

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON AND GLEESON JJ

THOMAS HOFER

APPELLANT

AND

THE QUEEN

RESPONDENT

Hofer v The Queen
[2021] HCA 36
Date of Hearing: 12 August 2021
Date of Judgment: 10 November 2021
S37/2021

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation

T A Game SC with D P Barrow for the appellant (instructed by Blair Criminal Lawyers)

D T Kell SC with K M Jeffreys for the respondent (instructed by Solicitor for Public Prosecutions (NSW))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Hofer v The Queen

Criminal practice – Appeal – Miscarriage of justice – Application of proviso that no substantial miscarriage of justice actually occurred – Where appellant convicted of sexual offences against two complainants – Where appellant's evidence contradicted complainants' testimonies – Where rule in *Browne v Dunn* not observed by defence counsel – Where prosecutor cross-examined appellant about defence counsel's non-observance of rule – Where prosecutor's cross-examination suggested parts of appellant's evidence a recent invention – Whether prosecutor's questioning impermissible and prejudicial such that it resulted in miscarriage of justice – Whether proviso applied because no substantial miscarriage of justice actually occurred.

Words and phrases – "any departure from a trial according to law to the prejudice of the accused", "appellate court's assessment of the appellant's guilt", "credibility", "cross-examination", "glaringly improbable", "miscarriage of justice", "nature and effect of the error", "proviso", "real chance", "recent invention", "root of the trial", "rule in *Browne v Dunn*", "serious breach of the presuppositions of the trial", "substantial miscarriage of justice".

Criminal Appeal Act 1912 (NSW), s 6(1).

1 KIEFEL CJ, KEANE AND GLEESON JJ. After a trial in the District Court of New South Wales, the appellant was convicted of eight counts of having sexual intercourse with another person knowing that the other person does not consent, contrary to s 61I of the *Crimes Act 1900* (NSW).

2 The offences charged arose from two sets of allegations made by two young women. They concerned events which took place on consecutive days. The charges were heard together and the Crown case in each had certain common features, although the prosecution did not rely upon them as tendency or coincidence evidence. The two complainants (C1 and C2) each responded to an online advertisement placed by the appellant offering to rent a bedroom in a "one bedroom house", preferably to a female aged between 21 and 35. Arrangements were made for each complainant to meet with the appellant. By the time the appellant took each of them to view the room, C1 and C2 were intoxicated, having drunk alcohol to excess at the insistence of the appellant. There was no dispute that sexual intercourse of some kind took place. The issue at trial was whether the appellant believed that each complainant consented to having sex with him or whether he was reckless as to whether she was consenting. The appellant gave evidence that he believed that each complainant consented. Accordingly, the credibility of the appellant was important.

3 During the course of the appellant's evidence, more particularly his cross-examination, it became apparent that certain of his evidence which was inconsistent with or contradicted that of C1 and C2 had not been put to them by defence counsel for comment. On each occasion when this arose the Crown prosecutor required the appellant to acknowledge the omission, which, for the most part, he did. He unsuccessfully attempted on some occasions to say that his counsel should have done so and on one tried to identify notes that he had provided to counsel. Towards the end of these areas of cross-examination the prosecutor put to the appellant that two aspects of his evidence which had not been put to C1 or C2 were, in effect, of recent invention. Defence counsel did not pursue objections to these suggestions of recent invention and the trial judge did not give the jury directions as to the use which could be made of this evidence.

4 The first question raised on this appeal is whether the questions asked by the Crown prosecutor in cross-examination of the appellant were impermissible and prejudicial such that they resulted in a miscarriage of justice within the common form appeal provision in New South Wales, s 6(1) of the *Criminal Appeal Act 1912* (NSW). The second is whether the trial miscarried on account of the incompetence of the appellant's counsel. If the answer to either question is in the affirmative, consideration must be given to the proviso to s 6(1) and whether, despite those errors, no substantial miscarriage of justice has actually occurred. It is only if that conclusion is reached that the appeal may be dismissed.

The evidence of C1

5 At the time of the alleged offences C1 was 23 years of age and had recently arrived in Australia from the United States of America for a working holiday. She was staying in a hostel but was looking for cheaper accommodation. She read the advertisement posted by the appellant and contacted him. After an exchange of messages between them, the appellant picked C1 up from the hostel in a taxi and took her to a bar. They later went to another bar.

6 The tenor of C1's evidence was that the appellant plied her with alcoholic drinks to the point where she became very intoxicated. In the course of the evening C1 learned for the first time that the bedroom was not available for her exclusive use and that the appellant was offering to share it. C1 also became uncomfortable about the appellant touching her limbs and sent a text message to a friend at the hostel saying that she wished to return to the hostel because she felt "weird with this guy".

7 Nevertheless, C1 went with the appellant to see the room. When it became obvious that the appellant wished to have sexual intercourse C1 said that she did not wish to, but the appellant proceeded to perform acts upon her without her consent, including an act of penile-vaginal intercourse. C1 said that she was "quite intoxicated" when that act occurred and that she was drifting "in and out of consciousness". During the acts she repeatedly called out that she didn't want to have sex and for him to stop. Following the sexual assaults, whilst in the bathroom of the house, she sent a text message of "Help" to a friend at the hostel. Screenshots of that text message corroborated her evidence.

8 There was other evidence which supported C1's evidence. The taxi driver who took her back from the appellant's house to the hostel gave evidence of her considerable distress. That distress was also evident to a manager at the hostel to whom she said she thought she had been raped. The next morning she made a complaint of rape to the police.

9 While C1 was on her way back to the hostel she received text messages from the appellant saying "Good night... sweet dreams, dear" and "enjoyed your company and hope to see you soon".

The evidence of C2

10 C2 was 17 years of age at the time of the offences and had recently moved to Sydney from interstate. She was also looking for accommodation. When she responded to the appellant's advertisement he offered to take her to dinner before showing her the room. After dinner they went to a bar and started drinking alcohol and talking. They then went to the same bar to which the appellant had taken C1

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the previous night. C2's evidence was to the effect that the appellant pressured her to drink more.

11 At some point in the conversation the appellant enquired as to C2's relationships. C2 told him that she was a lesbian, in order to indicate her lack of sexual interest in him. She was later to say that she was physically repulsed by the appellant. A witness heard her exclaiming that she was a lesbian to other people in the bar. C2 was not challenged as to this evidence in cross-examination by defence counsel.

12 Under cross-examination, C2 said that she got up to dance with some girls in the bar because she was uncomfortable about the appellant touching her on her buttocks. One of those persons, a young woman from Ireland, gave evidence that C2 was clearly intoxicated by this time. C2 also said that the appellant was forceful towards her on the dance floor.

13 C2 said that when she left the bar, she was so intoxicated that she could not walk properly. CCTV footage showed her holding onto the hand of the Irish girl before the appellant prised her fingers apart and pulled her towards him and away from the premises.

14 C2 said that once inside the appellant's bedroom she was forcibly pushed onto the bed and the appellant proceeded to have sexual intercourse with her despite her saying that she did not want to do so. She then froze. At some point whilst this was happening, she attempted to speak on her mobile phone to a friend to whom she had also sent a text message saying, "help me".

15 Photographs (stills of the CCTV footage) of C2 later leaving the house showed that she had her arm around the appellant's waist as she boarded a bus and that she kissed him and smiled. Under cross-examination she said that the smile was a pretence, she was in shock and she was afraid after what had happened. CCTV footage showed that C2 began to cry inconsolably as the bus left and to tug at her clothing. She was hysterical as she spoke to a friend on her mobile phone. When she alighted from the bus she fell to the ground and was screaming and uncontrollably distressed when her friend came upon her. The friend ran to a police station and returned with a female police officer to whom C2 said that the appellant had raped her.

16 Later that evening, C2 received a text message from the appellant: "Hi goodnight dear. Call me if you have any problems getting home". A short time later she received another saying, "Text me let me know you're okay".

Kiefel CJ
Keane J
Gleeson J

4.

The appellant's evidence in chief

Regarding C1

17 The appellant gave evidence that C1 was merely tipsy when they entered the bedroom and was able to maintain a normal conversation. She accepted his invitation for a massage and participated voluntarily in acts of oral sex which followed. He denied that penile-vaginal intercourse took place. He said that at no point did she say the words "stop" or "no" and that she gave no indication that she did not want the acts to occur. He gave evidence that C1 had an orgasm, a fact which had not been put by defence counsel to C1.

18 The appellant said that, in conversation following the sexual acts, he told C1 he had had chlamydia, and this made her angry and resulted in her dressing and leaving. He was cross-examined as to the relevance of this to C1, given his claim that they had not engaged in penile-vaginal intercourse.

Regarding C2

19 The appellant gave evidence that he and C2 discussed aspects of their personal lives over dinner. He made no response to her evidence that she had told him that she was a lesbian but he claimed that C2 had flirted with a young man at the bar they later attended.

20 The appellant said that when they arrived at his house, C2 was "slightly intoxicated" and in a happy mood. She was walking normally. He poured a drink, asked her to play music on her mobile phone, they undressed and she accepted a massage from him and participated in the acts of oral sex which followed. She initiated penile-vaginal intercourse which was interrupted by a call on her mobile phone which she took. She then performed fellatio upon him and further penile-vaginal intercourse followed. He asked C2 if he could ejaculate inside her; she agreed and they both had an orgasm. Neither of these latter two aspects of the evidence had been put to C2 in cross-examination. The appellant said C2 then said she had to meet friends, they both dressed and he waited with her for a bus. They were standing arm-in-arm at this point, kissed goodnight and waved goodbye to each other.

The cross-examination of the appellant

21 At an early point in the cross-examination of the appellant the Crown prosecutor elicited that the appellant was aged 47 at the time of the events in question, weighed 130 kg and is 188 cm, or 6 foot 3 inches tall. The cross-examination generally followed the events of the evening, the appellant's pressuring each of C1 and C2 to drink to excess, their states of intoxication, what took place and what was said in the bedroom.

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22 At some points in the course of his cross-examination, the appellant was required by the Crown prosecutor to acknowledge that certain matters, of which he had given evidence in chief or which he had raised in answer to questions under cross-examination, had not been put to C1 or C2 during their cross-examination by defence counsel. In the Court of Criminal Appeal eight such occasions were identified. On two of the latter occasions it was put to the appellant that he was making up his evidence in the course of cross-examination.

23 The relevant exchanges may be summarised as follows:

- (1) The first matter concerned his evidence, given in chief, that C1 had an orgasm during oral sex which he performed on her. The appellant was asked by the Crown prosecutor if he had heard that fact being put by his counsel to C1 in cross-examination. He said that he could not recall. Defence counsel objected at this point, but the trial judge dismissed it, observing that an answer had already been given.
- (2) It was put to the appellant that C2 had told him that she was a lesbian. He denied that was said and added that she had said she was bisexual. He was then asked whether he had heard that matter put to C2 at any stage. He agreed that it had not been put to her but pointed out that not only had she not said that she was a lesbian, she had also implied that she had been together sexually with an African man. Pressed further, the appellant agreed that C2 had not been asked in cross-examination whether she was bisexual and agreed that she had not been challenged as to her statement to him that she was a lesbian. He added that "may be [sic] my barrister should have cross-examined her better".
- (3) The Crown prosecutor put to the appellant that C2 showed no sexual interest in him. He responded by saying that he considered her kissing him and putting her tongue in his mouth to be quite sexual. He agreed that this matter had not been put to C2.
- (4) The Crown prosecutor put to the appellant that C2 had not been cross-examined as to her having performed oral sex upon the appellant. In this respect the prosecutor was mistaken, as he subsequently realised. He apologised to the jury for having suggested this. But by this time, the prosecutor had put the question to the appellant four times and made the point that C2 had not had the opportunity to comment. The appellant incorrectly accepted that this was the case and further responded by implying that his barrister may have been negligent or that the appellant had had a limited opportunity to speak with him before the trial.

Kiefel CJ
Keane J
Gleeson J

6.

- (5) The appellant made similar comments when it was pointed out to him, and he agreed, that it had not been put to C2 that he had asked if he could ejaculate inside her and she had agreed. He said that "again" it should have been put by his barrister. He attempted to refer to notes that he had given to his barrister on the topic, but was confined by the trial judge to a "yes" or "no" answer to the question.

- (6) In the course of questioning as to the matter in (5) the appellant said that he believed that both he and C2 had an orgasm. He agreed that it had never been suggested to C2 that she had had an orgasm:

"Q. And you never heard any suggestion put to her that she had an orgasm, correct?

