HIGH COURT OF AUSTRALIA

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10 **IN THE HIGH COURT OF AUSTRALIA**

BRISBANE REGISTRY

BETWEEN: **MALCOLM LAURENCE ORREAL**

Appellant

and

THE QUEEN

Respondent

APPELLANT'S SUBMISSIONS

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Part I:

1. The Appellant certifies that the submissions are in a form suitable for publication on the internet.

Part II: The Issues Presented by the Appeal

2. The appeal presents a classic error by the majority of the Court of Appeal in applying established principles by applying the proviso in s 668E of the *Criminal Code* (Qld) so as to refuse to allow the appeal to that Court and order a new trial notwithstanding that a miscarriage of justice occurred in the
30 Appellant's trial.
3. The matter giving rise to a miscarriage of justice was the receipt by the trial court of legally irrelevant but highly prejudicial[1] evidence that both the Appellant and the Complainant had tested positive for the presence of the Herpes simplex virus type 1 (HSV-1).[2] The real risk that the jury had

[1] Core Appeal Book ("CAB"), 79 L 25-27.
[2] CAB, 78 L 35-40 (McMurdo JA), CAB 80 L 47-50 (Mullins JA) and CAB 98 L 25-30 (Bond J).

impermissibly used the evidence adversely to the Appellant was accentuated by the failure of the learned trial judge to firstly, instruct the jury to ignore the Crown Prosecutor's submissions to the jury about the use of the evidence and secondly instruct the jury to ignore the inadmissible evidence altogether. Rather, both the Crown Prosecutor and the learned trial judge advised the jury that they could make some use of the evidence.

4. The Appellant contends that the said majority erred by proceeding to conduct its own assessment of the admissible evidence and to apply the proviso in the trial in circumstances where the Crown case turned on the credibility of the complainant's evidence.[3]

5. The Appellant also contends that the error of applying the proviso failed to take into account, sufficiently, the direction of the learned trial judge and the urgings of the prosecutor that they could take into account and make use of the wrongly admitted evidence.[4]

Part III:

6. The Appellant has considered whether a notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth). The delivery of such a notice is not necessary.

Part IV:

7. The appeal is from the decision of the Court of Appeal reported as *R v Orreal* [2020] QCA 95.

[3] Notice of Appeal, paragraph [2], CAB, page 117.
[4] Notice of Appeal, paragraph [3], CAB, page 117.

10 **Part V: Narrative Statement of the Relevant Facts**

8. The Appellant was convicted by a jury on 8 March 2019 of three counts of indecent dealing with a child under 16 years and two counts of digital rape. He was sentenced to 4 years imprisonment with parole eligibility after half of the sentence had been served.[5]

9. At his trial for counts of sexual offending against a child including indecent dealing, digital and penile rape, irrelevant and inadmissible but highly prejudicial[6] medical evidence was placed before the jury that both the Appellant and the Complainant had tested positive for presence of the Herpes simplex virus type 1 (HSV-1).[7]

20 10. The case turned on issues of contested credibility.

11. The Complainant's evidence was as follows.[8]

12. Whilst lying in the Appellant's bedroom on the evening of 29 January 2017, watching a movie, she became tired and switched off the TV.[9]

13. The Appellant rubbed her and tickled her, having her roll on her back.[10]

14. He touched her genitals and had her touch his erect penis after he rubbed it against her [Counts 1 and 2].[11]

15. He then inserted his finger into her vagina [Count 3].[12]

16. He pulled down her shorts and inserted his penis into her vagina causing her pain [Count 4].[13]

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[5] CAB, 82 L 45-52.
[6] CAB, 79 L 23-26.
[7] CAB, 78 L 35-40 (McMurdo JA), CAB, 80 L 47-50 (Mullins JA) and CAB, 98 L 25-30 (Bond J).
[8] CAB, 83 L 21-CAB, 84 L 10. (The evidence of the Complainant is set out in some detail at *R v Orreal* [2020] QCA 95 in the reasons for judgment of Bond J.)
[9] CAB, 83 L 31-33 (c).
[10] CAB, 83 L 35 (d).
[11] CAB, 83 L 37-40 (e).
[12] CAB, 83 L 41 (f).
[13] CAB, 83 L 42-44 (g).

