HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 13 Jan 2023 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	B52/2022
File Title:	BDO v. The Queen
Registry:	Brisbane
Document filed:	Form 27D - Respondent's submissions
Filing party:	Respondent
Date filed:	13 Jan 2023

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

B52/2022

IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

BETWEEN: **BDO**

Appellant

and

THE QUEEN

Respondent

RESPONDENT'S SUBMISSIONS

Part I:

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

Part II:

2. The appellant appeals on the following two grounds, pursuant to special leave to appeal granted on 21 October 2022 from the judgment of the Court of Appeal, Supreme Court of Queensland given on 15 October 2021.

    1. The Court of Appeal erred by misapplying the principles in *RP* v *The Queen (RP).*[1]

    2. The Court of Appeal erred by applying the proviso in circumstances where the trial judge had removed an element of the offence from the jury.[2]

3. The respondent contends;

    1. The Court of Appeal did not misapply *RP* – a case concerning the presumption of *doli incapax* at common law. Instead, the Court of Appeal properly applied the law relating to s.29 of the *Criminal Code (Qld).*

    2. The Court of Appeal was correct to conclude that no miscarriage of justice resulted from the misdirection in relation to consent by the complainant prior to 5 January 2004, which was shortly after the complainant had turned seven years of age.

---

[1] *RP v The Queen* (2016) 259 CLR 641 **(RP)**.
[2] Ground two cannot apply to the conviction on count four.

3. The application of the proviso under s.668E(1A) of the *Criminal Code (Qld)* arises for consideration only after an appeal court has concluded that there has been a material 'miscarriage of justice'. Not every error or misdirection amounts to a miscarriage of justice. A miscarriage of justice requires the Court to consider not only the fact of an error or irregularity, but the effect of the error or irregularity in the trial. There was no error in the conclusion of the Court of Appeal in relation to a miscarriage of justice. Only if the Court concludes that the error or irregularity in the trial has occasioned a miscarriage of justice will the application of the proviso arise for consideration.

Part III:

4. The respondent considers that notice is not required pursuant to section 78B of the *Judiciary Act 1903 (Cth)*.

Part IV:

5. The appellant's summary of the factual narrative of the offences set out in Paragraphs [5] to [16] is not in dispute subject to the observations that follow. The relevant facts are more fully set out in the decision of the Court of Appeal (*R v BDO* [2021] QCA 220 (BDO)) at [8]-[85].

The evidence as to the timing of the offences

6. The appellant focuses on the nine-year period of the charges for all but Count 4 on the indictment. However, properly understood, the relevant evidence was not, in fact, so wide. Whilst there remained a degree of vagueness in her evidence as to the timing of the offences, the complainant gave evidence of her recollection of the timing of each of the offences within the broad date range on the indictment by reference to a period of time when she was at primary school – '*early primary school'* (Count 18); '*early to mid primary school*' (Count 1); '*mid to late primary school'* (Count 8) and *'late primary school'* (Counts 2, 3, 6, 7, 9, and 12).

7. The complainant's reference to *'late primary school'* was clarified in her evidence to be when she was in grades 5 to 7[3]. This was between 2006 and 2008 when she was aged between 9 and 12. The complainant turned 12 years of age on 16 November 2008, the year that she completed primary school (Year 7) so that she was 11 years of age for all but approximately 1 month of her final year at school. This is important. Count 4 was indicted with greater particularity as to timing (July 2005). The complainant gave evidence as to the timing of Count 11 by reference to her having a broken arm (July 2008), and the complainant's parents gave evidence which narrowed the timeframe for the events alleged in Counts 13 and 14[4]. The complainant gave no evidence to narrow to timeframe alleged in relation to Counts 10, 15 and 16, but the defendant was acquitted of those offences.

8. Having regard to the evidence as to the timing of the alleged offences, except in relation to count four (when the defendant was aged 13 years and 9 months), it can be seen that the jury convicted the defendant only of those offences where there was evidence which supported the conclusion that he was over 14 years of age at the time alleged by the complainant that the particular offence was committed by him.

The issue of Consent in this trial.

9. The appellant submits that consent was a live issue in the trial. It is relevant that the defendant was convicted only of offences of rape[5] in the context that all allegations of penile and digital penetration of the complainant was expressly denied in the manner in which the defence case was run. It is also relevant that on a proper analysis of the evidence in the trial, only Count 1 and Count 18 were alleged to have occurred at a time likely prior to the amendment of s.349 of the Criminal Code (Qld) which commenced on 5 January 2004 at a time when the complainant was 7 years of age. The defendant was acquitted of those counts, as he was in relation to Counts 10, 15 and 16 in relation to which there was no evidence to further pinpoint the timing of the alleged offending.

