is well settled that, in a case that does not involve a fundamental defect, the proviso cannot be applied "unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict"[22]. And as explained in *Weiss v The Queen*, there are cases in which the natural limitations

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

21 *Collins v The Queen* (2018) 92 ALJR 517 at 526 [36] per Kiefel CJ, Bell, Keane and Gordon JJ; 355 ALR 203 at 212; [2018] HCA 18.

22 *Lane v The Queen* (2018) 92 ALJR 689 at 695 [38] per Kiefel CJ, Bell, Keane and Edelman JJ; 357 ALR 1 at 8; [2018] HCA 28, quoting *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 104 [29] per French CJ, Gummow, Hayne and Crennan JJ; [2012] HCA 14 and *Weiss v The Queen* (2005) 224 CLR 300 at 317 [44].

of proceeding on the record do not permit the appellate court to attain that satisfaction[23]. This was such a case. The Court of Appeal's only gauge of the sufficiency of S's evidence to prove the appellant's guilt to the criminal standard was the verdict. It cannot be assumed that the misdirection had no effect upon the jury's verdict in circumstances in which the misdirection precluded the jury from adopting a process of reasoning, favourable to the appellant, that was open to it.

Orders

32 For these reasons there should be the following orders:

1. Appeal allowed.

2. Set aside the order of the Court of Appeal of the Supreme Court of Western Australia made on 11 April 2018 and in lieu thereof substitute the following orders:

   (a) appeal allowed;

   (b) the appellant's conviction be quashed; and

   (c) there be a new trial.

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23 (2005) 224 CLR 300 at 316 [41]; and see *Baini v The Queen* (2012) 246 CLR 469 at 480 [29] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; [2012] HCA 59; *Castle v The Queen* (2016) 259 CLR 449 at 473 [68] per Kiefel, Bell, Keane and Nettle JJ; [2016] HCA 46; *Collins v The Queen* (2018) 92 ALJR 517 at 526 [36] per Kiefel CJ, Bell, Keane and Gordon JJ; 355 ALR 203 at 212.

33 EDELMAN J. I agree with the orders proposed in the joint judgment. And, subject to the addition of the brief remarks which follow, I agree with the reasons of their Honours.

34 The proviso in s 30(4) of the *Criminal Appeals Act 2004* (WA) is expressed in similar terms in each Australian State and Territory[24]. Section 30(4), which uses the common form of the proviso[25], permits the Court of Appeal of the Supreme Court of Western Australia to dismiss an appeal, even if a ground of appeal might be decided in favour of the offender, "if it considers that no *substantial* miscarriage of justice has occurred" (emphasis added). The meaning and application of that simple expression, capturing immaterial errors and miscarriages, has resulted in hundreds of applications for special leave and appeals to this Court. The scope of this concept of materiality also continues to vex courts considering administrative law[26] and appeals from civil decisions[27].

35 There are, broadly, two circumstances in which an appellate court will be unable to conclude that the error was immaterial, in the sense that no substantial miscarriage of justice has actually occurred. These are both sometimes described as circumstances where the proviso "does not apply" – although, of course, when the proviso is properly raised the appellate court is never relieved of its statutory duty to consider its application[28]; the appellate court must still consider whether or not a substantial miscarriage of justice has occurred. Both circumstances were initially relied upon by the appellant in this appeal.

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24 See *Criminal Appeal Act 1912* (NSW), s 6(1); *Criminal Procedure Act 1921* (SA), ss 155(2), 158(2); *Criminal Code* (Qld), s 668E(1A); *Criminal Code* (Tas), s 402(2); *Criminal Code* (NT), s 411(2); *Supreme Court Act 1933* (ACT), s 37O(3); cf *Criminal Procedure Act 2009* (Vic), s 276.

25 *Weiss v The Queen* (2005) 224 CLR 300 at 303 [1]; [2005] HCA 81.

26 See, eg, *Hossain v Minister for Immigration and Border Protection* (2018) 92 ALJR 780 at 788 [30]-[31], 789 [40], 795 [72]; 359 ALR 1 at 9, 11, 19; [2018] HCA 34; *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3 at [45], cf at [89]-[90].