17. She cried and was upset but he then rubbed the outside of her vagina with his fingers [Count 5].[14]
18. He stopped and asked her not to tell anyone.[15]
19. She later left his room to sleep with her sister.[16]
20. She complained to her Mother, the next day, and went to the Police.[17]
21. The Mother had dated the Appellant's son, two years prior to these incidents, and remained friends with him.[18]
22. She had taken her family to stop at the Appellant's house on the weekend of the offending.[19]
23. The Complainant's sister confirmed that the Complainant slept with her and that she was crying on that evening.[20]
24. The medical evidence revealed initial redness to her genitals consistent with blunt force trauma and a traumatic break of her hymen.[21]
25. The redness was unlikely to have been caused by a single finger inserted once and was more consistent with multiple fingers having been inserted or, possibly, a single finger inserted multiple times.
26. The injuries were consistent with penetration by a penis with that penetration having been "a matter of days" preceding the first examination.[22]

[14] CAB, 83 L 42-50 (g) and (h).
[15] CAB, 83 L 51-52 (i).
[16] CAB, 84 L 1-3 (k).
[17] CAB, 84 L 9-10 (l).
[18] CAB, 89 L 22-24 (a).
[19] CAB, 89 L 27-29 and L 49 [63]. The circumstances concerning the complainant (as opposed to the rest of the family), were complex as revealed from the mother's evidence in cross-examination. The Complainant was supposed to be staying at a friend's house but had been staying at a boy's house and was, subsequently, found on a bed with the man that the mother was then dating. See CAB, 89 L 49-CAB, 90 L25 [63](a)-(c)].
[20] CAB, 86 L50- CAB, 87 L22 [52].
[21] CAB, 88 L 55-57 [60](c).
[22] CAB, 88 L50-CAB, 89 L 12 [60].

27. The medical evidence with respect to the presence of Herpes simplex virus type 1 (HSV-1) in samples taken from the Complainant's vagina and the Appellant's blood was admitted without objection.[23]

28. The learned trial judge gave leave to the parties to adduce evidence from the Complainant about her relationship with a boyfriend.[24]

29. She confirmed the boy had touched her vagina with his tongue but could not identify when but said it was not 3-4 days prior to 29 January 2017.[25]

30. A swab was taken from the Appellant's urethra which proved negative to the virus.[26] The Appellant's blood tested positive for HSV-1.[27]

31. All that meant was that the Appellant had, at some point in the past, been infected with HSV-1 and was not shedding at the time of the swab.[28] It was not possible to say when he had acquired the virus. It was not possible to say whether he was shedding the virus on 29 January 2017 because most people will usually shed the virus for less than a period of 5 days.[29]

32. The Doctor confirmed in cross examination that he was unable to state how long the complainant had had HSV-1 but that, as the virus was found in her genitals, transmission must have occurred through contact with her genitals rather than her mouth. He confirmed that he could not say from whom she contracted the virus.[30]

33. The Appellant neither gave nor called evidence.[31]

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[23] CAB, 87 L 40-50 [56].
[24] CAB, 84 L 30-45 [39].
[25] CAB, 84 L 16-29 [38](a)-(c).
[26] CAB, 87 L 40-44 [56](a).
[27] CAB, 87 L 44-45 [56](b).
[28] CAB, 88 L 27-37 [58](g).
[29] CAB, 88 L 27-37 [58](g).
[30] CAB, 88 L 43-47 [59].
[31] CAB, 90 L 39 [64].

34. There were aspects of the evidence adduced from the Crown's witnesses that raised issues going to the Complainant's credibility. As stated, the Appellant was a longstanding friend of the Complainant's mother.[32] The Complainant had been, very recently, caught and admonished by her mother for being alone and on a bed with an ex-partner of the mother with whom she was not on friendly terms.[33] The mother was so angry, at the time of this event, that she broke a number of windows of the ex-partner's house.[34] The mother of the Complainant also acknowledged that the Complainant had lied to her, a number of times, about where she was as opposed to where she was supposed to be.[35] It is feasible, against this background, that one or more jury members relied on the wrongly admitted evidence to assist them to decide whether or not to accept the Complainant as sufficiently credible that they could rely on her evidence to be satisfied beyond reasonable doubt of the Appellant's guilt in respect of the charges.