---

[3] Appellant's Book of Further Materials at 101.
[4] Diane Barker at *Appellant's Book of Further Materials* 139 and 151 gave evidence that the appellant moved into the shed in about year 12 or just after. Damien Barker at *Appellant's Book of Further Materials* 160 gave evidence that it would have been after high school.
[5] Count 16 alleged an offence of Indecent Treatment of a child under 16 but he was acquitted of that count.

10. Consequently, whilst the misdirection in relation to the issue of consent prior to 5 January 2004 is accepted, it is submitted that no miscarriage of justice resulted from it.

11. It was expressly put to the complainant in cross-examination that penetrative acts of the her vagina did not occur. Allegations of that nature constituted nine of the eleven offences upon which the defendant was convicted. For the remaining two counts involving penile penetration of the complainant's mouth, the complainant gave evidence that she did not consent and there was no evidence that these acts occurred with her consent. It was not put to the complainant that there were consensual acts of oral sex by her on him for any of the specific counts.

12. In the context of the evidence in this trial, there were three periods of time relevant to the complainant's age and the law in Queensland relating to the issue of consent.

20 October 2001 to 4 January 2004

13. This is the period prior to the amendment to s.349 of the *Criminal Code (Qld).* For an offence alleged to have been committed during this period, the Crown was required to prove that consent was not freely and voluntarily given by the complainant who was then aged between 4 years 11 months and 7 years. The appellant was aged between 10 years and 12 years and about 2 months.

5 January 2004 to 15 November 2008

14. During this period, following the commencement of the amended s.349 and concluding upon the complainant's 12th birthday, the law deemed that the complainant could not consent. Therefore, for any offence that the jury concluded was committed during this period of time (Count 4 was one such offence), consent was not in issue.

15. Having regard to the evidence of the complainant, the practical reality is that each of the offences upon which the defendant was convicted were likely committed during this period of time. The complainant's evidence was that all offending occurred whilst she was at primary school. She turned 12 on 16 November 2008, which was her last year of primary school. Whilst the indictment was conservatively drafted to include the period when she was 12 and 13 years of age, the evidence of the offending gave a

more narrow scope for the offence to have been committed such that the issue of consent was greatly diminished.

16 November 2008 to 16 November 2010

16. This final period extends from the complainant's twelfth birthday to the end of the charged period, when she turned fourteen.

17. At the trial, the jury were instructed that for any offence that was or may have been committed during this period of time, the Crown had to prove that consent was not freely and voluntarily given by the complainant.

18. There was no suggestion at the trial that mistake of fact should be left to the jury for this time period.

Part V:

Ground 1: The Court of Appeal erred by misapplying the principles in RP

19. The issue of *doli incapax* in Queensland is governed by s.29 of the *Criminal Code (Qld)* and not the common law. The codified law requires that the Crown prove that the child had *capacity* to know that they ought not to do the act or make the omission. By contrast, the common law requires proof of knowledge of moral wrongness. The distinction is significant.

20. In *RP*, Kiefel, Bell, Keane and Gordon JJ said at [9]:

> *"The age at which a child is capable of bearing criminal responsibility for his or her acts has been raised by statute in New South Wales. Under s 5 of the Children (Criminal Proceedings) Act 1987 (NSW) (the Act), there is a conclusive presumption that no child under the age of ten years can be guilty of an offence. The Act does not otherwise affect the operation of the common law presumption of doli incapax. From the age of 10 years until attaining the age of 14 years, the presumption may be rebutted by evidence that the child knew that it was morally wrong to engage in the conduct that constitutes the physical element or elements of the offence."*

21. The plurality expressed its conclusion in the follow terms at [36]: *"seriously wrong in a moral sense"*.

22. Gageler J said at [38]:

> *"Doli incapax – incapacity for crime – is a common law presumption in the same way as innocence is a common law presumption. To establish that a child under the age of fourteen years has committed an offence* ***in a jurisdiction in which the common law presumption continues to apply****, the prosecution must prove more than the elements of the offence. The prosecution must prove beyond reasonable doubt that the child understood that the child's conduct which constituted the offence was seriously wrong by normal adult standards. That understanding cannot be inferred from the fact that the child engaged in the conduct which constituted the offence; it must be proved by other evidence. That other evidence might be or include evidence of the circumstances or manner of the conduct. That other evidence might also be or include evidence of the development or disposition of the child."* (Emphasis added)

23. "*Capacity to know*" requires the ability to reason but need not be limited to intellectual ability. The assessment of capacity may include consideration of the child's education, at school and at home, on moral issues, decision making ability and emotional development. Capacity refers to what resources a person may hold. It is readily apparent that "*knowledge*" and a "*capacity to know*" are quite separate things. Practically, it may be hard to imagine a situation where a person who had capacity to know did not know the moral wrongness of an action. That would mean the person simply did not apply their capacity. However, this does not overcome the distinction between the law in the common law and codified States.

