

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
KEANE, GORDON, STEWARD AND GLEESON JJ

MALCOLM LAURENCE ORREAL

APPELLANT

AND

THE QUEEN

RESPONDENT

Orreal v The Queen
[2021] HCA 44
Date of Hearing: 11 November 2021
Date of Judgment: 16 December 2021
B25/2021

ORDER

1. *Appeal allowed.*
2. *Set aside the order of the Court of Appeal of the Supreme Court of Queensland made on 8 May 2020 and, in its place, order that:*
 - (a) *the appeal be allowed;*
 - (b) *the appellant's convictions be set aside; and*
 - (c) *a new trial be had.*

On appeal from the Supreme Court of Queensland

Representation

S J Keim SC with P F Richards for the appellant (instructed by Legal Aid Queensland)

C W Heaton QC with C W Wallis for the respondent (instructed by Office of the Director of Public Prosecutions (Qld))

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

CATCHWORDS

Orreal v The Queen

Criminal practice – Appeal – Miscarriage of justice – Application of proviso that no substantial miscarriage of justice actually occurred – Where appellant convicted of unlawfully and indecently dealing with child under age of 16 years and rape – Where evidence admitted by consent that both appellant and complainant tested positive for herpes simplex virus type 1 ("impugned evidence") – Where impugned evidence irrelevant and inadmissible – Where Court of Appeal found miscarriage of justice because trial judge failed to direct jury to disregard impugned evidence in its entirety – Where Court of Appeal applied proviso because it concluded impugned evidence could not have impacted jury's assessment of reliability or credibility of complainant – Whether no substantial miscarriage of justice had actually occurred.

Words and phrases – "contested credibility", "jury's assessment of the reliability or credibility of the complainant", "miscarriage of justice", "natural limitations", "nature and effect of the error", "proviso", "substantial miscarriage of justice".

Criminal Code (Qld), s 668E(1A).

1 KIEFEL CJ AND KEANE J. After a trial in the District Court of Queensland, the appellant was convicted of three counts of indecent dealing with a child under 16 years and two counts of rape. In the course of his trial, evidence that both he and the complainant had tested positive for the presence of the herpes simplex virus type 1 ("HSV-1") was admitted ("the HSV-1 evidence"). It is not now disputed that the HSV-1 evidence had no probative value and was inadmissible. The prosecutor's address and the trial judge's summing up left the question of what use was to be made of the evidence to the jury. The trial judge did not direct the jury that it was to be disregarded.

2 A majority in the Court of Appeal of the Supreme Court of Queensland (Mullins JA and Bond J, McMurdo JA dissenting) held that a miscarriage of justice had occurred but that no substantial miscarriage of justice had actually occurred for the purposes of s 668E(1A) of the *Criminal Code* (Qld) and dismissed the appeal from conviction¹.

The prosecution evidence on the charges

3 The complainant was 12 years old at the time of the alleged offences. She and her family were staying at the appellant's house on the evening that the offences were said to have occurred. She gave evidence that she had been watching a movie on television whilst lying on the appellant's bed. The appellant turned the television off when the complainant became tired. He then proceeded to rub and tickle her back and legs before rolling her onto her back. He touched her genitals and had her touch his erect penis and then put his finger into her vagina. The appellant then pulled down her shorts and pushed his penis into her vagina, causing her pain. He then stopped. Whilst this was happening, the complainant said, she was crying and upset. He then started rubbing his fingers on the outside of her vagina. He then stopped and asked her to promise not to tell anyone and went outside.

4 After the appellant left, the complainant went outside the appellant's bedroom and ascertained that her mother, who was present in another room in the house, was not awake. Upon hearing the appellant returning, the complainant went back into the bedroom and lay back down on the bed. The appellant also returned to the bed. After a short period of time the complainant left the bedroom and the appellant, and went to sleep with her younger sister. The sister gave evidence that the complainant was crying quietly and shaking and that she comforted the complainant.

5 The following day the complainant told her mother what had happened. Her mother took her to the police, who interviewed her. The complainant was

1 *R v Orreal* [2020] QCA 95 at [29] per Mullins JA, [104] per Bond J.

medically examined that day, and again some ten days later. The evidence at trial was that those examinations revealed that the initial redness to her genitals, observed at the first medical examination, was consistent with blunt force trauma and a traumatic break of her hymen.

