

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

MATHEW CUCU BRAWN

APPELLANT

AND

THE KING

RESPONDENT

Brawn v The King
[2025] HCA 20
Date of Hearing: 4 December 2024
Date of Judgment: 7 May 2025
A20/2024

ORDER

- 1. Appeal allowed.*
- 2. Set aside the order made by the Court of Appeal of the Supreme Court of South Australia on 15 September 2022 and, in lieu thereof, the appellant's appeal to the Court of Appeal be allowed, his conviction set aside, and a new trial ordered.*

On appeal from the Supreme Court of South Australia

Representation

S G Henchcliffe KC with A J Culshaw for the appellant (instructed by Caldicott & Isaacs Lawyers)

M G Hinton KC with K J Draper and W M Scobie for the respondent (instructed by Director of Public Prosecutions (SA))

R J Sharp KC with T M Wood for the Commonwealth Director of Public Prosecutions, intervening (instructed by Office of the Director of Public Prosecutions (Cth))

B A Hatfield SC with E R Nicholson for the Director of Public Prosecutions (NSW), intervening (instructed by Solicitor for Public Prosecutions (NSW))

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CATCHWORDS

Brawn v The King

Criminal practice – Appeal – Irregularity in criminal trial – Where principal issue at trial was whether perpetrator was appellant or another adult member of complainant's community – Where after trial prosecution disclosed appellant's father had been charged with sexual offences against another child – Where appellant appealed conviction on ground that there had been a miscarriage of justice – Where Court of Appeal of Supreme Court of South Australia found prosecution breached prosecution's common law duty of disclosure – Where Court of Appeal found no miscarriage of justice because appellant did not demonstrate that defence would have been conducted differently but for breach of duty of disclosure – Whether Court of Appeal erred in finding no miscarriage of justice – Whether error or irregularity must be material to establish miscarriage of justice.

Words and phrases – "all relevant evidence", "appeal", "burden", "categories of potential miscarriages of justice", "character evidence", "common form criminal appeal provision", "concession", "conviction set aside", "could realistically have affected the reasoning of the jury to a verdict of guilty", "disclosure after the trial", "duty of disclosure", "error or irregularity", "fanciful or improbable", "final address", "forensic utility", "fundamental", "identity of the perpetrator", "informing a relevant line of inquiry", "maintaining an unlawful sexual relationship with a child under the age of 17 years", "materiality", "miscarriage of justice", "negative proposition", "new trial ordered", "opening address", "perpetrator", "proviso", "third limb".

Criminal Procedure Act 1921 (SA), s 158.

1 GAGELER CJ, GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ. After a trial by jury in the District Court of South Australia, the appellant was convicted of an offence of maintaining an unlawful sexual relationship with a child under the age of 17 years,¹ namely a girl who was aged between 5 and 8 years during the period the offence was committed.² The principal issue at the appellant's trial was whether the perpetrator was the appellant or another adult member of the complainant's community. According to one witness, the complainant said she was abused by her "uncle". Like other children in her community, the complainant referred to elder males within that community, including the appellant's father ("X"), as "uncle".

2 The appellant appealed his conviction. The Court of Appeal of the Supreme Court of South Australia found that the prosecution breached its common law duty of disclosure by failing to disclose to the appellant and his legal representatives that X had been charged with committing unlawful sexual acts against a teenage girl during a period that overlapped with the period of the indictment. However, the Court of Appeal held that there was no miscarriage of justice because it had not been demonstrated that, had that disclosure been made prior to or during the trial, the appellant's defence either "would" or "might" have been conducted differently.³

3 For the reasons that follow, where it has been shown that there was error or irregularity in a criminal trial, such as the breach of the prosecution's duty of disclosure that occurred in this case, then to establish a miscarriage of justice it must be shown that the error or irregularity was material in the sense that the error or irregularity could realistically have affected the reasoning of the jury to its verdict. The Court of Appeal erred to the extent that it required that it be demonstrated that the appellant's defence *would* have been conducted differently but for the error or irregularity and erred in failing to conclude that a miscarriage of justice was demonstrated. Accordingly, the appeal should be allowed, the appellant's conviction set aside and a new trial ordered.

1 *Criminal Law Consolidation Act 1935* (SA), s 50(1).

2 As the complainant was a child when the offence the subject of the appeal was committed, her name must not be published: *Evidence Act 1929* (SA), s 71A(4).

3 *Brawn v The King* (2022) 141 SASR 465 at 480 [83]-[84].