27 See, eg, *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 147; [1986] HCA 54; *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134 at 143; [1991] HCA 61; *Nobarani v Mariconte* (2018) 92 ALJR 806 at 812-813 [38]; 359 ALR 31 at 38-39; [2018] HCA 36.

28 *Weiss v The Queen* (2005) 224 CLR 300 at 316 [41]; *Kalbasi v Western Australia* (2018) 92 ALJR 305 at 339 [156]; 352 ALR 1 at 45; [2018] HCA 7.

36 The first circumstance is where the nature of the error at trial, or the reason why the appeal is allowed, is so fundamental that it can be said, without more, that a substantial miscarriage of justice has occurred[29]. Logically, this is the anterior consideration. While there is no rigid or predefined formula to determine what amounts to a fundamental error, the category encompasses circumstances where there is a fundamental defect amounting to a serious breach of the presuppositions of the trial[30]. Some serious denials of procedural fairness may be examples of such a circumstance[31]. Another example is *Lane v The Queen*[32], where the failure of the primary judge to give a necessary direction to the jury about the need to reach a verdict in which the jurors were unanimous about the factual basis for the conviction meant that it could not be known whether the jury, in reaching a verdict of guilty, had performed an essential step in the discharge of its function. It does not then fall to the appellate court to consider whether the appellant's conviction was inevitable[33]. To do so would substitute trial by an appellate court for trial by jury[34].

37 In written submissions on this appeal, the appellant argued that the error was one of this nature; however, senior counsel for the appellant did not press that argument in oral submissions. He was correct not to do so. The misdirection by the primary judge was not so fundamental to the trial that it could be said, without more, to have amounted to a substantial miscarriage of justice.

38 The second circumstance where an appellate court will be unable to conclude that an error is immaterial is where, for any other reason, the appellate court is not satisfied that there has been no substantial miscarriage of justice. A miscarriage of justice in these circumstances will almost always be substantial

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29 *Quartermaine v The Queen* (1980) 143 CLR 595 at 600-601; [1980] HCA 29; *Wilde v The Queen* (1988) 164 CLR 365 at 372-373; [1988] HCA 6; *Glennon v The Queen* (1994) 179 CLR 1 at 8, 12; [1994] HCA 7.

30 *Wilde v The Queen* (1988) 164 CLR 365 at 373. See also *Kalbasi v Western Australia* (2018) 92 ALJR 305 at 339 [155]; 352 ALR 1 at 44.

31 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [45].

32 (2018) 92 ALJR 689 at 697 [47]-[48]; 357 ALR 1 at 11; [2018] HCA 28.

33 *Lane v The Queen* (2018) 92 ALJR 689 at 695-696 [38]; 357 ALR 1 at 8-9.

34 *Lane v The Queen* (2018) 92 ALJR 689 at 698 [50]; 357 ALR 1 at 11, citing *R v Baden-Clay* (2016) 258 CLR 308 at 330 [66]; [2016] HCA 35. See also *Kalbasi v Western Australia* (2018) 92 ALJR 305 at 321 [67], 340-341 [162]; 352 ALR 1 at 20, 46-47.

unless the appellate court considers that, without the error, conviction by the jury, acting reasonably, was inevitable. This is by far the most dominant verbal formula to describe material errors that are not of the first, fundamental, type[35]. In effect, the verbal formula directs attention to whether the appellant was deprived of a possibility of acquittal[36]. In considering whether conviction was inevitable the appellate court must consider whether, in light of the verdict given at trial, "the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty"[37]. Like the first circumstance where the proviso "does not apply", that consideration does not permit, in practical terms, a retrial by an appellate court proceeding wholly or substantially on the record. Review of the record of the trial by the appellate court must be for the purpose of assessing whether conviction by the jury, acting reasonably, was inevitable. The natural limitations of an appellate court conducting that exercise include the "disadvantage that the appellate court has when compared with the [jury] in respect of the evaluation of witnesses' credibility and of the 'feeling' of a case which an appellate court,