Evidence of other sexual activity

6 In her evidence-in-chief the complainant was asked whether anyone other than the appellant had touched her vagina. She said that a 15 year old boy, who had been her boyfriend, had touched her vagina with his tongue. It had occurred on one occasion. She was asked whether anything was inserted into her vagina in the three or four days before the night when the events concerning the appellant had taken place and she answered "no".

7 This evidence came to be led by leave sought by the Crown and given by the trial judge under s 4 of the *Criminal Law (Sexual Offences) Act 1978* (Qld) to adduce evidence as to the sexual activities of the complainant with any person. Leave was granted after discussions had taken place between the prosecutor and defence counsel. Defence counsel did not object to leave being granted. Leave was said to be justified because the evidence was relevant to whether there were innocent explanations for her physical condition when she was medically examined after the alleged offending and whether there was any other explanation for the fact that the complainant and the appellant both had HSV-1. The complainant had been tested for the virus at the time of her first medical examination and the appellant had also been tested twice for the virus a number of days after the alleged offences.

8 Bond J, with whom Mullins JA agreed, was to observe that, objectively assessed, there was an obvious forensic advantage to the defence in having the HSV-1 evidence admitted. Without it, the evidence of the complainant's sexual contact with the 15 year old boy could not have been elicited, and that evidence provided the defence with some basis for impugning the complainant's account and her credit. It may also be observed that the evidence carried risks for the defence, but weighing risks is part of the process leading to a forensic choice being made by counsel.

The evidence relating to HSV-1

9 Before evidence relating to HSV-1 was given by a specialist paediatrician, the jury were informed that the prosecution and the appellant formally admitted three facts: (1) that, just over a week after the alleged incident, a swab was taken of the appellant's urethra and the result was negative for HSV-1; (2) that, a few days after that swab, the appellant's blood was tested for HSV-1 and it was positive; and (3) that it was not known whether the male child who performed oral sex on the complainant had or has HSV-1. The evidence that the complainant had

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a swab taken during her first medical examination and had tested positive for HSV-1 was then adduced during the examination-in-chief of the specialist paediatrician.

10 The evidence given by the specialist paediatrician included that HSV-1 causes cold sores but is also commonly found as a genital infection. The virus remains in the body of the infected person, who becomes immune to it. The virus may come back at various times during the person's life and be "shed" for a few days, during which the person is infectious. HSV-1 can be spread to the genitals by oral-to-genital spread and genital-to-genital spread from someone who is "shedding" the virus. All that could be said about the appellant was that at some point in the past he had been infected with HSV-1 and was not shedding when the swab was taken and that it was not possible to say when he had acquired the virus. It was not possible to say whether he was shedding the virus when the alleged offences occurred. Likewise, it was not possible to say when the complainant acquired the virus or from whom she acquired it. As the virus was found in her genitals, transmission must have occurred through contact with her genitals.

The prosecution address

11 In the course of addressing the jury about the HSV-1 evidence, the prosecutor said that "[t]he herpes thing is not the lynchpin in this case. It's very neutral, really", and referred to the evidence of the specialist paediatrician. It was said that the jury might think the complainant was infected by contact with her boyfriend's mouth rather than the appellant's penis. Nevertheless, the prosecutor confirmed that "it's still a factor for you to take into account". "[T]he point", she said, "is that both of them do have the same virus." The prosecutor went on: "It's a sexually transmissible virus, and the allegation in here is that the defendant forced her to engage in sexual contact and conduct, and so it's a matter for you with your life experience what you make of that. But I don't suggest that you would really put any weight on it."

The summing up

12 In her summing up the trial judge reminded the jury of the admissions relating to the test results and the medical evidence about the virus. Her Honour identified three aspects of the specialist paediatrician's evidence as important: that it is not possible to say with any certainty when the complainant contracted the virus; nor when the appellant contracted it; and it is not possible to say from whom the complainant contracted it.