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Materiality and miscarriages of justice

4 Section 158(1) and (2) of the *Criminal Procedure Act 1921* (SA) enact the "common form" criminal appeal provision for appeals from a conviction on indictment.⁴ Such an appeal may be brought as of right on any ground that involves a question of law alone or with the permission of the Court of Appeal on any other ground.⁵ Subject to s 158(2), s 158(1) enables and requires⁶ the Court of Appeal, when determining such an appeal, to allow the appeal if at least one of three limbs is satisfied, namely: (1) the verdict of the jury is unreasonable or cannot be supported having regard to the evidence; (2) the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law; or (3) on any ground there was a miscarriage of justice. Section 158(2) provides that the Court of Appeal may, notwithstanding that the point raised in an appeal might be decided in the appellant's favour, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred ("the proviso").

5 This appeal was heard immediately following the appeal in *MDP v The King*.⁷ The parties in this proceeding and in *MDP*, as well as the Commonwealth Director of Public Prosecutions and the New South Wales Director of Public Prosecutions ("the NSW DPP"), who each intervened in both appeals, made extensive submissions concerning the construction of the second and third of these limbs. However, the only questions of principle raised by this appeal are whether, in the case of an error or irregularity affecting an appellant's trial, an appellate court must be satisfied that the error or irregularity was material before it can be

4 *Criminal Code* (Qld), s 668E(1); *Criminal Appeal Act 1912* (NSW), s 6(1); *Criminal Code* (Tas), s 402(1); *Supreme Court Act 1933* (ACT), s 37O(2); *Federal Court of Australia Act 1976* (Cth), s 30AJ(1); *Criminal Code* (NT), s 411(1); *Criminal Appeals Act 2004* (WA), s 30(3). cf *Criminal Procedure Act 2009* (Vic), s 276(1).

5 *Criminal Procedure Act 1921* (SA), s 157(1)(a)(i), (a)(ii).

6 See *Davies and Cody v The King* (1937) 57 CLR 170 at 180; *Chamberlain v The Queen* [No 2] (1984) 153 CLR 521 at 531; *Kirkland v The Queen* [2021] SASCA 14 at [163].

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concluded that there was a miscarriage of justice within the meaning of the third limb of s 158(1) and, if so, how the question of materiality is to be determined.

6 With the exception of the appellant in *MDP* and the NSW DPP, all the parties and intervenors in both appeals submitted that, before an error or irregularity in a trial constitutes a miscarriage of justice, it must be material and described that threshold by reference to passages from this Court's decisions in one or more of *Hofer v The Queen*,⁸ *Edwards v The Queen*⁹ and *HCF v The Queen*.¹⁰ The appellant in *MDP* submitted that there was a credible argument that there is no such threshold but in the alternative embraced the approach of Edelman and Steward JJ in *HCF*.¹¹

7 The NSW DPP contended that the authorities suggested that the relevant threshold differed according to the nature of the asserted miscarriage, including the nature of the asserted error or irregularity. The NSW DPP cited as an example this Court's decision in *Huxley v The Queen*¹² where a complaint about the content of a jury direction was addressed on the basis of what the jury *would* have understood the direction to convey and whether overall it *would* have deflected the jury from its fundamental task of deciding whether the prosecution had proved its case beyond reasonable doubt.¹³ However, at least to the extent that such a complaint falls within the third limb, that analysis is directed to an anterior inquiry,

8 (2021) 274 CLR 351.

9 (2021) 273 CLR 585.

10 (2023) 97 ALJR 978; 415 ALR 190.

11 (2023) 97 ALJR 978 at 996 [82]; 415 ALR 190 at 211.

12 (2023) 98 ALJR 62; 416 ALR 359.

13 *Huxley v The Queen* (2023) 98 ALJR 62 at 72 [40]-[41], 75 [61]-[62], 76 [68]; 416 ALR 359 at 370-371, 375, 376, citing *Hargraves v The Queen* (2011) 245 CLR 257. See also *Huxley* (2023) 98 ALJR 62 at 70 [30]; 416 ALR 359 at 368.

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namely whether there was a misdirection;¹⁴ ie, whether there was an error or irregularity, and not whether it was material.

The test for materiality

8 Read literally, the statement in *Weiss v The Queen*¹⁵ that a "'miscarriage of justice' ... was *any* departure from trial according to law, regardless of the nature or importance of that departure" and similar statements in other decisions of this Court¹⁶ can be taken as saying that any error or irregularity in, or in relation to, a criminal trial need not have any possible effect on the trial and verdict before it constitutes a miscarriage of justice. However, as the parties' submissions disclose, other statements in this Court have referred to a materiality threshold which must be overcome before it can be said that an error or irregularity that has occurred in, or in relation to, a criminal trial amounts to a miscarriage of justice, although the formulations of that threshold have differed.¹⁷ We confirm that there is such a threshold. At the invitation of the parties, we now harmonise those various formulations as follows.