A. Correct

Q. Were you essentially making your evidence up as you went along, Mr Hofer?"

- (7) This point was made again by the prosecutor in connection with the appellant's response to questions about the CCTV footage which showed C2 clearly in distress after the bus pulled away from the bus stop:

"Q. ... you saw, didn't you and we all saw, [C2's] demeanour, a very, very short time after the bus pulled away didn't you?"

The appellant then suggested that C2's distress was connected with her "non-official" boyfriend having heard her breathing heavily whilst the appellant and C2 were having consensual sex, the boyfriend having phoned her at that time. The prosecutor then asked:

"Q. I see. Mr Hofer, did you hear that put to [C2] at any stage?

A. No. It was not.

Q. No it wasn't, was it. Are you just making things up as you go along Mr Hofer?

A. No I am not.

Q. Are you simply giving evidence and doing the best you can to meet what can be objectively proven by the Crown case?"

- (8) The appellant denied that he had said to C2, when they first entered the bedroom, "Let's do it". In cross-examination he sought to make the point

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that this was not the kind of language he would normally use. He said that he believed the police must have coached C2 and also C1 to say these words. It was some time before the appellant finally agreed that this allegation had not been put to C1 or C2 or any witness for the Crown.

The Crown's closing address

24 The closing address of the Crown followed the cross-examination of the appellant. In discussing the appellant's evidence, the prosecutor drew to the attention of the jury two of the matters referred to above: the appellant's evidence that C1 may have had an orgasm and his evidence that C2 told him that she was bisexual. He pointed out to the jury that these matters had not been put to C1 or C2 for their comment. In the case of the latter evidence, he suggested that the jury would accept C2's evidence that she told him that she was a lesbian.

25 The trial judge made no mention of those parts of the appellant's cross-examination referred to above. No directions were given as to what the jury was to make of the evidence or what, if any, inferences were to be drawn. No directions of this kind were sought by the Crown or defence counsel.

The rule of practice

26 The questions asked by the Crown prosecutor as to matters which had not been put to C1 or C2 for comment are to be understood by reference to the general rule of practice regarding the cross-examination of witnesses of an opposing party. The rule¹ requires that where it is intended that the evidence of the witness on a particular matter should not be accepted, that which is to be relied upon to impugn the witness's testimony should be put to the witness by the cross-examiner for his or her comment or explanation.

27 The rule was stated in *Browne v Dunn*², where the issue was whether a document was genuine or a sham. A number of persons who had signed the document were called to give evidence at trial, but it was not suggested to them in cross-examination that the document was other than genuine. The House of Lords held that those witnesses should have been given the opportunity to respond to any basis for suggesting to the contrary. The rule was described not only as one of

1 *Browne v Dunn* (1893) 6 R 67 at 70-71.

2 (1893) 6 R 67 at 70-71.

professional practice but as essential to fairness³. It may be added that adherence to the rule may also be necessary to permit an assessment on the part of the tribunal of fact of differences or inconsistencies in the accounts given and of the credit of witnesses where that is an issue.

28 *Browne v Dunn* was a civil proceeding, which is adversarial in nature. So too is a criminal proceeding. The rule may be regarded as both appropriate to and an important aspect of the adversarial system of justice⁴. There would seem to be no reason in principle why the requirements of the rule should not be followed in criminal trials. As a general rule, defence counsel should put to witnesses for the Crown for comment any matter of significance which is inconsistent with or contradicts the witness's account and which will be relied upon by the defence. In *MWJ v The Queen*⁵, it was noted that in many jurisdictions the rule has been held to apply in the administration of criminal justice.

Non-observance of the rule and cross-examination

29 The difficulty respecting the rule in criminal proceedings arises not so much from adherence to it as from the proper course to be followed when it is not observed. Criminal proceedings are not only adversarial. In our system of criminal justice, they are also accusatorial in nature, which requires that the Crown prove its case and cannot require an accused to assist in doing so⁶. The position of an accused person, who bears no onus of proof, cannot be equated with that of a defendant in civil proceedings⁷. Moreover, fairness in the conduct of a criminal trial may have a different practical content⁸ and require more restraint on the part of a prosecutor.

3 *Browne v Dunn* (1893) 6 R 67 at 71. See also *R v Birks* (1990) 19 NSWLR 677 at 688; *MWJ v The Queen* (2005) 80 ALJR 329 at 333 [18]; 222 ALR 436 at 440-441.

4 *MWJ v The Queen* (2005) 80 ALJR 329 at 333 [18]; 222 ALR 436 at 440-441.

5 (2005) 80 ALJR 329 at 333 [18]; 222 ALR 436 at 440-441.

6 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 136 [101], 153 [159]; *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 212-213 [20], 249 [125], 261 [159].

7 *MWJ v The Queen* (2005) 80 ALJR 329 at 340 [41]; 222 ALR 436 at 449.

8 *R v Birks* (1990) 19 NSWLR 677 at 688.

30 The need for consideration to be given to the course to be taken when the rule is not observed is likely to arise more often in criminal proceedings. In modern civil proceedings witness statements for each party are exchanged before trial. As a consequence, there is less likelihood that matters which are to be relied upon will not be addressed in some way. Contrast criminal proceedings, where it is not uncommon for matters which have not been put to the appropriate Crown witness to emerge from the evidence of an accused person⁹, including during the course of cross-examination.

31 An obvious course which may be taken is to recall the witness so that the omission can be corrected. This may be preferable and may be undertaken without injustice, depending on the course the trial has taken¹⁰. But a review of cases decided by the courts in New South Wales¹¹ shows that the course sometimes taken by the prosecution is to cross-examine the accused as to the omission. The cross-examination undertaken is not limited to drawing the attention of the accused to the fact of the omission, so as to highlight the matter for the jury. It extends to the reason for the omission. The evident purpose of the cross-examination is to impugn the credit of the accused by suggesting that the matter is of recent invention. As Gleeson CJ observed in *R v Birks*¹², it is one thing for the cross-examiner to point to the unfairness to a witness who has not had the opportunity to comment, it is quite another to suggest that the result of a failure to observe the rule of practice is that a person should not be believed.

32 The reasoning behind a decision to cross-examine the accused in pursuit of this purpose may readily be inferred. It commences with the fact that a matter is not put by defence counsel; it assumes that the reason for the omission is that counsel was unaware of the matter and that counsel was unaware because the accused had not given an account of it in his or her instructions. The conclusion reached is that the accused must now be making the evidence up.

33 In *R v Manunta*¹³, King CJ observed that an examination of an accused person which proceeds by reference to there being but one reason why a matter has not been put to a witness is "fraught with peril". As his Honour there observed,

9 *R v Birks* (1990) 19 NSWLR 677 at 688.

10 *MWJ v The Queen* (2005) 80 ALJR 329 at 339 [40]; 222 ALR 436 at 448-449.

11 *R v Birks* (1990) 19 NSWLR 677; *R v Dennis* [1999] NSWCCA 23; *Picker v The Queen* [2002] NSWCCA 78; *Llewellyn v The Queen* [2011] NSWCCA 66.

12 (1990) 19 NSWLR 677 at 690.

13 (1989) 54 SASR 17 at 23.

there may be many explanations for the omission which do not reflect upon the credibility of the accused. His Honour gave as examples defence counsel misunderstanding the accused's instructions or where forensic pressures may have resulted in looseness in the framing of questions. To these may be added the possibility that defence counsel has chosen not to advance certain matters upon which he or she had instructions because they were unlikely to assist the defence.

34 Where there remains a number of possible explanations as to why a matter was not put to a witness, there is no proper basis for a line of questioning directed to impugning the credit of an accused. Except in the clearest of cases, where there are clear indications of recent invention, an accused person should not be subjected to this kind of questioning. The potential for prejudice to an accused is obvious.

35 Proceeding on the basis of a mere assumption as to lack of instructions is likely to be productive of further unfairness in the course of the cross-examination. The assumption will inevitably lead to impermissible questions of the accused, put expressly or arising implicitly, as to the actual instructions he or she gave¹⁴. An accused person faced with questioning of this kind is likely to feel obliged to attempt to explain by reference to the instructions he or she in fact gave when in reality the accused carries no such onus. Questioning of this kind may result in the need for counsel or the solicitor for the defence having to disclose those instructions. This is a circumstance which should not arise.

36 In most cases, the cross-examination will have a dual purpose. It will be concerned with identifying unfairness to a Crown witness as well as seeking to have the accused's evidence disbelieved. Where it has the sole purpose of impugning the credit of the accused it will be necessary for leave to be sought from the trial judge¹⁵. The discussion which will inevitably take place on such an application will point up the risks associated with the course proposed.

37 A trial judge should be alert to the problems associated with cross-examination. They should be raised with counsel at an early point. Where the cross-examination has occurred, it will be necessary for the trial judge to warn the jury about any assumption made by the cross-examiner, to draw attention to the possible reasons why the matter has not been put and to direct the jury as to whether any inferences are available.

14 See for example *R v Birks* (1990) 19 NSWLR 677.

15 *Evidence Act 1995* (NSW), s 106.

The Court of Criminal Appeal – miscarriage of justice

38 The majority in the Court of Criminal Appeal (Fullerton and Fagan JJ) considered that a miscarriage will not inevitably follow where there has been no basis for a cross-examination of this kind. Their Honours correctly observed that consideration must be given to its effect on the trial¹⁶. Fagan J considered that the questioning had been limited, inconclusive and ineffectual and was not followed by an invitation to infer fabrication¹⁷. There was no repeated suggestion of recent invention and the jury were never told why it mattered if defence counsel had failed to put the matters in question¹⁸. The majority concluded there was therefore no miscarriage of justice.

39 Macfarlan JA, in dissent, held that there was no basis for the questioning by the Crown, impliedly as to the lack of instructions by the appellant. Defence counsel may well have thought that putting the matters to the complainants was counter-productive. The impermissible questions took up a significant part of the cross-examination and were the principal means of attack. His Honour concluded that the appellant's interests were prejudiced to a significant extent by the impermissible questions and the absence of any attempt by the trial judge to attempt to cure that prejudice¹⁹.

40 The majority in the Court of Criminal Appeal were also of the view that an alternative ground, that the appellant's trial miscarried on account of the incompetence of his counsel, failed²⁰.

A miscarriage of justice?

41 A miscarriage of justice to which s 6(1) of the *Criminal Appeal Act* refers includes any departure from a trial according to law to the prejudice of the accused²¹. This accords with the long tradition of criminal law that a person is

16 *Hofer v The Queen* [2019] NSWCCA 244 at [110] per Fullerton J, [126] per Fagan J.

17 *Hofer v The Queen* [2019] NSWCCA 244 at [130]. See also at [117] per Fullerton J.

18 *Hofer v The Queen* [2019] NSWCCA 244 at [117] per Fullerton J, [188] per Fagan J.

19 *Hofer v The Queen* [2019] NSWCCA 244 at [45]-[49].

20 *Hofer v The Queen* [2019] NSWCCA 244 at [118] per Fullerton J, [207] per Fagan J.

21 *Weiss v The Queen* (2005) 224 CLR 300 at 308 [18].

entitled to a trial where rules of procedure and evidence are strictly followed²². The larger and different question raised by the proviso, which is reserved to an appellate court, of whether there has notwithstanding that departure been no substantial miscarriage of justice, focuses upon whether the nature and effect of the error which has occurred prevents the appellate court from undertaking its assessment as to whether guilt has been proved to the requisite standard²³.

42 The questioning undertaken by the prosecution of the appellant departed from the standards of a trial to which an accused is entitled and the standards of fairness which must attend it²⁴. The questioning was such as to imply that the appellant was obliged to provide an explanation as to why matters had not been put to C1 or C2. This suggested he possessed information which he had not given counsel by way of instructions. The unfairness in this regard was compounded when the appellant was not permitted by the trial judge to provide an answer and by defence counsel not informing the court that he had those instructions. The attack upon the appellant's credit by assertions of recent invention was based upon an assumption which was not warranted. All of these matters were highly prejudicial to the appellant.

43 The evidence given by defence counsel before the Court of Criminal Appeal may be seen to confirm what King CJ said in *Manunta*²⁵ regarding the possibility of there being alternative explanations as to why a matter was not put to a witness other than recent invention. In relation to the appellant's statements about C1 having had an orgasm, defence counsel said that he decided not to put them to her because not only did he consider them irrelevant, he considered that it was likely to have the effect of turning the jury against the appellant. He had discussed this problem with the appellant.

44 It is a sufficient departure from the process of a criminal trial that a highly prejudicial cross-examination of the accused as to credit proceeded upon an unfounded assumption. In this case, evidence placed before the Court of Criminal Appeal showed that the assumption was in fact wrong. Instructions had in fact been

22 *Mraz v The Queen* (1955) 93 CLR 493 at 514; *Kalbasi v Western Australia* (2018) 264 CLR 62 at 69 [12].

