HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY **No. B 52 of 2022**

BETWEEN **BDO**

Appellant

and

THE QUEEN

Respondent

APPELLANT'S REPLY

Part I: This version of these submissions is in a form suitable for publication on the internet.

Part II: Ground 1

The complainant's evidence on dates was uncertain

1. The Respondent submits that the nine-year-date span in which s 29 *Code* was relevant *in theory* narrowed *in reality* by combining: (1) the complainant's evidence of timeframes attaching to allegations, such as "early", "mid" and "late primary school", together with (2) her evidence that late primary school means grades 5 – 7; and (3) evidence that she would have been in those grades between years "2006 and 2008".[1] From this, the argument goes, all other dates and ages can be extrapolated in, what was presented to the jury as, a straightforward, arithmetical exercise.[2] The result of this exercise would be as follows:[3]

Count/s	Timeframe	Corresponding years	Appellant's age[4]
2, 3, 6, 9, 12	Late primary school[5] (grades 5 – 7)	2006 – 2008	14 – 17
4	July 2005[6]	2005	13 years, 9 months
7	Primary school[7]	2002 – 2008	10 – 17
8	Mid-primary school[8]	2004 – 2005	12 – 14

[1] Respondent's submissions at [6] and [7].
[2] Indeed, the jury was given a table of dates to do exactly that. See ABFM at 208 (MFI H).
[3] For those counts of which the appellant was convicted.
[4] Again, extrapolating from the appellant's date of birth: 21 October 1991. ABFM at 179 [1].
[5] ABFM at 25, ll 20 – 27 (cts 2 & 3); at 45, l 35 (ct 6); at 41, ll 44 – 45 (ct 9); at 27, l 19 (ct 12).
[6] ABFM at 52, ll 1 – 12.
[7] ABFM at 38, l 38. The Respondent's submissions at [6], state this was "late" primary school. The transcript records that her evidence was that she was "in, like, primary school at that stage".
[8] ABFM at 49, l 18.

11	July 2008[9]	2008	16
13, 14	Late primary school / early high school[10]	2008 – 2009	16 – 18

2. As can be seen, on the Crown's approach, capacity would only be live *in practice* for counts 4, 7 and 8. (On this basis alone it is hard to see how, as the Respondent submits, the evidence supports the conclusion that he was over 14 years of age for *all* but count 4.[11])

3. This approach rests on the accuracy of the complainant's timeframes. While the complainant dated counts 2 and 3 to "late primary school" (which should, on the above Table, be 2006 – 2008), when asked whether it occurred before or after a photograph of the Appellant, dated 30 December 2004, she did not know.[12]

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4. Further, it was the Crown that chose an oppressive nine-year time frame for all but one of the charges. By so doing it accepted (presumably) that it could not be more specific. That date range created the legal architecture for the trial and this Court should not approach the case as if the Crown had narrowed the time frame in the way that it now wishes it had.

There was insufficient evidence to rebut the presumption of incapacity

5. The Respondent's submission that there was *ample* evidence to rebut the presumption[13]:
   a. fails to engage with the fact that the only evidence of the appellant's education and development was that he was of *below average* intelligence and maturity.
20 b. ignores the problems with using the evidence of the "circumstances of the offending" to conduct the necessary point-in-time assessment of capacity for each of the counts on the indictment, given the difficulties with dating the counts.[14]
   c. suggests, in relation to count 4, that the prosecution was aided by the fact that the appellant, at that time, was "three months short of legal maturity"[15]. *RP* is authority for the opposite – that the force of the presumption does not weaken with age.[16]

[9] ABFM at 38, l 44.
[10] ABFM at 44, ll 4 – 5.
[11] Respondent's submissions at [8].
[12] ABFM at 26, ll 9 – 10; see also ABFM at 101, ll 13 – 24.
[13] Respondent's submissions at [39].
[14] See Appellant's submissions at [20], especially at footnotes 59 and 60.
[15] Respondent's submission at [39].
[16] *RP* at [12].

d. places significant emphasis on the alleged violence and force that accompanied the sexual acts as evidence of capacity.[17] This reasoning was unsuccessful on similar facts in *RP*. It is also circular. Force, coercion, threats and violence are all likely to involve criminal conduct. Section 29 presumes that the Appellant does not have the capacity to know that such acts are wrong. How then, can it be said that acts of violence (of which he is presumed incapable of bearing criminal responsibility) assist to establish his knowledge of the wrongness of sexual acts?

6. The Respondent says that: "the issue [of capacity] is not resolved by focusing on what evidence is not available, but by considering the evidence that is available".[18] This is contrary to *RP:* "[I]n the absence of evidence on [the environment in which the appellant was raised, and his performance at school], it was not open to conclude that the appellant, with his intellectual limitations, was proved beyond reasonable doubt to have understood that his conduct…in engaging in sexual intercourse with his younger brother was seriously wrong in a moral sense".[19]

Ground 2:

Was Boddice J applying the proviso?

