HIGH COURT OF AUSTRALIA

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

MDP APPELLANT

AND

THE KING RESPONDENT

MDP v The King
[2025] HCA 24
Date of Hearing: 3 December 2024
Date of Judgment: 18 June 2025
B72/2023

ORDER

1. *Grant special leave to appeal to raise grounds 2 to 4 of the amended notice of appeal filed on 14 June 2024.*

2. *Appeal allowed.*

3. *Set aside the order made by the Court of Appeal of the Supreme Court of Queensland on 27 June 2023 and, in its place, the appellant's appeal to the Court of Appeal be allowed, his convictions set aside, and a new trial ordered.*

On appeal from the Supreme Court of Queensland

Representation

S C Holt KC with S J Hedge for the appellant (instructed by Jasper Fogerty Lawyers)

G J Cummings with S J Muir for the respondent (instructed by Office of the Director of Public Prosecutions (Qld))

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

MDP v The King

Criminal practice – Appeal – Wrong decision on question of law – Where appellant convicted of sexual offences – Where Crown led evidence of appellant smacking complainant's backside as evidence of sexual interest – Where direction to jury permitted use of that evidence as propensity evidence – Where appellant's trial counsel did not object to admission of evidence or to direction – Whether admission of evidence wrong decision on question of law – Whether direction wrong decision on question of law – Whether wrong decision on question of law has materiality threshold – Whether direction material – Whether substantial miscarriage of justice.

Words and phrases – "appeal", "common form criminal appeal provision", "conduct of counsel", "context evidence", "could realistically have affected the reasoning of the jury to a verdict of guilty", "decision", "decision over objection", "direction to the jury", "error or irregularity", "evidence of sexual interest", "failure to object", "fundamental", "inadmissible evidence", "materiality", "misdirection", "*Pfennig* direction", "*Pfennig* test", "propensity direction", "propensity evidence", "propensity reasoning", "proviso", "question of law", "relationship evidence", "rule in *Pfennig*", "second limb", "sexual interest", "sexual offence", "substantial miscarriage of justice", "trial counsel", "wrong decision", "wrong decision on a question of law".

Criminal Code (Qld), s 668E.

1 GAGELER CJ. This appeal from the judgment of the Court of Appeal of the Supreme Court of Queensland in *R v MDP*[1] was heard contiguously with the appeal from the judgment of the Court of Appeal of the Supreme Court of South Australia in *Brawn v The King*[2] in order to facilitate consideration of issues unresolved in *Weiss v The Queen*[3] concerning the "common form" criminal appeal provision which governs the determination of appeals against convictions on indictments in most Australian jurisdictions.[4] The determination of each appeal was assisted by submissions on legal principle made during and after the hearings by the parties to both appeals and by the Commonwealth Director of Public Prosecutions and the New South Wales Director of Public Prosecutions, who were granted leave to intervene in both appeals.

2 These reasons for judgment are to be read with the unanimous reasons for judgment in *Brawn*.[5] Whereas those dealt principally with the "third limb" of the common form criminal appeal provision, which provides for an appeal against conviction to be allowed on the ground of a miscarriage of justice, these deal principally with the "second limb" of the common form criminal appeal provision, which provides for an appeal against conviction to be allowed on the ground of a wrong decision on any question of law.

3 The issues of legal principle concerning the second limb of the common form criminal appeal provision resolved in this appeal are those addressed by Gleeson, Jagot and Beech-Jones JJ under the headings "The meaning and operation of the second limb" and "The second limb and the conduct of counsel".[6] Together with Gordon and Steward JJ[7] and Edelman J,[8] I agree with the statement of the applicable legal principles there set out. The result is that the Court is unanimous in holding that: (1) a wrong decision on a question of law within the meaning of the second limb involves a wrong determination or response to a

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1 (2023) 309 A Crim R 63.

2 (2022) 141 SASR 465.

3 (2005) 224 CLR 300.

4 See reasons of Gordon and Steward JJ at [9]; reasons of Gleeson, Jagot and Beech-Jones JJ at [77].

5 [2025] HCA 20.

6 Reasons of Gleeson, Jagot and Beech-Jones JJ at [96]-[110].

7 Reasons of Gordon and Steward JJ at [9].

8 Reasons of Edelman J at [44].

question of law by the trial judge that has legal effect in the trial;[9] and (2) a wrong decision on a question of law, other than one that amounts to a "failure to observe the requirements of the criminal process in a fundamental respect",[10] cannot result in an appeal against conviction being allowed on the second limb unless the appellant can establish that the wrong decision could realistically have affected the reasoning of the jury to the verdict of guilty that was returned in the trial that occurred.[11]

4 In relation to the application of those principles in the circumstances of the appeal, I agree with Gordon and Steward JJ, as in relevant substance does Edelman J.

5 The outcome is that the Court is unanimous in finding that no decision on a question of law within the meaning of the second limb occurred when evidence of witness "K", inadmissible according to *Pfennig v The Queen*,[12] was admitted in the trial of MDP without objection. The Court is also unanimous in finding that the trial judge made a wrong decision on a question of law in directing, contrary to *Pfennig*, that it was open to the jury to treat that evidence of witness "K" as evidence of MDP having a propensity to have a sexual interest in the complainant. The direction amounted to a wrong decision on a question of law notwithstanding the failure of counsel for MDP to oppose the giving of the direction or to seek a redirection and irrespective of the accuracy of the inference drawn by the Court of Appeal that the conduct of counsel for MDP was calculated to take "forensic advantage"[13] of the direction, in that counsel considered that the evidence was "weak in support of an inference of sexual interest" and was "content to encourage the prosecution into clutching at such a weak argument in support of its case to give foundation to ... arguments about the weaknesses of the prosecution case".[14]

6 The sole issue on which the Court is divided is whether MDP has demonstrated that the erroneous direction could realistically have affected the

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9 Reasons of Gleeson, Jagot and Beech-Jones JJ at [99]-[103]; reasons of Gordon and Steward JJ at [30]-[31]; reasons of Edelman J at [56].

10 *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].

11 Reasons of Gleeson, Jagot and Beech-Jones JJ at [106]-[107]; reasons of Gordon and Steward JJ at [33]; reasons of Edelman J at [44], [46].

12 (1995) 182 CLR 461.

13 (2023) 309 A Crim R 63 at 73 [44].

14 (2023) 309 A Crim R 63 at 74 [45].

reasoning of the jury to the verdicts of guilty that were returned in the trial. The majority, comprising Gordon and Steward JJ, Edelman J and me, concludes that the direction could realistically have had that effect. For my part, I consider that the jury, attempting to discharge its sworn duty to find facts relevant to guilt applying the law as stated by the trial judge, could realistically have treated the evidence of witness "K" in the manner the trial judge directed was open – as evidence of MDP having a propensity to have a sexual interest in the complainant – in their reasoning to the verdicts of guilty that were returned in the trial of MDP that occurred.

7 The consequence of the second limb of the common form criminal appeal provision being found to be engaged, by the conclusion that a wrong decision on a question of law was made that could realistically have affected the reasoning of the jury to the verdicts of guilty, is that this Court exercising the powers of the Court of Appeal must allow MDP's appeal to that Court and set aside his convictions unless persuaded by the Crown, in terms of the proviso to the common form criminal appeal provision, that "no substantial miscarriage of justice has actually occurred"[15] in accordance with the principles set out in *Weiss*. Although the Crown filed a Notice of Contention under r 42.08.5 of the *High Court Rules 2004* (Cth) relying on the proviso, the argument presented by the Crown in support of the application of the proviso was insufficient to overcome the "negative proposition" in *Weiss* in that the argument failed to demonstrate that "the evidence properly admitted at trial proved, beyond reasonable doubt, [MDP's] guilt of the offence[s] on which the jury returned its verdict[s] of guilty".[16] Gordon and Steward JJ conclude that the proviso has not been demonstrated to be engaged. I agree, as does Edelman J.

8 The orders to be made by majority in the disposition of the appeal are accordingly those proposed by Gordon and Steward JJ.

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15 Section 668E(1A) of the *Criminal Code* (Qld).

16 (2005) 224 CLR 300 at 317 [44].

9 GORDON AND STEWARD JJ. This appeal turns on the second limb of the "common form" appeal provision for appeals from a conviction on indictment in s 668E(1) of the *Criminal Code* (Qld),[17] which requires the Court of Appeal of the Supreme Court of Queensland to allow an appeal against conviction if it is of the opinion "that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law". If there is a wrong decision on a question of law, then the conviction is set aside if that wrong decision was fundamental[18] to the trial, or, subject to the application of the proviso,[19] if that wrong decision was material, in the sense that it could realistically have affected the reasoning of the tribunal of fact to verdict in the trial that was had. The applicable principles in relation to the second limb are set out in the reasons of Gleeson, Jagot and Beech-Jones JJ.[20]

10 After a trial by jury in the District Court of Queensland, the appellant, MDP, was convicted of 16 counts on an indictment alleging he committed sexual offences against his stepdaughter between 2014 and 2019, when she was between 7 and 12 years of age. Relevantly, by an amended notice of appeal, MDP contended that his convictions should be set aside on the basis of a wrong decision on a question of law by the trial judge to give a propensity direction in relation to "evidence inadmissible as propensity evidence" (ground 2). The inadmissible evidence, given by the complainant's sister ("K"), was that MDP smacked the complainant's backside. That evidence was led as evidence demonstrating that MDP had a sexual interest in the complainant and was prepared to act on it ("the impugned propensity evidence").

11 In this case, there was a wrong decision by the trial judge on a question of law.[21] That wrong decision was embodied in a direction to the jury that permitted their use of the impugned propensity evidence. That wrong decision was not

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17 See also *Federal Court of Australia Act 1976* (Cth), s 30AJ(1) and (2); *Criminal Appeal Act 1912* (NSW), s 6(1); *Criminal Procedure Act 1921* (SA), s 158(1) and (2); *Criminal Appeals Act 2004* (WA), s 30(3) and (4); *Criminal Code* (Tas), s 402(1) and (2); *Criminal Code* (NT), s 411(1) and (2); *Supreme Court Act 1933* (ACT), s 37O(2) and (3).

18 See, eg, *Wilde v The Queen* (1988) 164 CLR 365 at 373; *Weiss v The Queen* (2005) 224 CLR 300 at 317-318 [46]; *Baini v The Queen* (2012) 246 CLR 469 at 479 [26]; *Hofer v The Queen* (2021) 274 CLR 351 at 391-392 [123].

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

20 Reasons of Gleeson, Jagot and Beech-Jones JJ at [88]-[110].

21 Reasons of Gleeson, Jagot and Beech-Jones JJ at [126]-[136].

fundamental, as that term is understood,[22] but, as will be explained, in the trial that was had, the only available conclusion is that that wrong decision on a question of law – a direction that should not have been given about the use of the impugned propensity evidence – could realistically have affected the reasoning of the jury.

12 In sum, the direction was a wrong decision on a question of law given by the trial judge which the Court must assume that the jury followed. It followed that, as a result of that wrong direction, everything that had gone before in the trial in relation to the impugned propensity evidence – the Crown opening, K's evidence, the defence opening, MDP's evidence, the defence closing, the Crown closing – had to be, and we must assume that it was, taken into account by the jury in reasoning to verdicts of guilt. That wrong decision on a question of law satisfied the materiality threshold and this Court cannot conclude "that no substantial miscarriage of justice has actually occurred".[23] That is, we do not consider that the proviso to s 668E(1) applies. The appeal should be allowed, MDP's convictions set aside, and a new trial ordered.

13 It is necessary to describe the trial that was had.

The alleged offending and the trial

14 MDP's offending allegedly commenced after MDP began living with the complainant's mother and sisters in 2014 and occurred at their various residences between 2014 and 2019. The final episode allegedly occurred about a month before a complaint was made to police. On the night of 28 October 2019, the complainant's mother awoke and noticed MDP was not in bed. She found him in the complainant's bedroom with the lights off and looking under the doona. She asked him what he was doing. He said he was looking for his watch. He purported to look for it and eventually returned to the bedroom. The complainant's mother continued to ask him what he had been doing. He responded by asking, "What, do you think I'm touching the girls?"

15 The next morning, on 29 October 2019, the complainant's mother told the complainant of what she had seen, which prompted the complainant to disclose to her mother what MDP had been doing to her. A complaint was made to the police within days. On 31 October 2019, the complainant participated in

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22 See, eg, *Wilde* (1988) 164 CLR 365 at 373; *Weiss* (2005) 224 CLR 300 at 317-318 [46]; *Baini* (2012) 246 CLR 469 at 479 [26]; *Hofer* (2021) 274 CLR 351 at 391-392 [123].