13 The trial judge then said to the jury: "where does that leave you? You might think that evidence does not really help you one way or the other. You are left with evidence that both the defendant and the complainant child both tested positive for the same herpes virus, but on the state of the evidence, you cannot know when she

contracted it, you cannot know when the defendant contracted it and you cannot know who she contracted it from. You just take that evidence into account along with all of the other evidence."

A miscarriage of justice?

14 There were two grounds of appeal before the Court of Appeal. The first ground related to the conduct of the defence counsel at trial. It included an allegation that counsel had failed to object to the admissibility of the HSV-1 evidence.

15 The difficulty with that contention, Bond J observed, was that defence counsel decided not to object, having made an assessment that there was a forensic advantage for the defence in doing so. In his Honour's view the appellant should be regarded as bound by his counsel's forensic choices. No miscarriage of justice could be said to result².

16 There can be no doubt about the correctness of his Honour's reasoning in this regard, as is evidenced by the fact that the ground is not pressed on the appeal to this Court. Save for exceptional cases, in our system of justice, parties are bound by the conduct of their counsel, who exercise a wide discretion in deciding matters such as what evidence to lead or have excluded³. It is usually only when an appellate court is persuaded that no rational forensic justification can be discerned for counsel's decision that consideration will be given to whether it gave rise to a miscarriage of justice⁴.

17 The second ground of appeal was that there was a miscarriage of justice and prejudice because of the admission of the HSV-1 evidence. Bond J held that a

2 *R v Orreal* [2020] QCA 95 at [91]-[92].

3 *Nudd v The Queen* (2006) 80 ALJR 614 at 618 [9]; 225 ALR 161 at 164; *R v Baden-Clay* (2016) 258 CLR 308 at 324 [48]; *Hamilton (a pseudonym) v The Queen* (2021) 95 ALJR 894 at 906 [54]; 394 ALR 194 at 207-208.

4 *Craig v The Queen* (2018) 264 CLR 202 at 211-212 [23].

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miscarriage of justice within the third limb of s 668E(1) of the *Criminal Code* (Qld)⁵ was established⁶.

18 No doubt because of the way the grounds were framed his Honour did not consider whether the forensic choice which had prevented a finding of miscarriage of justice with respect to the first ground was also operative with respect to the second ground. Logically one would think that must be so. His Honour appears to have based his decision that there was a miscarriage of justice not only on the fact that the evidence was adduced but also on the fact that it was not corrected by the trial judge in summing up⁷. Arguably this is a matter relevant to the application of the proviso in s 668E(1A)⁸. Had the second ground also been dealt with on the basis of the forensic choice of defence counsel to not object to the admission of the HSV-1 evidence, no miscarriage of justice within s 668E(1) could be said to have occurred. It would follow that no question of whether there had been a substantial miscarriage of justice within s 668E(1A) could arise.

19 That was not the course taken. In its submissions the respondent accepted that a miscarriage of justice was established and properly does not seek to resile from that concession. Attention must therefore be directed to the application of the proviso.

The proviso and its application

20 An appellate court must be persuaded that evidence properly admitted at trial establishes guilt to the requisite standard before it can conclude that no substantial miscarriage of justice has actually occurred. It must consider the whole of the record of the trial and the nature and effect of the error which gives rise to

5 That sub-section provides: "The Court on any such appeal against conviction 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 can not 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 ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal."

6 *R v Orreal* [2020] QCA 95 at [94].

7 *R v Orreal* [2020] QCA 95 at [94].

8 That sub-section provides: "However, the Court may, notwithstanding that it is of the 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."

the miscarriage of justice in the particular case⁹. As explained in *Kalbasi v Western Australia*¹⁰, this is because some errors will prevent the appellate court from being able to assess whether guilt was proved beyond reasonable doubt. The examples there given include cases which turn on issues of contested credibility¹¹ or cases where there has been a wrong direction on an element of liability in issue¹². What they have in common is that the appellate court cannot be satisfied that guilt has been proved.