9 A common circumstance relied on as giving rise to a miscarriage of justice is that there was an error or irregularity in the trial at which the appellant was convicted; that is, some defect in the trial such as a departure from the rules of evidence or procedure, improper cross-examination by a crown prosecutor¹⁸ or a misstatement of fact by the trial judge in the summing up.¹⁹ If such an error or

14 *Huxley* (2023) 98 ALJR 62 at 69 [24], 70 [30], 76 [67]; 416 ALR 359 at 366, 368, 376.

15 (2005) 224 CLR 300 at 308 [18] (emphasis in original).

16 *Kalbasi v Western Australia* (2018) 264 CLR 62 at 69-70 [12]; *GBF v The Queen* (2020) 271 CLR 537 at 547 [24].

17 *Hofer v The Queen* (2021) 274 CLR 351 at 364-365 [41], 366-367 [47], 388-392 [114]-[123], 392 [125], 393 [130]; *Edwards v The Queen* (2021) 273 CLR 585 at 609 [74]; *HCF v The Queen* (2023) 97 ALJR 978 at 981-982 [2], 996 [82]; 415 ALR 190 at 191-192, 211.

18 Such as in *Hofer* (2021) 274 CLR 351.

19 Such as in *Simic v The Queen* (1980) 144 CLR 319 at 333-334.

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irregularity was "fundamental" in the sense discussed in the authorities²⁰ then there will be a miscarriage of justice and no occasion to address the proviso separately will arise. The establishment of a fundamental error or irregularity will necessarily mean that there was a substantial miscarriage of justice.²¹

10 For other errors or irregularities to constitute a miscarriage of justice, they must be material in the sense that the error or irregularity could realistically have affected the reasoning of the jury to a verdict of guilty that was returned by the jury in the criminal trial that occurred. In this context, "could" is to be understood as meaning "having the capacity to", and "realistically" distinguishes the relevant assessment of the possibility of a different outcome from a possibility that is fanciful or improbable. This threshold to establish that an error or irregularity is material must be satisfied by the appellant, but that burden is not onerous. It does not invite an analysis of whether, but for the error, the accused might or might not have been found guilty.

11 In each instance where the materiality threshold is met, the error or irregularity will be one that could realistically have affected the jury's reasoning to a verdict of guilty. The inquiry required by this materiality threshold or test does not collapse into the inquiry undertaken in applying the proviso. The question posed by the materiality test looks to the possible effect of the error or irregularity on the trial that was had. In contrast, the task required of an appellate court in applying so much of the proviso that requires it to address the "negative proposition" stated in *Weiss*,²² namely by asking whether "the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty", is qualitatively different from asking whether an error or irregularity could realistically have affected the jury's reasoning to the verdict of guilty that was returned by the jury in the trial that occurred. The proviso was addressed by all members of the Court in *Hofer*. As the

20 *Wilde v The Queen* (1988) 164 CLR 365 at 373; *Katsuno v The Queen* (1999) 199 CLR 40 at 60 [35]; *Weiss v The Queen* (2005) 224 CLR 300 at 317-318 [46]; *Hofer* (2021) 274 CLR 351 at 391-392 [123], referring to *Maher v The Queen* (1987) 163 CLR 221 at 234; *Hoang v The Queen* (2022) 276 CLR 252 at 268 [42]; *Huxley* (2023) 98 ALJR 62 at 72-73 [44]; 416 ALR 359 at 371.

21 *HCF* (2023) 97 ALJR 978 at 982-983 [7], 996 [83]; 415 ALR 190 at 193, 211.

22 (2005) 224 CLR 300 at 317 [44].

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judgments in *Hofer* illustrate,²³ it is conceivable but not inevitable that an appellate court, having concluded that an error or irregularity was such that a miscarriage of justice has been established, could nevertheless be satisfied of the negative proposition, depending on the nature of the evidence and the nature of the error or irregularity.²⁴

12 The categories of potential miscarriages of justice are not closed. A review of the multitude of circumstances which have been found to constitute a miscarriage of justice was undertaken by Gageler J in *Hofer*.²⁵ Many but not all of those cases involved an actual or alleged error or irregularity in the trial that led to a conviction. Subject to what follows, in each of those instances of error or irregularity where the conviction was set aside the above test of materiality was satisfied. For example, in *Cesan v The Queen*²⁶ the relevant defect at the trial arose from the conduct of the trial judge in periodically sleeping during the trial. However, it was the "repeated distraction of the jury [because the trial judge was asleep] from attending to the evidence at various stages of the trial, including when one of the accused was giving his evidence" that constituted a miscarriage of justice.²⁷ That conclusion conforms with the above test of materiality.