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

a video recorded interview with police.[24] On 1 November 2019, her sister, K, also did so. During K's interview, K told the police that MDP "smacks [the complainant] on the bum ... [r]andomly" when "[w]e weren't doing anything wrong".

16 This was a short trial before a jury which commenced on 2 August 2021. The jury retired to consider their verdicts at 2.49 pm on 5 August 2021. In the Crown's opening address at the start of MDP's trial, the prosecutor said, "you're going to hear [K] talk about having witnessed [MDP] smack [the complainant] on the bottom, and she'll describe that that occurred when they weren't doing anything wrong; so a non-disciplinary way". Although this did not expressly indicate that the Crown would lead that evidence as evidence of MDP's sexual interest, there was an implication underlying the "non-disciplinary" comment such that it is possible that that comment was a reference to the evidence being used as sexual interest evidence. Defence counsel understood the evidence to be deployed by the Crown as sexual interest evidence.

17 After the prosecutor's opening, the complainant gave evidence by her recorded interview with police being played to the jury[25] and then by her pre-recorded oral evidence being played,[26] in which she confirmed that what she had told police was correct. The complainant described sexual offending by MDP against her. She did not refer to being smacked on the backside. The complainant was cross-examined by MDP's trial counsel and re-examined by the prosecutor. The complainant was not asked any questions about the smacking.

18 The same approach was adopted for the giving of K's evidence. Her pre-recorded evidence was shown to the jury as part of the Crown case. There was no objection to the admission of K's evidence. In K's video recorded interview with police, K gave evidence that there had been occasions when she had seen MDP smack the complainant "on the bum", apparently randomly, and not in the context of her having done something naughty and getting a smack:

"**[K:]** But he, he, he like smacks [the complainant] on the bum.

[Detective:] Smacks her? What do you mean by that?

[K:] Randomly.

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24 *Evidence Act 1977* (Qld), s 93A.

25 *Evidence Act*, s 93A.

26 *Evidence Act*, ss 21AB(a)(i) and 21AK.

> **[Detective:]** Yeah. Like if she's naughty or you know if you do, sometimes if you do the wrong thing you might get a smack?
>
> **[K:]** No.
>
> **[Detective:]** Not like that?
>
> **[K:]** We weren't doing anything wrong."

The sole evidence of bottom slapping was from K.

19 After the Crown case closed, MDP's trial counsel opened the defence case on 4 August 2021. Defence counsel said that MDP would be called as a witness and then said:

> "To provide a context for [MDP's] evidence, you have heard from [K] that there was a mention of touching of [the complainant] on the bottom in the interview. [MDP] will say in his evidence that, yes, he did do that. In fact, he did that on more than one occasions [sic], not only to [the complainant], but also to [K] on many occasions. He will say that he would discipline them, smack them on the backside. He would play with them and during the course of that he accepts that there would have been some times that he slapped them on the backside, not only on the single occasions [sic] mentioned by [K], but on many. He will say that there was never a sexual aspect to that. He was their father."

20 MDP gave evidence at trial. He denied committing any of the offences. MDP gave evidence-in-chief about the impugned propensity evidence:

> "**[Counsel:]** And how often would that happen in relation to [the complainant]?
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> **[MDP:]** I smacked all of them on the bottom, it was just a ... regular thing, you know. Just like, 'get' – you know, 'Get on', and, you know, 'Get out of here', or, you know, like, 'Don't do that', you know. Like, I didn't – yeah, I did – didn't like flogging my kids.
>
> **[Counsel:]** Yep. Okay. And in terms – whenever you touched – you used the word bum – [the complainant's] bum, was there any sexual - - -?
>
> **[MDP:]** No, it was never in a sexual nature, it was just, you know, like, 'Get on', 'Get out of here', or, you know, 'Get out of the way.'"

21 MDP was then cross-examined on the topic:

"**[Crown:]** But you gave evidence earlier that you used to smack them to discipline them?

[MDP:] Yeah, it was like a playful smack.

[Crown:] When you say playful, was it discipline?

[MDP:] Yeah.

[Crown:] So you were involved in the discipline of them?

[MDP:] Yeah.

...

[Crown:] You'd smack her on the bottom, though, wouldn't you?

[MDP:] Yeah. Disciplinary.

[Crown:] You'd do that even when she hadn't been naughty?

[MDP:] Yeah. Like, when she was in the way, you know. Like, 'Get out – get out of the way.' You know?

[Crown:] And you'd actually smack her on the bottom?

[MDP:] Yeah. I'd smack them all on the bottom."

The Crown did not put to MDP that the bottom slapping evidence was motivated by sexual interest.

22 Prior to the closing addresses, the prosecutor raised with the trial judge that he proposed to address the jury "on evidence of sexual interests", specifically K's evidence "of [MDP] smacking [the complainant] on the bottom in circumstances where it was not for discipline". The prosecutor told the trial judge that he had raised the issue with defence counsel but thought that he should raise it with the trial judge before he addressed on it in case the trial judge had a different view about whether the evidence amounted to evidence of sexual interest. The trial judge said the evidence was "pretty tenuous". The prosecutor said he accepted "the smacking is at the very low end of the spectrum of evidence of sexual interest", but that, subject to the view of the trial judge, he proposed to address on it briefly. The prosecutor submitted that it did amount to evidence of sexual interest.

23 Defence counsel agreed to a direction, saying:

> "Yes, the Crown Prosecutor, my learned friend, did open that evidence in his opening address about [K's] evidence about sexual interest. In my submission, tactically, I was going to use that in my favour in the closing address. So if your Honour wanted to give a sexual interest direction as contended for by my learned friend, I don't have a difficulty with it. I'll be using it in a way that will become clear in my closing address."

The trial judge ultimately said, "At this stage I'm inclined to permit it because the direction to the jury includes that they have to consider whether or not it reaches the bar."

24 Closing addresses commenced at 3.29 pm on 4 August 2021 and were completed that afternoon. Defence counsel addressed the jury first.[27] In relation to the bottom slapping evidence, the defence said that "[a]part from the one incident of his touching [the complainant] ... on the backside" no one had said "anything about anything untoward being witnessed". On the issue of "sexual interest", defence counsel said:

> "Sexual interest. Imagine if you were a grandparent or you did that to your child and you touched them on the backside and some other child at the time said that seemed a little bit weird or strange. [The prosecutor] will stand up three or four years later and say that's just simply evidence of sexual misconduct. That you can use that against [MDP] as per his opening to say you can more safely act upon the evidence to say that this is just a witnessed event. How plausible is it? Well, again, [MDP] gave evidence and said very quickly that he not only did that once, but he did that on many occasions to both [sisters]. Once again, not only did he accept it. He came into it and expanded it quite significantly."

25 In the Crown's address to the jury,[28] the Crown confirmed it relied upon the impugned propensity evidence as sexual interest evidence:

> "Now, [K] also recalled how [MDP] would smack [the complainant] on the bum. She described that this would occur when they weren't doing anything wrong. That wasn't challenged in cross-examination. In fact, [MDP] admitted it. But clearly, members of the jury, it was more than just an innocent 'get out of the way' slap. It wasn't a disciplinary slap. Because [K] remembered it. [K] found it unusual. [She] didn't say [MDP]

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27 *Criminal Code* (Qld), s 619(3) and (4).

28 *Criminal Code* (Qld), s 619(3) and (4).

> was doing this to all the other kids. It was just [the complainant]. The Crown says that demonstrates he had a sexual interest in her, and it also demonstrates there isn't some concoction between the two girls, because [the complainant] didn't actually mention that. [K] did witness it, and it wasn't challenged. Maybe [the complainant] didn't mention it because it pales in comparison to everything else that happened to her. But it does prove independently from [the complainant], in my submission to you, that he did have a sexual interest in her, and he was prepared to act on it, and that's what he did on those other occasions."

As the last sentence of that passage records, the Crown's case was that, independently of the complainant's evidence, the impugned propensity evidence demonstrated MDP's sexual interest in the complainant and that MDP was prepared to act on it, and that that is what MDP did on the occasions in respect of which he was charged.

26 In summing up, the trial judge told the jury that the Crown relied on the complainant's evidence of the charged acts as evidence that MDP "had a sexual interest in the complainant and was willing to give effect to that interest". The jury were instructed that, if they accepted evidence of particular conduct making up the charged acts beyond reasonable doubt, "then you may use that finding in considering whether [MDP] committed the other offences charged". The trial judge warned the jury that the evidence of the charged acts must not be used in any other way, such as concluding that MDP was "generally a person of bad character", and that even if, based on a conclusion that MDP was guilty of a particular offence, the jury were satisfied that MDP had a sexual interest in the complainant, it would not inevitably follow that the jury would find MDP guilty of another count on the indictment.

27 The trial judge then addressed the "evidence of other alleged incidents" that were not the subject of charges on the indictment, which were said to demonstrate a sexual interest on the part of MDP towards the complainant – specifically, the impugned propensity evidence. The trial judge reminded the jury that the Crown relied on K's evidence of MDP smacking the complainant's backside as demonstrating MDP's sexual interest in the complainant and that he was prepared to act upon it. The trial judge also told the jury that the Crown "argues that this evidence makes it more likely that [MDP] committed the charged offences, as against that particular complainant". The trial judge then directed the jury in these terms:

> "But you can only use this other evidence, if you are satisfied beyond reasonable doubt that [MDP] did act as the evidence suggests, and that that conduct does demonstrate that he had a sexual interest in the complainant and was willing to pursue it.

> *... [I]f you are not satisfied about that smacking on the bottom, as going to a sexual interest, then you simply put that to one side ...* [I]t is not something that ... the complainant has given evidence about, but rather her sister, [K]. So it may impact upon your assessment of [K's] evidence. *If you do not accept that this other evidence proves to your satisfaction that [MDP] had a sexual interest in the complainant, then you must not use the evidence in some other way.* For example, to find that [MDP] is guilty of the charged offences.
>
> If you do accept that this uncharged allegation occurred and that the conduct does demonstrate a sexual interest of [MDP] [in] the complainant, bear in mind it does not automatically follow that [MDP] is guilty of any of the offences charged. You cannot infer only from the fact that this other conduct occurred, that [MDP] did the things which he is charged with. You must still go back and decide whether you have been satisfied beyond reasonable doubt of all of the essential facts based upon the whole of the evidence that has been placed before you." (emphasis added)

28 In sum, the trial judge gave the jury a direction which (a) noted the Crown's reliance on evidence demonstrating sexual interest; (b) directed that, if the jury accepted that evidence beyond reasonable doubt, the jury could use that evidence in finding that MDP committed the offences charged; (c) directed that, specifically in relation to the impugned propensity evidence, "you can only use this other evidence, if you are satisfied beyond reasonable doubt that [MDP] did act as the evidence suggests, and that that conduct does demonstrate that he had a sexual interest in the complainant and was willing to pursue it"; (d) directed that, if the jury were not satisfied as to the impugned propensity evidence, the jury must put it to one side; (e) noted that the fact the evidence was given by K may affect the jury's assessment of the evidence; and (f) said, "If you do not accept that this other evidence proves to your satisfaction that [MDP] had a sexual interest in the complainant, then you must not use the evidence in some other way. For example, to find that [MDP] is guilty of the charged offences."

29 There was no application for a redirection.

Second limb

30 The first step in the analysis is to identify the "decision" on a "question of law".[29] The giving of the direction was a decision on a question of law.[30] This is

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29 Reasons of Gleeson, Jagot and Beech-Jones JJ at [99].

30 Reasons of Gleeson, Jagot and Beech-Jones JJ at [127].

particularly so given that the trial judge weighed whether to give the direction and said:

> "Yes, well, it was a matter raised with [K] as an unusual feature of their dynamic. At this stage I'm inclined to permit it because the direction to the jury includes that they have to consider whether or not it reaches the bar."

That is, the judge weighed whether to give the direction and decided whether to do so. The fact that both parties favoured the giving of the direction does not change that characterisation.

31 The next step in the analysis requires MDP to demonstrate that the decision was "wrong".[31] It was wrong. In *Roach v The Queen*,[32] this Court addressed the "rule in *Pfennig* [*v The Queen*[33]]". The concern in *Pfennig* was the highly prejudicial effect that similar fact evidence of propensity may have for an accused and, "[m]ore to the point, the possibility that a jury might reason to guilt, when such a conclusion is not compelled, [which] might be productive of unfairness".[34] The rule in *Pfennig* addresses that problem of unfairness.[35] It is applied in order to resolve "the tension between probative force and prejudicial effect".[36] What then is the rule in *Pfennig*? Accepting the probative force of evidence of propensity, the rule's "focus is upon the propensity evidence itself"[37] and it requires a trial judge, when determining whether the propensity evidence is to be admitted before a jury, to apply the standard which the jury must eventually apply.[38] "The judge must ask whether there is a rational view of the propensity evidence, seen in

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31 Reasons of Gleeson, Jagot and Beech-Jones JJ at [129]-[136].