21 The appellant did not give evidence. The evidence tendered of the results of his blood test could not rationally affect the probability of the existence of a fact in issue at his trial¹³. Yet both the prosecutor and the trial judge told the jury that use could be made of it when they ought to have been told in unequivocal terms to disregard it. That should have occurred because, not only was the evidence irrelevant and therefore inadmissible, it was also prejudicial to the appellant. The nature of the evidence, that both the complainant and the appellant tested positive to HSV-1, combined with the jury being told that it was able to be taken into account, gave rise to a significant possibility that the evidence could be misused by the jury to support acceptance of the complainant's account, as McMurdo JA in dissent held¹⁴.

22 His Honour also correctly pointed out that although an appellate court has the record, from which it may make some assessment of the prosecution's case, there are "natural limitations" when proceeding wholly or substantially on the record¹⁵. This is not a case like *Hofer v The Queen*¹⁶ where it may be apparent to an appellate court that the evidence of a witness is glaringly improbable. In such a

9 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [43]-[44]. See *Kalbasi v Western Australia* (2018) 264 CLR 62 at 71 [15].

10 (2018) 264 CLR 62 at 71 [15].

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

12 See *Pollock v The Queen* (2010) 242 CLR 233.

13 *Goldsmith v Sandilands* (2002) 76 ALJR 1024 at 1025 [2]; 190 ALR 370 at 371.

14 *R v Orreal* [2020] QCA 95 at [10]-[12].

15 *R v Orreal* [2020] QCA 95 at [13], referring to *Weiss v The Queen* (2005) 224 CLR 300 at 315-316 [40] citing *Fox v Percy* (2003) 214 CLR 118 at 125-126 [23].

16 (2021) 95 ALJR 937 at 952 [61].

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case the court is not usurping the function of a jury in rejecting evidence that is so improbable as to be incapable of belief. This case is one which turns on the jury's acceptance of the evidence of the complainant. In such a case the appellate court should not seek to duplicate the function of the jury, because it does not perform the same function in the same way nor have the same advantages¹⁷.

23 The respondent submits that the impugned evidence was neutral and logically incapable of assisting the jury in support of their ultimate determination as to the guilt or otherwise of the appellant. This submission mirrors what was said by the majority in the Court of Appeal¹⁸. It may be accepted that, logically, the evidence could not assist the jury, but often the nature of prejudicial evidence means that it may not be rationally applied. Uninstructed by the trial judge, the jury may well have reasoned that the test results were no coincidence and pointed to the complainant having contracted the virus from the appellant. Had the jury been directed to disregard the evidence, such prejudice would almost certainly have been overcome, but that did not occur.

Orders

24 The appeal from the decision of the Court of Appeal should be allowed and the order of that Court dismissing the appeal should be set aside. In lieu thereof, it should be ordered that the appeal to that Court be allowed, the verdicts be quashed and a new trial be held.

17 *Pell v The Queen* (2020) 268 CLR 123 at 144-145 [37].

18 *R v Orreal* [2020] QCA 95 at [27] per Mullins JA, [102] per Bond J.

25 GORDON, STEWARD AND GLEESON JJ. The appellant was convicted by a jury of three counts of unlawfully and indecently dealing with a child under the age of 16 years contrary to s 210(1)(a) of the *Criminal Code* (Qld) ("the Code"), and two counts of rape contrary to s 349 of the Code. The question raised by this appeal is whether the Court of Appeal of the Supreme Court of Queensland (Mullins JA and Bond J, McMurdo JA dissenting) erred by applying the proviso in s 668E(1A) of the Code to dismiss the appellant's appeal against conviction. Section 668E(1A) provides relevantly that, if the court on an appeal against conviction is of the opinion, on any ground whatsoever, that there was a miscarriage of justice, the court may dismiss the appeal if it considers that "no substantial miscarriage of justice has actually occurred".

26 At the trial, evidence was admitted with the appellant's consent¹⁹, the substance of which was that both the complainant and the appellant had tested positive for the presence of the herpes simplex virus type 1 ("HSV-1") ("the impugned evidence"). The Court of Appeal found that the impugned evidence was irrelevant and inadmissible²⁰, and that there had been a miscarriage of justice because the trial judge failed to direct the jury that they were obliged to disregard the impugned evidence in its entirety²¹.

27 For the following reasons, the Court of Appeal erred in its application of s 668E(1A) and therefore the appeal must be allowed.