24. Questions surrounding the requirements of s 29(2) of the *Criminal Code (Qld)* were referred to the Court of Appeal in 1997 by the Attorney-General in *R v F ex parte A-G*.[6] The court rejected the test applied by the trial judge in that case that "*the Crown must call strong and pregnant evidence that the accused understood that what he did was seriously wrong, not merely naughty or mischievous*".[7]

25. Consistent with the directions given to the jury and the formulation of the test adopted by the Court of Appeal at [137] in the present case, Davies JA (with whom McPherson JA and Shepherdson J agreed) at 160 said of s.29;

---

[6] [1999] 2 Qd R 157 (***R v F***).
[7] At p159.

> *"The Crown must prove beyond reasonable doubt that the accused had the capacity to know that he ought not to do the act which he did."*

26. Davis JA went onto to express the view that;

> *"…if the phrase "that the person ought not to do the act" needs to be paraphrased, and I doubt if it does, to use the phrase, "that the act was wrong according to the ordinary principles of reasonable man."*[8]

27. Prior to *R v F,* the Queensland Court of Appeal highlighted the difference between knowledge and capacity in *R v B*[9]*,* where Pincus JA said at pp3 and 4 (Davies JA and de Jersey J agreeing):

> *"We were referred to authorities which would if applied, attribute to the subsection which I have quoted a rather different meaning from that which its language appears to convey. For example, reference was made to B v. R (1958) 44 Cr.App.R., an English case, in which speaking of an accused between the ages of 8 and 14 it was said that in order to rebut the presumption in favour of such a child "guilty knowledge must be proved and the evidence to that effect must be clear and beyond all possibility of doubt". **It is plain that this is not the law of Queensland.** What the Code requires could hardly be more clearly stated: it must be proved that at the relevant time "the person had capacity" (I emphasise capacity) "to know that the person ought not to do the act". **This is, of course, different from proving actual knowledge.** Authority is hardly needed for that proposition, but if it were needed it is supplied by the case of McGrath (C.A. No. 252 of 1986, judgment delivered 20 November 1986) to which the respondent has referred us. Further, there is no indication in the section that any special burden of proof applies to this issue."* (Emphasis added)

28. The case of *B v R* (above) to which Pincus JA referred, was cited by the plurality in *RP* (at [9]) in support of the conclusion in that case as to the requirements of the common law of *doli incapax.* That is the paragraph upon which the appellant now relies to support the contention that the standard directions given in Queensland (as

[8] Citing ***R v M*** (1977) 16 SASR 589 at 591.
[9] [1997] QCA 486.

they were in the present case) based upon the existing Queensland jurisprudence, are *"wrong"*.

29. The law in Queensland is clear. That the decisions of *B v R* and *R v F* reflect the codified law in Queensland was confirmed in *R v JJ; ex parte Attorney-General (Qld).*[10] *RP*, is not authority for a different contention.

30. *Rye v State of Western Australia*[11] is instructive. That case concerned events in 1972 when the appellant was aged 13 years and 3 months. The court found that the issue of the appellant's capacity under s.29 was overlooked by the trial judge (the trial proceeded without a jury), the prosecutor and defence counsel. There was an accepted requirement of the trial judge to make findings in relation to that issue. The trial judge's failure to make any findings was a material error of law such that a miscarriage of justice resulted.