32 (2011) 242 CLR 610.

33 (1995) 182 CLR 461.

34 *Roach* (2011) 242 CLR 610 at 622 [34].

35 *Roach* (2011) 242 CLR 610 at 622 [34].

36 *Roach* (2011) 242 CLR 610 at 622 [36], citing *Pfennig* (1995) 182 CLR 461 at 483.

37 *Roach* (2011) 242 CLR 610 at 622 [35].

38 *Roach* (2011) 242 CLR 610 at 622 [35].

the setting of the prosecution case, which is consistent with the accused's innocence" and, if so, the evidence ought not be admitted.[39]

32 As the Crown properly accepted in this Court, the impugned propensity evidence "would never have passed the *Pfennig* test".[40] That is because there is a rational view of the evidence which is consistent with a non-sexual interest, and which is thus consistent with the innocence of MDP. The evidence should not have been admitted for a propensity purpose and yet the trial judge's sexual interest direction invited the jury to engage in propensity reasoning in relation to that specific evidence. It directed the jury that it was open to them to be satisfied beyond reasonable doubt that the evidence could demonstrate a propensity for having sexual interest in the complainant. That was impermissible. The common law principles regarding propensity evidence did not permit that evidence being admitted, let alone being left to the jury with the direction that they could use it as propensity evidence. The trial judge directed the jury that they could use the impugned propensity evidence as propensity evidence. That was a wrong decision on a question of law.

33 The third step is whether that wrong decision on a question of law, which was not "fundamental" to the trial that was had,[41] was material.[42] That is, could the wrong decision realistically have affected the reasoning of the jury to the verdict of guilt in the trial that was had?[43] The only conclusion open is yes.

34 The Crown accepted, as it must, that the jury would not disregard the direction. It did not matter that the impugned propensity evidence bore no resemblance to the charged conduct. The impugned propensity evidence was capable of being interpreted as sexual in nature as that was the basis on which the Crown relied upon it in its closing, which was reflected in the trial judge's direction to the jury. The prejudicial nature of propensity evidence is widely understood, hence the restrictive approach in *Pfennig*.

35 The wrong decision was to tell the jury that it was open to them to consider that the bottom slapping (if they accepted that it had happened) showed a sexual interest on which MDP was prepared to act. That direction could have led the jury

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39 *Roach* (2011) 242 CLR 610 at 622 [35], citing *Pfennig* (1995) 182 CLR 461 at 485.

40 See *Pfennig* (1995) 182 CLR 461 at 483, 485.

41 Reasons of Gleeson, Jagot and Beech-Jones JJ at [104]-[106].

42 Reasons of Gleeson, Jagot and Beech-Jones JJ at [104].

43 Reasons of Gleeson, Jagot and Beech-Jones JJ at [107], citing *Brawn v The King* [2025] HCA 20 at [10].

down a wrong path if, consistent with what the trial judge had left open to them, the jury concluded that the bottom slapping did show sexual interest.

36 Noting that the trial judge said the jury had to be persuaded beyond reasonable doubt that the bottom slapping did show sexual interest neither permits nor requires a different conclusion. The trial judge, by telling the jury to consider whether it did show sexual interest, necessarily told the jury that it could do so and thereby left sexual interest open as a pathway for them to decide. That the direction could have had that result is enough to show that it was material.

37 The trial judge's direction that the jury could only use the impugned propensity evidence if satisfied beyond reasonable doubt that it evidenced MDP's sexual interest in the complainant necessarily directed the jury to consider the impugned propensity evidence and thereby left open to the jury a pathway of impermissible propensity reasoning in circumstances where the impugned propensity evidence itself could not possibly rise to that standard. In following the trial judge's direction to assess whether they were satisfied beyond reasonable doubt that the impugned propensity evidence established MDP's sexual interest in the complainant, the jury had to consider the impugned propensity evidence and did so in the context of the trial that was had. In a trial that lasted only a few days, the impugned propensity evidence was the subject of the Crown opening, K's evidence, the defence opening, MDP's evidence, the defence closing, the Crown closing, and then the trial judge's wrong direction. The impugned propensity evidence could realistically have influenced the jury's perception of MDP's evidence.

Proviso

38 In *Weiss v The Queen*, this Court explained that "in applying the proviso, the task is to decide whether a 'substantial miscarriage of justice has actually occurred'".[44] This requires the court to make its own independent assessment of the evidence 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 record, the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty".[45] The question is "whether a guilty verdict was *inevitable*, not whether a guilty verdict was *open*".[46] In other words, the pivot in *Weiss* was from an

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

45 *Weiss* (2005) 224 CLR 300 at 316 [41] (footnote omitted).

46 *Baini* (2012) 246 CLR 469 at 481 [32] (emphasis in original). See also *Lindsay v The Queen* (2015) 255 CLR 272 at 301-302 [86].

"effect-on-the-jury" concept of the appellate function to a "determination-of-guilt" concept.[47]

39 In this case, even accepting that the Crown had a compelling case, the proviso cannot be applied. This Court cannot make an independent assessment of the evidence 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 record, the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty".[48] This Court cannot make an independent assessment of whether each guilty verdict was inevitable.[49] The Crown case involved contested issues of credit in relation to MDP and the complainant, which "prevent the appellate court from being able to assess whether guilt was proved to the criminal standard".[50] This Court does not have the entire record before it. It cannot be said that no substantial miscarriage of justice has actually occurred.

Conclusion and orders

40 For those reasons, MDP should be granted special leave to appeal to raise grounds 2 to 4 of the amended notice of appeal filed 14 June 2024. The appeal should be allowed. The order of the Court of Appeal of the Supreme Court of Queensland of 27 June 2023 should be set aside and, in its place, the appeal should be allowed, MDP's convictions set aside, and a new trial ordered.

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47 *Hofer* (2021) 274 CLR 351 at 377 [84].

48 *Weiss* (2005) 224 CLR 300 at 316 [41] (footnote omitted).

49 *Baini* (2012) 246 CLR 469 at 481 [32].

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

EDELMAN J.

Introduction

41 Section 668E(1) of the *Criminal Code* (Qld) is in a common form. It relevantly provides that on an appeal against conviction, the court "shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground":

> "[(i)] that [the verdict] is unreasonable, or can not be supported having regard to the evidence, or
>
> [(ii)] 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
>
> [(iii)] that on any ground whatsoever there was a miscarriage of justice".

These three "limbs" are then followed by a proviso that the court may nevertheless "dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred".[51]

42 The overarching principle in relation to each of the three limbs is that each is concerned with a miscarriage of justice.[52] Although the third limb "speaks of miscarriage of justice specifically",[53] it is a catch-all provision to ensure that every instance of miscarriage of justice that is not included within the first two limbs is nevertheless captured within the appeal provision. Hence, it has been said that the "principles concerning the approach to a misdirection of law apply in the same way whether the misdirection is characterised as an 'error of law', as a 'miscarriage of justice', or as a 'wrong decision of any question of law'".[54]

43 The three limbs and the proviso have been the subject of an enormous amount of jurisprudence over the last century. For some periods, uncertainty has lingered as competing views within this Court clamoured for acceptance. During other periods, there has been clarity following a decision in which this Court, by majority or unanimously, has expressed a clear view with a strong degree of

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

52 *Whitehorn v The Queen* (1983) 152 CLR 657 at 685. See also *Festa v The Queen* (2001) 208 CLR 593 at 653 [199]; *Libke v The Queen* (2007) 230 CLR 559 at 589 [81]; *Filippou v The Queen* (2015) 256 CLR 47 at 54 [13].

53 *Whitehorn v The Queen* (1983) 152 CLR 657 at 685.

54 *Huxley v The Queen* (2023) 98 ALJR 62 at 72 [42]; 416 ALR 359 at 371 (footnote omitted).

certainty as to the operation of one or other of the limbs or of the proviso. Nevertheless, sometimes, perhaps even many years later, those clear views are replaced by another clear view expressed with the same degree of certainty.

44 In this appeal, and the companion appeal in *Brawn v The King*,[55] this Court has again attempted to provide clarity in this area, this time in relation to issues concerning the latter two of the three limbs. I agree with the statements of principle in the reasons of Gleeson, Jagot and Beech-Jones JJ. As those statements of legal principle are adopted by all four members of the majority of this Court, they form part of the ratio decidendi of this case.[56] The difference between the majority and the minority concerns the manner in which those statements of principle are to be applied.

45 In this appeal, there was a wrong decision on a question of law at trial. The trial judge erred in directing the jury that the "bottom slapping evidence", as that evidence was described by the parties, could be used as propensity evidence if the jury were satisfied that the evidence demonstrated that MDP had a sexual interest in the complainant. The central issue is whether that wrong decision was material so that the appellate court should have been "of [the] opinion that the verdict of the jury should be set aside". The central issue in this appeal, as in *Brawn v The King*,[57] thus concerns the application of the requirement that an error or irregularity must be material before a miscarriage of justice can arise. The application of that requirement has caused considerable difficulty in applications for judicial review, as well as in civil appeals, because "materiality" has been used to describe at least three different concepts. The same is true in criminal appeals.

46 There are two basic points that must be borne in mind, at least in criminal appeals. First, where the error or irregularity is not fundamental, the appellant must establish only 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".[58] Secondly, this test for materiality presents a very low bar to the identification of a miscarriage of justice. In the circumstances of this case, the direction of the trial judge required the jury to consider the bottom slapping evidence in an erroneous manner. Once it is accepted that the jury might have considered the bottom slapping evidence, that error, almost by definition,

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55 [2025] HCA 20.

56 *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232 at 267; *The Commonwealth v Yunupingu* (2025) 99 ALJR 519 at 533 [25], 564 [177], 585 [263]-[264].

57 [2025] HCA 20.

58 *Brawn v The King* [2025] HCA 20 at [10].

could realistically have affected the reasoning of the jury to the verdicts of guilty that were returned by the jury. It was a material error.

47 In this appeal, the Crown relied upon the proviso, asserting that the appeal should nevertheless be dismissed because there was no substantial miscarriage of justice. That would require this Court to conclude, upon its independent assessment of the trial record, that absent the erroneous direction a verdict of guilty was, or is, inevitable. Even apart from the absence of the complete record of the trial in this Court, such a conclusion is impossible in respect of a trial in which the central issues concerned the credibility of the complainant and MDP and which proceeded on the basis that the inadmissible bottom slapping evidence could assist the jury in their resolution of the case.

The bottom slapping evidence and the direction

48 MDP's ground, and proposed grounds, of appeal in this Court asserted that a miscarriage of justice had occurred in two ways. One way was by the admission of the bottom slapping evidence. The other way was by the trial judge's direction to the jury that they could use propensity reasoning in respect of uncharged sexual conduct by MDP. MDP submitted that each of these two asserted miscarriages of justice was both an error of law (the second limb of s 668E(1) of the *Criminal Code*) and a miscarriage of justice generally (the third limb of s 668E(1) of the *Criminal Code*).

49 The bottom slapping evidence and the trial judge's direction are fully set out in the reasons of Gordon and Steward JJ. It suffices to explain why this appeal can be decided on the ground concerning the trial judge's erroneous direction constituting a wrong decision on a question of law rather than by reference to the erroneous admission of the bottom slapping evidence.

50 It was common ground in this Court that the Court of Appeal erred in so far as it concluded that the evidence was admissible under s 132B of the *Evidence Act 1977* (Qld) (as in force at the time of the trial and subsequently repealed[59]).[60] That section was not concerned with evidence in relation to the offences with which MDP was charged.[61] There was also no suggestion that the bottom slapping evidence was admitted by consent. In this Court, the only ground upon which the

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59 See *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023* (Qld), ss 64, 68. See also *Evidence Act 1977* (Qld), s 103CB.

60 See *R v MDP* (2023) 309 A Crim R 63 at 69-70 [29].

61 *Criminal Code* (Qld), ss 210, 229B, 349. See *Evidence Act 1977* (Qld), s 132B(1).

Crown asserted that the bottom slapping evidence was admissible was on the basis that it was relationship evidence.