23 *Kalbasi v Western Australia* (2018) 264 CLR 62 at 71 [15].

24 As to the prosecutorial obligation to afford fairness see *Libke v The Queen* (2007) 230 CLR 559 at 586 [71].

25 (1989) 54 SASR 17 at 23.

given by the appellant in relation to seven of the eight matters. In relation to the eighth matter, defence counsel had read the appellant's psychiatric report²⁶.

45 It cannot be inferred that the jury would not attach any importance to what arose from the cross-examination. There were a number of matters which were identified as not having been put to C1 or C2. The persistent requirement that the appellant acknowledge that fact was likely to have suggested to the jury that questions were being asked about more than what defence counsel should have done by way of fairness to the complainants. The questions clearly required the appellant to provide some sort of explanation, a view which would have been confirmed when he attempted to do so. The purpose of the line of questioning, that the appellant should not be believed as to these accounts, was put beyond doubt when, in relation to the sixth and seventh matters, the prosecutor alleged that the appellant had made up his evidence in the course of the cross-examination. It was not necessary for the prosecution to go further than it did in address in pointing out the process of reasoning in which the jury might engage to cause unfair prejudice to the appellant. The prosecutor had effectively invited the jury to reject the appellant's evidence as not credible.

46 This is not the first occasion upon which cross-examination of this kind has been held to result in a miscarriage of justice. In *Birks*²⁷, the accused was cross-examined as to the instructions he had given when his counsel had failed to put certain matters to the complainant. The accused answered that he had given those instructions, a fact confirmed by his counsel after the jury retired. The conduct of the prosecutor, and later the trial judge, in pursuing the omission as a matter of credibility of the accused's evidence, resulted in a miscarriage of justice. In *Picker v The Queen*²⁸ the defence was that the complainant initiated sexual intercourse, but defence counsel had left out some of the accused's instructions. The prosecutor pointed out the omissions to the accused and put to him that he had made them up. The cross-examination was held to be impermissible and highly prejudicial to the accused's case²⁹.

47 The prejudice to the appellant was not addressed by the trial judge, as it should have been. It was necessary that the trial judge put the omissions in

26 *Hofer v The Queen* [2019] NSWCCA 244 at [97] per Macfarlan JA.

27 (1990) 19 NSWLR 677 at 681-683, 692.

28 [2002] NSWCCA 78 at [40].

29 *Picker v The Queen* [2002] NSWCCA 78 at [41].

perspective, discount any assumption as to why they occurred by reference to other possibilities and warn the jury about drawing any inference on the basis of a mere assumption. Absent such directions there was a real chance that the jury may have assumed that the reason for the omission was that the appellant had changed or more recently made up his story³⁰.

48 It is not necessary to determine whether the inaction of defence counsel was such as to itself amount to a miscarriage of justice. The cross-examination of the appellant clearly does. There is, however, much to be said for the view taken by the majority in the Court of Criminal Appeal on the question.

49 There having been a miscarriage of justice, s 6(1) of the *Criminal Appeal Act* requires that the appeal be allowed, unless it be determined that the proviso applies.

The application of the proviso

The Court of Criminal Appeal

50 In the Court of Criminal Appeal, Fagan J concluded that if, contrary to his Honour's view, a miscarriage of justice had occurred at trial, the proviso would have justified the dismissal of the appeal³¹. Fullerton J agreed with Fagan J that, had a miscarriage of justice been established, the proviso would have applied³².

51 In relation to the application of the proviso, Fagan J considered that the appellant's guilt was proved beyond reasonable doubt. That being so, and because the eight matters the subject of the impermissible cross-examination did not go "to the root of the trial"³³ as a matter of process, no substantial miscarriage of justice had actually occurred³⁴. Fagan J, in concluding that any flaw in the conduct of the trial did not go to the root of the trial, plainly had in mind the language of Brennan,

30 *R v Manunta* (1989) 54 SASR 17 at 26; *R v Birks* (1990) 19 NSWLR 677 at 691-692; *Abdallah* (2001) 127 A Crim R 46 at 52 [24].

31 *Hofer v The Queen* [2019] NSWCCA 244 at [189].

32 *Hofer v The Queen* [2019] NSWCCA 244 at [103].

33 *Hofer v The Queen* [2019] NSWCCA 244 at [192].

34 *Hofer v The Queen* [2019] NSWCCA 244 at [189]-[201]. See *Weiss v The Queen* (2005) 224 CLR 300 at 314 [35].

15.

Dawson and Toohey JJ in *Wilde v The Queen*³⁵ and the observations of the unanimous Court in *Weiss v The Queen*³⁶ that even where the appellate court is satisfied of the appellant's guilt beyond reasonable doubt, there may have been a "significant denial of procedural fairness at trial" which makes it "proper to allow the appeal and order a new trial".

52 Macfarlan JA dissented, concluding that the proviso did not apply because the impermissible cross-examination was apt to have infected the jury's verdicts; and, that being so, he could not be satisfied that the evidence at trial proved the appellant's guilt beyond reasonable doubt³⁷. His Honour said that the Court of Criminal Appeal "would have to rely upon the jury's verdicts of guilty if it were to conclude that the [appellant's] evidence was not reasonably possibly true, in the same way that it would have to rely on the guilty verdicts to hold that the complainants' evidence ought to be accepted", and the "jury's verdicts cannot ... be relied upon in this way because they were impugned by the Crown's impermissible cross-examination"³⁸.

53 In this Court, the appellant adopted the reasoning of Macfarlan JA and submitted that if either ground of appeal was established, the proviso could not apply. The Crown submitted that the majority in the Court of Criminal Appeal were correct in their application of the proviso, because the only element in the Crown case that was really in issue, namely whether the appellant knew that each complainant was not consenting or was reckless as to whether she was consenting, was established beyond reasonable doubt.

Guilt beyond reasonable doubt?

54 In considering whether the appellant's guilt was established beyond reasonable doubt as a necessary (albeit not necessarily sufficient)³⁹ condition of the application of the proviso, it must be understood that lack of consent by each complainant was not contested by defence counsel at trial. The appellant's case at

35 (1988) 164 CLR 365 at 373.

36 (2005) 224 CLR 300 at 317 [44]-[45].

37 *Hofer v The Queen* [2019] NSWCCA 244 at [61], [63].

38 *Hofer v The Queen* [2019] NSWCCA 244 at [60]-[61].

39 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [44]; *Baini v The Queen* (2012) 246 CLR 469 at 480 [28]-[30]; *Lane v The Queen* (2018) 265 CLR 196 at 206-207 [38].

trial, as put by his counsel, was "not whether the two women ... were consenting to have sex with him but rather whether his perception of their behaviour throughout the respective evenings led him to believe that they were consenting to having sex with him".

55 The conclusion of Fagan J that the appellant's guilt was proved beyond reasonable doubt was reached, as his Honour said, "upon the whole of the evidence at trial and taking into account the jury's verdict"⁴⁰. As will be explained, that conclusion could be reached without needing to rely upon the jury's verdict as the determinant of whether the evidence of the appellant on the crucial issue should be rejected because greater weight should be accorded to the evidence of the complainants. The evidence of the appellant on the crucial issue was "so obviously false that it carrie[d] no weight at all"⁴¹.

56 No complaint as to counsel's competence was made by the appellant in relation to this aspect of the conduct of the trial. If one looks at the evidence that is common ground between the complainants and the appellant and takes into account the glaring improbability of the aspects of the appellant's evidence material to his belief as to the consent of each of the complainants, there can be no reasonable doubt that the appellant was, at the least, reckless as to whether he acted with her consent.

57 True it is that the appellant was not obliged to give evidence⁴², and that the tribunal of fact need only have had a doubt about this element for the appellant to have been acquitted; but the point is that, absent evidence from the appellant, there was simply no reason for the tribunal of fact to entertain a doubt about this element of each offence. It was necessary for the jury, as it was for the Court of Criminal Appeal, to consider whether the appellant's evidence might "reasonably possibly" be true⁴³.

40 *Hofer v The Queen* [2019] NSWCCA 244 at [189], citing *Weiss v The Queen* (2005) 224 CLR 300.

41 See and compare *Castle v The Queen* (2016) 259 CLR 449 at 468 [52], 472 [66].

42 *X7 v Australian Crime Commission* (2013) 248 CLR 92; *Lee v New South Wales Crime Commission* (2013) 251 CLR 196.

43 *Douglass v The Queen* (2012) 86 ALJR 1086 at 1090 [13]; 290 ALR 699 at 703, citing *Liberato v The Queen* (1985) 159 CLR 507 at 515.

58 A consideration of the appellant's evidence, together with the evidence that was common ground between the parties, inevitably leads to the conclusion that the appellant's evidence was so glaringly improbable that it could not give rise to a reasonable doubt as to his guilt. To explain why this is so, it is necessary first to consider the function of an appellate court in the application of the proviso.

59 In *Weiss*⁴⁴ this Court resolved the apparent tension in the former Victorian equivalent of s 6(1) of the *Criminal Appeal Act* between the command to allow an appeal where the court is of the opinion that there was a miscarriage of justice, and the proviso that it may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred, on the basis that the appellate court's assessment of the appellant's guilt "is not to be undertaken by attempting to predict what a jury (whether the jury at trial or some hypothetical future jury) would or might do", but on the basis that the appellate court is itself satisfied of the appellant's guilt beyond reasonable doubt. As was explained by the plurality in *Kalbasi v Western Australia*⁴⁵, in such a case "the appellate court is not predicting the outcome of a hypothetical error-free trial, but is deciding whether, notwithstanding error, guilt was proved to the criminal standard on the admissible evidence at the trial that was had".

60 In some cases the error which has occurred at trial may be such as to prevent the appellate court from making that assessment. In *Kalbasi*⁴⁶, Kiefel CJ, Bell, Keane and Gordon JJ explained:

"*Weiss* requires the appellate court to consider the nature and effect of the error in every case⁴⁷. This is because some errors will prevent the appellate court from being able to assess whether guilt was proved to the criminal standard. These may include, but are not limited to, cases which turn on issues of contested credibility⁴⁸, cases in which there has been a failure to

44 (2005) 224 CLR 300 at 314 [35], 317 [44].

45 (2018) 264 CLR 62 at 70 [12].

46 (2018) 264 CLR 62 at 71 [15].

47 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [44]; *AK v Western Australia* (2008) 232 CLR 438 at 455-456 [53]-[55].

48 *Castle v The Queen* (2016) 259 CLR 449.

leave a defence or partial defence for the jury's consideration⁴⁹ and cases in which there has been a wrong direction on an element of liability in issue or on a defence or partial defence⁵⁰. In such cases ... regardless of the apparent strength of the prosecution case, the appellate court cannot be satisfied that guilt has been proved. Assessing the application of the proviso by reference to considerations of 'process' and 'outcome' may or may not be helpful provided always that the former takes into account the capacity of the error to deprive the appellate court of the ability to justly assess the latter⁵¹."

61 Contrary to the view of Macfarlan JA in the Court of Criminal Appeal, this is not a case where the issue – as to whether the Crown had proved that the appellant did not believe that the complainants consented to having sex with him or was reckless in that regard – turned upon the rejection of the appellant's evidence simply because of a preference for the evidence of each of the complainants⁵². It is instructive to refer, in this regard, to this Court's decision in *Castle v The Queen*⁵³. In that case, Kiefel, Bell, Keane and Nettle JJ distinguished between a case which turns on the jury's preference for the evidence of one witness over another witness and a case, like the present, where it is apparent to an appellate court that the evidence of a witness is glaringly improbable. In the latter case, the appellate court is not usurping the function of the jury in rejecting evidence that is so glaringly improbable as to be incapable of belief⁵⁴.

62 In *Castle*⁵⁵, the plurality accepted that it was open to the Court of Criminal Appeal to conclude that the evidence of the accused was, in light of the objective evidence, glaringly improbable, and so not a reason to refrain from applying the

49 *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92; *Lindsay v The Queen* (2015) 255 CLR 272. See also *Filippou v The Queen* (2015) 256 CLR 47.

50 *Pollock v The Queen* (2010) 242 CLR 233; and see *Reeves v The Queen* (2013) 88 ALJR 215 at 223-224 [50]; 304 ALR 251 at 261.

51 *Nudd v The Queen* (2006) 80 ALJR 614 at 618 [6]; 225 ALR 161 at 163.

52 *Hofer v The Queen* [2019] NSWCCA 244 at [60].

53 (2016) 259 CLR 449 esp at 472 [66].