31. In the decision of *Rye* both the majority (Buss P and Mazza JA) and Vaughn JA noted that the focus is on *'capacity'* in the codified state of Western Australia[12], and drew upon the "*preponderance of the appellate decisions in Queensland"*[13] in support of that view, and distinguished *RP* in relation to the test to be applied.[14] In particular, drawing on some of the concepts from *RP*, the majority concluded that:

> *"In our opinion, a child will have a capacity to know that doing the relevant act or making the relevant omission was morally wrong if, at the material time, he or she had the capacity to know that the conduct in question was seriously wrong by the ordinary standards of reasonable adults. So, the question for the jury or other fact finding tribunal where the State must prove beyond reasonable doubt that a child had the requisite capacity is whether, at the material time, the child had capacity to know that the conduct in question was seriously wrong by the ordinary standards of reasonable adults."*[15]

32. In a separate judgment in which he expressed a "*slightly different view*"[16] to the majority on this point, Vaughan JA preferred the "*exposition of Davies JA (McPherson*

---

[10] [2005] QCA 153 at (***JJ***).
[11] [2021] WASCA 43 (***Rye***). The decision was handed down after the trial in the present case.
[12] At [44].
[13] see at *Rye v The State of Western Australia* (above) at [44] per Buss P and Mazza JA and Vaughan JA in agreement at [85].
[14] At [51].
[15] *Rye v The State of Western Australia* (above) at [51] (internal citations omitted).
[16] *Rye v The State of Western Australia* (above) at [89].

JA and Shepherdson J agreeing) in R v F; ex parte Attorney General"[17] (set out above at [24] and [25] of these submissions). In expressing his preference, he acknowledged that it may be a "*distinction without a difference*"[18] particularly having regard to how the majority explain the concept (at [51]) and apply it (at [79]) to the circumstances in that case.

33. The formulation of the applicable test in the context of a codified jurisdiction was consistent with the words used by the court in the present case at [137]. It is submitted that the Court of Appeal properly applied the relevant test to the consideration of the application of s.29 of the *Criminal Code (Qld)* to the circumstances of this case. The case of *RP v The Queen* does not dictate a different approach in Queensland, nor does it expose any error in the decision of the Court of Appeal in the present case.

Evidence of capacity in the present case

34. Even if, giving full respect to the language of s.29, the principles articulated in *RP* as to the nature of the enquiry by a jury when considering the issue of capacity were relevant in the present case, the evidence was such as to account for them.

35. In the present case, there was a body of evidence capable of supporting the conclusion that the appellant had the requisite capacity[19] such that it can be seen that no miscarriage of justice resulted from the consideration of this issue in the circumstances of this case. The evidence of the children's mother[20], in particular, provided considerable support for that conclusion. In addition, there was evidence of the circumstances of the offending which also supported the conclusion of capacity. For example, the complainant gave evidence that from the first occasion she could remember, the appellant had told her that it was "*our little secret*" and that he told her, whilst holding her really tightly, that if she told anyone, he would hurt her.[21] In addition, on the occasion alleged in Count 8 (next to the laundry), the defendant desisted when their mother came into the adjacent laundry and remained silent until their mother left. The complainant also gave evidence of the occasion (Count 12) at the shack when they were riding motorbikes. He put his penis into her vagina and she screamed. In response he put a rag over her mouth. They then heard their father's

[17] *Rye v The State of Western Australia* (above) at [91].
[18] *Rye v The State of Western Australia* (above) at [92].
[19] Summarised in the Directions to the jury by the trial judge at Core Appeal Book 19 and 20.
[20] Summarised in the Court of Appeal (BDO) at [100] to [102] of the judgement
[21] BDO at [35]

motorbike start up and the appellant told the complainant to lie to her father and say that she fell off her bike.

36. It is also relevant that a degree of violence or force was described by the complainant in the commission of the offences. For example, the complainant gave evidence that on the occasion alleged in Counts 13 and 14, the appellant got really mad when she tried to leave and he took her inside and locked the door before making her put her mouth around his penis and then he sat on her and put his penis into her vagina.[22] Similarly in relation to the occasion alleged in Count 9. The complainant explained that he got really mad because she would do what he had asked her to do in relation to a horse, and then took her into the shed and put her on the dirt floor and put his penis into her vagina.[23]

37. The jury in the present case therefore were tasked to consider the appellant's capacity to know that he ought not do the acts alleged against him, which was not simply a consensual sexual relationship between siblings, but sexual activity committed in the context of the evidence given by the complainant (which included allegations of a degree of force, coercion, and threats of violence), and with a background of the instruction given to him by his mother directly relevant to the things he was alleged to do.

38. Reliance upon the evidence of the circumstances surrounding the offending when considering the question of the appellant's capacity does not disclose error. Evidence which tends to prove the relevant capacity will necessarily be limited in some cases, however the issue is not resolved by focusing on what evidence is not available, but by considering the evidence that is available. In this particular case, there *was* ample evidence to support the conclusion that, for the offences where the appellant was under 14 years of age, he had the relevant capacity.