51 Evidence can be admissible as relevant relationship evidence, subject to grounds for exclusion, if the evidence can provide relevant context for other evidence. For instance, relationship evidence might "place the offence in context in circumstances in which evidence of the offence might otherwise present as inexplicable" or it might explain the complainant's "failure to complain or to rebuff the accused" or the "accused's confidence to act" as they did.[62]

52 The prosecution made no suggestion to the jury, in opening or closing submissions, that the bottom slapping evidence from the complainant's sister provided context to any aspect of the relationship between the complainant and MDP. In this Court, however, the Crown asserted that the bottom slapping evidence provided some context to assist the defence submission which was described by the Crown in this Court as follows:

> "no one saw anything. The highest the prosecution can point to is [that] the sister saw something that struck her as a bit odd, and [MDP] slapped her on the backside."

53 The bottom slapping evidence, as set out in the reasons of Gordon and Steward JJ, was not so anodyne and was not suggested by the prosecution at trial to be so anodyne. In particular, the complainant's sister's evidence was that MDP would "smack[] [the complainant] on the bum" and would do so "[r]andomly" and when "[w]e weren't doing anything wrong". These comments were made shortly prior to the sister describing how the complainant had told her that "sometimes [MDP] kisses [the complainant] and he puts his tongue in her mouth". In any event, even apart from the serious questions raised by the bottom slapping evidence, that evidence did not provide any relevant context such that the bottom slapping evidence could be described as "relationship evidence".

54 The only remaining basis for the admissibility of the bottom slapping evidence was the basis upon which it was relied at trial by the prosecution; namely, to demonstrate that MDP "had a sexual interest in [the complainant]". In this Court, it finally (and properly) became common ground that the evidence was not admissible for that propensity purpose. The bottom slapping evidence was therefore inadmissible.

55 In circumstances in which the inadmissible bottom slapping evidence had already been admitted and relied upon by the prosecution as propensity evidence, the direction that the trial judge should have given to the jury was that the jury should disregard that evidence entirely. That was not what happened. Not only did

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62 *Johnson v The Queen* (2018) 266 CLR 106 at 116 [19].

the trial judge direct the jury that they *could* have regard to the bottom slapping evidence but, in the propensity direction, the trial judge explained to the jury the manner in which they should have regard to it if they were satisfied that the conduct demonstrated a sexual interest by MDP in the complainant.

A decision on a question of law

56 As Gleeson, Jagot and Beech-Jones JJ explain, "the natural and ordinary meaning of a decision on a question of law involves some determination or response to a question of law by a trial judge that has legal effect in the trial".

57 In order to determine whether there is a decision on a question of law, the focus is therefore upon actions taken by the trial judge with legal effect (namely, determinations and responses). There is no utility in an attempt to divine any thought process of the trial judge. Nor is there any utility in an attempt to identify whether any question of law had been raised by the parties expressly or by implication. Although the absence of any determination or response by a trial judge to the admission of inadmissible evidence will not constitute a "decision" (hence the admission of the bottom slapping evidence in this case involved no decision), an error made by the trial judge in their directions to the jury can constitute a wrong decision on a question of law even without any request for a particular direction or for a re-direction.[63] A mere failure by a trial judge to give a particular direction, by itself, will not ordinarily involve any determination or response to a question of law by the trial judge that has a legal effect in the trial. But such a failure might mean that a direction that was actually given by the trial judge, or facts that were summarised by the trial judge, involved an error of law in that the jury were permitted the liberty to engage in impermissible reasoning.

58 In this case, the direction given by the trial judge in relation to the bottom slapping evidence involved a wrong decision on a question of law. The question of law might be expressed as whether a propensity direction should have been given. Alternatively, the question of law might be expressed as whether the trial judge should have directed the jury to disregard the bottom slapping evidence. However the question is expressed, it was a wrong decision on a question of law by the trial judge to give the propensity direction.

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63 *Gassy v The Queen* (2008) 236 CLR 293 at 312-313 [55]-[56]. Compare *Papakosmas v The Queen* (1999) 196 CLR 297 at 319 [72]; *Dhanhoa v The Queen* (2003) 217 CLR 1 at 12-13 [37]-[38], 15 [49].

Three senses of materiality

59 The concept of materiality has been used in at least three different senses by this Court. In administrative law[64] and sometimes on civil appeals,[65] there has been confusion in the cases caused by the conflation of different senses of materiality.[66] In criminal law, the distinction between three of the senses of materiality is more widely appreciated but the lack of a clear delineation between the different meanings is capable of leading to confusion.

60 First, "materiality" is sometimes used by reference only to the error or irregularity itself. Such material errors have often been described as "fundamental", or as sufficient irrespective of whether a properly conducted hearing could not possibly have produced a different result.[67] Other descriptions include referring to the error as "such a departure from the essential requirements of the law that it goes to the root of the proceedings",[68] and as "radical".[69] This use of materiality is best expressed by asking whether the error or irregularity was of a fundamental nature to, relevantly, an administrative hearing, a civil trial, or a criminal trial. If an appellant demonstrates materiality in this sense in a criminal appeal, a new trial (or entry of an acquittal) must be ordered.

61 Secondly, "materiality" is sometimes used by reference to the process of reaching a decision. In this context the question is sometimes put in terms that ask

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64 *Nathanson v Minister for Home Affairs* (2022) 276 CLR 80 at 123-127 [95]-[104].

65 See *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at 525-526 [42]-[43], 546 [106], 574-577 [188]-[194], referring to *Balenzuela v De Gail* (1959) 101 CLR 226.

66 See *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at 116-117 [125]-[128], referring to Daly, "A Typology of Materiality" (2019) 26 *Australian Journal of Administrative Law* 134.

67 **Criminal appeals**: *Quartermaine v The Queen* (1980) 143 CLR 595 at 600-601; *Wilde v The Queen* (1988) 164 CLR 365 at 373. **Judicial review**: *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 137 [40], 147-148 [72]; *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at 565 [164]; *Nathanson v Minister for Home Affairs* (2022) 276 CLR 80 at 125-126 [98]-[103]. See also *R (Osborn) v Parole Board* [2014] AC 1115 at 1149 [68]. **Civil appeals**: *DWN042 v Republic of Nauru* (2017) 92 ALJR 146 at 151 [21]; 350 ALR 582 at 588.

68 *Wilde v The Queen* (1988) 164 CLR 365 at 373.

69 *Wilde v The Queen* (1988) 164 CLR 365 at 373; *Kalbasi v Western Australia* (2018) 264 CLR 62 at 119 [155].

whether there was "practical injustice",[70] or whether the error had any "significance in determining the verdict"[71] or "*could* realistically have resulted in a different decision".[72] Another common formulation is whether the error or irregularity was "*capable* of affecting the result", or had the "capacity for practical injustice".[73] Whether in the context of applications for judicial review, civil appeals, or criminal appeals, the reference to a "capacity" to affect a result directs attention to the effect that the error or irregularity had on the process by which the decision was made, irrespective of whether the actual result might have been different. Hence, subject to the third sense of materiality, the admission of inadmissible "material" evidence in a civil or criminal trial is a sufficient basis to order a new trial irrespective of "the effect [in the sense of the 'conclusion'] which the evidence if admitted would produce upon the Court if the Court were the tribunal of fact".[74]

62 In this context, the question is best expressed by asking whether the applicant or appellant has demonstrated that the error or irregularity could realistically have affected the reasoning of the decision-maker to a conclusion. In criminal appeals this requires asking whether 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.[75] The error or irregularity

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70 *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29 at 54 [66]; *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at 564 [162], citing *Weiss v The Queen* (2005) 224 CLR 300 at 308 [18]; *Edwards v The Queen* (2021) 273 CLR 585 at 609 [74]; *Nathanson v Minister for Home Affairs* (2022) 276 CLR 80 at 123-124 [95]; *HCF v The Queen* (2023) 97 ALJR 978 at 995 [78]; 415 ALR 190 at 210.

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

72 *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at 538 [85] (emphasis in original).

73 **Criminal appeals**: *Edwards v The Queen* (2021) 273 CLR 585 at 609 [74], quoting *R v Matenga* [2009] 3 NZLR 145 at 158 [31] (emphasis in original); *HCF v The Queen* (2023) 97 ALJR 978 at 995 [78]; 415 ALR 190 at 210. See also *Weiss v The Queen* (2005) 224 CLR 300 at 308 [18]; *Cesan v The Queen* (2008) 236 CLR 358 at 392-393 [116]-[122]. **Judicial review**: *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at 564 [162], quoting *R v Matenga* [2009] 3 NZLR 145 at 158 [31] (emphasis in original); *Nathanson v Minister for Home Affairs* (2022) 276 CLR 80 at 123-124 [95]. **Civil appeals**: *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at 564 [161], referring to *Piddington v Bennett and Wood Pty Ltd* (1940) 63 CLR 533 at 554.

74 *Balenzuela v De Gail* (1959) 101 CLR 226 at 236.

75 *Brawn v The King* [2025] HCA 20 at [10].

need not be a link in the chain of reasoning to the decision-maker's conclusion. Indeed, the error or irregularity need not even be a strand in the rope of reasoning to the decision-maker's conclusion if two paths to that conclusion were open. It is enough that the decision-maker's reasoning process to the conclusion that was reached could realistically have been affected. If an applicant or appellant demonstrates materiality in this sense, it is prima facie sufficient for a new trial, subject to the third use of materiality.

63 Thirdly, materiality is sometimes used to describe a conclusion that, even where an applicant for judicial review or an appellant has established that an error or irregularity is one that could realistically have affected the reasoning of the decision-maker, the application for judicial review or appeal might nevertheless be dismissed if the result would inevitably have been the same because there was, or is, no possibility of any different conclusion in a properly conducted hearing. In applications for judicial review, the test is expressed as whether the "facts before the Court provided a basis to consider that the outcome would inevitably have been the same had the error not been made".[76] In civil appeals, the test is expressed as whether there was a "substantial wrong or miscarriage",[77] or whether a properly conducted proceeding "could not possibly have produced a different result".[78] In criminal law, in the common form proviso, this is expressed as whether there was a "substantial miscarriage of justice"[79] such that, regardless of the error or irregularity, "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".[80] This has also been expressed in criminal appeals as asking whether

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76 *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 98 ALJR 610 at 619 [36]; 418 ALR 152 at 161.

77 *Nobarani v Mariconte* (2018) 265 CLR 236 at 247 [38], quoting *Balenzuela v De Gail* (1959) 101 CLR 226.

78 *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 147.

79 See *Federal Court of Australia Act 1976* (Cth), s 30AJ(1) and (2); *Criminal Appeal Act 1912* (NSW), s 6(1); *Criminal Procedure Act 1921* (SA), s 158(1) and (2); *Criminal Code* (Qld), s 668E(1) and (1A); *Criminal Appeals Act 2004* (WA), s 30(3) and (4); *Criminal Code* (Tas), s 402(1) and (2); *Criminal Code* (NT), s 411(1) and (2); *Supreme Court Act 1933* (ACT), s 37O(2) and (3). cf *Criminal Procedure Act 2009* (Vic), s 276.

80 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [44]. See also *Kalbasi v Western Australia* (2018) 264 CLR 62 at 120-121 [158]-[160].

conviction was inevitable.[81] Rationally, there is no difference between these formulations.[82]

64 In principle, the approach to whether an error is material ought to be the same whether the question is being asked for the purposes of a criminal appeal, a civil appeal, or an application for judicial review. At least in relation to criminal appeals the approach required in this country is now clear. The materiality threshold (whether 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) is the same no matter which limb of the common form appeal provision is being applied. Although some earlier authorities appear to have rejected that materiality threshold in relation to the second or third limbs, many of those cases did so in the context of rejecting a different concept of materiality which focuses instead upon whether the error might have affected the verdict.[83]

65 In each case the enquiry is as follows. If the error or irregularity was fundamental then the error will be material and the appeal will be allowed. Otherwise, an error or irregularity will, prima facie, be material and the appeal will be allowed if the appellant satisfies the low bar of establishing that the error or irregularity was something that could realistically have affected the reasoning of

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81 *Darkan v The Queen* (2006) 227 CLR 373 at 402 [95], 407 [117]; *Baini v The Queen* (2012) 246 CLR 469 at 481-482 [33], 484 [40]; *Lindsay v The Queen* (2015) 255 CLR 272 at 276 [4], 301-302 [86]; *Castle v The Queen* (2016) 259 CLR 449 at 472 [65], 477 [81]; *R v Dickman* (2017) 261 CLR 601 at 605 [4]-[5], 620 [63]; *Lane v The Queen* (2018) 265 CLR 196 at 212 [56], 213 [59]; *OKS v Western Australia* (2019) 265 CLR 268 at 282-283 [38]; *Awad v The Queen* (2022) 275 CLR 421 at 445 [78]. See also *Pollock v The Queen* (2010) 242 CLR 233 at 252 [70]; *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 106-107 [35]-[38]; *Filippou v The Queen* (2015) 256 CLR 47 at 54-55 [15]; *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at 571-572 [179].