Trial

28 The alleged offences occurred on 29 January 2017, when the complainant was 12 years old. The appellant was a family friend, and the complainant, along with her mother and siblings, were staying at the appellant's home that evening.

29 At the trial, which was conducted over four days, the jury heard a recording of the complainant's police interview from 30 January 2017 and also pre-recorded evidence she gave when she was 14 years old. The complainant's evidence was that she was watching a movie on television in the appellant's bedroom, when the appellant entered the room, lay down beside her on the bed and then committed the five counts of alleged offending. Afterwards, the complainant went to the lounge room where her mother and sister were sleeping, and lay down next to her sister on the couch. The complainant's sister, who was 11 years old at the time,

19 *R v Orreal* [2020] QCA 95 at [20].

20 *R v Orreal* [2020] QCA 95 at [22], [24].

21 *R v Orreal* [2020] QCA 95 at [10], [29], [94].

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gave evidence that the complainant was crying when she lay down beside her. The next day, the complainant reported the alleged offending to her mother. The complainant also submitted to two physical vaginal examinations, on 30 January 2017 and 9 February 2017, which revealed initial redness to her genitals consistent with blunt force trauma and a traumatic break of her hymen. A specialist paediatrician, Dr Waugh, gave evidence that the redness was unlikely to have been caused by a single finger inserted once and was more consistent with multiple fingers having been inserted, or possibly a single finger inserted multiple times. The injuries were consistent with penetration by a penis, and that penetration having been effected "a matter of days" preceding the first examination.

30 The prosecution case rested on the evidence of the complainant and, accordingly, her reliability and credibility were central issues in the trial. The appellant's case theory at trial was that the complainant was a depressed and troubled young girl who had, at the least, a troubled relationship with her mother and who could not be regarded as a reliable narrator, and that there might be innocent explanations for the physical condition of the complainant's genitals as identified by the medical examinations.

31 The impugned evidence comprised several items of evidence. One was a vaginal swab taken from the complainant which detected the presence of HSV-1 in the complainant's vagina. There was evidence from Dr Waugh that the swab indicated contact in the area of the swab by a person who, at some stage, had become infected with HSV-1 and was, at the time of that contact, shedding the virus. There was also evidence of a swab of the appellant's urethra, taken on 8 February 2017, which yielded a negative result for HSV-1 and a sample of the appellant's blood, tested on 10 February 2017, which yielded a positive result for HSV-1. Additionally, Dr Waugh gave evidence, both in chief and under cross-examination, about HSV-1 and the implications of the positive test results.

32 Finally, the exhibits included a page ("exhibit 7") that recorded four facts agreed by the prosecution and the appellant²². Three of those four facts form part of the impugned evidence, being the results of the appellant's blood test and urethral swab respectively, and that it was unknown whether a male child who performed oral sex on the complainant had or has HSV-1. This last agreed fact concerned evidence given by the complainant of a single occasion of oral sex performed on her by a 15 year old boy. That evidence was adduced by the

22 *R v Orreal* [2020] QCA 95 at [56].

Gordon J
Steward J
Gleeson J

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prosecution with the trial judge's leave²³, and without any objection from the appellant.

33 Each of the prosecutor, defence counsel and the trial judge addressed the jury about the impugned evidence. The prosecutor dealt with that evidence in the following terms in her closing address:

"So then let's go to the medical evidence, and that's where the problem really lies for the [appellant]. I'm going to get to the problem in a moment, but I'll deal first with this herpes thing. The herpes thing is not the lynchpin in this case. It's very neutral, really. We know from Dr Waugh's evidence that we can't say whether the [appellant] gave [the complainant] the virus or even whether [the complainant] gave the [appellant] the virus or even if they both independently had the virus of each other.

We also know from [the complainant] that she'd had one instance of sexual contact before and that involved her boyfriend performing oral sex on her. That's the one sexual instance that she spoke about or the only other sexual instance that she's been involved in. And you might well think that given the evidence that we heard about herpes simplex virus type 1 generally being associated with oral herpes, you might well think that she caught it from her boyfriend's mouth rather than the [appellant's] penis.