39. Further, as noted above, the evidence as to the timing of the offences upon which the appellant was convicted was such as to support the conclusion that they occurred at a time when his capacity was presumed, that is, when he was 14 years or older. The exception is Count 4. On that occasion he was essentially three months short of legal

[22] BDO at [50]
[23] BDO at [48]

maturity as to the issue of capacity. In light of the evidence outlined above, there was ample probative evidence upon which the jury could conclude the requisite capacity.

40. Contrary to the contentions of the appellant, the relevant evidence in this case went beyond the acts themselves but provided positive evidence upon which the jury could properly conclude that the appellant's intellectual and moral development, in so far as it related to the nature of the acts alleged against him, was capable of supporting the conclusion of his capacity[24].

41. No error is exposed in the consideration by the Court of Appeal of this issue and no miscarriage of justice arises from the issue of capacity in the circumstances of this case. The directions given to the jury on this issue were sufficient to alert them to the necessary considerations that arose in the circumstances of this case.

42. If, contrary to the submission of the respondent the Court is of the view that the jury was misdirected giving rise to a miscarriage of justice, it is submitted that having regard to the evidence as to the actual age of the appellant at the time of each specific offences upon which he was convicted, the circumstances of the particular offences[25], together with the evidence which went to his intellectual and moral development and education as to matters relevant to this offending, there was no substantial miscarriage in the circumstances of this case, that is, the proviso should apply.

Ground 2*: The Court of Appeal erred in the application of the proviso in the circumstances of this case.*

43. This ground contends that the Court of Appeal erred in the application of the proviso in dismissing Ground 2[26] of the appeal before that Court. It is here said that the trial judge misdirected the jury in two material respects so as to preclude the application of the proviso. The first; the misdirection in relation to consent by the complainant prior to the amendment to s.349 of the *Code*; and secondly, the failure to direct the jury as to excuse under s.24 of the *Code*, both of which, it is contended, were live on the evidence. This ground is advanced on the assumption by the appellant that the court was employing the proviso to dismiss Ground 2.

---

[24] See particularly *RP, F and JJ.*
[25] Contrary to the contention of the appellant at [47] of his written submission, the allegations here were much more than simply "*engaging in sexual intercourse with his younger sister*".
[26] Which related to the issue of the complainant's consent and the misdirection as a result of the amendment to s.349 of the *Code*.

Miscarriage of Justice?

44. Firstly, it is submitted in response that this was not a proviso case. What is revealed in the decision of the Court of Appeal at [143] is a consideration of the effect of the misdirection upon the verdicts in the case. In order to determine wither the misdirection in this case was such as to give rise to a miscarriage of justice, it was necessary and appropriate for the Court to consider that misdirection in the context of the whole of the evidence and the issues litigated in the case. The Court's conclusion (correct in our respectful submission) was that no miscarriage of justice resulted from the misdirection in this case.

45. The respondent concedes that contrary to the directions given, if the jury concluded that a particular offence was committed prior to 5 January 2004 (at which time, the complainant was 7 years of age, she having turned 7 on 16 November 2003), they also had to be satisfied that the complainant did not *give* her consent at the relevant time.[27] The court properly recognised that the conclusion of a misdirection does not automatically lead to the conclusion that there has been a miscarriage of justice.[28] The court is required to consider its effect on the trial to determine whether there has been a miscarriage of justice in terms of s.668E(1) of the *Criminal Code (Qld)* and only if so, does the proviso fall to be considered.[29]

46. If, contrary to that primary submission, this Court concludes that this was a proviso case, the following submissions are made. In advancing these contentions, the appellant's focus is upon the broad date range alleged in the indictment. However, it is submitted that it is the evidence as to the timing of the events to which attention should be primarily directed. Whilst the broad date range does give rise to the technical possibility that the issue of consent arose for consideration, a proper consideration of the evidence reveals that it was not *actually* relevant, or that it did not *actually* result in any detriment to the appellant having regard to the verdicts of the jury.

47. The evidence in the trial narrowed the actual allegation as to timing such that it can be readily concluded that in relation to each count upon which the appellant was convicted, consent was not a live issue. That is, on the evidence given by the

---

[27] as that is understood in light of cases such as ***R v Sunderland*** [2020] QCA 156
[28] *BDO* at [140].
[29] *Weiss v The Queen* (2005) 224 CLR 300; See also *Kalbassi v Western Australia* (2018) 264 CLR 62.

complainant, the appellant was only convicted of those offences where the evidence supported the only reasonable conclusion to be that the offence was committed after 5 January 2004. Only Counts 1 and 18 were likely committed at a time prior to 5 January 2004 and the defendant was acquitted of those counts. Counts 10, 15 and 16 were accompanied by no evidence to narrow the timeframe of the offending, and again, the defendant was acquitted.