7. The Respondent is right to say that we have approached Ground 2 on the basis that Boddice J was applying the proviso even though his Honour used the phrase 'miscarriage of justice' (i.e. missed out the word "substantial"). This was also the Respondent's position at the special leave application.[20] We have done so because his Honour's reference to "an independent assessment of the evidence as a whole"[21] is plainly the language of the proviso.

8. In a change of position, the Respondent now says that his Honour was actually applying the third limb of the common form provisions. It does so by citing Gageler J's reasons in *Hofer*,[22] but fails to acknowledge that his Honour was alone in incorporating 'effect on the verdict' reasoning into the third limb. The plurality explained that a miscarriage of justice:

[17] Respondent's submissions at [36] – [37].
[18] Respondent's submission, at [38] (emphasis added).
[19] *RP* at [36] (emphasis added).
[20] See footnote 22 of the Respondent's submissions in response to the Applicant's special leave application.
[21] See *BDO v The Queen* [2021] QCA 220 at [139]-[143].
[22] *Hofer v The Queen* (2021) 291 A Crim R 114 (***Hofer***).

> "refers to any departure from a trial according to law to the prejudice of the accused. This accords with the long tradition of criminal law that a person is entitled to a trial where rules of procedure and evidence are strictly followed…"[23]

9. This statement of the law is consistent with the unanimous judgment of this Court in *GBF,*[24] and the majority's reasons in *Kalbasi.*[25] It follows that if, as the Crown now says, the Court of Appeal was applying the third limb test, then it did so in a way contrary to authority.

The Respondent's reliance on Awad and Kalbasi is flawed

10 10. The Respondent's reliance on *Awad* concerned s 276(1)(b) *Criminal Procedure Act* 2009 (Vic), which (as Gordon and Edelman JJ observed) "is not in the same form as the common form criminal appeal provision".[26]

11. Again, Gageler J in *Kalbasi* was in the minority. In that case the plurality said:

> "The concepts of a 'lost chance of acquittal' and its converse the 'inevitability of conviction' do not serve as tests because the appellate court is not predicting the outcome of a hypothetical error-free trial, but is deciding whether, notwithstanding error, guilt was proved to the criminal standard on the admissible evidence at the trial that was had".[27]

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Consent (and mistaken belief in consent) were live issues

12. The evidence at trial which raised 'consent' and 'mistake of fact' as issues for the jury is summarised at [63]-[72] of our primary outline. The exchange between the trial judge and counsel on the question of alternative verdicts supports that submission:
    a. the prosecutor had earlier said that the risk that the jury would otherwise accept the complainant's evidence but have a doubt about consent was "*a very clear problem"* (although this was a view not shared by the trial judge).[28]

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[23] *Hofer* at [41] (Kiefel CJ, Keane and Gleeson JJ).
[24] See *GBF v The Queen* (2020) 271 CLR 537 at [24] (per Kiefel CJ, Bell, Keane, Gordon and Edelman JJ). Justice Gageler cites this passage of *GBF* in his Honour's reasons in *Hofer* at fn 108, as an example of a passage which might be thought to "reinforce" an incorrect reading of *Weiss v The Queen* (2005) 224 CLR 300.
[25] *Kalbasi v Western Australia* (2018) 264 CLR 62 at [12] (***Kalbasi***).
[26] *Awad v The Queen* [2022] HCA 36, [75] (Gordon and Edelman JJ).
[27] *Kalbasi* at [12] (per Kiefel CJ, Bell, Keane and Gordon JJ).
[28] Respondent's Book of Further Materials [**RBFM**] 7, l 26 (emphasis added).

b. defence counsel's position on the question of alternative verdicts was influenced by the danger that the jury might find the appellant guilty of indecent dealing, either because of a compromise or a misunderstanding of the prosecution's case.[29]

c. defence counsel believed (as did the trial judge) that consent was not an element of any offence prior to the complainant's 12th birthday. Given that there were different issues involved in raising an excuse under s 24 in relation to later incidents[30] it cannot be assumed that the same decision would have been made if the true legal position had been appreciated.

The Respondent should be bound by its nine-year time frame

13. The Crown submits that, notwithstanding the broad date range on the Indictment, the only reasonable conclusion on the evidence is that the offences were committed *after* 5 January 2004,[31] such that consent did not matter at all.

14. It was the Crown that chose to lay charges with a nine-year time frame. If the evidence allowed that time frame to be shortened, then it was incumbent on the Crown to shorten it. Prosecutors should not be permitted to charge specific events within oppressively broad time periods and then seek avoid the consequences of the law changing during that period by a de facto narrowing.

15. Further, given that the parties were not aware of the importance of 5 January 2004 (when the law changed), the complainant's evidence was not challenged or clarified by reference to it.

Dated: 2 February 2023

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[29] RBFM 9, ll 13-28.
[30] See Appellant's submissions at [71].
[31] Respondent's submissions at [47].