IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY No. B68 of 2017

BETWEEN:

JOHN COLLINS
Appellant

and

THE QUEEN
Respondent

APPELLANT'S REPLY

Part I:

1. We certify that this submission is in a form suitable for publication on the internet.

Part II:

Reply to the argument on the appeal

2. The respondent submits that the appellant had an 'opportunity' to be heard about the proviso, 'elected' not to pursue it further and made a 'tactical decision' to that effect.[1] It is true that the respondent did make a brief submission about the inapplicability of the proviso. Neither the Crown nor the Court exercised their 'opportunity' to challenge or contradict it. The only 'tactic' deployed at that point was the decision not to occupy the Court's time with submissions that were, by any objective reckoning, neither desired nor required.

3. The respondent submits that, in respect of the proviso, the prosecution carries only an 'evidential onus'.[2] Those words are not used in *Lindsay*.[3] In that case Nettle J wrote that

1 Respondent's submissions, [14], [17]-[20].
2 Respondent's submissions, [16].
3 (2015) 255 CLR 272.

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'the Crown carries the onus of establishing that the proviso is applicable'.[4] The authorities to which his Honour referred do not use those words either.[5]

4. As it happened, the Crown did not purport to discharge any onus, evidential or otherwise. The situation therefore called for application of the procedure contemplated by Nettle J.[6] Given that the Crown was not the first to take the point (and in fact disavowed it), the Court of Appeal ought to have made it clear that application of the proviso was within its contemplation, identified with sufficient clarity the basis on which it envisaged the proviso could apply, and given the appellant an appropriate opportunity to advance submissions in opposition to the identified basis.

Reply to the notice of contention

5. The respondent seeks now to make an argument about the 'effect' of Ms M's evidence.[7] This is not the sort of argument that would have warranted a grant of special leave. It is a question of fact ill-suited to resolution in the High Court.[8]

6. In any event, it is not and was never relevant to inquire whether the defence *established* that Ms M's evidence about this conversation was '*true and accurate*'.[9] As a function of the onus, all that had to be done was to raise a reasonable possibility that the words were spoken by the complainant. If that was so, then the jury ought to have been able to take that into account in assessing her credibility. To tell the jury that they could not do that was, as Burns J held, a mistake, and there are insufficient reasons to doubt the correctness of his Honour's reasons for so holding.

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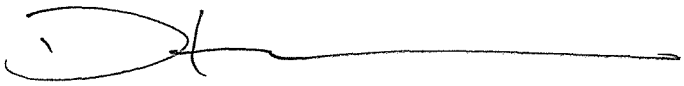
4 Ibid, 294 [64].
5 *Mraz v R* (1955) 93 CLR 493, 514 (Fullagar J); *TKWJ v R* (2002) 212 CLR 124, 143 [63] (McHugh J).
6 (2015) 255 CLR 272, 294 [64].
7 Respondent's submissions, [37], [40]. The 'effect' of the evidence has been clearly enough understood by all involved in this litigation until this point – the trial judge, trial counsel on both sides, both counsel on appeal, and Burns J. The only dispute has been about the use to be made of it.
8 See, eg, *Morris v R* (1987) 163 CLR 454, 456 (Mason CJ).
9 Respondent's submissions, [40] (our emphasis).

Dated 2 February 2018



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