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35 *Collins v The Queen* (2018) 92 ALJR 517 at 526-527 [41]; 355 ALR 203 at 213-214; [2018] HCA 18. See also *Gallagher v The Queen* (1986) 160 CLR 392 at 412-413; [1986] HCA 26; *Wilde v The Queen* (1988) 164 CLR 365 at 372; *Festa v The Queen* (2001) 208 CLR 593 at 631 [121], 636 [140], 661 [226]; [2001] HCA 72; *Conway v The Queen* (2002) 209 CLR 203 at 226 [63]; [2002] HCA 2; *Arulthilakan v The Queen* (2003) 78 ALJR 257 at 269 [62], 270-271 [68]-[69]; 203 ALR 259 at 275, 276-277; [2003] HCA 74; *Kamleh v The Queen* (2005) 79 ALJR 541 at 547 [29], 549 [39]; 213 ALR 97 at 104, 106; [2005] HCA 2; *Darkan v The Queen* (2006) 227 CLR 373 at 402 [95], 407 [117]; [2006] HCA 34; *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 106-107 [35]-[38]; [2012] HCA 14; *Baini v The Queen* (2012) 246 CLR 469 at 481-482 [33], 484 [40]; [2012] HCA 59; *Lindsay v The Queen* (2015) 255 CLR 272 at 276 [4], 301-302 [86]; [2015] HCA 16; *Castle v The Queen* (2016) 259 CLR 449 at 472 [65], 477 [81]; [2016] HCA 46; *R v Dickman* (2017) 261 CLR 601 at 605 [4]-[5], 620 [63]; [2017] HCA 24.

36 *Wilde v The Queen* (1988) 164 CLR 365 at 371-372; *Kalbasi v Western Australia* (2018) 92 ALJR 305 at 321-322 [71], 334 [136], 340 [160]; 352 ALR 1 at 21-22, 38, 46. See also *Mraz v The Queen* (1955) 93 CLR 493 at 514; [1955] HCA 59; *Driscoll v The Queen* (1977) 137 CLR 517 at 524-525; [1977] HCA 43; *R v Storey* (1978) 140 CLR 364 at 376; [1978] HCA 39; *Pollock v The Queen* (2010) 242 CLR 233 at 252 [70]; [2010] HCA 35; *Filippou v The Queen* (2015) 256 CLR 47 at 54-55 [15]; [2015] HCA 29.

37 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [44]. See *Kalbasi v Western Australia* (2018) 92 ALJR 305 at 339-340 [158]-[160]; 352 ALR 1 at 45-46.

reading the transcript, cannot always fully share"[38]. Hence, "[t]here will be cases, perhaps many cases, where those natural limitations require the appellate court to conclude that it cannot reach the necessary degree of satisfaction"[39].

39 It can sometimes be a finely balanced matter whether to conclude that conviction was inevitable or, to put the matter positively, whether there was a possibility that, but for the error, the jury, acting reasonably, might have acquitted. In this case, for the reasons given in the joint judgment, the natural limitations of an appeal prevented the appellate court from concluding that conviction by the jury, acting reasonably, was inevitable. The circumstances which make this so are as follows: (i) the prosecution case could not have succeeded without the jury accepting relevant parts of the evidence given by the complainant; (ii) the evidence relied upon by the prosecution, apart from the complainant's oral evidence, was limited, with the Facebook messages perhaps being the most significant; (iii) the complainant had admitted that she had told some lies, and her credibility was challenged at trial in a real and substantial way; and (iv) the misdirection must be taken to have circumscribed the appellant's challenge to the complainant's evidence because, as Buss P rightly said, it "prohibit[ed] the jury from engaging in a process of reasoning, favourable to the appellant, in relation to fact-finding concerning [the complainant's] honesty and reliability as a witness that was open to them"[40]. The misdirection cannot therefore have been one which had no effect upon the jury, acting reasonably, in its verdict. Conviction was not inevitable.

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38 *Fox v Percy* (2003) 214 CLR 118 at 126 [23]; [2003] HCA 22.

39 *Weiss v The Queen* (2005) 224 CLR 300 at 316 [41].

40 *OKS v Western Australia* (2018) 52 WAR 482 at 507 [124].