82 *Ratten v The Queen* (1974) 131 CLR 510 at 516; *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 532; *Carr v The Queen* (1988) 165 CLR 314 at 332; *Chidiac v The Queen* (1991) 171 CLR 432 at 443; *Nudd v The Queen* (2006) 80 ALJR 614 at 617 [5]; 225 ALR 161 at 162-163; *R v Hillier* (2007) 228 CLR 618 at 629-630 [20]. See also *Collins v The Queen* (2018) 265 CLR 178 at 194-195 [42]-[43]. But compare *Hofer v The Queen* (2021) 274 CLR 351 at 380-381 [90]-[94].

83 *Weiss v The Queen* (2005) 224 CLR 300 at 307-308 [16]-[18], considering *R v Gibson* (1887) 18 QBD 537 at 540-541; compare 307 [14], citing *Bray v Ford* [1896] AC 44 at 52: no entitlement to a new trial as of right where misdirection "upon a wholly immaterial point". See also *Simic v The Queen* (1980) 144 CLR 319 at 328; *Hembury v Chief of the General Staff* (1998) 193 CLR 641 at 655-656 [37]-[39].

the jury to a verdict of guilty that was returned by the jury in the criminal trial that occurred. Nevertheless, for these non-fundamental irregularities or errors, the appeal will be dismissed if the respondent establishes that the error or irregularity was not material in the sense that there was no substantial miscarriage of justice.

66 The separation of the second and third senses of materiality is clearest in criminal appeals, where the third sense is (helpfully) rarely described as "materiality" and usually referred to only as the "proviso". It is also well established, at least for criminal appeals, that the proviso does not subsume the second category of materiality because the onus of proving that there has been no substantial miscarriage of justice is upon the respondent.[84] Since it is for the respondent to prove that any miscarriage of justice is not substantial, the appellant's onus of proof can be satisfied by showing an insubstantial or minimal[85] miscarriage of justice. That is a low bar. Unless it were a low bar the concept of materiality, as a tool of analysis in discerning miscarriages and substantial miscarriages of justice, could itself be productive of injustice.

The materiality issue on this appeal

67 There was, properly, no submission by MDP in this Court that the trial judge's propensity direction to the jury was wrong in such a fundamental way that the error was, in and of itself, material. Thus, in order to establish that the trial judge's propensity direction was material, MDP was required to satisfy the Court of Appeal that the direction 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.

MDP established that the propensity direction was material

68 The bottom slapping evidence featured in the opening addresses of the prosecution and the defence. It was the subject of examination-in-chief and cross-examination of MDP. The evidence featured in the closing addresses of the prosecution and the defence. The evidence was the subject of a direction by the

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84 *Mraz v The Queen* (1955) 93 CLR 493 at 514; *KBT v The Queen* (1997) 191 CLR 417 at 434; *TKWJ v The Queen* (2002) 212 CLR 124 at 143 [63]; *Lindsay v The Queen* (2015) 255 CLR 272 at 294 [64]; *GBF v The Queen* (2020) 271 CLR 537 at 547 [24]; *Hofer v The Queen* (2021) 274 CLR 351 at 394 [132], quoting *Weiss v The Queen* (2005) 224 CLR 300 at 316 [41]; *Awad v The Queen* (2022) 275 CLR 421 at 445 [78]; *HCF v The Queen* (2023) 97 ALJR 978 at 1001-1002 [111]-[112]; 415 ALR 190 at 217-218. See also *Balenzuela v De Gail* (1959) 101 CLR 226 at 233-235; *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at 547 [110].

85 *Hembury v Chief of the General Staff* (1998) 193 CLR 641 at 671 [74].

trial judge. It is impossible rationally to contend that the bottom slapping evidence must have been ignored by the jury. There is, at the very least, a real possibility that the bottom slapping evidence was considered by the jury.

69 The propensity direction by the trial judge was an erroneous instruction to the jury as to how the jury should use the inadmissible bottom slapping evidence. The propensity direction required that, before the jury could rely on the bottom slapping evidence, the jury must consider whether the bottom slapping evidence showed a sexual interest by MDP in the complainant. The jury were required to apply that direction in their reasoning.[86] In the real possibility that the jury considered the bottom slapping evidence, the direction by the trial judge necessarily had the effect of requiring the jury to engage in a process of reasoning that should not have been undertaken. As Gordon and Steward JJ observe, that is enough to show that the direction by the trial judge was material.[87] The direction could realistically have affected the reasoning of the jury to the verdicts of guilty.

The proviso should not be applied

70 It was long ago established in civil appeals from jury decisions that, in deciding whether a "substantial wrong or miscarriage" had occurred, the appellate court "cannot substitute its judgment for that of the jury".[88] The same has long been true in criminal appeals: "the court is not substituting trial by a court of appeal for trial by jury".[89] An appellate court faces natural limitations, when compared with a jury, because the appellate court proceeds only from the record. This means that there will be cases, "perhaps many cases, where [the] natural limitations [of an appellate court] require the appellate court to conclude that it cannot reach the necessary degree of satisfaction" that conviction was inevitable.[90] I agree with Gordon and Steward JJ[91] that the contested issues of credit at trial preclude the application of the proviso in this case.

71 It is not possible for an appellate court to resolve the issues of credit that arose at MDP's trial by reasoning that the verdicts of guilt by the jury necessarily required the acceptance of the essential aspects of the complainant's evidence beyond reasonable doubt, independent of the bottom slapping evidence. The

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86 *Simic v The Queen* (1980) 144 CLR 319 at 331-332.

87 Reasons of Gordon and Steward JJ at [36].

88 *Balenzuela v De Gail* (1959) 101 CLR 226 at 235.

89 *M v The Queen* (1994) 181 CLR 487 at 494.

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

91 Reasons of Gordon and Steward JJ at [39].

resolution by the jury of any contested issues of credit may not have occurred independently of the bottom slapping evidence. Indeed, the potential importance of the role of the bottom slapping evidence was consistently reinforced throughout the trial.

72 The prosecutor opened the Crown case by referring to "a couple of things" about which the complainant's sister would give recorded evidence. One of those was the bottom slapping evidence. MDP was cross-examined about the bottom slapping evidence. In closing, the prosecutor relied upon the bottom slapping evidence as evidence, independent of the complainant's evidence, that confirmed MDP's sexual interest in the complainant.

73 Trial counsel for MDP opened MDP's case by responding to the bottom slapping evidence. Trial counsel for MDP also led evidence from MDP to respond to the bottom slapping evidence, with MDP saying that he would smack all the children on the bottom, not merely the complainant, either in a disciplinary way or to move them out of the way. And trial counsel for MDP addressed the bottom slapping evidence in his closing address to the jury, seeking to minimise its significance.

74 The bottom slapping evidence was also the subject of the propensity direction given by the trial judge. The trial judge emphasised the nature of the bottom slapping evidence as evidence given by the complainant's sister, independent of the complainant's evidence: "[i]t is not something that [the complainant] has given evidence about, but rather her sister".

75 In short, the bottom slapping evidence played a significant role throughout the trial. It was evidence upon which the jury might place weight in the process of reaching its verdicts of guilty. It is not open to an appellate court, years later and divorced from the atmosphere of the trial, to conclude that, despite this role of the bottom slapping evidence, the conviction of MDP on each count was nevertheless inevitable.

Conclusion

76 Special leave to appeal in relation to the proposed grounds set out in the appellant's amended notice of appeal should be granted and the appeal must be allowed. Orders should be made as proposed by Gordon and Steward JJ.

77 GLEESON, JAGOT AND BEECH-JONES JJ. Section 668E(1) and (1A) of the *Criminal Code* (Qld) enact the "common form" appeal provision for appeals from a conviction on indictment.[92] The so-called "second limb" of the common form appeal provision[93] is expressed in s 668E(1) as requiring the Court of Appeal of the Supreme Court of Queensland to allow an appeal against conviction if it is of the opinion "that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law". The so-called "third limb" is expressed in s 668E(1) as requiring that the appeal be allowed if the Court of Appeal is of the opinion "that on any ground whatsoever there was a miscarriage of justice". Section 668E(1) is subject to s 668E(1A), which provides that "the Court [of Appeal] 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 proviso").

78 A "decision" by a trial judge on a question of law for the purpose of the second limb is not confined to decisions on such questions that are made over the objection of a party. Instead, it is sufficient that the trial judge made some determination or gave some response to a question of law in a manner that has legal effect in the trial. If there is a decision, if it is "on a question of law" and if it is wrong, then the conviction "should be set aside" if the wrong decision was in respect of a question of law that was fundamental to the trial[94] or if, subject to the application of the proviso, the wrong decision could realistically have affected the reasoning of the judge or jury to the verdict of the trial that was had.

79 In this case, there was a wrong decision by the trial judge on a question of law. The decision was embodied in the trial judge's direction to the jury that permitted the use of evidence given by the complainant's sister ("K") that the appellant smacked the complainant's backside as evidence demonstrating that the

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92 See also *Supreme Court Act 1933* (ACT), s 37O(2), (3); *Federal Court of Australia Act 1976* (Cth), s 30AJ(1), (2); *Criminal Appeal Act 1912* (NSW), s 6(1); *Criminal Code* (NT), s 411(1), (2); *Criminal Procedure Act 1921* (SA), s 158(1), (2); *Criminal Code* (Tas), s 402(1), (2); *Criminal Appeals Act 2004* (WA), s 30(3), (4).

93 See *Filippou v The Queen* (2015) 256 CLR 47 at 54 [13].

94 *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 v The Queen* (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 v The Queen* (2023) 98 ALJR 62 at 72-73 [44]; 416 ALR 359 at 371. See *Brawn v The King* [2025] HCA 20 at [9].

appellant had a sexual interest in the complainant and was prepared to act on it. However, as will be explained, that decision was not in respect of a question of law that was material in that it was not fundamental to the trial and could not realistically have affected the reasoning of the jury to the verdict in the trial that was had. Accordingly, the second limb is not satisfied. For the same reasons, the admission of that evidence, and the giving of that direction, do not satisfy the materiality threshold to establish a miscarriage of justice within the meaning of the third limb.[95] Accordingly, the appeal must be dismissed.

Background

80 After a trial in the District Court of Queensland, the appellant was convicted by a jury of all 16 counts of an indictment alleging he committed sexual offences against his stepdaughter between 2014 and 2019 when she was between 7 and 12 years of age. The complainant gave direct evidence of the commission of those offences. The prosecution also adduced evidence from K to the effect that she observed the appellant smack the complainant's backside in circumstances that did not suggest that any administration of discipline was involved ("K's evidence"). K's evidence was admitted without objection. The appellant gave evidence denying the charges. He said that he smacked all the children, including the complainant, not for any sexual purpose but for the purpose of disciplining them or moving them out of the way. In the circumstances described below, the prosecution sought, and the trial judge gave the jury, a propensity direction in respect of the complainant's evidence of the charged acts and K's evidence.

81 The appellant appealed his convictions to the Court of Appeal (Mullins P, Morrison JA and Henry J). One of the appellant's grounds of appeal before the Court of Appeal was that the trial judge's propensity direction in respect of K's evidence occasioned a miscarriage of justice.

82 The Court of Appeal observed that the admissibility of K's evidence did not turn upon its capacity to support a finding that the appellant had a sexual interest in the complainant because it was otherwise admissible under the former s 132B of the *Evidence Act 1977* (Qld) as evidence of the degree of familiarity of the domestic relationship between the appellant and the complainant. In this Court, it was accepted that s 132B was not engaged because the trial of the appellant was

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95 See *Brawn* [2025] HCA 20 at [10].

not a criminal proceeding for an offence defined in Chapters 28 to 30 of the *Criminal Code*.[96]

83 So far as propensity reasoning was concerned, the Court of Appeal considered that K's evidence was "obviously not strong enough"[97] to meet the test specified in *Pfennig v The Queen*[98] because it was incapable of excluding any inference that, in smacking the complainant, the appellant was not demonstrating or giving effect to any sexual interest in her. The Court queried whether *Pfennig* established a test for admissibility in respect of evidence relied on for propensity reasoning which was not otherwise evidence of "clearly sexual"[99] conduct but, in any event, found that the trial judge's direction in respect of the use of K's evidence as propensity evidence (the "propensity direction") did not occasion a miscarriage of justice for two reasons.