13 Three matters should be noted. First, in stating the test of materiality applicable where there is an error or irregularity we are not addressing what is sufficient to establish a miscarriage of justice in those cases involving fresh, much less new, evidence. There is established authority as to the approach to be adopted in those cases.²⁸

23 (2021) 274 CLR 351 at 367 [49], 374-375 [72]-[77], 391-392 [123], 393 [130].

24 See *Kalbasi* (2018) 264 CLR 62 at 83 [57].

25 (2021) 274 CLR 351 at 388-389 [115].

26 (2008) 236 CLR 358.

27 *Cesan v The Queen* (2008) 236 CLR 358 at 391 [112], 393 [119].

28 *Gallagher v The Queen* (1986) 160 CLR 392 at 399, 402, 414, 421; *Rodi v Western Australia* (2018) 265 CLR 254 at 263 [28].

14 Second, we are also not addressing other categories of cases where there is
 an alleged miscarriage of justice that does not involve an alleged error or
 irregularity.²⁹

15 Third, and finally, we are not addressing whether or not the establishment
 of an error or irregularity that is material in the sense explained above will be
 sufficient to establish a miscarriage of justice in all circumstances, including those
 circumstances where that error or irregularity was the product of, or contributed to
 by, the accused as a result of rational forensic decisions of their trial counsel.³⁰
 That issue does not arise in this case.

16 Subject to those three matters, the establishment of a material error or
 irregularity will establish a miscarriage of justice warranting the allowing of the
 appeal and consideration of the appropriate remedy subject to any invocation of
 the proviso. The burden of satisfying the proviso rests upon the prosecution and
 the proviso, including the negative proposition, is to be addressed by the appellate
 court in accordance with existing authority, principally *Weiss*.³¹ If the burden
 imposed on the prosecution by the proviso is discharged, the appeal must be
 dismissed. Otherwise, the appeal must be allowed.

The prosecution and defence cases

17 The indictment alleged that the offence was committed between 1 April
 2016 and 1 January 2019. The appellant turned 18 years of age in April 2016. Both
 the complainant and the appellant were members of the Sudanese community, and
 their families were very close.

29 See, eg, *TKWJ v The Queen* (2002) 212 CLR 124 at 135 [33], 149-150 [79], 156
 [97], 157 [101], 157 [104]; *Nudd v The Queen* (2006) 80 ALJR 614 at 622 [24]; 225
 ALR 161 at 170; *Craig v The Queen* (2018) 264 CLR 202 at 215-216 [37].

30 See *Hamilton (a pseudonym) v The Queen* (2021) 274 CLR 531 at 555 [49], 557
 [54] and the cases there cited; *TKWJ* (2002) 212 CLR 124 at 132-133 [24]-[25], 133
 [28]; *Orreal v The Queen* (2021) 274 CLR 630 at 639-640 [14]-[18].

31 See also *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92; *Castle v The
 Queen* (2016) 259 CLR 449.

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18 To prove the offence, the prosecution was required to prove the existence of a relationship "in which" two or more unlawful sexual acts were committed.³² The prosecution relied on eight such acts and a relationship between the appellant and the complainant as close family friends as demonstrated by the complainant's description of the appellant as her "cousin".

19 The prosecution played to the jury recordings of two interviews the police conducted with the complainant in which she described those eight acts, as well as unlawful sexual acts committed against her prior to the appellant turning 18 years of age. In those interviews, the complainant identified the appellant as the perpetrator. Five of the eight acts were alleged to have occurred in the appellant's bedroom, two of the acts were said to have occurred in the complainant's bedroom and the other act was alleged to have occurred in the lavatory of a public park where the complainant and the appellant were attending the birthday party of another child.

20 The appellant gave evidence denying that he ever sexually abused the complainant. He called character evidence. He also adduced evidence from members of his family to contradict aspects of the evidence given by the complainant and other members of her family called as part of the prosecution case concerning the configuration of rooms in the various households, the sleeping arrangements, whether the appellant and the complainant were discovered alone in a bedroom together and the period of time he attended the birthday party in the park. X was not called to give evidence by either the prosecution or the defence.

21 Immediately after the prosecutor's opening address, the appellant's trial counsel told the jury that the commission of the sexual acts against the complainant was not in issue. Instead the principal issue was whether the complainant "is accurate and whether [the complainant] is reliable when she says it's [the appellant] who abused her".³³ This was reiterated when counsel opened the defence case and,

32 *R v M, DV* (2019) 133 SASR 470 at 476 [16], 478 [22]; *R v Mann (Question of Law Reserved on Acquittal (No 1 of 2020))* (2020) 135 SASR 457 at 464-465 [20]. See also *MK v The King* (2023) 112 NSWLR 96.