35. The Appellant's case, as expressed to the jury during the closing address, was that the incident did not happen, and that the complainant had been untruthful.[36]

Part VI: Argument of the Appellant:

The Argument as it Emerges from the Reasons of the Court of Appeal

36. The judges who comprised the majority of the Court of Appeal erred by rejecting any possibility that the jury would place weight on the wrongly admitted evidence.

[32] Appellant's Book of Further Material ("BOFM") 40 L 7-20.
[33] BOFM 48 L 20-BOFM 50 L5 and BOFM 52 L 1-40.
[34] BOFM 52 L 6-30.
[35] BOFM 47 L 10-48 L 21.
[36] CAB, 92 L 42-CAB, 93 L 35 [74].

37. Mullins JA, for example, stated that, in the circumstances of the conduct of the trial, the evidence could not have had any bearing on the jury's assessment of the reliability and credibility of the complainant's evidence.[37] This was an assessment that lacked a proper appreciation for the dynamics of jury considerations. It is one thing for an experienced judge to make the intellectual assessment that even highly prejudicial evidence has no probative value. It is quite another thing for a court to be certain that a group of 12 lay people, who have been instructed that they make some use of the evidence, will not place weight on such evidence. The temptation for lay people in any consideration of disputed questions of fact to use "where there is smoke, there is fire" forms of reasoning will always be strong.[38]

38. Mullins JA went on to state that that the learned trial judge's lack of definitive guidance concerning how to assess the HSV-1 evidence could be used by the jury did not suggest that there was a risk that the jury would use the evidence in a way that was adverse to the Appellant.[39] Her Honour described the learned trial judge's directions as simply an observation that the evidence did not help them one way or the other.[40]

39. Her Honour's description of the relevant direction by the trial judge does not convey the full character of the direction. The relevant passage of the summing up appears in the reasons of Bond JA as follows:

"*So where does that leave you? You might think that the evidence does not really help you one way or the other. You are left with evidence that both the defendant and the complainant child both tested positive for the same herpes*

[37] CAB, 82 L 27-30 [27].
[38] The difficulty with the reasoning engaged in by Mullins JA is identified in a different example in *Lane v The Queen* [2018] HCA 28 at [43]; (2018) 265 CLR 196 at 208, per Kiefel CJ, Bell, Keane and Edelman JJ.
[39] CAB, 82 L 30-35.
[40] CAB, 82 L 10-16.

virus, but on the state of the evidence, you cannot know when she contracted it, you cannot know when the defendant contracted it and you cannot know who she contracted it from. <u>You just take that evidence into account with all of the other evidence.</u>" (Underlining added)[41]

40. The trial judge directed the jury about their respective functions.[42] The jury were directed to ignore any judicial comment on the evidence unless it coincided with their own independent view.[43]Accordingly, when the trial judge commented that the jury might think that the evidence "does not really help you one way or the other",[44] that was likely to carry less weight in the light of the overriding direction. Then, when the trial judge directed the jury, that they "just take that evidence into account along with all of the other evidence",[45] its effect was to license the jury to engage in the smoke and fire reasoning in determining questions of credibility. The circumstances required the trial judge to instruct the jury, as a matter of law, that they must disregard the evidence completely.

41. Mullins JA concluded her reasons by acknowledging that the admission of the HSV-1 evidence at trial was an error in the conduct of the trial[46] but seeming to say that the lack of a strong direction from the trial judge direction on the subject and the lack of utility persuaded Her Honour that there was no risk that the jury might have used the evidence adversely to the Appellant.[47]

42. Bond JA's errors of reasoning were similar in terms and effect. After paraphrasing the direction to the jury and stating that there was no suggestion

[41] CAB, 97 L 8-16.
[42] CAB, 9 L 15-27.
[43] CAB, 9 L 5-27.
[44] CAB, 53 L 20-21.
[45] CAB, 53 L24-25.
[46] CAB, 82 L36.
[47] CAB, 82 L 31-36.

in either counsel's address or in the trial judge's directions that the HSV-1 evidence was relevant to an assessment of credibility,[48] His Honour expressed his conclusion as the jury, acting rationally and following the directions given to them, could not have had their view of the complainant's reliability or credibility affected by the evidence.[49]

