HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

BETWEEN: MALCOLM LAURENCE ORREAL

Appellant

and

THE QUEEN

Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I:

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

Part II: **Outline of the Propositions that the Appellant intends to advance in oral argument**

2. The majority of the Court of Appeal erred by applying the proviso in s 668E of the *Criminal Code* (Qld)[1] (the **Code**) to dismiss the appeal.[2]

3. The initial miscarriage of justice was the admission of inadmissible evidence,[3] albeit, with the consent of the defendant that both the appellant and the complainant had tested positively for the herpes (HSV-1) virus.[4]

4. This initial error in the conduct of the trial was exacerbated by two further events. The learned Crown Prosecutor, in her closing speech,[5] and the learned trial judge,[6] in her summing up, conveyed to the jury that they could use the inadmissible evidence in their fact finding. As the majority held, the learned trial judge should have directed the jury that they were obliged to disregard the evidence entirely.[7]

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[1] Joint Book of Authorities part A (**JBA-A**), page 7.
[2] Core Appeal Book (**CAB**), page 82, lines 35-41, [29] (Mullins JA) and page 101, lines 20-32, [102] (Bond J).
[3] CAB, page 78, lines 37-41, [7] (McMurdo JA); page 80, lines 45-52, [19] (Mullins JA); and page 97, lines 29-39, [90] (Bond J).
[4] A useful summary of this evidence appears at CAB, page 77, lines 18-40, [1]-[3] (McMurdo JA).
[5] CAB, page 79, lines 8-9, [8] (McMurdo JA) and page 81, lines 47-58, [24] (Mullins JA).
[6] CAB, page 79, lines 10-29 [9]-[10] (McMurdo JA) and page 82, lines 10-19 [26] (Mullins JA).
[7] CAB, page 98, lines 26-34 [94] (Bond J) with whom Mullins JA agreed.

5. The prosecutor, as part of a broader discussion, said that [the herpes thing] is almost like a chicken and an egg argument but it's still an argument that the jury could take into account because the point is that they both have the same virus.[8]

6. The judge, at the end of a summary of the inadmissible evidence, told the jury that you just take that evidence into account along with all the other evidence.[9]

7. It was necessary for the intermediate appellate court to consider the nature and effect of the compounding errors constituted by the wrongful admission of the evidence and the indications by the prosecutor and the trial judge to the jury that such evidence could be used by the jury.[10]

8. It is significant, in the present case, that the Crown case depended on the jury's acceptance (sufficiently, to resolve any reasonable doubt) of the complainant's credibility to make out its case. In such cases, there is particular difficulty, for the appellate court, in assessing whether, in the absence of the errors, the Crown has proved its case beyond reasonable doubt.[11]

9. It is accepted that the obligation to assess the nature and effect of the errors subsists notwithstanding the difficulty presented by the importance of the contested credibility of the complainant.[12] However, as this court said in *Baini v the Queen*,[13] in many cases, an appellate court will not be in a position to decide whether an appellant must have been convicted if the errors had not been made. Inevitability of a guilty verdict, in the absence of the error, is described in *Baini's* case as a necessary prerequisite of applying the proviso.[14]

10. Despite the absence of absolute red lines and the need for the appellate court to consider the nature and effect of the error, in each case, it is important that the appellate court also acknowledge the difficulty, especially, in a case of contested credibility, of arriving at a conclusion that the jury must, nonetheless, have arrived at a guilty verdict.

11. Of particular importance is the majority's (correct) conclusion that the jury should have been instructed to disregard the wrongly admitted evidence, entirely.[15] To conclude that the jury must, nonetheless, have reached the same verdict if they had

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[8] Book of Further Materials (**BOFM**), page 83, lines 20-40.
[9] CAB, page 53, lines 20-25.
[10] *Kalbasi v Western Australia* [2018] 264 CLR 62 at 71 [15] (Kiefel CJ, Bell, Keane and Gordon JJ): Joint Book of Authorities part C (**JBA-C**), page 198 (PDF 192).
[11] *Kalbasi v Western Australia* [2018] 264 CLR 62 at 71 [15] (Kiefel CJ, Bell, Keane and Gordon JJ): JBA-C, page 198 (PDF 192).
[12] *Weiss v The Queen* (2005) 224 CLR 300 at 315 [36] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ): JBA-C, page 353 (PDF 347).
[13] (2012) 246 CLR 469 at 480 [29] (French CJ, Hayne, Crennan, Kiefel and Bell JJ): JBA-C, page 95 (PDF 89).
[14] *Baini v The Queen* (2012) 246 CLR 469 at 481 [32] (French CJ, Hayne, Crennan, Kiefel and Bell JJ): JBA-C, page 96 (PDF 90).
[15] CAB, page 98, lines 26-34 [94] (Bond J) with whom Mullins JA agreed.

been properly instructed is the type of reasoning which, in *Lane v The Queen*,[16] was held to involve the appellate court in performing the constitutional function of the jury. The Court in *Lane's* case went on to speak of a breach of the presuppositions of the trial which preclude the application of the proviso.[17]

12. It may be accepted that, in conducting an assessment of the whole of the record,[18] the majority of the Court of Appeal were assessing the nature and effect of the errors as discussed in *Weiss*.[19] Even if one ignores the constraints applicable to such process, discussed above, the conclusions arrived at by the majority as to the nature and effect of the errors were wrong. The evidence was prejudicial and susceptible to reasoning in which a correlation was treated as leading to a causal connection that which we have referred to, in our written submissions, as smoke and fire reasoning. It is impossible to conclude that one or more jurors did not use this evidence to settle, for themselves, what was a strongly contested question of credibility. It was that question of the credibility of the complainant on which the Crown's case was dependent.

13. Both, for reasons of principle, and substantive reasons going to the nature and effect of the error, the majority of the Court of Appeal erred in applying the proviso in s 668E of the Code.

Dated: 10 November 2021

Stephen Keim .....

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Senior Legal Practitioner presenting the case for the Appellant

[16] (2018) 265 CLR 196 at 207-209 [41]-[44] (Kiefel CJ, Bell, Keane and Edelman JJ): JAB-C, page 261, line 39 – page 263, line 20 (PDF 255-257).
[17] (2018) 265 CLR 196 at 209-210 [44]-[48] (Kiefel CJ, Bell, Keane and Edelman JJ): JAB-C, page 263, line 18 – page 264, line 31 (PDF 257-258).
[18] Respondent's submissions, page 2, [2.3].
[19] (2005) 224 CLR 300 at 315 [36] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ): JBA-C, page 353 (PDF 347).