33 The appellant's trial counsel was permitted to address the jury immediately after the prosecution opening for the limited purpose of outlining the issues in contention between the prosecution and the defence: *Criminal Procedure Act*, s 136(1).

as noted below, in counsel's final address. The trial judge summarised the defence case accordingly.

22 A significant part of the defence case fixed upon evidence that when the complainant first complained about her abuse she said that her "uncle" sexually abused her. The prosecution called a school support worker who told the jury that, two days prior to the complainant's first interview with the police, she told the support worker that the complainant felt "sad when [she] remember[ed] things that [her] uncle [did] to [her]". In cross-examination the support worker agreed that in her written statement she described the complainant referring to her "uncle" three times and the complainant describing this "uncle" as having "bought things for her that she didn't want". A character witness called on behalf of the appellant said that it is common for children in the Sudanese community to call adults "uncle" or "aunty" rather than their names. Each of the complainant's parents told the jury that their children referred to X as "uncle". The complainant said that she called X "uncle".

23 The complainant was cross-examined about her complaint to the support worker. She said she was "not sure" if she told the support worker that she was abused by her "uncle" or told the support worker that her "uncle" bought things for her that she did not want. The complainant said that she "remember[ed] an uncle" who bought her a packet of lollies she did not want but the complainant could not remember his name. She denied that this "uncle" abused her. At the conclusion of the cross-examination of the complainant it was put to her that she was not abused by the appellant and not abused in his bedroom. In re-examination the complainant denied that she told the support worker that her "uncle" "did things" to her. The complainant said that she also regarded the appellant as her "uncle". The complainant was not asked whether X ever abused her. She was not asked how many male members of her community she referred to as "uncle".

24 In her closing address to the jury, the appellant's trial counsel referred to the evidence of the support worker and asked (rhetorically) why the complainant "has changed or changes her story from saying it's [her] uncle who's abused her to nominating" the appellant. Counsel suggested that it was a "real possibility" that "*some other 'uncle'* of [the complainant] in the Sudanese community has, in fact, abused her" (emphasis added). Counsel submitted that "[f]or some reason unknown to the defence" such as "some family dynamic, some fear of power or position ... within the Sudanese community" or some other reason the complainant had "decided to keep silent about *that man*" (emphasis added). Counsel reminded

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the jury of the character witness' evidence to the effect that "all senior members of the Sudanese community are respectfully ... referred to as uncle and aunty".

Disclosure after the trial

25 On 29 July 2019, X was charged with committing six sexual offences against his biological niece, "Y", between November 2018 and May 2019 when Y was aged between 15 and 16 years of age. He was committed for trial on 23 July 2020. The proceedings were discontinued in August 2020 before he was arraigned.

26 The appellant was tried in June 2021 and sentenced on 4 August 2021 to a substantial term of imprisonment. Soon after the appellant was sentenced, counsel for the prosecution disclosed to the appellant's legal representatives that X had previously been charged with sexual offences against a child. According to the Court of Appeal, counsel for the prosecution expressed "some surprise" when the appellant's legal representatives explained that this information had not previously been disclosed to them.³⁴ The appellant had been aware of the charges against X but had not disclosed them to his legal representatives because he did not understand the relevance or significance of that information. It was not suggested that the solicitors in the Office of the Director of Public Prosecutions ("ODPP") who instructed counsel for the prosecution at the appellant's trial were aware that charges had previously been laid against X.

27 The appellant made inquiries of the ODPP and was provided with a "facts of charge" document, which provided a detailed account of the offences allegedly committed by X. It seems likely that the document was derived from a statement given by Y or an interview conducted with her.

Proceedings in the Court of Appeal

28 The appellant appealed his conviction on the basis that the failure by the prosecution to make proper disclosure of the charges against X resulted in a miscarriage of justice.

29 It was common ground in the Court of Appeal and in this Court that it did not matter whether, at the relevant time, knowledge of the charges against X was

34 *Brawn* (2022) 141 SASR 465 at 469 [18].

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only in the possession of the police or whether that knowledge was shared by the ODPP. Collectively the "prosecution" could be taken to have had that knowledge.³⁵

30 The Court of Appeal described the duty of disclosure as "a duty owed to the court, which requires that the prosecutor disclose as soon as practicable all material available to the prosecutor, or of which the prosecutor becomes aware, which could constitute evidence relevant to the guilt or innocence of the accused".³⁶ However, the Court found that the prosecution had not breached the duty in that respect because in argument before the Court of Appeal the appellant's counsel was said to have conceded that the appellant had not been deprived of any opportunity to adduce admissible evidence that X had engaged in unlawful sexual intercourse with another child.³⁷ In this Court the appellant disputed whether any such concession was made.