43. The system of criminal justice, as administered by appellate courts, requires the assumption, that, as a general rule, juries understand, and follow, the directions they are given by trial judges. It does not involve the assumption that their decision-making is unaffected by matters of possible prejudice.[50]

44. In that sense, it is not appropriate, at the expense of an appellant, to assume that the jury will eschew reliance upon inadmissible, prejudicial evidence where it has been placed before them and they have been given permission to place weight and act upon it.[51]

45. Bond JA's categorization of particularly, the Crown Prosecutor's address concerning the HSV-1 evidence fails to paint a full and accurate impression of that evidence.

46. The relevant passage is set out in the reasons of McMurdo JA, as follows:[52]
"*There are plenty of explanations here. It's almost like a chicken and egg argument, but it's still a factor for you to take into account because the point is that both of them do have the same virus. It's a sexually transmissible virus, and the allegation in here is that the defendant forced her to engage in sexual contact and conduct, and so it's a matter for you with your life experience*

[48] CAB, 101 L 15-20.
[49] CAB, 101 L 24-27.
[50] *Gilbert v R* [2000] 201 CLR 414; [2000] HCA 15.
[51] This point is made in slightly different circumstances in *Lane v The Queen* [2018] HCA 28 at [41]; (2018) 265 CLR 196 at 207-208, per Kiefel CJ, Bell, Keane and Edelman JJ.
[52] CAB, 78 L 53- CAB, 79 L 2.

what you make of that. But I don't suggest that you would really put any weight on it."

47. McMurdo JA commented that, despite the last sentence, the prosecutor did suggest that the jury might use the evidence as proof of facts which supported the prosecution case.[53] Indeed, His Honour's description of the passage from the Crown Prosecutor's speech is understatement. The passage verges on floridity. The reference to "life experience" is as close as one might go to inviting smoke and fire reasoning and the final sentence to which His Honour drew attention has an air of a wink and a nod advocacy about it.

48. McMurdo JA, in dissent, correctly, would not have applied the proviso and would have upheld the appeal and ordered a new trial. His Honour found that the jury might have used the inadmissible evidence impermissibly and adversely to the Appellant.[54]

49. His Honour drew attention to the requirement that the appellate court consider the nature and effect of the error that occurred in the trial.[55] This is because some errors will prevent the appellate court from being able to assess whether guilt was proved to the criminal standard, for example, where the case turned on an issue of credibility.[56] His Honour instanced, drawing on authority, *Castle v The Queen*[57] as an example of this kind of case.[58]

50. McMurdo JA concluded that there was a significant possibility that the wrongly admitted evidence assisted the prosecution to persuade the jury to accept the complainant's evidence.[59] His Honour found that the complainant's evidence

[53] CAB, 79 L 8-10.
[54] CAB, 79 L 23-25.
[55] CAB, 79 L 30-33, citing *Weiss v The Queen*, [2005] HCA 81at [36]; (2005) 224 CLR 300 at 314 and *Kalbasi v Western Australia* (2018) 264 CLR 62 at 71 [15]; [2018] HCA 7 at [15]
[56] CAB, 79 L 34-36, citing *Kalbasi v Western Australia* [2018] HCA 7 at [15]; (2018) 264 CLR 62 at 71
[57] [2016] HCA 46; (2016) 259 CLR 449
[58] CAB, 79 L 34-35.
[59] CAB, 79 L 37-38.

was not the only evidence in the prosecution case but proof of guilt depended on it. The result was that it was not possible to conclude that there was no substantial miscarriage of justice in the case.[60]

51. The Appellant submits that McMurdo JA expressed the applicable principles, correctly, and applied them appropriately to the facts of the case.

Principles:

52. The key aspects of the principles of law applicable to this appeal have been articulated above in the discussion of the authorities relied upon by McMurdo JA in His Honour's reasons. However, it may be of assistance to refer to certain articulations of these principles that are of particular assistance in this appeal.