54 Compare *R v Baden-Clay* (2016) 258 CLR 308 at 329-330 [65]-[66].

55 (2016) 259 CLR 449 at 472 [66].

proviso. The obstacle to the application of the proviso in that case was, however, that proof of guilt depended on acceptance of the disputed evidence of the Crown witness "M". M's veracity and reliability were challenged because her drug and alcohol abuse had resulted in psychotic episodes and auditory hallucinations⁵⁶. The Court of Criminal Appeal was not able to resolve that challenge in favour of the prosecution by reference to the record. In the present case, notwithstanding the acquittals on counts 1 and 8, there was no challenge to the jury's guilty verdicts so far as the occurrence of acts of sexual intercourse was concerned. And while the appellant gave evidence that he believed that the complainants were consenting to having sex with him, this Court can be satisfied of the appellant's guilt to the requisite standard because the appellant's evidence as to his belief is incapable of being believed. Once his evidence on this issue is rejected, there is no reason, having regard to the record, to doubt that he did not have that belief. In the particulars of this case, making "due allowance for the 'natural limitations' that exist in the case of an appellate court proceeding wholly or substantially on the record", this Court can and must give effect to "its own independent assessment" of the evidence⁵⁷.

63

This is not a case where this Court was required to seek to resolve a conflict between oath and oath, where the resolution of the contest must depend on the reliability of the jury's verdict. While the Crown case did include reliance on the effect of impermissible cross-examination, there were other, and overwhelmingly sufficient, reasons for rejecting the appellant's evidence as to his belief that each complainant was consenting, and to conclude on the whole of the evidence that he was at least reckless as to her consent, and so to find him guilty beyond reasonable doubt. Those reasons do not depend merely on rejecting the appellant's evidence, and certainly not rejecting it by reason of a preference for the evidence of either complainant. The appellant's evidence in support of his belief that each complainant was consenting to having sex with him was so glaringly improbable that it was not capable of raising a doubt in the mind of a reasonable jury as to his recklessness as to whether either complainant consented to having sex with him.

⁵⁶ *Castle v The Queen* (2016) 259 CLR 449 at 461 [19].

⁵⁷ *Weiss v The Queen* (2005) 224 CLR 300 at 316 [41]. See also *Kalbasi v Western Australia* (2018) 264 CLR 62 at 69-70 [12].

64 In his reasons, Fagan J, having earlier noted that the appellant was "a 130 kg virtual stranger" to each complainant⁵⁸, went on to say⁵⁹:

"His evidence that he thought they agreed was objectively improbable given the age difference, the brief period over which each complainant had made his acquaintance and the limited, non-romantic business purpose for which they had met with him. The incontestable evidence that the [appellant] had plied each of these young women with alcohol evinced his intent, from the outset, to reduce their capacity for resistance; it showed his reckless disregard for whether they consented or not."

65 To these undisputed aspects of the evidence noted by Fagan J may be added the truly extraordinary circumstance that the appellant's assaults on the complainants occurred on consecutive nights upon young women who had responded to the appellant's offer of accommodation. The extraordinary circumstance that the incidents in question occurred on consecutive nights is significant, not because of coincidence or tendency, but because of what it reveals of the appellant's modus operandi and the intention which informed his plans. On two nights in a row, with different young women, the appellant pursued a course of conduct that was plainly focused upon having sex with them. The evident purpose of the appellant's plan was to reduce each complainant's agency by isolating her in his house, where, affected by alcohol, she would be at his mercy by reason of his height and weight. Plying each complainant with alcohol before bringing her back to his house was also part of that plan, which had nothing to do with the search for a possible housemate.

66 It is an affront to common sense to suggest that the appellant, in fabricating the pretext of offering to share his house, was acting otherwise than with the intention to lure young women back to his house and, having plied them with alcohol before doing so, to have sex with them irrespective of their wishes. There is no room here for reasonable doubt that in the case of each complainant the sexual assaults which the appellant perpetrated were planned in advance and were to be executed without regard to the wishes of the complainants.

67 It should be noted that there is an obvious reason why defence counsel refrained from putting to C1 and C2 those aspects of the appellant's evidence that were said by the Crown to be matters of recent invention. As noted above, defence counsel identified that reason in his evidence before the Court of Criminal Appeal.

58 *Hofer v The Queen* [2019] NSWCCA 244 at [190].

59 *Hofer v The Queen* [2019] NSWCCA 244 at [191].

He refrained from putting these matters to the complainants because he thought that these matters "held a high risk of actually setting the jury against Mr Hofer".

68 Counsel's appreciation, both of the irrelevance of the evidence in question to the issues in the case, and the likely adverse effect that the appellant's evidence would have upon the jury as the tribunal of fact, was plainly correct. The appellant's attempt to present his evening with each complainant as "a date" can be seen as a fabrication that is of a piece with the fabrication of his advertisement for a housemate. Any reasonable tribunal would have regarded this evidence as bordering on fantasy.

69 Thus far, in this discussion of whether the appellant was proved to be guilty as found by the jury, attention has been focused on what was identified at trial and in the arguments in this Court as to the crucial issue at trial, that is, whether the appellant truly believed that each complainant consented to have sex with him. In the Court of Criminal Appeal, Fagan J noted that the commission of an act of sexual intercourse was admitted by the appellant for all counts upon which the appellant was convicted in relation to C1 except counts 6 and 7⁶⁰. The appellant denied that these acts of penile-vaginal penetration had occurred. In this regard, Fagan J preferred the evidence of C1 as "highly credible" while the evidence of the appellant lacked credibility⁶¹. His Honour took a similar view in relation to the establishment of the element of consent (as distinct from the appellant's belief or recklessness as to the element of consent) in relation to both C1 and C2⁶².

70 To the extent that Fagan J relied upon the verdict of the jury as resolving the contest of credibility between the appellant on the one hand and the complainants on the other, that course was not open to his Honour if it were to be assumed that the jury's verdict may have been affected by the impermissible cross-examination of the appellant. But, for the reasons stated above, the evidence of the appellant was so wholly lacking in credibility that it was not necessary for Fagan J to rely upon the verdict of the jury as resolving these issues.

71 In the extraordinary circumstances of this case, just as no reasonable tribunal of fact could possibly have been beguiled by the appellant's fabrications, so an appellate court invited to apply the proviso is not obliged to entertain these

60 *Hofer v The Queen* [2019] NSWCCA 244 at [190].

61 *Hofer v The Queen* [2019] NSWCCA 244 at [190].

62 *Hofer v The Queen* [2019] NSWCCA 244 at [191].

fantastical suggestions as giving rise to a reasonable doubt as to the appellant's guilt.

A failure of process?

72 In *Weiss*, when speaking of failures of process involving a denial of procedural fairness, this Court was speaking of "errors or miscarriages of justice ... [that] may amount to such a serious breach of the presuppositions of the trial"⁶³. This is not a case where there has been a failure of process that involves a serious breach of the presuppositions of the trial, such that the proviso cannot be applied.

73 In *Nudd v The Queen*⁶⁴, Gleeson CJ acknowledged that there may be cases where counsel's "ineptitude is so extreme as to constitute a denial of due process to the client". His Honour described such cases as "rare", and in justifying that description referred to the two examples given by McHugh J in *TKWJ v The Queen*⁶⁵: "cases where, for no valid reason, counsel fails to cross-examine material witnesses, or does not address the jury".

74 The failure of defence counsel at trial to stop the cross-examination of the appellant and the consequent suggestions of recent invention do not make the present appeal an example of the rare case where there has been a denial of the presuppositions of the trial. A suggestion that any impermissible cross-examination based on a supposed breach by the accused of the rule in *Browne v Dunn* is such a failure of due process that the proviso cannot be applied cannot stand with this Court's decision in *MWJ v The Queen*⁶⁶.

75 The failure of process in the present case cannot be said to have been of greater significance to the integrity of the trial process than that which occurred in *Kalbasi*. In that case, there was no issue as to proof of a particular element of the offence charged and the accused's counsel consented to the removal of that element from the jury's consideration⁶⁷. This Court held that these flaws in the trial process

63 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [46].

64 (2006) 80 ALJR 614 at 621-622 [19]; 225 ALR 161 at 169.

65 (2002) 212 CLR 124 at 148 [76].

66 (2005) 80 ALJR 329 at 340 [42]-[43]; 222 ALR 436 at 449.

67 *Kalbasi v Western Australia* (2018) 264 CLR 62 at 82-83 [55]-[58].

did not amount to the kind of failure of process that would prevent the application of the proviso⁶⁸.

76 In the present case, the Crown's impermissible contention of recent invention was of little significance in the determination of the real issue in the trial. The flaw in the trial process cannot be said to have been such that "the jury has not performed its function"⁶⁹. The difficulty for the appellant, which was overwhelming, lay not in the suggestion that his case involved recent invention, but in his account, which was as much a fabrication as his advertisement that he was seeking to find a housemate. Whether the fabrication of his evidence was or was not "recent" was beside the point.

Conclusion and order

77 The Crown's submissions in relation to the application of the proviso should be accepted. The appellant's conviction did not involve a substantial miscarriage of justice within the meaning of the proviso. The Court of Criminal Appeal was right to dismiss the appeal.

78 The appeal to this Court should be dismissed.

68 *Kalbasi v Western Australia* (2018) 264 CLR 62 at 84 [60].

69 See and compare *Lane v The Queen* (2018) 265 CLR 196 at 210 [48].

79 GAGELER J. In common with criminal appeal statutes in most other States and Territories of Australia, the *Criminal Appeal Act 1912* (NSW)⁷⁰ provides that, on an appeal against a conviction on indictment, the appellate court:

"shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that *on any other ground whatsoever there was a miscarriage of justice*, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that *no substantial miscarriage of justice has actually occurred*."

80 Kiefel CJ, Keane and Gleeson JJ find in the present case that "there was a miscarriage of justice" on a ground that was not "the wrong decision of any question of law". Their Honours nevertheless conclude that the appeal against conviction was properly dismissed in the application of the proviso because "no substantial miscarriage of justice has actually occurred". I agree with that finding and that conclusion, and broadly with the reasons expressed by their Honours.

81 My purpose in adding these reasons is squarely to address the content of, and relationship between, the "miscarriage of justice" ground and the "no substantial miscarriage of justice has actually occurred" proviso in a manner that lays to rest reservations I have repeatedly expressed in the past⁷¹ about aspects of the reasoning in *Weiss v The Queen*⁷².

Weiss and the proviso

82 Before *Weiss*, appellate courts in Australia had not reached a conclusion on "what, if anything, is the difference between a miscarriage of justice and a

70 Section 6(1) of the *Criminal Appeal Act 1912* (NSW) (emphasis added).

71 See *Baini v The Queen* (2012) 246 CLR 469 at 487-488 [50]-[52]; *Reeves v The Queen* (2013) 88 ALJR 215 at 226 [64]-[66]; 304 ALR 251 at 264-265; *Filippou v The Queen* (2015) 256 CLR 47 at 74 [78]; *Castle v The Queen* (2016) 259 CLR 449 at 476-477 [80]-[81]; *Kalbasi v Western Australia* (2018) 264 CLR 62 at 84-88 [62]-[71]; *Lane v The Queen* (2018) 265 CLR 196 at 211-212 [52]-[56].

72 (2005) 224 CLR 300.

substantial miscarriage of justice"⁷³. They treated the verdict that had been returned by the jury as the sole determinant of guilt. They approached the question whether there had been a miscarriage of justice and the question whether a substantial miscarriage of justice had actually occurred in much the same way: by asking in each case whether an identified error or irregularity in the conduct of the trial had deprived the appellant of a chance of acquittal⁷⁴.

83 On one view⁷⁵, the inquiry posed by the miscarriage of justice ground, like the inquiry posed by the unreasonable verdict ground⁷⁶, was an inquiry of a nature that left little or no room for further inquiry about whether a substantial miscarriage of justice had actually occurred. The real significance of the proviso on that view lay in its operation to alleviate the automatic consequence of an appellate court finding a "wrong decision of *any* question of law"⁷⁷. On another view⁷⁸, the inquiries into whether there had been a miscarriage of justice and whether a substantial miscarriage of justice had actually occurred were cumulative. The difference between a miscarriage of justice and a substantial miscarriage of justice on that alternative view was at most a difference of degree in the chance of acquittal that was lost. On what became pre-*Weiss* the most commonly adopted formulation, an appellate court would not say that "no substantial miscarriage of justice" had actually occurred unless it could say that "had there been no blemish in the trial, an appropriately instructed jury, acting reasonably on the evidence properly before them and applying the correct onus and standard of proof, would inevitably have convicted"⁷⁹.