84 The first reason was that, reflecting the terms of the direction given by the trial judge, there was no realistic prospect of the jury concluding beyond reasonable doubt that the smacking of the complainant's backside described by K was motivated by a sexual interest and the evidence was not so inherently prejudicial that there was a real risk of the jury not correctly applying the trial judge's directions. The second reason was that the appellant's trial counsel consented to the giving of the propensity direction for the tactical reason of seeking to persuade the jury to conclude that the prosecution was "over-reaching in its futile reliance upon the bottom slapping as sexual interest" and trial counsel's consent to the giving of the direction was "an important indication that [the] appellant suffered no miscarriage of justice".[100]

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96 *Evidence Act 1977* (Qld), s 132B(1). The appellant was convicted of four counts under s 349(1) (Chapter 32) of the *Criminal Code* (Qld), one count under s 210(1)(b) (Chapter 22), one count under s 229B(1) (Chapter 22) and ten counts under s 210(1)(a) (Chapter 22). See *Roach v The Queen* (2011) 242 CLR 610.

97 *R v MDP* (2023) 309 A Crim R 63 at 72 [37].

98 (1995) 182 CLR 461.

99 *MDP* (2023) 309 A Crim R 63 at 73 [40].

100 *MDP* (2023) 309 A Crim R 63 at 75 [47], citing *Gateley v The Queen* (2007) 232 CLR 208 at 233.

The appeal to this Court

85 The appellant was granted special leave to appeal to this Court.[101] Initially, the sole ground of appeal was that the Court of Appeal erred in holding that no miscarriage of justice occurred when evidence inadmissible as propensity evidence, namely K's evidence, was left to the jury to be used as propensity evidence. In its written submissions, the respondent sought to rely on the proviso.

86 By an amended notice of appeal, the appellant sought to expand the grant of special leave to appeal to raise three further grounds of appeal. Proposed ground 2 contends that the trial judge made a wrong decision on a question of law in deciding to direct the jury that they could employ propensity reasoning in relation to K's evidence. Proposed ground 3 contends that the admission at the trial of K's evidence resulted in a miscarriage of justice. Proposed ground 4 contends that the trial judge made a wrong decision on a question of law in permitting that evidence to be led. The respondent filed a notice of contention, expanding its reliance on the proviso. However, it did not oppose the expansion of the grant of special leave to appeal or reliance on the amended grounds of appeal.

87 The Court will only grant a party special leave to appeal to raise grounds of appeal that were not raised at trial or in the Court of Appeal in exceptional cases.[102] However, we would grant the appellant special leave to appeal to raise the proposed additional grounds in the circumstances, because: (1) the proposed additional grounds are very closely related to the ground raised in the Court of Appeal the subject of the initial grant of special leave to appeal to this Court; (2) the proposed additional grounds were the subject of detailed submissions from a number of parties in this Court as part of a wider consideration of the common form appeal provision; (3) no relevant prejudice would be occasioned to the respondent by the further grant of special leave to appeal, provided that the respondent is permitted to expand its reliance on the proviso; and (4) proposed ground 2 has persuaded a majority of this Court to set aside the appellant's conviction.

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101 *MDP v The King* [2023] HCASL 215.

102 See *Crampton v The Queen* (2000) 206 CLR 161.

The second limb of the common form appeal provision

88 This appeal was heard immediately before the appeal in *Brawn v The King*.[103] As was the case in *Brawn*,[104] the parties in this proceeding, as well as the Commonwealth Director of Public Prosecutions ("the CDPP") and the New South Wales Director of Public Prosecutions ("the NSW DPP"), who each intervened in both appeals, made extensive submissions concerning the construction and operation of the second and third limbs of the common form appeal provisions.

89 The question of principle addressed in *Brawn* was whether, in the case of an error or irregularity affecting a criminal trial, an appellate court must be satisfied that the error or irregularity was material before it can be concluded that there was a miscarriage of justice within the meaning of the third limb and, if so, how the question of materiality is to be determined.[105] The Court held that, leaving aside errors or irregularities that are "fundamental" in the sense discussed in the authorities,[106] to establish a miscarriage of justice the appellant must demonstrate 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 the verdict of guilty that was returned by the jury in the criminal trial that occurred.[107]

90 One issue that was not addressed in *Brawn* as it did not arise, but which does arise in this case, is whether, before a verdict of guilty should be set aside on the ground of a wrong decision on any question of law within the meaning of the second limb, it must be demonstrated that the wrong decision involved an error that was in any sense "material". Another issue in this case arises from the CDPP's submission that, unless a trial judge was expressly required to resolve a contest between the parties at trial, there is not a "decision" on a question of law; a submission that, if accepted, would bear upon the disposition of this appeal.

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103 [2025] HCA 20.

104 [2025] HCA 20 at [5].

105 [2025] HCA 20 at [5].

106 See, eg, *Wilde* (1988) 164 CLR 365 at 373. See *Brawn* [2025] HCA 20 at [9] fn 20.

107 *Brawn* [2025] HCA 20 at [10].

The parties' submissions on the second limb

91 The parties' submissions in relation to the second limb addressed both what constitutes a "decision" and whether a wrong decision on a question of law must be material to establish the second limb.

"Decision"

92 The appellant contended that "decision" within the second limb had a wide meaning so that it included not only a misdirection of law by the trial judge but also a circumstance where evidence is adduced without objection or any ruling by the trial judge, at least where the trial judge was aware in advance that evidence of uncharged acts was to be led at trial and does not intervene.

93 The CDPP contended for a narrow meaning of "decision" within the second limb. Given the adversarial nature of criminal trials and the necessity for such a decision to be of or on a "question" of law, the CDPP submitted that there is only such a decision for the purposes of the second limb where the trial judge has made a "ruling" after a contest between the parties on a particular issue. Thus, the CDPP contended that the admission of inadmissible evidence can amount to a "wrong decision" only if that evidence is admitted over the objection of a party and a misdirection or non-direction on a matter of law may constitute a "wrong decision" only if the direction (or the failure to make a direction) follows a request by a party. The respondent supported the CDPP's submission as to the meaning of "decision". The NSW DPP also contended for a narrow meaning of "decision", which excludes a misdirection not given at the request of a party and which did not involve any ruling or decision by a trial judge.

"Materiality"

94 The appellant submitted that no materiality threshold is applicable to the second limb so that any wrong "decision" on a question of law would result in the appeal being allowed subject only to the application of the proviso. To prevent appeals that seek to set aside convictions based on innocuous or irrelevant errors of law, the appellant submitted that this Court should hold that the "negative proposition" stated in *Weiss v The Queen*, namely that "[i]t cannot be said that no substantial miscarriage of justice has actually occurred unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable

doubt, the accused's guilt",[108] is not a necessary condition for the satisfaction of the proviso.[109]

95 The CDPP did not submit that the second limb included any materiality threshold. The NSW DPP, however, submitted that there is a materiality threshold for the second limb in that it must be shown that the error was productive of a miscarriage of justice.

The meaning and operation of the second limb

96 The appellant's submissions depart from previous decisions of this Court concerning the meaning of a "decision" for the purposes of the second limb. The appellant's submission to the effect that the adducing of evidence without objection constitutes a "decision" is contrary to *R v Soma*,[110] *Johnson v The Queen*[111] and other statements of this Court.[112] The CDPP's contention that a decision is only made following an objection or opposition would preclude errors of law in reasons for judgment following a trial without a jury falling within the second limb, contrary to *Filippou v The Queen*[113] and *Fleming v The Queen.*[114] The CDPP's contention would also exclude a misdirection on matters of law falling within the second limb unless the direction was the subject of a dispute before and resolved by the trial judge.[115]

97 There is a conflict in the authorities as to whether, to satisfy the second limb, it must be shown that the wrong decision on a question of law was in some

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108 (2005) 224 CLR 300 at 317 [44].

109 See *Kalbasi v Western Australia* (2018) 264 CLR 62 at 87-88 [70], 120 [158]; cf *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 104 [29].

110 (2003) 212 CLR 299 at 303-304 [11].

111 (2018) 266 CLR 106 at 125 [52].

112 See, eg, *HML v The Queen* (2008) 235 CLR 334 at 400 [176].

113 (2015) 256 CLR 47 at 64-65 [48], 75 [81].

114 (1998) 197 CLR 250 at 262 [27].

115 cf *Simic v The Queen* (1980) 144 CLR 319 at 327; *Gassy v The Queen* (2008) 236 CLR 293 at 312 [55]; *Filippou* (2015) 256 CLR 47 at 54 [13].

way material.[116] Even so, the resolution of that conflict should not create any potential uncertainty by revisiting the meaning of "decision" or the operation of the proviso. The preferable approach is to have regard to previous decisions and apply the statutory language in the context of the duties and functions of the trial judge and counsel in a criminal trial.

98 As in respect of the third limb of the common form appeal provision considered in *Brawn*, we confirm that there is a materiality threshold for the second limb of the common form appeal provision. The materiality threshold is to be applied within the context of the following four steps.

99 The first step in engaging the second limb of the common form appeal provision is for the appellant to identify a "decision" by the trial judge on a "question of law".

100 Such a decision is not confined to decisions of a trial judge that are made over the objection of a party. Instead, the natural and ordinary meaning of a decision on a question of law involves some determination or response to a question of law by a trial judge that has legal effect in the trial. Whether a trial judge has made a decision is to be considered in the context of the duties and obligations of a trial judge at a criminal trial.

101 It is for the parties, consistent with their obligations to the court, to determine what evidence will be adduced at a trial. Ordinarily, the trial judge will only make a "decision" in relation to the admission or use of evidence if one party objects to that admission or use or at least seeks a ruling to that effect (although the admission of inadmissible evidence or the impermissible use of otherwise admissible evidence may give rise to a miscarriage of justice under the third limb). Whether there is a decision in a particular case will involve consideration of at least the significance of the evidence and whether there was a request for a ruling on, or objection to, the admission of the evidence.

102 By contrast, the responsibility to deliver a summing up that correctly states the relevant principles of law rests with the trial judge,[117] as does the responsibility to deliver reasons for judgment at a judge-alone trial in those jurisdictions that

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116 cf *Cohen* (1909) 2 Cr App R 197 at 207; *Filippou* (2015) 256 CLR 47 at 54 [13], 76 [84]; *Hofer* (2021) 274 CLR 351 at 393 [130].

117 See *RPS v The Queen* (2000) 199 CLR 620 at 637 [41]; *Fingleton v The Queen* (2005) 227 CLR 166 at 198-199 [83]; *McKell v The Queen* (2019) 264 CLR 307 at 312-313 [3], 322-323 [45]; *Hamilton (a pseudonym) v The Queen* (2021) 274 CLR 531 at 548 [26]-[27], 549-550 [30], 556 [52], 557-558 [57], 563 [76]-[77].

permit such trials.[118] Thus, if a trial judge misdirects the jury on a matter of law or includes a wrong decision on a question of law in their reasons for verdict following a trial without a jury there will be a wrong decision on a question of law for the purposes of the second limb[119] (and that is so whether or not those decisions were the subject of submissions or counsel caused or contributed to the decision). Although a mere failure by a trial judge to give a particular direction will not ordinarily involve the making of a decision on a question of law unless a party has requested such a direction,[120] two further points should be made. First, the failure to give a direction that was not requested may nevertheless amount to a miscarriage of justice.[121] Second, the word "ordinarily" is important. Given the context of the duties and obligations of a trial judge in a criminal trial, there may be circumstances in which a trial judge's failure to give a direction that has not been requested that has legal effect in a trial gives rise to a decision on a question of law.[122]

103 The second step in engaging the second limb of the common form appeal provision arises if there is a decision on a question of law. If there is a decision on a question of law, the appellant must then establish that the decision was "wrong".

104 The third step in engaging the second limb of the common form appeal provision arises if it is shown there was a wrong decision on a question of law, in which case the appellant must show that the wrong decision involved an error that was either fundamental to the trial or, if not fundamental, material in the relevant sense.

105 As expressed in s 668E(1) of the *Criminal Code*, the second limb of the common form appeal provision provides that the Court of Appeal hearing an appeal against conviction "shall allow the appeal if it is of opinion that ... the judgment of the court of trial *should be set aside* on the ground of the wrong decision of any question of law" (emphasis added). The common form appeal

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118 *Supreme Court Act 1933* (ACT), s 68C; *Criminal Procedure Act 1986* (NSW), s 133; *Criminal Code* (Qld), s 615C; *Juries Act 1927* (SA), s 7; *Criminal Code* (Tas), s 383(6); *Criminal Procedure Act 2004* (WA), s 120. See also *Fleming v The Queen* (1998) 197 CLR 250; *AK v Western Australia* (2008) 232 CLR 438 at 453 [44], 467-468 [85]; *R v Sabet* (2018) 84 MVR 19 at 25-27 [25]-[29], 43 [90].