48. Having regard therefore to the counts upon which the appellant was convicted, and given the way the trial was run, the misdirection occasioned no forensic disadvantage to the appellant.

49. The statement of principle by Gageler J in *Hofer v The Queen*[30] is instructive in relation to the two-stage process of the task facing an appellate court. The first stage should not be a formality. Relevantly, his Honour said at [123]:

> *"Except in the case of an error or irregularity so profound as to be characterised as a "failure to observe the requirements of the criminal process in a fundamental respect", an error or irregularity will rise to the level of a miscarriage of justice only if found by an appellate court to be of a nature and degree that could realistically have affected the verdict of guilt that was in fact returned by the jury in the trial that was had. Only if that threshold is met is a miscarriage of justice established. Only then can a further issue arise of the appellate court going on in the consideration of the proviso to ask and answer the distinct question of whether the court is satisfied that no substantial miscarriage of justice actually occurred. And only where that distinct question arises does the court need itself to be satisfied that the evidence properly admitted at trial established guilt beyond reasonable doubt before it can answer that no substantial miscarriage of justice actually occurred"* (internal citations omitted).

50. Therefore, the issues in the trial and the evidence is of primary importance. In addition to the evidence as to the timing of the specific offences, evidence as to the nature of the offending (should there be any lingering possibility that the offence was impacted by the misdirection), was also relevant. That is, the complainant gave evidence in relation to the specific offences that included a degree of force, coercion, and threats

[30] (2021) 291 A Crim R 114.

of violence. The only contrary evidence to suggest consensual activity was what the appellant said in the pre-text conversation with the complainant. That touched upon general conduct only and implicitly accepted a sexual relationship with the complainant, but did not address the specific allegations made in relation to each of the counts on the indictment. To the extent that consent might have been technically relevant, the evidence was such as to dismiss any actual relevance in the determination by a reasonable jury of consent in relation to any of the allegations upon which an indicted count was based (in relation to the charges upon which the defendant was convicted).

Mistake of Fact as to consent?

51. Similarly, no miscarriage of justice arises as a result of the failure of the trial judge to direct in relation to mistake of fact as to consent. Although, the appellant contends in this Ground of Appeal that the Court of Appeal erred in the application of the proviso given the failure of the primary judge to direct as to this, it is said, essential feature of the trial. This contention was not specifically raised before the Court of Appeal. If the articulation at [140] of the decision of the Court of Appeal reflects the application of the proviso, it was in relation only to the accepted misdirection in relation to the issue of consent.

52. Regardless, the respondent submits that the issue of mistake of fact as to consent does not arise unless the jury concluded that a particular offence may have been committed at a time when consent was relevant. For the reasons advanced above in relation to the timing of the offences, that was technical rather than actual, in the context of the evidence in this case as to the timing of the offences. Further, and perhaps more importantly, the defence case was conducted by the appellant on the basis that there were no penetrative acts by him of the complainant's vagina. Against that, the complainant said that she did not consent to any of the penetrative acts[31], including from the first occasion which, on the state of the evidence, must have been when she was very young.[32]

53. The appellant's case, as demonstrated by the cross-examination of the complainant was that;

---

[31] *BDO* at [134]: *"The complainant's evidence was that on no occasion of penetration was she consenting to that act."*
[32] *BDO* at [10].

- He did not put his penis, fingers or objects in her vagina.
- He never ejaculated in her mouth.
- He never gagged her.
- Any other sexual conduct *short* of vaginal penetration was done with her consent.

54. In his counsel's address, the appellant's case was made clear. Defence Counsel explained to the jury:

> *"And I'm probably repeating myself here, but different aspects of the – when I talk about asking her a question and she doesn't accept that, you get an understanding, also, of his account of what is, or what was suggested to [SB] regarding the fact that it was suggested to her that there was never any penetration of her vagina with either his penis or his mouth or tongue or any object, but that it was effectively accepted that he put his penis in her mouth, because there was a discussion about ejaculate, and she accepted that he had ejaculated on her body."*[33]
>
> And further[34];
> *This is not a case where [the appellant] is saying none of this happened; he didn't have any kind of sexual relationship. He accepts that there was a relationship. It's just that each of them are packaging it in completely opposing ways. So the real issue with respect to this sexual interest is, did the acts she complains of, the sexual intercourse and the oral intercourse, did they happen to her or not, not was there a sexual interest with his sister, because clearly there was…"*