73 *R v Gallagher* [1998] 2 VR 671 at 679. See also *Soma* (2001) 122 A Crim R 537 at 540 as considered on appeal in *R v Soma* (2003) 212 CLR 299 at 304-305 [14]-[15], 312-313 [42]-[44].

74 eg, *Mraz v The Queen* (1955) 93 CLR 493 at 514; *Driscoll v The Queen* (1977) 137 CLR 517 at 524-525.

75 eg, *TKWJ v The Queen* (2002) 212 CLR 124 at 145-146 [71].

76 See *M v The Queen* (1994) 181 CLR 487 at 494; *Baini v The Queen* (2012) 246 CLR 469 at 486 [48].

77 See Ross, *The Court of Criminal Appeal* (1911) at 121-122.

78 eg, *Simic v The Queen* (1980) 144 CLR 319 at 332.

79 *Wilde v The Queen* (1988) 164 CLR 365 at 371-372. See *Conway v The Queen* (2002) 209 CLR 203 at 226 [63].

84 *Weiss* reframed the inquiry posed by the proviso. *Weiss* did so by reorienting the function to be performed by an appellate court when applying the proviso. Henceforth, the function of the appellate court was to be understood to require the court to make its own independent assessment of whether the appellant was proved guilty of the offence on which the jury had returned the verdict of guilt⁸⁰. Unless itself persuaded that the evidence properly admitted at trial established guilt beyond reasonable doubt, the appellate court was to be precluded from concluding that no substantial miscarriage of justice had actually occurred⁸¹. The pivot that occurred in the introduction of that negative proposition was from an "effect-on-the-jury" conception of the appellate function to a "determination-of-guilt" conception of the appellate function⁸².

85 For me, as for some others at the time *Weiss* was decided⁸³, that reorientation of the function to be performed by an appellate court – from an inquiry into loss of a chance of acquittal to an inquiry into criminal guilt – has been difficult to square with the traditional common law understanding of the jury as the constitutional tribunal for the determination of criminal guilt. I have preferred to understand the essential role of an appellate court in an appeal against a conviction on indictment as being to ensure the integrity of the verdict of guilt that has been rendered by the jury. Essentially for the reasons laid out by the Privy Council in *Makin v Attorney-General for New South Wales*⁸⁴ and by Deane J in *Wilde v The Queen*⁸⁵, I have baulked at the notion that the function of the appellate court encompasses determination of guilt for itself. The proper function of the appellate court, I have thought, is to determine "not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials"⁸⁶. I have not thought it part of the function of the appellate court "to say that the accused is, in its view, so obviously guilty that the requirement of a fair trial according to law can be dispensed

80 (2005) 224 CLR 300 at 315-316 [39]-[41].

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

82 cf Edwards, "To Err is Human, But Not Always Harmless: When Should Legal Error be Tolerated?" (1995) 70 *New York University Law Review* 1167 at 1171.

83 See "Farewell Speech by The Honourable Justice Callaway" (2007) 140 *Victorian Bar News* 28 at 29.

84 [1894] AC 57 at 69-70.

85 (1988) 164 CLR 365 at 375.

86 *Bollenbach v United States* (1946) 326 US 607 at 614.

with"⁸⁷. Reservations expressed by some Justices who were party to the judgment in *Weiss* about the scope of its holding⁸⁸ and not-infrequent post-*Weiss* lapses into pre-*Weiss* terminology and modes of analysis⁸⁹ have fuelled my misgivings.

86 More often than not, the circumstances revealed by the appellate record make it open for an appellate court to proceed on the assumption that a belief beyond doubt or a reasonable doubt that the court itself forms on an examination of the evidence properly admitted at trial is a belief beyond doubt or a reasonable doubt that would have been formed by a properly instructed reasonable jury, which the trial jury can for this purpose be assumed to have been⁹⁰. Where that assumption holds, as I sought to explain in *Kalbasi v Western Australia*⁹¹, the appellate court's independent assessment of whether the appellant was proved guilty beyond reasonable doubt can be regarded as a step in the court's determination of whether the appellant was deprived of a chance of acquittal by the trial jury that was fairly open. The court's own assessment that the evidence properly admitted at trial proves the appellant's guilt beyond reasonable doubt contributes logically to the court's ultimate conclusion that the appellant was not deprived of such a chance of acquittal. In many cases, perhaps almost all cases, the difference between pre-*Weiss* orientation and post-*Weiss* orientation accordingly makes no practical difference. The outcome is the same.

87 Having been conscious that the difference between the pre-*Weiss* and post-*Weiss* orientations might very often be dismissed as more jurisprudential than determinative, I have avoided having to meet *Weiss* head on in the past. What has made that avoidance possible is that the ordinary assumption, that a belief an appellate court itself forms beyond doubt on the evidence properly admitted at trial is also a belief that the trial jury properly instructed would have formed on the

87 *Wilde v The Queen* (1988) 164 CLR 365 at 375, quoted in *Grey v The Queen* (2001) 75 ALJR 1708 at 1719 [53]; 184 ALR 593 at 608.

88 See *Libke v The Queen* (2007) 230 CLR 559 at 579-582 [41]-[52].

89 eg, *Filippou v The Queen* (2015) 256 CLR 47 at 55 [15]; *R v Dickman* (2017) 261 CLR 601 at 619 [58], 620 [63]. See also the decisions noted in *Collins v The Queen* (2018) 265 CLR 178 at 193-194 [41] (footnote 36).

90 *Ratten v The Queen* (1974) 131 CLR 510 at 516; *Festa v The Queen* (2001) 208 CLR 593 at 632-633 [123]; *Heron v The Queen* (2003) 77 ALJR 908 at 917 [50]; 197 ALR 81 at 93-94.

91 (2018) 264 CLR 62 at 85-88 [64]-[71]. See to similar effect the views expressed by Edelman J in *Kalbasi v Western Australia* (2018) 264 CLR 62 at 121 [159]-[160] and *Collins v The Queen* (2018) 265 CLR 178 at 193-194 [41]-[42].

same evidence, has been available in those cases in which I have been required to consider the proviso⁹².

88 The assumption ordinarily available to an appellate court is strained in the extraordinary circumstances of the present case. Here, as Kiefel CJ, Keane and Gleeson JJ demonstrate, an appellate court can be persuaded on the evidence properly admitted at trial that the appellant's account of the circumstances justifying his asserted belief that the complainants consented to sexual intercourse was so glaringly improbable as to exclude the reasonable possibility of that account being true. That is the conclusion to which two out of three members of the Court of Criminal Appeal were persuaded after independently reviewing the evidence, and it is the conclusion to which four out of five members of this Court now come on their own independent assessment of the evidence. Yet here the acquittal of the appellant on two of ten counts of sexual intercourse without consent on which he was indicted shows that, even though the trial jury might have been influenced by the unfair cross-examination to which the appellant was subjected to take a dim view of his credit, the trial jury might not have disbelieved his account in its totality.

89 There is accordingly a disconnect between what an appellate court can conclude from the record about the guilt of the appellant and what an appellate court can conclude from the record about what the trial jury might conclude about the guilt of the appellant. The extraordinary circumstances of the present case are in that respect not unlike the extraordinary circumstances which precipitated the re-examination and reframing of the inquiry posed by the proviso in *Weiss*, albeit that the present case is the converse of that case. There the initial conclusion of the Victorian Court of Appeal was that, had an identified error in the trial not occurred, the trial jury would still have returned the verdict of guilty that it did but that a hypothetical properly instructed reasonable jury might not have returned a verdict of guilty⁹³. Having been told by this Court that its task of considering the proviso "is not to be undertaken by attempting to predict what a jury (whether the jury at trial or some hypothetical future jury) would or might do"⁹⁴, that Court on remitter

92 *Reeves v The Queen* (2013) 88 ALJR 215 at 226 [64]-[66]; 304 ALR 251 at 264-265; *Castle v The Queen* (2016) 259 CLR 449 at 476-477 [80]-[81]; *Lane v The Queen* (2018) 265 CLR 196 at 211 [53], 213-214 [63].

93 *R v Weiss* (2004) 8 VR 388 at 400-401 [70].

94 (2005) 224 CLR 300 at 314 [35]. See also at 315-316 [40].

found for itself that guilt was proved beyond reasonable doubt and in consequence applied the proviso⁹⁵.

90 The demand of *Weiss* is for an appellate court to survey the whole of the appellate record⁹⁶:

"The task is to be carried out by each member of the appellate court personally. The relevant question to be asked is not whether the jury which returned the guilty verdict would have done so if there had been no error. Nor is it whether a reasonable jury would convict. Instead, the question for each member of the appellate court personally is whether that member thinks that the evidence properly received established the accused's guilt beyond reasonable doubt."

91 *Weiss* further demands that each member of an appellate court approach that question conscious of the inherent limitations of fact-finding on the basis only of an appellate record. The appellate record before the Court of Criminal Appeal in the present case included the whole of the record of the trial. The appellate record before this Court does not extend to the whole of the record of the trial but includes everything that either party contends is relevant to this Court's own consideration of the proviso.

92 The trial jury's acquittal of the appellant on two out of ten counts indicates that the attitude of the jury to the appellant's account might not have been one of wholesale disbelief. That circumstance provides reason to reflect long before being confident that the appellate record is alone a sufficient basis upon which to be satisfied of proof beyond reasonable doubt of the appellant's guilt on the other eight counts. Might something about the manner in which the appellant gave his account, or something about the atmosphere of the trial not conveyed in the written record, have made the incredible seem credible? To the Court of Criminal Appeal and to this Court, the answer is an unknowable unknown. The possibility that the question might admit of an affirmative answer could never be excluded beyond all shadow of doubt. But I can and do exclude it in my own mind beyond the shadow of a *reasonable* doubt.

93 Where, "making due allowance for the 'natural limitations' that exist in the case of an appellate court proceeding wholly or substantially on the record", the court is persuaded to the conclusion that the evidence properly admitted at trial established guilt beyond reasonable doubt, the court must give effect to "its own

95 *R v Weiss [No 2]* (2006) 164 A Crim R 454 at 479 [137]-[138].

96 *Cooper v The Queen* (2012) 87 ALJR 32 at 43 [61]; 293 ALR 17 at 30 (footnote omitted).

independent assessment"⁹⁷. That is what *Weiss* said. Lest there be any doubt, that is what the majority in *Kalbasi* said that *Weiss* said⁹⁸. I cannot read *Castle v The Queen*⁹⁹ as saying anything different.

94 If the appellate court's assessment is to be truly independent, then the mere circumstance that there is a real possibility that the trial jury might have made a different assessment had the trial jury performed the appellate function cannot be allowed to divert the appellate court from forming and giving effect to its own conclusion of guilt. That is where the logic of *Weiss* leads. That is where it leads in this case.

95 The extraordinary circumstances of the present case therefore make my engagement with *Weiss* unavoidable. If there were ever to be an occasion to re-examine and perhaps to depart from *Weiss*, this is it. But *Weiss* has not been sought to be reopened in any case in the 16 years since it was decided, and it has not been sought to be reopened in this case¹⁰⁰. Absent an application now to reopen *Weiss*, there is no question but that my duty is to follow it.

96 "Obviously, respect for the rule of law must start with those who are responsible for *pronouncing* the law."¹⁰¹ Their entrustment with the judicial function entails that the "duty of judges in the hierarchy of courts is to obey authority; not to be convinced by it"¹⁰². The uniqueness of the constitutionally designated position of the High Court as the "Federal Supreme Court"¹⁰³ within the judicial hierarchy of Australia gives rise to no exception when it comes to the duty of a Justice of this Court confronted with an authority of this Court. Brennan J captured both the duty of an individual Justice to obey a previous decision that stands unyieldingly as an authority of this Court and the rationale for that duty when he explained that, "[a]s the function of defining the law is vested in the Court

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

98 (2018) 264 CLR 62 at 69-70 [12].

99 (2016) 259 CLR 449 at 472-473 [66]-[68].

100 cf *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439; *Miller v The Queen* (2016) 259 CLR 380 at 399-400 [39].

101 *McCleskey v Zant* (1991) 499 US 467 at 529 (emphasis in original).

102 *Vickers Cockatoo Dockyard Pty Ltd v El Ali* (unreported, New South Wales Court of Appeal, 17 December 1987).

103 Section 71 of the *Constitution*.

rather than in the justices who compose it, a decision of the Court will be followed in subsequent cases by the Court, however composed, subject to the exceptional power which resides in the Court to permit reconsideration"¹⁰⁴. His Honour went on to explain that "observance of such a constraint, coupled with the Court's ability to re-examine its own decisions, provides the appropriate balance between a legal system on which the dead hand of the past rests too heavily and one in which the law is in continual ferment"¹⁰⁵.