There are plenty of explanations here. It's almost like a chicken and egg argument, but *it's still a factor for you to take into account because the point is that both of them do have the same virus. It's a sexually transmissible virus, and the allegation in here is that the [appellant] forced her to engage in sexual contact and conduct, and so it's a matter for you with your life experience what you make of that. But I don't suggest that you would really put any weight on it.*" (emphasis added)

34 The transcript records the following submissions by defence counsel, including the trial judge's interjection:

"[Defence counsel]: Now, just briefly in relation to the evidence regarding the herpes virus. The fact that the [appellant] and complainant have the herpes virus doesn't prove anything. You've heard how common the virus is from the expert and you've also heard how the virus can be transmitted separately, even by having oral sex which, you know, she had with her boyfriend at some point in time. There's no evidence from the prosecution how old the boy was, or that that boy was even tested, who she

23 See *Criminal Law (Sexual Offences) Act 1978* (Qld), s 4.

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had the oral sex with, for the virus. If you had the results for the boy and he was also positive for herpes virus, what would you think then? Then again

- - -

[Trial judge]: Don't invite them to speculate, [defence counsel].

[Defence counsel]: I suggest to you that the evidence of the herpes virus doesn't help you with your decision making process at all. It certainly doesn't strengthen the [prosecution] case as you don't know where – you don't know where she got it from, or how long she's even had it."

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In summing up, after identifying the charges, the trial judge commenced by reciting the agreed facts (three of which, as previously noted, comprised part of the impugned evidence), observing that the jury "must treat those facts as proved". The trial judge then referred to the impugned evidence in addressing the evidence of Dr Waugh, noting that he gave evidence about two issues, being the presence of the herpes virus and the injuries he observed to the complainant's genitals. The relevant passage of the summing up is as follows:

"I am going to deal first with the evidence about herpes virus. Before referring to [Dr Waugh's] evidence on that issue, I will remind you of the admissions in exhibit 7. They are that the [appellant] had a swab taken of his urethra on 8 February 2017 which returned a negative result for the herpes virus, but he then had a blood test two days later on 10 February 2017 which returned a positive result for the herpes virus. There is also an admission that it is not known whether the male child who performed oral sex on the complainant ... had or has herpes virus. That is, herpes virus type 1.

Now, what was Dr Waugh's evidence about that? He gave evidence that the complainant ... also tested positive for herpes virus 1 on a swab taken from her vagina. So that is the same herpes virus that the [appellant] returned a positive blood test for. He said that that virus, herpes virus 1, causes common cold sores around the mouth. It can also cause genital infections. He said the virus is also commonly found as a genital infection. In that case, it would normally be spread oral to genital or genital to genital. He did not see any evidence of herpes on the complainant's physical examination. He said you can have that herpes virus without knowing that you have it; that is, you can have no symptoms.

This is probably the most important part of his evidence, and there are three parts of it. First, it is not possible to say with any certainty when ... the complainant, contracted the virus. Second, he said it is not possible to say when the [appellant] contracted the virus. Third, he said it is not

possible to say who the complainant ... contracted the virus from. He said for a child her age, it would be unlikely for her to have had a genital herpes virus infection for a long period beforehand. He said it does require genital contact to acquire it, but he does not know when that happened.

So where does that leave you? *You might think that evidence does not really help you one way or the other. You are left with evidence that both the [appellant] and the complainant child both tested positive for the same herpes virus, but on the state of the evidence, you cannot know when she contracted it, you cannot know when the [appellant] contracted it and you cannot know who she contracted it from. You just take that evidence into account along with all of the other evidence.*" (emphasis added)

Court of Appeal's reasons

36 The majority of the Court of Appeal considered that, on an assessment of the whole of the appellate record (but making due allowance for the limitations of proceeding wholly by reference to the record) and giving weight to the jury's guilty verdicts, they were able to be persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the appellant's guilt of the counts on which the jury returned their verdicts²⁴. Critical to the analysis of Bond J, who wrote the principal reasons for the majority, was the finding that the impugned evidence did not impact upon the credibility of the complainant or the reliability of her evidence²⁵. His Honour explicitly recognised that a different conclusion on the operation of the proviso would have been necessary if the impugned evidence could have impacted on the jury's assessment of the reliability or credibility of the complainant²⁶. Bond J considered that there was no suggestion made by counsel in closing addresses before the jury or by the trial judge that the impugned evidence was relevant to an assessment of the reliability or credibility of the complainant's evidence and therefore concluded that "the jury, acting rationally and following the directions given to them, could not have had their view of the reliability or credibility of the complainant's evidence affected by the HSV-1 evidence"²⁷.