55. The appellant did not give evidence and the pre-text conversation was not in relation to any specific allegations of rape. Accordingly, there was no evidence of the appellant's version of events. Whilst his counsel accepted that he 'effectively' accepted that he put his penis into the complainant's mouth, he denied the circumstances of such conduct alleged by the complainant. Counts 3 and 13 were convictions for such conduct. Count 3 involved ejaculation in the complainant's mouth, which was denied. Count 13 involved an allegation of a single occasion during

[33] Appellant's Book of Further Material 231 Ln43.
[34] Appellant's Book of Further Material 232 Ln42 to 233 Ln1.

which oral sex was followed by penial/vaginal penetration (Count 14), the latter was expressly denied.

56. The way in which the appellant ran his case was such that he 'admitted' to having a sexual relationship with his sister involving acts of sexual touching (but not penetration of her vagina). The conduct that was implicitly accepted by the appellant did not correlate with what was alleged in the indicted counts. However, this was not a case of an offence of '*maintaining an unlawful sexual relationship with a child*'[35]. Specific allegations of sexual offending amounting to rape were reflected in separate counts on the indictment. The appellant denied the conduct alleged against him in relation to each of those specific counts.

57. Whether consent, or mistake as to consent was a live issue for the trial as a whole distracts from the proper question. The question is whether it was a live issue for the period of time to which the misdirection applied and in relation to the specific allegations made in relation to each of the counts on the indictment. Accordingly, whilst it remained a matter for the Crown to prove, neither 'consent' nor a mistake about it by the appellant were live issues in dispute at the trial according to the way in which the case was litigated by the appellant.

58. As noted, the appellant's case was that he admitted to having a sexual relationship with his sister but denied all of the allegations reflected in the counts on the indictment. Once the jury accepted the complainant's account in relation to a specific offence beyond reasonable doubt, they would have also accepted her evidence that she did not consent to such an act. There was no scope for, nor evidence to support, a consideration as to the appellant being mistaken about her lack of consent in relation to any of the offences on the indictment (as opposed to perhaps some other sexual offence he implicitly admitted to having committed upon his sister).

59. Importantly, at the conclusion of the evidence, and in discussions between counsel and the trial judge in relation to the required directions, the appellant's trial counsel specifically disavowed the need for any directions about alternative verdicts.[36] Of course, consideration of an alternative verdict to a charge of rape would only arise (in the circumstances here) in the event that the jury entertained a doubt about the issue of

[35] Pursuant so s.229B of the *Code*. As the defendant was not an 'adult' during the period of the alleged offending, an offence pursuant to s.229B was not available.
[36] Respondent's Book of Further Material at 5 to 9, see particularly at 9 Ln32

consent (or mistake as to consent), but not the fact of the alleged sexual misconduct. The position taken by defence counsel further demonstrates that not only was mistake of fact not a live issue at the trial neither was the trial litigated on consent in relation to the particularised acts.

60. In *The Queen v Baden-Clay*[37] this court held that it was not the role of the tribunal of fact to embark on a path that involved speculation. In that case the Court of Appeal quashed a murder conviction and substituted it with manslaughter. The High Court restored the murder conviction and unanimously held at 312:

> *"The hypotheses actually relied upon by the respondent were met by the evidence led by the prosecution. Although the prosecution had to prove murder, there remained no other reasonable hypothesis consistent with innocence. A hypothesis capable of being considered must be one which arises from the evidence and not from speculation about all the infinite ways in which a death might have resulted."*

And at 326:

> *"The Court of Appeal's conclusion to the contrary was not based on evidence. It was mere speculation or conjecture rather than acknowledgment of a hypothesis available on the evidence. In this case, there was no evidence led at trial that suggested that the respondent killed his wife in a physical confrontation without intending to kill her."*

61. Consequently, given the way in which the case was litigated, it is unsurprising that the appellant's counsel at trial did not seek a direction regarding mistake of fact in relation to any of the acts, even if they were found to have occurred after the complainant was aged 12. This was a rational forensic decision by the appellant's counsel as there was no evidence which would have given rise to it. *Stevens v The Queen*[38], upon which the appellant relies, is not authority for the notion that there is always a need to leave an intermediate position which is not the case of either of the parties, and not properly raised in the evidence.[39]

---

[37] (2016) 258 CLR 308
[38] (2005) 227 CLR 319 (***Stevens***).
[39] See for example: *R v Hall* [2011] QCA 26 and *R v De Silva* [2018] QCA 274.