97 The bottom line is that I am impelled to follow *Weiss*, not "because it is the right decision, because it is logical, because it is just, because it accords with the weight of authority, because it has been generally accepted and acted on, because it secures a beneficial result to the community", but "because it is a previous decision and for no other reason"¹⁰⁶.

***Weiss* and the miscarriage of justice ground**

98 That brings me to the content of the miscarriage of justice ground and its relationship to the proviso as authoritatively expounded in *Weiss*.

99 The reasoning in *Weiss* explained the language and intended operation of the proviso against the historical backdrop of what was referred to in *Weiss* as the "Exchequer rule". Under that common law rule, according to *Weiss*, a "miscarriage of justice" was "*any* departure from trial according to law, regardless of the nature or importance of that departure"¹⁰⁷.

100 Taken out of context, that description of the former position at common law has the potential to be read as indicating that the miscarriage of justice ground is confined to a departure from a rule or principle of law as distinct from a departure from procedural regularity in the conduct of a trial. The description might also be understood to indicate that any departure from a rule or principle of law bearing on the conduct of a trial constitutes a miscarriage of justice for the purpose of the miscarriage of justice ground irrespective of the practical consequence of that

104 *Baker v Campbell* (1983) 153 CLR 52 at 103.

105 *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 130.

106 *Australian Crime Commission v Stoddart* (2011) 244 CLR 554 at 574-575 [57], quoting Radin, "Case Law and Stare Decisis: Concerning *Präjudizienrecht* in *Amerika*" (1933) 33 *Columbia Law Review* 199 at 200.

107 (2005) 224 CLR 300 at 308 [18] (emphasis in original).

departure. Later references to the passage might be thought to reinforce that reading¹⁰⁸.

101 That *Weiss*'s description of the former position at common law can be read in that way is evident from the re-examination of the miscarriage of justice ground in light of *Weiss* seen to be necessary to be undertaken in recent decisions of the Court of Criminal Appeal of New South Wales¹⁰⁹. That the description in *Weiss* can be so read is evident also from the need felt by the Supreme Court of New Zealand in *R v Matenga*¹¹⁰ to distance itself from the passage by adding the following qualification to its adoption of *Weiss*. The Supreme Court said¹¹¹:

"The *Weiss* Court accepted that a miscarriage under [the miscarriage of justice ground] is anything which is a departure from applicable rules of evidence or procedure. We have hesitated about whether in its statutory context that is the meaning which should be given to the word, lest it might lead to the application of the proviso in a large number of cases. Few trials are perfect in all respects. Frequent use of the proviso may create the false impression that the appeal court is too ready to resort to it despite the existence of a miscarriage of justice. In the end, departing in this respect from *Weiss*, we consider that in the first place the appeal court should put to one side and disregard those irregularities which plainly could not, either singly or collectively, have affected the result of the trial and therefore cannot properly be called miscarriages. A miscarriage is more than an inconsequential or immaterial mistake or irregularity."

102 The present case is an opportunity for clarification. *Weiss* should not be taken to draw a distinction for the purpose of the miscarriage of justice ground between a departure from the proper conduct of a trial which involves legal error and a departure from the proper conduct of a trial which involves some other form of irregularity. Nor should *Weiss* be taken to mean that an error or irregularity

108 eg, *King v The Queen* (2012) 245 CLR 588 at 611 [53]-[55]; *GBF v The Queen* (2020) 94 ALJR 1037 at 1042 [24]; 384 ALR 569 at 575.

109 See *Hamide v The Queen* (2019) 101 NSWLR 455 at 473-484 [75]-[129] (special leave to appeal refused: *Hamide v The Queen* [2020] HCATrans 085); *Caleo v The Queen* [2021] NSWCCA 179 at [154]-[167].

110 [2009] 3 NZLR 145.

111 [2009] 3 NZLR 145 at 157 [30]. Section 385(1)(c) of the *Crimes Act 1961* (NZ) required a court to allow an appeal against conviction if "on any ground there was a miscarriage of justice".

which could not have affected the result of the trial will amount to a miscarriage of justice.

103 The references in *Weiss* to the "Exchequer rule" derive from the label given by John Henry Wigmore in 1903¹¹² to a narrow understanding¹¹³ which had come by then to prevail in the United States of a rule introduced into the common law of England by a decision of the Court of Exchequer in 1835¹¹⁴. The narrow understanding can be seen to have been reflected in a strict and literal interpretation of the statement two years later that "where evidence formally objected to at *Nisi Prius* is received by the Judge, and is afterwards thought by the Court to be inadmissible, the losing party has *a right* to a new trial"¹¹⁵. The narrow understanding was that, if "error" was found, "prejudice" would normally be presumed¹¹⁶.

104 By 1906, adherence to the "Exchequer rule" in the United States was being identified as a source of a reported discrepancy between new trials being ordered in over 40 per cent of cases brought before appellate courts in the United States compared with new trials being ordered in around three per cent of cases brought before appellate courts in England¹¹⁷. In a famous speech to the American Bar Association in 1906, Wigmore's contemporary, Roscoe Pound, lamented that "exaggerated contentious procedure" in the United States had "[kept] alive the unfortunate [Exchequer rule], dead in the country of its origin, according to which

112 Wigmore, "New Trials for Erroneous Rulings upon Evidence; a Practical Problem for American Justice" (1903) 3 *Columbia Law Review* 433. See also Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* (1904), vol I at 69-79.

113 Compare *Robinson & Vincent Ltd v Rice* (1926) 38 CLR 1 at 10; *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 455 [44]; 390 ALR 590 at 601.

114 *Crease v Barrett* (1835) 1 C M & R 919 [149 ER 1353].

115 *Wright v Doe dem Tatham* (1837) 7 A & E 313 at 330 [112 ER 488 at 495], quoted with the emphasis added in *Weiss v The Queen* (2005) 224 CLR 300 at 307 [13].

116 *The American and English Encyclopaedia of Law and Practice* (1910), vol 4 at 433-437.

117 Amidon, "The Quest for Error and the Doing of Justice" (1906) 5 *Canadian Law Review* 364 at 364-366, 372; Committee on Judicial Administration and Remedial Procedure, *Orthodox English Rule vs Exchequer Rule of Evidence: report of Committee on Judicial Administration and Remedial Procedure, before Alabama State Bar Association, June 28, 1907* (1907) at 15, 17.

errors in the admission or rejection of evidence are presumed to be prejudicial and hence demand a new trial"¹¹⁸.

105 Together with William Howard Taft¹¹⁹, who was later to become President and then Chief Justice of the Supreme Court of the United States, Wigmore and Pound spearheaded a campaign to eradicate the influence of the "Exchequer rule" in the United States. The campaign came to fruition with the passage in 1919 of a federal law requiring an appellate court in any civil or criminal case to disregard "technical errors, defects, or exceptions which do not affect the substantial rights of the parties"¹²⁰ and with the enactment of rules in similar terms¹²¹ in many States of the United States in the surrounding decade¹²².

106 An appreciation of how the reference to the "Exchequer rule" in the critical passage in *Weiss* is to be understood is assisted by a reference earlier in *Weiss* to the rule having been stated in the Queen's Bench Division of the English High Court of Justice in 1887 in *R v Gibson*¹²³ in terms that "if any bit of evidence not legally admissible, *which might have affected the verdict*, had gone to the jury, the party against whom it was given was entitled to a new trial". The emphasised words in that statement of the rule are important. They bear out the observation of Pound that the American understanding of the common law rule, as one by which errors in the admission or rejection of evidence were *presumed* to be prejudicial, was an exaggeration of the understanding that existed in England. The English version of the rule involved no presumption of prejudice. The English version of the rule conferred an entitlement to a new trial only if the erroneous admission of

118 Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice" (1906) 40 *American Law Review* 729 at 739.

119 Taft, "The Administration of Criminal Law" (1905) 15 *Yale Law Journal* 1 at 16-17.

120 Act of 26 February 1919, ch 48, 40 Stat 1181. See also Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3rd ed (1940), vol 1 at 377-379.

121 American Law Institute, *Code of Criminal Procedure: Official Draft* (1930) at 1302-1304.

122 See Fairfax, "A Fair Trial, Not a Perfect One: The Early Twentieth-Century Campaign for the Harmless Error Rule" (2009) 93 *Marquette Law Review* 433.

123 (1887) 18 QBD 537 at 540-541, quoted in *Weiss v The Queen* (2005) 224 CLR 300 at 307 [16] (emphasis added).

evidence operated to the prejudice of the party against whom it was admitted in the sense that it might have affected the verdict.

107 Given the policy laid down by the Privy Council in 1879 that "in all parts of the empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same"¹²⁴, it was only to be expected that the English and not the American understanding of the common law rule would be taken up in Australia. That understanding was succinctly conveyed by Cussen J in 1907 when he said that "the wrongful reception of statements as evidence will not invalidate the conviction if it could not have affected the verdict"¹²⁵. Three years later, in *R v Grills*¹²⁶, to which reference was made in *Weiss*¹²⁷, Griffith CJ said that *Gibson* could not be treated "as an authority for the position that if any inadmissible evidence is 'left' to ... the jury, the conviction is bad". His Honour added:

"What was really decided was that if the jury are expressly invited to take inadmissible evidence into consideration the conviction is bad. It happens, I suppose, in innumerable cases that, by inadvertence, irrelevant evidence (which, strictly speaking, is not admissible) is admitted, and passes without notice and without mischief."

108 The reference to the "Exchequer rule" in the critical passage in *Weiss*¹²⁸ is therefore best understood as a reference to the prevailing English and Australian understandings of the rule rather than as a reference to the prevailing American understanding as described and criticised by Wigmore. So understood, the qualification that the Supreme Court of New Zealand thought useful to be spelt out in *Matenga* is not really a departure from *Weiss*. The qualification is implicit in the common law rule referred to in *Weiss*.

109 That the reasoning in *Weiss* should have focused on the common law rule pertaining to the consequence of the reception of inadmissible evidence and on the proviso's operation to modify its strictness, without drawing attention to the qualification in what *Weiss* identified as the leading English statement of the rule, is understandable. *Weiss* was a case in which the inquiry posed by the proviso had

124 *Trimble v Hill* (1879) 5 App Cas 342 at 345.

125 *Knox v Bible* [1907] VLR 485 at 495-496, citing *R v Gibson* (1887) 18 QBD 537 as explained in *R v Ludlow* (1898) 24 VLR 93 at 98-99.

126 (1910) 11 CLR 400 at 410.

127 (2005) 224 CLR 300 at 308 [17].

128 (2005) 224 CLR 300 at 308 [18], quoted above at [99].

been triggered by a finding of a wrong decision of a question of law – an incorrect ruling by the trial judge on the admissibility of evidence¹²⁹. The threshold for finding that the wrong decision of a question of law also led to a miscarriage of justice¹³⁰ was unquestionably met in the circumstances of *Weiss* given that the incorrect ruling of the trial judge had resulted in the admission of evidence found to be not only "irrelevant" but also "prejudicial"¹³¹.

110 *Weiss* presented no occasion to explore the metes and bounds of the miscarriage of justice ground. Nothing in the reasoning or the legal history recounted in *Weiss* contradicts the understanding expressed by Isaacs J in *Hargan v The King*¹³² that the extension of the miscarriage of justice ground beyond "an error in strict law" was "the greatest innovation" made by the *Criminal Appeal Act* – "to lose sight of that [would be] to miss the point of the legislative advance". Nor does the reasoning in *Weiss* or the underlying legal history call into question the consistent application of the miscarriage of justice ground, noted in *Davies and Cody v The King*¹³³, to "set aside a conviction whenever it appears unjust or unsafe to allow the verdict to stand because some failure has occurred in observing the conditions which, in the court's view, are essential to a satisfactory trial, or because there is some feature of the case raising a substantial possibility that, either in the conclusion itself, or in the manner in which it has been reached, the jury may have been mistaken or misled".

111 When applying the miscarriage of justice ground, as when administering criminal law more generally, appellate courts have proceeded on the foundational understanding that every person accused of a serious crime has an entitlement to a trial that is fair¹³⁴. "The central thesis of the administration of criminal justice" was identified before *Weiss* in terms of an accused person having an entitlement not simply to "a trial according to law" but to a "*fair* trial according to law"¹³⁵.

129 (2005) 224 CLR 300 at 304 [5].

130 cf *Fleming v The Queen* (1998) 197 CLR 250 at 262 [27].

131 (2005) 224 CLR 300 at 304 [5]. See also *Cesan v The Queen* (2008) 236 CLR 358 at 383 [81].

132 (1919) 27 CLR 13 at 23.