24 *R v Orreal* [2020] QCA 95 at [18], [29], [99], [102].

25 *R v Orreal* [2020] QCA 95 at [99].

26 *R v Orreal* [2020] QCA 95 at [100].

27 *R v Orreal* [2020] QCA 95 at [102].

37 Mullins JA, who agreed with Bond J, considered that it was patent from the content of the impugned evidence that it could not assist the prosecution case "when almost 80 per cent of the male population would test positive to HSV-1 and it was not known whether the 15 year old boy with whom the complainant had a sexual encounter had or has HSV-1"²⁸. Her Honour's assessment was also that the impugned evidence "was not evidence that could have had any bearing on the jury's assessment of the reliability and credibility of the complainant's evidence"²⁹. Her Honour concluded that there was no risk that the jury would use the evidence in a way that was adverse to the appellant³⁰.

38 In dissent, McMurdo JA found that there was a "significant possibility" that the impugned evidence assisted the prosecution to persuade the jury to accept the complainant's evidence. In those circumstances, his Honour reasoned that the jury's verdicts might have been affected by the misuse of the evidence so that the guilty verdicts which were returned could not be used in reasoning that the evidence properly admitted at trial proved, beyond reasonable doubt, the appellant's guilt³¹. McMurdo JA concluded that the nature of the error or irregularity in the trial prevented the Court of Appeal from concluding that there was no substantial miscarriage of justice because of the natural limitations that attended the Court of Appeal's task³².

Respondent's submissions

39 In this Court, the respondent accepted that there had been a miscarriage of justice at the trial. The respondent submitted that the Court of Appeal was able to assess the complainant's evidence in the context of the whole of the evidence at the trial and particularly having regard to the corroborating evidence of opportunity to offend as alleged, the observations of the complainant's younger sister of the complainant's distressed condition, the timely complaint made by the complainant to her mother and the evidence of physical injuries to the complainant's vagina. The respondent submitted that, in the context of the corroborating evidence, the impugned evidence was, at best, neutral and was logically incapable of assisting the jury in their assessment of the complainant's credibility and reliability. Alternatively, the respondent submitted that any capacity for the impugned

28 *R v Orreal* [2020] QCA 95 at [27].

29 *R v Orreal* [2020] QCA 95 at [27].

30 *R v Orreal* [2020] QCA 95 at [28].

31 *R v Orreal* [2020] QCA 95 at [12].

32 *R v Orreal* [2020] QCA 95 at [16].

evidence to have impacted upon the jury's assessment of the complainant was negligible.

40 The respondent also submitted that, even if the impugned evidence had the capacity to affect the jury's verdicts, such that the Court of Appeal was not permitted to afford significant weight to the guilty verdicts returned, the properly admitted evidence was nonetheless sufficient to enable the appellate court to be persuaded of the appellant's guilt.

Whether no substantial miscarriage of justice actually occurred

41 While there is no single universally applicable description of what constitutes "no substantial miscarriage of justice", an appellate court is precluded from concluding that no substantial miscarriage of justice actually occurred unless the court itself is persuaded that the evidence properly admitted at trial established guilt beyond reasonable doubt³³. In addressing that question, it is necessary to consider the nature and effect of the error³⁴. In cases which turn on contested credibility, the nature and effect of the error may render an appellate court unable to assess whether guilt was proved beyond reasonable doubt due to the "'natural limitations' that exist in the case of any appellate court proceeding wholly or substantially on the record"³⁵. Further, as explained in *Pell v The Queen*³⁶:

"[T]he assessment of the credibility of a witness by the jury on the basis of what it has seen and heard of a witness in the context of the trial is within the province of the jury as representative of the community. Just as the

33 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [44]-[45]; *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 104 [29]; *Kalbasi v Western Australia* (2018) 264 CLR 62 at 69-70 [12]-[13]; *Lane v The Queen* (2018) 265 CLR 196 at 206-207 [38]; *Hofer v The Queen* (2021) 95 ALJR 937 at 951 [59], 955-956 [84], 965 [131]-[132].