62. As noted, the Court of Appeal was not asked to specifically consider this contention. However, there is no basis to conclude that a failure to direct the jury in relation to mistake of fact reasonably arose in the circumstances of this case so as to give rise to a miscarriage of justice, nor that the consideration by the Court of Appeal of the issue of consent in this trial was erroneous.

The Proviso

63. In undertaking a review of the whole of the evidence it is readily apparent that the Crown case in relation to the counts upon which the appellant was convicted, was strong. The complainant's account of what took place was comprehensively tested in cross-examination. Other evidence supported relevant aspects of her account. Despite the broad timeframe of the charges as drafted, the evidence of the complainant, supported in some material respects (as to timing) by her parents, narrowed the scope during which the offence was alleged to have been committed. This narrowing of the timeframe applicable to a particular count is directly relevant to the issues raised in this appeal, which rely for their strength upon the broad timeframe of the indictment. The case was not litigated primarily on the issue of consent[40] and the contended misdirections were not reasonably capable of deflecting or distracting the jury from its task.

64. The test of 'inevitability' was recently discussed in *Awad v The Queen*[41]. At [94]-[95] Gordon and Edelman JJ said:

> *"If both the prosecution and defence counsel would necessarily have supported such an essential direction, the error of law in failing to comply with s 16(2) would have no capacity to affect the result of the trial. Even without consideration of the whole of the record, the error can be seen to involve no substantial miscarriage of justice, perhaps because it involved no miscarriage of justice at all. However, where the appellant has demonstrated that an error of law has occurred in or in relation to their trial, the appellate court will need to be satisfied that the error was plainly so innocuous that it could not possibly have affected the outcome in order to dismiss the appeal on that basis. If that*

[40] Cf *Collins v The Queen* (2018) 265 CLR 178 where the triable issue was consent.
[41] (2022) 96 ALJR 1082

> *high threshold of satisfaction cannot be reached, then the court must assess the inevitability of the conviction on the whole of the record.*
>
> *Where the error is a particular misdirection to a jury, it will usually be necessary to focus upon the specific misdirection when considering whether the misdirection had the capacity to deflect the jury from their fundamental task of deciding whether or not the prosecution has proved the elements of the charged offence beyond reasonable doubt. That may commonly be the case where the misdirection was not trivial or innocuous and, in the context of the whole of the charge, it was "open" for the jury to follow the misdirection."*

65. Earlier, in *Kalbassi v Western Australia,*[42] in relation to the application of the test, Justice Gageler said at [71]:

> *"Where the appellate court considers that a wrong decision on a question of law or some other irregularity was material and where the appellate court goes on to consider whether the appellate court can itself be persuaded of guilt, however, what is important to recognise is that the appellate court is engaged throughout in a process of analysis directed to the same ultimate question of whether the identified error denied the appellant a chance of acquittal which was fairly open. The ultimate question remains throughout whether the appellate court can be satisfied that the jury's verdict of guilty would not have been different if the identified error had not occurred or, in other words, that the verdict of guilty was "inevitable" in the sense that, "assuming the error had not been made, the result was bound not to have been any different for the jury if acting reasonably on the evidence properly before them and applying the correct onus and standard of proof."*

Conclusion on Ground 2

66. This was not a proviso case and no error in the conclusion of the Court of Appeal is disclosed. However, in the event that this Court concludes that a miscarriage of justice occurred, it is submitted that the nature of that miscarriage is not such as to preclude the application of the proviso. A consideration of the proviso would cause this Court

[42] (2018) 264 CLR 62

to conclude that no substantial miscarriage of justice occurred in all of the circumstances of this case.

Part VI: Not applicable.

Part VII: It is estimated that the presentation of the respondent's oral argument will take one to one and a half hours.

Dated 13 January 2023

C W Heaton KC
C Cook
Counsel for the Respondent
(07) 3738 9574
DPPAppeals@justice.qld.gov.au

IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

BETWEEN: **BDO**

Appellant

and

THE QUEEN

Respondent

ANNEXURE TO THE SUBMISSIONS OF THE RESPONDENT

Pursuant to Practice Directions No.1 of 2019, the Respondent sets out below a list of statues referred to in these submissions:

No.	Description	Version	Provisions
1.	*Criminal Code Act 1899* (Qld)	Current	s 29, 29(2), 229B, 668E(1)(A),
2.	*Judiciary Act* (1903) Cth	Current	s 78B
3.	*Criminal Code Act 1899* (Qld)	Amended on 5 January 2004	s 349