133 (1937) 57 CLR 170 at 180.

134 See generally Spigelman, "The truth can cost too much: The principle of a fair trial" (2004) 78 *Australian Law Journal* 29.

135 *McKinney v The Queen* (1991) 171 CLR 468 at 478 (emphasis added).

Hence, it could meaningfully be said at a level of generality that a miscarriage of justice would arise "whenever the accused has not had a *fair* trial according to law"¹³⁶.

112 Fairness, however, is a standard not a rule. As Deane J pointed out in *Jago v District Court (NSW)*¹³⁷:

"The general notion of fairness which has inspired much of the traditional criminal law of this country defies analytical definition. Nor is it possible to catalogue in the abstract the occurrences outside or within the actual trial which will or may affect the overall trial to an extent that it can no longer properly be regarded as a fair one. Putting to one side cases of actual or ostensible bias, the identification of what does and what does not remove the quality of fairness from an overall trial must proceed on a case by case basis and involve an undesirably, but unavoidably, large content of essentially intuitive judgment. The best that one can do is to formulate relevant general propositions and examples derived from past experience."

113 Using language of Mason CJ and McHugh J in *Dietrich v The Queen*¹³⁸, it is precisely "because, in the ordinary course of the criminal appellate process, an appellate court is generally called upon to determine ... whether something that was done or said in the course of the trial, or less usually before trial, resulted in the accused being deprived of a fair trial and led to a miscarriage of justice" that neither before nor after the introduction of the common form criminal appeal statutes has there been any "judicial attempt to list exhaustively the attributes of a fair trial" such as might allow it to be said that any departure at all from a trial exhibiting all of those attributes is to be characterised as a departure from a fair trial according to law. To the extent that rules of law and of practice to regulate the course of the criminal trial have emerged from appellate judgments, they are rules tailored to avoiding or mitigating the risk of occurrence of a miscarriage of

136 *Jones v The Queen* (1997) 191 CLR 439 at 450 (emphasis added).

137 (1989) 168 CLR 23 at 57. See also *Penney v The Queen* (1998) 72 ALJR 1316 at 1320-1321 [22]; 155 ALR 605 at 611.

138 (1992) 177 CLR 292 at 300 (footnote omitted).

justice¹³⁹. Some are truly "fundamental"¹⁴⁰, but few are so rigid as to admit of mechanical application.

114 In *Nudd v The Queen*¹⁴¹, in which the miscarriage of justice ground was invoked on the basis of an allegation that trial counsel was incompetent, Gummow and Hayne JJ said:

"'Miscarriage of justice', as a ground on which a court of appeal is required by the common form of criminal appeal statute to allow an appeal against conviction, may encompass any of a very wide variety of departures from the proper conduct of a trial. Alleging that trial counsel was incompetent does not reveal what is said to be the miscarriage of justice. That requires consideration of what did or did not occur at the trial, of whether there was a material irregularity in the trial, and whether there was a significant possibility that the acts or omissions of which complaint is made affected the outcome of the trial."

115 The need for an appellate court to consider, and ordinarily to be satisfied of, "a significant possibility that the acts or omissions of which complaint is made affected the outcome of the trial" in order to find a miscarriage of justice has routinely informed the analysis undertaken to establish whether or not there was a miscarriage of justice in subsequent cases. Examples are *Libke v The Queen*¹⁴² (where the complaint was that the prosecutor had engaged in unfair cross-examination of the appellant), *Cesan v The Queen*¹⁴³ (where it was found that the jury was distracted from paying attention to evidence as a result of the trial judge being asleep), *Jones v The Queen*¹⁴⁴, *Pollock v The Queen*¹⁴⁵ and *Hargraves v The*

139 *Bromley v The Queen* (1986) 161 CLR 315 at 324-325; *Longman v The Queen* (1989) 168 CLR 79 at 86.

140 *RPS v The Queen* (2000) 199 CLR 620 at 637 [41].

141 (2006) 80 ALJR 614 at 622 [24]; 225 ALR 161 at 170, referring to *TKWJ v The Queen* (2002) 212 CLR 124 at 134 [31], 148 [75], 149-150 [79], 157 [101], [104] (footnotes omitted).

142 (2007) 230 CLR 559 at 589 [81]-[83], 605 [134].

143 (2008) 236 CLR 358 at 387-388 [93]-[96], 390-391 [105]-[106], 393 [119].

144 (2009) 83 ALJR 671 at 678 [30]; 254 ALR 626 at 634, affirming *R v Roughtan* (2007) 179 A Crim R 389 at 406 [83].

145 (2010) 242 CLR 233 at 252 [69]-[70].

*Queen*¹⁴⁶ (where the relevant complaint in each case was of misdirection), *Patel v The Queen*¹⁴⁷ (where a late narrowing of the prosecution case rendered much of the evidence previously admitted irrelevant), *Castle v The Queen*¹⁴⁸ (where the error identified was that evidence left to the jury as an admission was in fact exculpatory), *Craig v The Queen*¹⁴⁹ (where the appellant had been given incorrect legal advice by his counsel), *Rodi v Western Australia*¹⁵⁰ (where there was found to be a significant possibility that the trial jury would have acquitted had fresh evidence been before it), *De Silva v The Queen*¹⁵¹ (where the complaint was of a failure of the trial judge to give a specific direction as to how the jury should approach certain evidence), and *McKell v The Queen*¹⁵² and *R v Abdirahman-Khalif*¹⁵³ (where the relevant complaint in each case was of an unfair comment by the trial judge in the course of summing up to the trial jury).

116 In the application of the miscarriage of justice ground, there is no principled reason for treating "an error in strict law" differently from another error or irregularity in the conduct of a trial. The miscarriage of justice in a particular case might arise from a singular error or irregularity, or it might arise from a cumulation of errors or irregularities some or all of which might or might not be connected¹⁵⁴ and some or all of which might or might not be capable of being characterised as errors of law¹⁵⁵. Whether or not some or all of them might be characterised as errors of law, the consideration required to be given to their individual or cumulative

146 (2011) 245 CLR 257 at 277-278 [47]-[50].

147 (2012) 247 CLR 531 at 564 [118].

148 (2016) 259 CLR 449 at 471-472 [63]-[65], 477 [81].

149 (2018) 264 CLR 202 at 215-216 [36]-[37].

150 (2018) 265 CLR 254 at 262 [26], 265 [34].

151 (2019) 268 CLR 57 at 68-70 [30]-[36].

152 (2019) 264 CLR 307 at 320-323 [39], [42]-[45].

153 (2020) 94 ALJR 981 at 1001 [77]; 384 ALR 1 at 26.

154 See *Nudd v The Queen* (2006) 80 ALJR 614 at 621 [18]; 225 ALR 161 at 168-169, explaining *R v Birks* (1990) 19 NSWLR 677.

155 eg, *Evans v The Queen* (2007) 235 CLR 521 at 532-533 [37].

consequence remains the same. An inconsequential error, including an inconsequential error of law, is not a miscarriage.

117 The present case furnishes an illustration. The irregularity that occurred at the trial was essentially one of unfairness. The unfairness lay in the prosecutor subjecting the appellant to a line of cross-examination and submission conveying an insinuation that parts of his evidence were the product of recent invention which, if the insinuation was to be dispelled by the appellant, had the practical effect of requiring the appellant to divulge the instructions he had given to his counsel¹⁵⁶.

118 The overall prejudicial consequence of the irregularity is identified by Kiefel CJ, Keane and Gleeson JJ in terms of giving rise to a "real chance" that the jury, in reaching its verdict of guilty on eight of ten counts on which the appellant was indicted, inferred that the appellant invented some parts of his evidence between the time when his counsel cross-examined the complainants at the trial and the short time later when he came to give his own evidence at the trial. I agree with that identification, and with the language in which it is couched. What is essential to the finding of miscarriage of justice is that the irregularity had the meaningful potential or tendency to have affected the result of the trial.

119 However, the irregularity might additionally or alternatively be characterised (as senior counsel for the appellant submitted) as including the admission during the cross-examination of the appellant, without objection, of inadmissible evidence about what had occurred in the presence of the jury during the cross-examination of the complainants by counsel for the defence. The evidence was inadmissible (as senior counsel for the appellant submitted) either because it was adduced for the purpose of impugning the appellant's credibility without leave of the trial judge¹⁵⁷ or (if not adduced for the purpose of impugning the appellant's credibility) because it could not rationally have affected the assessment of the probability of the existence of a fact in issue in the trial and was therefore irrelevant¹⁵⁸. Treating that characterisation as correct, the absence of objection to the admission of most of the inadmissible evidence means that most of the inadmissible evidence could not be said to have been admitted as a result of

156 *R v Birks* (1990) 19 NSWLR 677 at 702; *Llewellyn v The Queen* [2011] NSWCCA 66 at [140].

157 Sections 102 and 104 of the *Evidence Act 1995* (NSW).

158 Sections 55 and 56 of the *Evidence Act 1995* (NSW).

a wrong decision of any question of law¹⁵⁹. The erroneous admission of the inadmissible evidence to which no objection was made would give rise, or contribute, to a miscarriage of justice only through such prejudicial effect as the evidence has the potential to have on the jury. The inquiry into the potential or tendency of what occurred to have affected the result of the trial would remain the same.

120 Terms like "real chance" have been used in the context of explaining a finding of a miscarriage of justice interchangeably with terms like "significant possibility"¹⁶⁰, "perceptible risk"¹⁶¹ and "substantial risk"¹⁶². Often it has been thought enough to refer to the error or irregularity that has given rise to a miscarriage of justice as "prejudicial"¹⁶³ in contradistinction to "innocuous" or occasioning "no real forensic disadvantage"¹⁶⁴. All are different ways of expressing a realistic possibility of a causal connection between one or more identified legal errors or procedural irregularities and the verdict returned by the trial jury.

121 The terminology is unimportant provided it is understood that the requisite analysis in the context of finding a miscarriage of justice is factual. The inquiry is into the tendency or propensity of an error or irregularity to have affected the basis on which the trial jury actually reached its verdict in the totality of the events that occurred in the trial that was had. The inquiry is not into the outcome of a hypothetical trial before a hypothetical jury in which the error or irregularity is assumed not to have occurred.

122 Finding a miscarriage of justice post-*Weiss* is in that way the result of a more precise and confined inquiry than might have been thought to have been indicated pre-*Weiss*, when the miscarriage of justice ground and the non-application of the proviso were both commonly explained to involve the finding

159 *R v Soma* (2003) 212 CLR 299 at 304 [11], 324 [79]; *Johnson v The Queen* (2018) 266 CLR 106 at 125 [52].

160 eg, *Nudd v The Queen* (2006) 80 ALJR 614 at 622 [24]; 225 ALR 161 at 170.

161 eg, *Castle v The Queen* (2016) 259 CLR 449 at 471 [64].

162 eg, *McKell v The Queen* (2019) 264 CLR 307 at 321 [42], 327 [58].

163 eg, *Patel v The Queen* (2012) 247 CLR 531 at 562 [113].

164 eg, *R v Roughan* (2007) 179 A Crim R 389 at 406 [83], affirmed in *Jones v The Queen* (2009) 83 ALJR 671 at 678 [30]; 254 ALR 626 at 634.

of a loss of a "real chance of acquittal"¹⁶⁵ or of a "chance which was fairly open ... of being acquitted"¹⁶⁶. By reframing the inquiry to be undertaken by an appellate court applying the proviso, *Weiss* has demanded greater precision in framing the inquiry to be undertaken by an appellate court finding a miscarriage of justice.

123 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"¹⁶⁷, 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 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. Only then can a further issue arise of the appellate court going on in the consideration of the proviso to ask and answer the distinct question of whether the court is satisfied that no substantial miscarriage of justice actually occurred. And only where that distinct question arises does the court need itself to be satisfied that the evidence properly admitted at trial established guilt beyond reasonable doubt before it can answer that no substantial miscarriage of justice actually occurred.

Order

124 I agree that the appeal should be dismissed.

165 eg, *R v Storey* (1978) 140 CLR 364 at 376.

166 eg, *Mraz v The Queen* (1955) 93 CLR 493 at 514.

167 *Maher v The Queen* (1987) 163 CLR 221 at 234, quoted and applied in *Katsuno v The Queen* (1999) 199 CLR 40 at 60 [35] and in *Lee v The Queen* (2014) 253 CLR 455 at 472 [48].

125 GORDON J. I agree that there was a "miscarriage of justice" at the trial of the appellant¹⁶⁸. I do not agree that this Court can conclude "no substantial miscarriage of justice has actually occurred"¹⁶⁹. That is, I do not agree that the proviso to s 6(1) of the *Criminal Appeal Act 1912* (NSW) applies.