31 The Court of Appeal also held that the duty of disclosure extends to requiring disclosure of material that "may be of forensic utility even if it can only be used by the defence indirectly before or at the trial", such as "informing a relevant line of inquiry", assisting in identifying witnesses or assisting in the questioning of witnesses at the trial.³⁸ The Court of Appeal found that the prosecution had not complied with this aspect of the duty because, by no later than the defence opening, the "undisclosed material" (ie, the fact of the charges and the "facts of charge" document) may have assisted the appellant's cross-examination of various witnesses on the topic of the identity of the offender.³⁹ Nevertheless, the Court of Appeal concluded that there was no miscarriage of justice because the appellant failed to demonstrate that, had the undisclosed material been provided, his defence either "would" or "might" have been conducted differently.⁴⁰

35 See, eg, *Mallard v The Queen* (2005) 224 CLR 125 at 132-133 [16]; *Director of Public Prosecutions Act 1991* (SA), s 10A.

36 *Brawn* (2022) 141 SASR 465 at 473 [36].

37 *Brawn* (2022) 141 SASR 465 at 475 [50], 480 [83].

38 *Brawn* (2022) 141 SASR 465 at 475 [52].

39 *Brawn* (2022) 141 SASR 465 at 476 [56].

40 *Brawn* (2022) 141 SASR 465 at 480 [83]-[84].

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Non-disclosure and miscarriage of justice

32 Ground 1 of the appeal contends that the Court of Appeal erred in finding that the prosecution's failure to comply with its duty of disclosure did not result in a miscarriage of justice. This ground is premised on the Court of Appeal having accurately recorded the concession of the appellant noted above.⁴¹

33 Decisions of this Court have accepted that at common law the prosecution must, at least, disclose all relevant evidence to an accused and the failure to do so may warrant the quashing of a conviction as a miscarriage of justice.⁴² As there was no challenge to the Court of Appeal's finding that there was a failure on the part of the prosecution to comply with its duty of disclosure, it is unnecessary to address how far the scope of that duty extends beyond disclosure of such evidence.⁴³

34 So far as assessing the effect of a breach of the duty is concerned, in both *Mallard v The Queen*⁴⁴ and *Grey v The Queen*⁴⁵ the convictions were set aside after the Court considered the potential impact of the non-disclosure on the *capacity* of the accused to refute a central component of the prosecution case and undermine

41 See above at [30].

42 *Mallard* (2005) 224 CLR 125 at 133 [17] per Gummow, Hayne, Callinan and Heydon JJ, 150-151 [64]-[67] per Kirby J. See also *Grey v The Queen* (2001) 75 ALJR 1708 at 1712 [18], 1713 [23] per Gleeson CJ, Gummow and Callinan JJ, 1718 [50], 1721 [63] per Kirby J; 184 ALR 593 at 598, 599-600, 607, 611; *Edwards* (2021) 273 CLR 585 at 605-606 [63]-[64].

43 See *Edwards* (2021) 273 CLR 585 at 595 [26], 600-601 [48]. See also *R v Keane* [1994] 1 WLR 746 at 752; [1994] 2 All ER 478 at 484; *R v Brown (Winston)* [1998] AC 367 at 376-377; *R v Reardon [No 2]* (2004) 60 NSWLR 454 at 468 [48]; *R v Spiteri* (2004) 61 NSWLR 369 at 373-374 [17]-[20]; *R v Livingstone* (2004) 150 A Crim R 117 at 126-127 [44]-[45]; *R v Lipton* (2011) 82 NSWLR 123 at 145-147 [77].

44 (2005) 224 CLR 125.

45 (2001) 75 ALJR 1708; 184 ALR 593.

its credibility.⁴⁶ That approach accords with the test of materiality set out above. Otherwise, it suffices to observe that the lost opportunity to cross-examine a witness on material that should have been disclosed bears upon the assessment of whether a failure to comply with the duty has occasioned a miscarriage of justice.⁴⁷

35 The unchallenged breach of the duty of disclosure in this case amounted to an error or irregularity in the appellant's trial. The appellant did not contend that the error or irregularity was "fundamental" in the sense noted above. Instead, the appellant submitted that, once the Court of Appeal accepted that the undisclosed material may have assisted the conduct of the defence case and the appellant's cross-examination of various witnesses on the topic of the identity of the perpetrator, then it followed that the irregularity was material so as to constitute a miscarriage of justice. The appellant further submitted that the absence of the undisclosed material could have realistically affected the forensic choices available to the appellant's trial counsel as to the emphasis to be placed on who might have perpetrated the sexual abuse described by the complainant. It was also submitted that, consistent with counsel's ethical obligations, in the absence of the undisclosed material counsel could not have suggested to the jury that X was or may have been the perpetrator.