53. The plurality in *Kalbasi*[61] make it clear that there are certain categories of error and certain cases which throw up particular difficulty in an appellate court being satisfied that no substantial miscarriage of justice resulted from the error. Cases which turn on issues of contested credibility come within such a classification.[62] It does not follow that the proviso can never be applied in any case in which credibility is in dispute.[63] There may be errors of absolute triviality which could make no difference to any aspect of the jury's view of the evidence. It does mean, however, that appellate courts must show particular caution in deciding to apply the proviso in the categories of circumstances identified by the plurality.[64] The present appeal is not, simply,

[60] CAB, 80 L 36-39.
[61] (2018) 264 CLR 62; [2018] HCA 7
[62] *Kalbasi v Western Australia* (2018) 264 CLR 62 at 71 [15]; [2018] HCA 7 at [15], per Kiefel CJ, Bell, Keane and Gordon JJ
[63] See, also, *Weiss v The Queen*, [2005] HCA 81at [36]; (2005) 224 CLR 300 at 314.
[64] The plurality in *Lane v The Queen* [2018] HCA 28 at [48]-[50]; (2018) 265 CLR 196 at 210-211 stressed the particular relevance of the need for a jury verdict to be unanimous and the need to avoid substituting trial by jury with trial by appellate court and the inhibiting effect this has on the ability to apply the proviso where the capability of errors to affect some aspect of a jury's reasoning processes is in issue.

a case where the majority of the Court of appeal failed to show sufficient caution. The circumstances were such that applying the proviso should never have loomed as a significant possibility.

54. It is also wrong for an appellate court to focus only upon whether that court can conclude from the written record of the evidence properly admitted at trial that the Appellant was proved beyond reasonable doubt to be guilty of the offences charged.[65] To approach the matter in that way pays insufficient regard to the error of law or miscarriage of justice which, in the absence of the proviso, requires the court to allow the appeal.[66]

Summary of the Appellant's Argument

55. In the Court of Appeal, McMurdo J correctly identified that the established principles articulated in *Kalbasi* were applicable to the present matter. The prosecution case, almost wholly, was dependent on the jury accepting the disputed evidence of the complainant.

56. The errors involving admission of irrelevant and prejudicial evidence and the compounding thereof by statements to the jury by both the learned trial judge and the prosecutor meant that the jury's consideration of the wrongly admitted evidence was very capable of influencing the jury to accept the Complainant's contested allegations against the Appellant.

57. The Court of Appeal was wrong in concluding that there was no risk that the jury would use the evidence in a way that was adverse to the Appellant.[67] The Court of Appeal was, in the circumstances, wrong in regarding itself as

[65] This seems to have been a premise that underlay much of the reasoning of the majority of the Court of Appeal. Bond JA made an express finding to that effect CAB, 99 L 54-CAB, 100 L 23. This seems to have been adopted by Mullins JA at CAB, 82 L 38-41.
[66] *AK v WA* [2008] HCA 8 at [42], per Gummow and Hayne JJ, (2008) 232 CLR 438 at 452.
[67] CAB, 82 L 30-35 [28], per Mullins JA and CAB, 100 L 23-35 [100] and CAB, 101 L 13-32 [102], per Bond J.

10 capable of assessing whether guilt was proved to the criminal standard[68] and in applying the proviso to dismiss the appeal.

Part VII:

58. The Appellant seeks the following orders:

(1) That the judgment of the Court of Appeal be set aside;

(2) That, in lieu thereof, the appeal to the Court of Appeal from the verdict of the jury be upheld;

(3) That the guilty verdicts be quashed;

(4) That a new trial be held.

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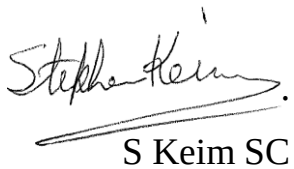
Part VII:

59. The Appellant estimates that he will require two hours in which to present his oral argument.

Dated: 4 June 2021



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[68] CAB, 99 L 55-60 and CAB, 100 L 1-23 [98]-[99], per Bond J acceded to by Mullins JA at CAB, 82 L 38-42 [29].

10 **IN THE HIGH COURT OF AUSTRALIA**

BRISBANE REGISTRY

BETWEEN: **MALCOLM LAURENCE ORREAL**

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Annexure

20 ## List of Statutes Referred to in Written Submissions

1. *Criminal Code Act 1899* (Qld) as at 8 March 2019