119 See fn 116 and fn 117.

120 *Hamilton* (2021) 274 CLR 531 at 548-549 [28].

121 See, eg, *BRS v The Queen* (1997) 191 CLR 275 at 302, 306, 328.

122 See above at [100]-[101].

provisions refer either to the appellate court forming an "opinion",[123] or "consider[ing]",[124] being satisfied[125] or "think[ing]",[126] that the verdict "should be set aside"[127] on the ground of a wrong decision on a question of law. These provisions accommodate an approach to the significance and materiality of the wrong decision for the purpose of the second limb of the common form appeal provision that corresponds with that applying to the third limb as explained in *Brawn*.

106 Thus, if the wrong decision was in respect of a question of law that was "fundamental" to the trial in the sense discussed in the authorities concerning the third limb,[128] then the guilty verdict must be set aside; the proviso is necessarily inapplicable. In that circumstance it is unnecessary to undertake any further assessment of whether the wrong decision could have had any effect on the verdict and whether no substantial miscarriage of justice has occurred. The appeal must be allowed in that case.

107 Otherwise, to demonstrate that the verdict should be set aside on the basis of the second limb, an appellant must establish that the wrong decision involved an error that could realistically have affected the reasoning of the judge or jury to the verdict of guilty in the trial that was had.[129] That is so, for the following reasons:

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123 *Criminal Appeal Act 1912* (NSW), s 6(1); *Criminal Code* (NT), s 411(1); *Criminal Code* (Qld), s 668E(1); *Criminal Code* (Tas), s 402(1); *Criminal Appeals Act 2004* (WA), s 30(3)(b).

124 *Supreme Court Act 1933* (ACT), s 37O(2)(a)(ii).

125 *Federal Court of Australia Act 1976* (Cth), s 30AJ(1)(b).

126 *Criminal Procedure Act 1921* (SA), s 158(1)(b).

127 *Supreme Court Act 1933* (ACT), s 37O(2)(a)(ii); *Federal Court of Australia Act 1976* (Cth), s 30AJ(1)(b); *Criminal Appeal Act 1912* (NSW), s 6(1); *Criminal Code* (NT), s 411(1); *Criminal Code* (Qld), s 668E(1); *Criminal Procedure Act 1921* (SA), s 158(1)(b); *Criminal Code* (Tas), s 402(1); *Criminal Appeals Act 2004* (WA), s 30(3)(b).

128 See *Brawn* [2025] HCA 20 at [9].

129 *Brawn* [2025] HCA 20 at [10].

(1) The consideration of whether an appeal "should be allowed" on the basis of a wrong decision on a question of law would not include truly innocuous or irrelevant wrong decisions.

(2) The fact that the second limb requires a decision that reflects an error of law (as opposed to a mere irregularity)[130] shows that, if the second limb is applied, the error might more readily be considered to be material.

(3) As with the third limb, the materiality threshold does not collapse into the inquiry undertaken in applying the proviso. The question posed looks to the possible effect of the wrong decision on a question of law on the trial that was had.[131]

108 The fourth step in engaging the second limb of the common form appeal provision arises if the wrong decision on a question of law does not concern a question that was fundamental to the trial but is nevertheless found to be material. In such cases, the appeal must be allowed unless the prosecution establishes that no "substantial miscarriage of justice" occurred (ie, by applying the proviso).

The second limb and the conduct of counsel

109 If the evidence the subject of a particular decision on a question of law was admitted over objection or the direction the subject of a decision was sought but refused or given over opposition, then no question of the conduct of counsel who made the objection or sought the direction contributing to any wrong decision will arise. Further, while the decisions of counsel will often provide the context in which a trial judge may make a decision on a question of law, for example, to admit evidence or to give a direction,[132] whether the conduct of counsel caused or contributed to the decision by the trial judge being wrong is irrelevant to whether there is a wrong decision on a question of law. The trial judge has a responsibility to "be astute to secure for the accused a fair trial according to law" and this extends to "an adequate direction ... as to the law".[133]

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130 *Nudd v The Queen* (2006) 80 ALJR 614 at 617-619 [6]-[9]; 225 ALR 161 at 163-165.

131 *Brawn* [2025] HCA 20 at [11].

132 *Doggett v The Queen* (2001) 208 CLR 343 at 346 [2]; *Huynh v The Queen* (2013) 87 ALJR 434 at 441 [31]; 295 ALR 624 at 631-632.

133 *Pemble v The Queen* (1971) 124 CLR 107 at 117. See above fn 129 and fn 131.

110 Otherwise, even allowing for any conduct of counsel which caused, contributed to or even encouraged a wrong decision by the trial judge on a question of law, if it is nevertheless concluded that there is a wrong decision on a question of law which could realistically have affected the reasoning of the judge or jury to the verdict of guilty then, subject to the application of the proviso, the appeal should be allowed and the verdict should be set aside.

Applying the second limb in this case

111 As noted, by the amended notice of appeal the appellant contended that his convictions should be set aside on the basis of a wrong decision on a question of law by the trial judge to give a propensity direction in relation to "evidence inadmissible as propensity evidence" (ground 2) and to "permit[] the prosecution to lead inadmissible evidence of uncharged sexual conduct" (ie, K's evidence) as propensity evidence (ground 4). To address these grounds, it is necessary to describe the course of the trial in further detail.

112 Both the complainant and K were interviewed by the police prior to the appellant being charged. During her interview, K told the police that the appellant "smacks [the complainant] on the bum ... [r]andomly" when "[w]e weren't doing anything wrong". The complainant described sexual offending by the appellant against her. She made no reference to being smacked on the backside and was not asked any questions as to whether it occurred.

113 The evidence of both K and the complainant was recorded prior to the trial.[134] In their pre-recorded evidence each of them confirmed that what they told police was correct. Both were cross-examined by the appellant's trial counsel (and re-examined by the crown prosecutor). None of the questions concerned whether the appellant ever smacked the complainant's backside.

The prosecution and defence cases

114 In opening the prosecution case,[135] the crown prosecutor told the jury that they would hear evidence from K that she witnessed the appellant "smack" the complainant "on the bottom" and that that occurred "when they weren't doing anything wrong".

115 After the crown prosecutor's opening, the pre-recorded evidence, including the interviews with police of both the complainant and K tendered pursuant to

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134 *Evidence Act*, ss 21AB(a)(i), 21AK(1).

135 On 2 August 2021: see *Criminal Code*, s 619(1).

s 93A of the *Evidence Act*, was shown to the jury as part of the prosecution case. The appellant's trial counsel did not object to the admission of K's evidence.

116 After the prosecution case closed, the appellant's trial counsel opened the appellant's case to the jury.[136] The appellant's trial counsel told the jury that the appellant would be called as a witness and that he would say he smacked both K and the complainant on many occasions but that it never had any "sexual aspect".

117 In his evidence-in-chief the appellant denied committing any of the offences. The effect of his evidence, including the denial that his actions in disciplining the complainant and K were of a sexual nature, has already been outlined.[137] There was no cross-examination specifically directed to the appellant smacking the complainant on the backside, but he was asked briefly about disciplining the complainant. In response, the appellant said he gave the complainant a "playful smack" to discipline her.

Closing addresses

118 Prior to closing addresses, the crown prosecutor raised with the trial judge that he proposed to address the jury "on evidence of sexual interests", specifically K's evidence. The crown prosecutor stated that he had already raised the issue with the appellant's trial counsel. The crown prosecutor accepted that the "smacking is at the very low end of the spectrum of evidence of sexual interest that would normally be captured" but added that "subject to your Honour's view, I propose to just address on it briefly".

119 The trial judge then called on the appellant's trial counsel, who stated:

> "[Appellant's trial counsel]: Yes, the [c]rown [p]rosecutor, my learned friend, did open that evidence in his opening address about [K's] evidence about sexual interest. In my submission, *tactically, I was going to use that in my favour in the closing address. So if your Honour wanted to give a sexual interest direction as contended for by my learned friend, I don't have a difficulty with it*. I'll be using it in a way that will become clear in my closing address. Thank you.
>
> HIS HONOUR: Yes, well, it was a matter raised with the other child as an unusual feature of their dynamic. At this stage *I'm inclined to permit it*

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136 On 4 August 2021: see *Criminal Code*, s 619(3).

137 See above at [80].

because the direction to the jury includes that they have to consider whether or not it reaches the bar." (emphasis added)

120 As evidence was adduced on behalf of the appellant, the appellant's trial counsel addressed the jury before the crown prosecutor.[138] In his closing address, the appellant's trial counsel noted that apart from the "one incident of [the appellant] touching" the complainant on the backside, "no one has said anything about anything untoward being witnessed". The appellant's trial counsel noted that the crown prosecutor opened on the touching of the complainant's backside as evidence of "sexual interest". The appellant's trial counsel belittled the prosecution case for having to rely on that as evidence of "sexual interest" and reminded the jury of the appellant's evidence on that topic.

121 In his closing address,[139] the crown prosecutor referred to K's evidence and contended that, independently of the complainant's evidence, it demonstrated the appellant's sexual interest in the complainant and that "he was prepared to act on it, and that's what he did on those other occasions".

The summing up

122 In summing up, the trial judge told the jury that the prosecution relied on the complainant's evidence of the charged acts as evidence that the appellant "had a sexual interest in the complainant and was willing to give effect to that interest". The jury were instructed that, if they accepted evidence of particular conduct making up the charged acts beyond reasonable doubt, "then you may use that finding in considering whether [the appellant] committed the other offences charged". The trial judge warned the jury that the evidence of the charged acts must not be used in any other way, such as concluding that the appellant was "generally a person of bad character", and that even if, based on a conclusion that the appellant was guilty of a particular offence, the jury were satisfied that the appellant had a sexual interest in the complainant, it would not inevitably follow that the jury would find the appellant guilty of another count on the indictment.

123 The trial judge then addressed the "evidence of other alleged incidents" that was not the subject of a charge on the indictment, which was said to demonstrate a sexual interest on the part of the appellant towards the complainant (ie, K's evidence). The trial judge reminded the jury that the prosecution relied on K's evidence of the appellant smacking the complainant's backside as demonstrating the appellant's sexual interest in the complainant and that he was prepared to act

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138 *Criminal Code*, s 619(3), (4).

139 *Criminal Code*, s 619(4), (6).

upon it. The trial judge also told the jury that the prosecution "argues that this evidence makes it more likely that the [appellant] committed the charged offences, as against that particular complainant". The trial judge then instructed the jury as follows:

> "*But you can only use this other evidence, if you are satisfied beyond reasonable doubt that the [appellant] did act as the evidence suggests, and that that conduct does demonstrate that he had a sexual interest in the complainant and was willing to pursue it.*
>
> *... [I]f you are not satisfied about that smacking on the bottom, as going to a sexual interest, then you simply put that to one side* ... [I]t is not something that ... the complainant has given evidence about, but rather her sister, [K]. So it may impact upon your assessment of [K's] evidence. *If you do not accept that this other evidence proves to your satisfaction that the [appellant] had a sexual interest in the complainant, then you must not use the evidence in some other way.* For example, to find that the [appellant] is guilty of the charged offences.
>
> If you do accept that this uncharged allegation occurred and that the conduct does demonstrate a sexual interest of the [appellant] [in] the complainant, bear in mind it does not automatically follow that the [appellant] is guilty of any of the offences charged. *You cannot infer only from the fact that this other conduct occurred, that the [appellant] did the things which he is charged with. You must still go back and decide whether you have been satisfied beyond reasonable doubt of all of the essential facts based upon the whole of the evidence that has been placed before you.*" (emphasis added)

124 The appellant's trial counsel did not apply for a redirection.

Ground 4: "permitt[ing] the prosecution to lead inadmissible evidence"

125 Consistent with the above analysis, the first step in addressing this ground of appeal is to identify whether there was a decision by the trial judge on a question of law. The appellant contended that, having heard the crown prosecutor's opening address, the trial judge "should be taken to have decided" that K's evidence could be led. That submission should be rejected. The course of the events of the trial reveals that there was no "decision" or determination on the part of the trial judge to admit K's evidence or permit the evidence to be led or adduced.[140] Accordingly,

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140 See above at [100]-[101].

the second limb of the common form appeal provision cannot be engaged. Ground 4 of the amended notice of appeal should be rejected.