36 The course of the appellant's trial is outlined above. The respondent embraced the Court of Appeal's characterisation of the defence case as being "diffuse in its focus" in that, without being specific, the appellant's trial counsel had pointed to "other males" in the complainant's community when suggesting that the complainant was being untruthful about the identity of her abuser. The Court of Appeal described the defence as contending "that it was reasonably possible that it was not the appellant but one *or more of those other males*, including but not limited to [X], who had committed the offending" (emphasis added).⁴⁸ The Court of Appeal stated that, rather than narrowing the focus to any one member of the Sudanese community, including X, the appellant's trial counsel had adopted this approach because the complainant's account was specific to the appellant and to

46 *Mallard* (2005) 224 CLR 125 at 135 [23]; *Grey* (2001) 75 ALJR 1708 at 1712 [18]; 184 ALR 593 at 598.

47 *Grey* (2001) 75 ALJR 1708 at 1712 [18]; 184 ALR 593 at 598.

48 *Brawn* (2022) 141 SASR 465 at 480 [81].

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those places the appellant attended (ie, the birthday party and his own bedroom).⁴⁹ The Court of Appeal observed that it would not have been credible to substitute another male as the perpetrator because, for example, it would not have been credible to suggest that another male abused the complainant in the appellant's bedroom.⁵⁰

37 However, the Court of Appeal mischaracterised the defence case. It is correct that the defence did not seek to identify any specific male as the perpetrator beyond someone who could be characterised as the complainant's "uncle". However, the defence case focussed on a single alternative perpetrator and did not raise the possibility of multiple perpetrators. Thus, it was submitted to the jury that "some other 'uncle'" was the perpetrator, being "that man" that the complainant had decided to keep silent about. The defence case sought to confront the complainant's account that instances of sexual abuse were committed in the appellant's bedroom and other locations such as the birthday party by suggesting that the complainant was either lying or mistaken about the appellant being the perpetrator, was either lying or mistaken that any abuse took place in his bedroom, and was otherwise unreliable. The defence case that there was an alternative perpetrator may have been enhanced if the appellant's trial counsel had directed the jury's attention toward a particular "uncle" (ie, X) who was likely to have had a reasonable level of contact with the complainant over the relevant period in similar if not the same locations as the complainant said the sexual abuse took place.

38 The respondent contended that the absence of disclosure was immaterial as the defence case included the possibility that X was one of the "uncles" she complained about. The respondent pointed to evidence of the complainant, adduced in chief and in cross-examination, that placed X in the complainant's home for part of the period of the offence (and the period of the "uncharged acts") and also at the birthday party. The respondent contended that the appellant's trial counsel was not restrained in nominating X as the perpetrator because that course would have been justified by the evidence adduced about a complaint made by the complainant against her "uncle". The respondent further contended that possession of the undisclosed material at the time of the trial would not have enhanced trial counsel's capacity to demonstrate that it was X who was the perpetrator.

49 *Brawn* (2022) 141 SASR 465 at 479 [78].

50 *Brawn* (2022) 141 SASR 465 at 480 [79].

39 It is doubtful that, without the undisclosed material, there was any proper basis for the appellant's trial counsel to have positively suggested that X may have been the perpetrator.⁵¹ The appellant's trial counsel would have been justified in concluding that she could not take that course. On the Court of Appeal's findings, the appellant's trial counsel should have at least been informed that a prosecuting authority considered there was a reasonable basis for alleging that X had committed similar sexual offences against a teenage girl in a period that overlapped with the offence allegedly committed by the appellant and should have been provided with the details of those alleged offences as set out in the "facts of charge" document. The appellant's trial counsel could have reasonably concluded that the details of the alleged offences in that document were taken from a statement of or interview with that teenage girl. If the appellant's trial counsel had been provided with the undisclosed material, then, given the evidence of the complainant against her "uncle", counsel would have had a sufficient basis to have submitted that it was reasonably possible that X perpetrated the sexual abuse described by the complainant and cross-examined the complainant towards making such a potential submission. At the very least, any assessment made by counsel that such a course was justified would have had a far more sound basis than without such disclosure.

40 As it was, without the required disclosure by the prosecution, the defence case did not seek to elevate X as a possible perpetrator beyond any other member of the ill-defined class of male members of the complainant's community that might have been regarded by the complainant as her "uncle". While there was evidence adduced at the trial that X was nearby at the time of some of the instances of offending described by the complainant, the cross-examination of her on that topic concerned X's presence and the presence of other family members as matters bearing only on the opportunity for the appellant to have abused the complainant undetected. The cross-examination of the complainant was not directed to establishing X as a possible perpetrator. For example, there was no cross-examination directed to establishing the possibility that X was alone with the

51 See *Clyne v The New South Wales Bar Association* (1960) 104 CLR 186 at 200-201. As at June 2021, r 64 of the South Australian Bar Association Barristers' Conduct Rules provided that "[a] barrister must not allege any matter of fact amounting to criminality, fraud or other serious misconduct against any person unless the barrister believes on reasonable grounds that: (a) available material by which the allegation could be supported provides a proper basis for it; and (b) the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client and the case if it is not made out".