34 *Kalbasi v Western Australia* (2018) 264 CLR 62 at 71 [15]; *Lane v The Queen* (2018) 265 CLR 196 at 206-207 [38]-[39]; *Hofer v The Queen* (2021) 95 ALJR 937 at 951-952 [60], 965-966 [133].

35 *Fox v Percy* (2003) 214 CLR 118 at 125-126 [23]; *Weiss v The Queen* (2005) 224 CLR 300 at 316 [41]; *Castle v The Queen* (2016) 259 CLR 449 at 472-473 [65]-[68]; *Kalbasi v Western Australia* (2018) 264 CLR 62 at 71 [15]; *Hofer v The Queen* (2021) 95 ALJR 937 at 957-958 [91]-[93], 965-966 [133].

36 (2020) 268 CLR 123 at 144-145 [37]-[38].

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performance by a court of criminal appeal of its functions does not involve the substitution of trial by an appeal court for trial by a jury, so, generally speaking, the appeal court should not seek to duplicate the function of the jury in its assessment of the credibility of the witnesses where that assessment is dependent upon the evaluation of the witnesses in the witness-box. The jury performs its function on the basis that its decisions are made unanimously, and after the benefit of sharing the jurors' subjective assessments of the witnesses. Judges of courts of criminal appeal do not perform the same function in the same way as the jury, or with the same advantages that the jury brings to the discharge of its function.

... The assessment of the weight to be accorded to a witness' evidence by reference to the manner in which it was given by the witness has always been, and remains, the province of the jury." (footnote omitted)

42 Where proof of guilt is wholly dependent on acceptance of the complainant's evidence, and a misdirection may have affected that acceptance, the appellate court cannot accord the weight to the verdict of guilty which it otherwise might³⁷. The majority of the Court of Appeal erred in placing weight on the verdicts because, as McMurdo JA observed, those verdicts might have been affected by the misuse of the impugned evidence in the absence of a direction to disregard that evidence.

43 The majority of the Court of Appeal's assessment that the impugned evidence did not impact upon the credibility or reliability of the complainant's evidence ignored the significantly prejudicial nature and effect of that evidence, as do the respondent's submissions that the evidence was "neutral" and "incapable" of affecting the jury's assessment. It could only have been the potentially prejudicial effect of the impugned evidence that made it a miscarriage of justice for the trial judge to have failed to direct the jury to ignore that evidence.

44 When regard is had to the young age of the complainant and the evidence of her previous single experience of oral sex, it is not difficult to envisage one or more jurors using "life experience", in accordance with the prosecutor's invitation, to conclude that the impugned evidence supported the complainant's version of events, or that it dispelled doubts that they might otherwise have held about her version of events. For example, one or more jurors may have applied what they considered to be "life experience" about the relative likelihood of possible explanations for the complainant's positive test for HSV-1. The prospect that one or more jurors relied upon the impugned evidence is enhanced by the volume of

37 *Collins v The Queen* (2018) 265 CLR 178 at 191-192 [36]; *Hofer v The Queen* (2021) 95 ALJR 937 at 951-952 [60], 965-966 [133].

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that evidence and the attention that was given to the impugned evidence over the course of the trial.

45 Further, and contrary to the majority's reasoning, the absence of any clear direction from the trial judge to the jury to disregard the impugned evidence left the jury free to "make of that" what they would with the benefit of their "life experience", as the prosecutor had suggested the jury might do. In effect, the jury were invited to employ the impugned evidence as they saw fit. In those circumstances, it was not possible for the Court of Appeal to assess whether guilt was proved beyond reasonable doubt at trial.

Conclusion

46 The appeal must be allowed. The order of the Court of Appeal dated 8 May 2020 dismissing the appeal must be set aside and, in lieu thereof, there will be an order that the appellant's appeal to that Court be allowed, the appellant's convictions be set aside and a new trial be had.