Ground 2: misdirecting the jury in relation to propensity reasoning

126 The exchanges that led to the giving of the propensity direction in relation to K's evidence reveal that the appellant's trial counsel did not oppose the giving of the direction ("I don't have a difficulty with it"). In fact, the appellant's trial counsel accepted that the giving of the propensity direction was the price to be paid for the tactical use he sought to make of that evidence, and the prosecution's reliance on it, in his closing address (that is, that the crown prosecutor's reliance on this aspect of K's evidence exposed the weakness of the prosecution's case overall).

127 Nevertheless, as the parties accepted, the giving of the propensity direction involved a "decision" by the trial judge. As noted, regardless of the assistance or encouragement that a trial judge may receive from counsel, it is the trial judge's responsibility to deliver a summing up that correctly states the relevant principles of law.[141] The trial judge decided to give the propensity direction and formulated its content.

128 In addressing the first step in applying the second limb it is necessary to identify the relevant decision "on a question of law". The proposed ground of appeal characterises the trial judge as having decided to direct the jury that they could employ propensity reasoning in relation to evidence inadmissible as propensity evidence. That is an incomplete description of the trial judge's "decision". The relevant decision is embodied in that part of the summing up which extended the propensity direction in respect of the complainant's evidence of the charged acts to K's evidence. That latter part of the summing up also contained elements protective against misuse of K's evidence, namely, that the jury must be satisfied beyond reasonable doubt that: (1) the appellant did act as the evidence suggested, by smacking the complainant on the backside randomly when she and her sister were not doing anything wrong; (2) this conduct demonstrated that the appellant had a sexual interest in the complainant; and (3) this conduct demonstrated that the appellant was willing to act on his sexual interest in the complainant. The trial judge did not explicitly state that K's evidence could be used to support a sexual interest. Nevertheless, it was implicit in the propensity direction that K's evidence could be used in that way. In that respect the decision was a decision on a question of law.

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141 See fn 117.

129 The second step in applying the second limb requires the appellant to demonstrate that the decision was "wrong".[142]

130 In responding to this and the other proposed grounds of appeal, the respondent contended that K's evidence was initially adduced by the prosecution as "context" evidence; that is, evidence capable of placing the complainant's relationship with the appellant in context and rebutting any suggestion that her complaints came "out of the blue".[143] The respondent noted that the appellant made a concession to that effect in the Court of Appeal. As noted, the Court of Appeal relied on s 132B of the *Evidence Act* as a basis for the admission of K's evidence as admissible "context" or "relationship" evidence.[144] The respondent further submitted that the potential use of K's evidence as demonstrating the appellant's sexual interest in the complainant only arose in response to a suggestion made by the appellant to the complainant that she had recently invented her allegations and, as that use only concerned the appellant's motive to act, it did not involve propensity reasoning.[145]

131 It is doubtful whether the respondent's submissions accurately describe the course of the trial. However, to resolve this proposed ground of appeal it is not necessary to determine whether this aspect of K's evidence was admissible on some basis other than to show the appellant's sexual interest in the complainant and his preparedness to act upon it. That was the only use that was sought to be made of K's evidence in the crown prosecutor's closing address and that was the only use reflected in the trial judge's directions, which is the focus of ground 2 of the amended notice of appeal. That form of use involved propensity reasoning.[146]

132 In this Court, the respondent accepted that this aspect of K's evidence "would never have passed the *Pfennig* test". The "*Pfennig* test" is applied to exclude otherwise relevant evidence that is capable of supporting the existence of the alleged propensity.[147] It requires a trial judge, when determining whether the

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142 See above at [103].

143 See, eg, *Roach* (2011) 242 CLR 610 at 624 [42].

144 See *R v PAB* [2008] 1 Qd R 184 at 189 [28].

145 Citing *HML* (2008) 235 CLR 334 at 426 [277].

146 *HML* (2008) 235 CLR 334 at 353 [8], 358 [26], 382 [103], 384 [111], 395 [155], 502 [512]; *BBH v The Queen* (2012) 245 CLR 499 at 519 [50], 546 [152], 557-558 [196]-[197].

147 *BBH* (2012) 245 CLR 499 at 541 [131], 557 [196].

evidence of propensity is to be admitted, to apply the standard which the jury must eventually apply, namely whether there is a rational or reasonable view of the propensity evidence, considered in the context of the prosecution case, which is consistent with the accused's innocence. If so, and leaving other bases for its admission, the evidence should not be admitted.[148]

133 However, the respondent submitted that, in the absence of any objection to K's evidence, there was no ruling in respect of its admission and the *Pfennig* test had no application as to its use as propensity evidence. The respondent relied on the approach of Hayne J in *HML v The Queen*,[149] where evidence relied on to demonstrate the appellant's sexual interest in his daughter (his purchase of underwear for her) was described as "equivocal" and therefore inadmissible for that purpose[150] but was nevertheless admitted without objection. His Honour reviewed the directions given by the trial judge in respect of that evidence and concluded that no miscarriage of justice occurred.[151] The respondent also submitted that the trial judge's direction in this case did not involve any wrong decision on a question of law because the issue which arose before the trial judge was not whether a propensity direction should be given but the form of the direction, and the propensity direction that was given was protective of the appellant's interests.

134 The respondent's submissions should not be accepted. The Court of Appeal's concern as to the applicability of the *Pfennig* test to the admission of evidence relied on to support propensity reasoning, which is not otherwise prejudicial, is not relevant to this proposed ground of appeal, which concerns the trial judge's direction as to the use the jury could make of evidence relied on to support propensity reasoning. The *Pfennig* test is an expression of "the standard which the jury must eventually apply" in engaging in propensity reasoning.[152] It embodies the use the jury can make of such evidence[153] in that, unless there is no

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148 *Pfennig v The Queen* (1995) 182 CLR 461 at 485; *Roach* (2011) 242 CLR 610 at 622 [35].

149 (2008) 235 CLR 334.

150 (2008) 235 CLR 334 at 400 [175].

151 (2008) 235 CLR 334 at 407 [201].

152 *Pfennig* (1995) 182 CLR 461 at 483, 485; *Roach* (2011) 242 CLR 610 at 622 [35].

153 *HML* (2008) 235 CLR 334 at 357 [22], 498-499 [502]-[503], 502 [512]; *Roach* (2011) 242 CLR 610 at 623-624 [41]; *BBH* (2012) 245 CLR 499 at 546 [153].

rational or reasonable view of the evidence that is consistent with the accused's innocence, the jury cannot use the evidence to support propensity reasoning.

135 Further, while the evidence concerning the purchase of underwear in *HML* was admitted without objection, Hayne J concluded that its admission did not give rise to a miscarriage of justice because the directions given to the jury *precluded* that evidence from being used to support propensity reasoning.[154] In this case, however, the trial judge's direction (implicitly) *permitted* K's evidence to be used to support propensity reasoning (provided the jury were satisfied beyond reasonable doubt of the matters identified). Further, it is not correct that the trial judge was called on to consider only the content of any propensity direction. Although the giving of the propensity direction was not opposed, the trial judge determined that he would "permit" the prosecution to rely on K's evidence as propensity evidence ("inclined to permit") and directed the jury accordingly.

136 To the extent that the trial judge's propensity direction implicitly permitted the jury to use K's evidence as propensity evidence, it was wrong in law. If that evidence was accepted, then, as the respondent conceded, that evidence, considered alone or with the evidence of the charged acts, was too equivocal as to the existence of any sexual interest on the part of the appellant in the complainant and his preparedness to act upon it to warrant its use by the jury to support propensity reasoning. That is, there were several obvious rational and reasonable explanations for the appellant's conduct in smacking the complainant on the backside as described in K's evidence having nothing to do with the appellant having a sexual interest in the complainant including, for example, that K was wrong, that the smacks were not "random", and that they were by way of disciplining the complainant, moving the complainant out of the way, or were in mere play in common with the treatment of K herself.

137 The third step in engaging the second limb of the common form appeal provision is to determine whether the trial judge's wrong decision on a question of law was fundamental or material.[155] The propensity direction in this case did not concern a question that was fundamental to the trial.[156] However, could the decision realistically have affected the reasoning of the jury to the verdict of guilty

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154 (2008) 235 CLR 334 at 407 [201].

155 See above at [104].

156 See above at [106].

in the trial that occurred?[157] Three aspects of that inquiry in the context of this trial should be noted.

138 First, the application of the test of materiality requires a comparison with a trial that was otherwise the same but in which the correct decision of law was made. In this case, as no other permissible use of K's evidence was sought to be relied on, the application of the test of materiality involves a comparison of the trial that was had with the same trial but one where the jury were directed that K's evidence should be put aside.[158]

139 Second, the test does not involve consideration of a trial where K's evidence was not opened on by the prosecution, adduced by the prosecution without objection, responded to by the appellant's trial counsel and the subject of addresses by both the crown prosecutor and the appellant's trial counsel. Those events were part of the trial that occurred and preceded the wrong decision on a question of law.

140 Third, as noted, the decision of the trial judge reflected in the relevant part of the summing up contains several protective elements which had to be satisfied before K's evidence could be used as evidence of the appellant's sexual interest in the complainant. Those protective elements required the evidence to be "put ... to one side" if the jury were not satisfied beyond reasonable doubt that the "random" backside smacking took place as described by K and if the jury were not satisfied beyond reasonable doubt that such conduct by the appellant demonstrated a sexual interest in the complainant and his willingness to act on that sexual interest. The direction given by the trial judge can be contrasted with a direction given in relation to tendency evidence in jurisdictions governed by the Uniform Evidence Acts. Those jurisdictions either preclude[159] the jury being directed that they have to be satisfied beyond reasonable doubt of the evidence said to support the

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157 See above at [107].

158 See *HML* (2008) 235 CLR 334 at 358 [26], 489 [471], 498-499 [502]-[503]; *BRS* (1997) 191 CLR 275 at 305.

159 For example, Victoria. See *Director of Public Prosecutions v Roder (a pseudonym)* (2024) 98 ALJR 644 at 646 [2]; 418 ALR 190 at 191.

propensity or the propensity itself, or significantly limit the circumstances in which that may occur.[160]

141 K was 11 years old when she gave her police interview. The effect of her evidence was that the appellant smacked her sister on the backside at "random" even when she and her sister were not doing anything wrong. This evidence is vague and describes conduct that is trivial when compared to the continuous and grave sexual misconduct of the appellant described by the complainant. As noted, the conduct described by K was clearly explicable as being unrelated to any sexual interest of the appellant in the complainant. The offending conduct described by the complainant took place when no-one else was present or awake other than an eight-month-old child, whereas K described the complainant being smacked by the appellant in her presence without any suggestion of subterfuge or secrecy.

142 In these circumstances, there was no realistic possibility of the jury relying on K's evidence to support any finding of a sexual interest on the part of the appellant in the complainant and thus no such possibility of the jury's reasoning process being affected. Further, unlike, for example, evidence of the commission by the appellant of unambiguously sexual acts towards the complainant, K's evidence did not carry any appreciable risk of prejudice by the jury using the evidence in a manner contrary to the trial judge's direction. The position may have been different had the propensity direction not included the protective elements to which we have referred (consistent with what might usually be given in the Uniform Evidence Act jurisdictions).

143 Our assessment does not lose any force when compared with a direction precluding the jury from relying on K's evidence to find any sexual interest on the part of the appellant in the complainant. On both approaches there was no realistic possibility that the jury could have treated K's evidence as demonstrating beyond reasonable doubt a sexual interest in the complainant on the part of the appellant that he was prepared to act upon and no realistic possibility of the jury deploying it for some other impermissible use. It follows that the appellant has not demonstrated that the decision of the trial judge to give the propensity direction could realistically have affected the reasoning of the jury to a verdict of guilty.

144 Accordingly, we would reject ground 4 in the amended notice of appeal and no question of applying the proviso arises.

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160 *Criminal Procedure Act 1986* (NSW), s 161A. See also *R v Bauer (a pseudonym)* (2018) 266 CLR 56 at 98 [86]; *Roder* (2024) 98 ALJR 644 at 652 [31]; 418 ALR 190 at 198-199.

Remaining grounds – miscarriage of justice

145 Given our conclusions in relation to the immateriality of the propensity direction for the purposes of the second limb, it follows that ground 1 in the amended notice of appeal, which makes the same complaint about the trial judge's directions under the third limb, does not satisfy the materiality threshold described in *Brawn*. Further, our conclusions about the effect of the propensity direction mean that the same result follows for ground 3 of the amended notice of appeal, which complains about the admission of K's evidence under the third limb.

Conclusion

146 We would grant special leave to appeal to raise grounds 2 to 4 of the amended notice of appeal filed 14 June 2024 but dismiss the appeal.