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complainant at or in the vicinity of at least some of the locations at which she described the abuse as having occurred. Similarly, the closing submission that "some other 'uncle'" abused the complainant made no reference to X. If proper disclosure had been made, that may have become a submission that "some other 'uncle'" was most likely X or there was a reasonable possibility that was the case. In the end result, the absence of disclosure meant that either a realistic basis for identifying X as a possible perpetrator was denied to the appellant, or he was at least substantially impaired in raising it.

41 It may be that, if the undisclosed material had been provided to the appellant's legal representatives, the appellant's defence would not have been conducted differently. There may have been forensic disadvantages to tethering the defence case too closely to nominating a specific "uncle" as the possible perpetrator. For example, as noted by the respondent, for a period of time when some of the sexual acts were said by the complainant to have occurred "nearly every day", there was evidence that X was in Melbourne. The appellant may have also been hesitant to allow his trial counsel to conduct his case in a manner that potentially implicated X.⁵²

42 However, as explained, the test for whether an error or irregularity is material so as to amount to a miscarriage of justice looks to the possible effect on the trial that was had; it is not a counterfactual inquiry into a trial that did not occur. If the appellant's trial counsel had sought to identify X as the perpetrator, or the most likely perpetrator amongst the possible "uncles", then that might have been a better or worse defence case than was in fact run. But that is beside the point. What matters is that the appellant was denied the opportunity to conduct a case that was different from the case that was run, and that difference could realistically have affected the reasoning of the jury to the verdict of guilty.⁵³

43 Once it is accepted, as it was here, that there was a breach of the duty of disclosure then a miscarriage of justice will have been established if it can be concluded that the breach could realistically have affected the reasoning of the jury to the verdict of guilty that was returned. To the extent that the Court of Appeal addressed that issue by reference to whether it "would" have affected the course of the trial and thus the jury's reasoning, their Honours erred. There was evidence at

52 See South Australian Bar Association Barristers' Conduct Rules, r 64(b).

53 cf *Edwards* (2021) 273 CLR 585 at 595 [28], 596 [30], 609 [75].

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the trial that the complainant had nominated an "uncle" as the perpetrator and that the complainant regarded X as an "uncle". Given that evidence and the manner in which the trial was conducted, the denial to the appellant of the opportunity, or at least the enhanced opportunity, to point to X as a possible perpetrator that was occasioned by the non-disclosure of material suggesting X had committed similar sexual abuse against a teenage girl is a matter that could realistically have affected the reasoning of the jury to the verdict of guilty.

44 Ground 1 of the appeal should be upheld.

The alleged concession

45 Ground 2 of the appeal contends that the Court of Appeal erred in relying on what was understood to be a concession by the appellant that the prosecution's non-disclosure had not deprived him of any opportunity to adduce admissible evidence that X had engaged in unlawful sexual intercourse with another child.

46 Given that the appellant succeeds on ground 1, it is not necessary to address this ground. In any event, the argument in the Court of Appeal about whether, had disclosure been made, the appellant might have adduced additional evidence proceeded on the basis that the only "disclosure" which should have been made was of the "facts of charge" document and the other information noted above. However, disclosure of those documents did not necessarily discharge the prosecution's duty of disclosure and we should not be taken as necessarily accepting that it did so. It is not known whether there was other material that the prosecution was required to disclose, such as a copy of any statement provided by Y or any interview conducted with her, or whether there was any reason why such a statement or interview could not be provided. As the appellant's conviction will be set aside and a new trial ordered, it will be for the parties to address whether any further disclosure is required.

The proviso

47 By a notice of contention, the respondent sought to rely on the proviso⁵⁴ by contending that, if this Court found that there is no materiality threshold required to establish a miscarriage of justice, the appeal should be dismissed because no

54 *Criminal Procedure Act*, s 158(2).

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substantial miscarriage of justice actually occurred. However, as this Court has held there is such a materiality threshold, the notice of contention does not arise.

Conclusion

48 The appeal should be allowed and the order of the Court of Appeal dismissing the appellant's appeal against his conviction should be set aside. In lieu thereof the appellant's appeal to that Court should be allowed, his conviction set aside, and a new trial ordered.⁵⁵

55 *Criminal Procedure Act*, s 158(3).