A miscarriage of justice

126 I agree with Kiefel CJ, Keane and Gleeson JJ that questions asked of the appellant in cross-examination by the prosecutor departed from the standards of a trial to which the appellant was entitled. The unfairness to the appellant in being asked these questions was emphasised when he was not permitted to explain why he thought matters had not been put to the complainants and other Crown witnesses. The unfairness was compounded by defence counsel saying as little as he did about those matters and by the trial judge not intervening to prevent the questioning, not seeking to remedy the error when it first arose and not telling the jury that there may be many reasons why a matter was not raised in cross-examination of a witness.

127 That events of the kind that happened at the appellant's trial can constitute a miscarriage of justice is well established. The analysis of Garling J in *Llewellyn v The Queen*¹⁷⁰ is right. It follows that the appeal should be allowed unless the Court "considers that no substantial miscarriage of justice has actually occurred"¹⁷¹.

The proviso

128 The principles governing the application of the proviso are set out in *Weiss v The Queen*¹⁷². *Weiss* was decided 16 years ago and has since been applied by this

168 *Criminal Appeal Act 1912* (NSW), s 6(1).

169 *Criminal Appeal Act*, s 6(1).

170 [2011] NSWCCA 66 at [137], citing *Whitehorn v The Queen* (1983) 152 CLR 657 at 663-664; *R v Manunta* (1989) 54 SASR 17; *R v Birks* (1990) 19 NSWLR 677 at 690-692, 703; *R v Dennis* [1999] NSWCCA 23 at [45]-[46]; *Abdallah* (2001) 127 A Crim R 46 at 52 [24]; *Picker v The Queen* [2002] NSWCCA 78 at [41]-[42], [47]-[62]; *R v Scott* [2004] NSWCCA 254 at [41]-[63]; *RWB v The Queen* (2010) 202 A Crim R 209 at 225 [101].

171 *Criminal Appeal Act*, s 6(1). See also *Weiss v The Queen* (2005) 224 CLR 300 at 317 [44].

172 (2005) 224 CLR 300.

Court and intermediate appellate courts in the determination of many hundreds of criminal appeals.

129 The common form criminal appeal statute, derived from the *Criminal Appeal Act 1907* (UK)¹⁷³, uses the phrase "miscarriage of justice" twice: first in stating a ground on which an appeal against conviction *must* be allowed and then in the proviso stating the circumstance in which, despite a ground of appeal being established, the appeal *may* be dismissed. The ground of appeal is described as "on any other ground whatsoever there was a miscarriage of justice"; the proviso permits the appellate court to dismiss the appeal notwithstanding that it is of the opinion that the point or points raised by the appeal *might be decided* in favour of the appellant "if it *considers* that *no substantial miscarriage of justice has actually occurred*" (emphasis added).

130 The text of the provision reveals a fundamental difference between the two steps of first, deciding whether a ground of appeal is established and second, considering whether the proviso may (not must) be applied. One of the three kinds of grounds of appeal (verdict that is unreasonable or cannot be supported on the evidence; wrong decision of any question of law; and on any other ground whatsoever there has been a miscarriage of justice) will not be established if the mistake made at trial was one which could have had no effect on the outcome of the trial. That is, when considering whether a ground of appeal is established it is necessary and sufficient for the appellate court to conclude that the error might have made a difference.

131 By contrast, when considering whether the proviso applies, the appellate court *cannot* apply the proviso unless it is persuaded that the admissible evidence at trial proved the accused's guilt beyond reasonable doubt. But that is a negative proposition. The appellate court cannot apply the proviso unless it is persuaded to that conclusion. Other considerations may show that the discretion which the proviso gives ("provided that the court *may* ... dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred") should not be exercised (emphasis added). The proviso cannot be applied unless the appellate court is positively persuaded of the accused's guilt beyond reasonable doubt. And it is the Crown that must persuade the court to the requisite standard.

132 In applying the proviso, an appellate court "must itself decide whether a substantial miscarriage of justice has actually occurred"¹⁷⁴. This is "an objective task not materially different from other appellate tasks" which "is to be performed

173 *Weiss* (2005) 224 CLR 300 at 306 [12].

174 *Weiss* (2005) 224 CLR 300 at 315 [39].

with whatever are the advantages and disadvantages of deciding an appeal on the record of the trial; it is not an exercise in speculation or prediction"¹⁷⁵. More particularly, "[t]he appellate court must make its own independent assessment of the evidence¹⁷⁶ and determine whether, making due allowance for the 'natural limitations' that exist in the case of an appellate court proceeding wholly or substantially on the record¹⁷⁷" (emphasis added), the *Crown* proved beyond reasonable doubt that the appellant was guilty of the offence on which the jury returned its verdict of guilt¹⁷⁸.

133 In *Fox v Percy*¹⁷⁹, Gleeson CJ, Gummow and Kirby JJ observed that the "'natural limitations' that exist in the case of any appellate court proceeding wholly or substantially on the record" include "the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the 'feeling' of a case which an appellate court, reading the transcript, cannot always fully share". Their Honours amplified the point by reference to several earlier decisions of this Court making the same point about the limitations that an appellate court has when it proceeds on the written record of the trial¹⁸⁰. More recently, in *Kalbasi v Western Australia*¹⁸¹, Kiefel CJ, Bell, Keane and Gordon JJ said that in "cases which turn on issues of contested

175 *Weiss* (2005) 224 CLR 300 at 315 [39]; see also 315-316 [40].

176 *Driscoll v The Queen* (1977) 137 CLR 517 at 524-525; *R v Storey* (1978) 140 CLR 364 at 376; *Morris v The Queen* (1987) 163 CLR 454; *M v The Queen* (1994) 181 CLR 487; *Festa v The Queen* (2001) 208 CLR 593 at 631-633 [121]-[123].

177 *Fox v Percy* (2003) 214 CLR 118 at 125-126 [23]. See also *Baini v The Queen* (2012) 246 CLR 469 at 480 [29].

178 *Weiss* (2005) 224 CLR 300 at 316 [41].

179 (2003) 214 CLR 118 at 125-126 [23].

180 *Dearman v Dearman* (1908) 7 CLR 549 at 561; *Scott v Pauly* (1917) 24 CLR 274 at 278-281; *Jones v Hyde* (1989) 63 ALJR 349 at 351-352; 85 ALR 23 at 27-28; *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 179; *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479, 482-483.

181 (2018) 264 CLR 62 at 71 [15]. See also *Weiss* (2005) 224 CLR 300 at 316 [41], 317 [44]; *Perara-Cathcart v The Queen* (2017) 260 CLR 595 at 639 [126]; *Collins v The Queen* (2018) 265 CLR 178 at 191-192 [36]-[37]; *OKS v Western Australia* (2019) 265 CLR 268 at 279-280 [31]; *GBF v The Queen* (2020) 94 ALJR 1037 at 1043 [27]; 384 ALR 569 at 576.

credibility" an appellate court may be prevented "from being able to assess whether guilt was proved to the criminal standard". This is such a case.

134 There were two issues in this case. First, what acts of sexual intercourse¹⁸² did the appellant commit? The appellant denied the acts alleged in counts 1, 6, 7 and 8, against the first complainant. Second, did the Crown establish beyond reasonable doubt that the appellant knew that the complainants were not consenting or that, realising the possibility that each complainant was not, he went ahead regardless? The appellant swore he believed they were consenting. The jury acquitted the appellant on counts 1 and 8.

135 I do not accept that the Court can conclude from the written record made available to it that the evidence properly admitted at trial proved, beyond reasonable doubt, the appellant's guilt of the offences on which the jury returned its verdicts of guilt¹⁸³. That is, not having seen and heard the evidence given at trial by the complainants and the appellant, the Court cannot say that the evidence established beyond reasonable doubt that the appellant engaged in the acts which he denied or that, despite his evidence that he believed the complainants consented, he either knew that the complainants did not consent or, realising that it was possible that the complainants were not consenting, went ahead regardless.

136 And, where, as here, it was for the prosecution to establish the accused's state of mind and the accused chose to give evidence about his state of mind, it is not a matter of choosing which witness to believe. As this Court made clear in *De Silva v The Queen*¹⁸⁴, "the issue is always whether the prosecution has proved the elements of the offence beyond reasonable doubt".

137 Put in different terms, the conclusion from the written record that the appellant was guilty beyond reasonable doubt of the offences on which the jury returned its verdicts of guilt is not open in this case because it could be reached *only* by assessing the *whole* of the admissible evidence at trial¹⁸⁵ – in particular, the evidence the complainants gave and the evidence the appellant gave. The credibility of those witnesses (the complainants and the appellant) was and

182 *Crimes Act 1900* (NSW), s 61I read with s 61H(1) definition of "sexual intercourse".

183 cf *Weiss* (2005) 224 CLR 300 at 317 [44].

184 (2019) 268 CLR 57 at 62 [9], citing *Murray v The Queen* (2002) 211 CLR 193 at 201-202 [23], 213 [57]. See also *Liberato v The Queen* (1985) 159 CLR 507 at 515.

185 See *Weiss* (2005) 224 CLR 300 at 317 [43].

had to be an important part of that assessment¹⁸⁶. The evidence of the appellant, particularly his evidence about his state of mind, cannot be dismissed from consideration as contrary to some objective fact.

138 Thus, as the Crown properly accepted in argument in this Court, if the Court concluded that "the jury must have been relevantly misled by the impugned questioning in a material matter ... then there may be little scope for the proviso to operate". If there was an error of that kind, the Crown did not seek to discharge the onus of establishing, or satisfying the Court of, the appellant's guilt beyond reasonable doubt; in addressing the proviso, the Crown did not seek to show that an error of that kind would have had no significance.

139 The questions asked of the appellant in cross-examination by the prosecutor departed from the standards of a trial to which the appellant was entitled; the questioning was highly prejudicial and attacked the appellant's credit, a central issue at trial. (Even so, the jury acquitted the appellant on two counts.) But regardless of that fact, it is a case where there was conflicting sworn evidence given on issues central to the trial; that is, what acts were committed and did the prosecution prove the appellant's state of mind. It is impermissible to apply the proviso.

140 It is not enough to say that the appellant's evidence as a whole was "glaringly improbable"¹⁸⁷. First, the issue is not an issue about probabilities¹⁸⁸. The standard is beyond reasonable doubt. The question is, as explained, whether the Court can conclude that the evidence as a whole proved, to *that* standard, the appellant's guilt of the offences on which the jury returned its verdicts of guilt. In that context, it is not enough simply to say that the appellant's evidence *should be* rejected (because it is "glaringly improbable")¹⁸⁹. It would need to be said that the appellant's evidence *must be* rejected (or is incapable of being accepted), and even then it does not necessarily follow that the Court could be satisfied that the *whole* of the admissible evidence at trial proved beyond reasonable doubt the appellant's guilt. The appellate court's task must be

186 See *Perara-Cathcart* (2017) 260 CLR 595 at 639 [126]; *OKS* (2019) 265 CLR 268 at 279-280 [31]. See also *Louth v Diprose* (1992) 175 CLR 621 at 639-640.

187 cf *Castle v The Queen* (2016) 259 CLR 449 at 472 [66].

188 cf *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439 at 452 [24]-[25], 466-468 [62]-[63], 477-478 [87], 485 [112].

189 cf *Fennell v The Queen* (2019) 93 ALJR 1219 at 1233 [78]-[81]; 373 ALR 433 at 451-452.

undertaken on the whole of the record of the trial, including entry of convictions and acquittals¹⁹⁰.

141 Second, and no less importantly, a conclusion that the appellant's evidence was glaringly improbable is too generally expressed. It is a conclusion that treats the appellant's evidence and his credibility as a single, undifferentiated whole when the inquiry must be about individual, separate counts and about the elements of each count. It is a conclusion that seeks to proceed from a proposition that the appellant intended to have sex to the conclusion that the appellant intended to have sex regardless of consent and then to the conclusion that he committed all of the acts alleged against him. That conclusion depends upon treating nothing the appellant said in evidence that was inconsistent with his guilt as capable of raising a reasonable doubt about his guilt. And, critically in this case, that is necessarily a conclusion about the credibility of what the appellant said in evidence. It is *not* a conclusion based on rejecting some or all of the appellant's evidence as inconsistent with some demonstrated objective fact.

Conclusion and orders

142 The appeal should be allowed. Order 3 made by the Court of Criminal Appeal of the Supreme Court of New South Wales on 18 October 2019 should be set aside and, in its place, it should be ordered that the appeal be allowed, the appellant's convictions be quashed, and there be a retrial.

190 See *Weiss* (2005) 224 CLR 300 at 317 [43].

