IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P21 of 2017

BETWEEN:

Pouyan KALBASI
Appellant

and

The State of Western Australia
Respondent

APPELLANT'S REPLY

Part I:

1. This submission is in a form suitable for publication on the internet.

Part II:

2. The appellant contends that the plurality's application of the proviso in s30(4) of the *Criminal Appeals Act 2004* (WA) to the appellant's conviction appeal was based on two findings: that their Honours were satisfied of the appellant's guilt beyond reasonable doubt; and that the error was not of such a nature as to preclude the application of the proviso (*Kalbasi v Western Australia* [2016] WASCA 144 ("CA") at [179], [180], [192]-[206], [208]-[215]; cf. Respondent's Submissions "RS" at [3]). It is submitted that their Honours erroneously limited consideration of the nature and effect of the error to whether it was of a type that precluded the application of the proviso in the sense that it constituted a fundamental defect (CA at [206], [211], [214], [215], cf. RS at [60]). The passage at CA [214] was insufficient to constitute the required analysis (see Appellant's Submissions "AS" at [77]).

Weiss v The Queen (2005) 224 CLR 300

3. The respondent submits that *Weiss v The Queen* (2005) 224 CLR 300 and subsequent authority on the proviso require consideration be given to the nature and effect of the error (RS at [18], [22]-[24], [47]). The respondent rejects the notion that the cases suggest that there are some cases where satisfaction of guilt is sufficient to apply the proviso (RS at [25]; cf. AS at [37], [45]). However, these contentions are at odds with how their Honours understood the decision in *Weiss* and the test for the proviso (see CA at [179]-[180], [192]-[206], [208]-[215]; cf. RS at [60]). They are also inconsistent with the way in which *Weiss* has been understood and applied in other decisions of the Western Australian Court of Appeal (see *Hughes v Western Australia* at [60]-[68], [76]-[79]; *Peterson v Western Australia* (2016) 50 WAR 45 at [22]-[23]).

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4. The respondent relies upon a passage in *Weiss* at [43] to support the contention that an appellate court must consider the nature and effect of the error when considering the proviso in any given case (RS at [18], [47]). In *Weiss* at [43] the Court said that an appellate court, when considering the proviso, must have regard to the whole of the record including the fact that the jury returned a guilty verdict. The Court in *Weiss* then observed 'But there are cases in which it would be possible to conclude that the verdict would, or at least should, have had no significance in determining the verdict that was returned by the trial jury.' (at [43]). This passage was cited by *Hughes* at [65] in the context of determining what was described as the 'outcome' aspect of the proviso. *Hughes* at [65] was extracted by their Honours at CA [180]. To the extent that this passage of *Weiss* requires consideration of the nature of the error that consideration appears to be relevant only to assessing the weight to be given to the jury's verdict when determining whether the court itself is satisfied of the accused's guilt. Such an approach treats satisfaction of the accused's guilt as the critical question for the proviso rather than consideration of the effect of the error on the trial and the verdict returned by the jury. This, it is submitted, is an erroneous approach to the proviso and pays insufficient regard to the statutory language of s30 of the *Criminal Appeals Act* (see AS at [43], [48]).

5. The respondent submits that *Weiss* is part of a 'contiguous line of authority' and subsequent authority on the proviso explains and develops the fundamental legal principles set out in *Weiss* (RS at [8], [19]-[30]). However, this submission appears to be largely based on the contention that *Weiss* and subsequent authority simply emphasise the statutory language of the proviso and affirm that the test is whether no substantial miscarriage of justice has occurred (RS at [10], [11], [12], [15], [18], [19], [20], [21], [23], [24], [26], [28]-[30]). This submission is also premised on the respondent's view of *Weiss* that consideration of the nature and significance of the error is required for the application of the proviso (RS at [18]). It is not in dispute that the statutory test for the application of the proviso is that no substantial miscarriage of justice has occurred (s30(4) *Criminal Appeals Act*). The issue in this appeal is how an appellate court is to approach that question. It is the way in which an appellate court is to approach that question that was the subject of *Weiss* and subsequent authority and it is the nature of this approach that is currently unclear.

6. The respondent appears to suggest that the lost chance of acquittal test and/or the inevitable conviction test can be answered by a court's consideration of whether it is satisfied of the accused's guilt beyond reasonable doubt (RS at [29]). However, satisfaction of the accused's guilt beyond reasonable doubt answers the test of whether it was open to a jury to be satisfied of the guilt of an accused (*M v The Queen* (1994) 181 CLR 487). This is the test for whether the jury's verdict is unreasonable under s30(3)(a) of the *Criminal Appeals Act*. This test is different to the question posed by the proviso and different to whether the conviction was inevitable (see AS at [52], *Baini v The Queen* (2012) 246 CLR 469 at [32], *Baiada Poultry Ltd v The Queen* (2012) 246 CLR 92 at [35]-[36], *Lindsay v The Queen* (2015) 255 CLR 272 at [85]-[86]). The respondent submits that the decisions of *Pollock v The Queen*

(2010) 242 CLR 233, *Baini v The Queen, Filippou v The Queen* (2015) 256 CLR 47 and *Castle v The Queen* (2016) 91 ALJR 93 and references to inevitability of conviction are not inconsistent with *Weiss* citing at [40] of that decision (RS at [29]). However, in *Weiss* at [40] the Court appears to disavow reliance on an "inevitability of conviction" test in determination of the proviso on the basis that reference to "a jury" is apt to distract attention from the appellate court considering for itself whether no substantial miscarriage of justice has occurred.

7. The principles identified in *Filippou* do appear to sideline the decision in *Weiss* insofar as *Weiss* suggests that the proviso can be applied where an appellate court is satisfied of the accused's guilt beyond reasonable doubt and the error at the trial was not of such a nature as to preclude the application of the proviso (cf. RS at [30]). It is the appellant's case that the considerable controversy surrounding *Weiss* warrants it being revisited and if necessary overruled (see AS at [55]-[57]).

Outcome and Process

8. The respondent submits that their Honours considered both the outcome and process aspect of the proviso together and not in exclusion to each other (RS at [33]). However, it is apparent that their Honours regarded consideration of the proviso as requiring two separate types of analysis: first, consideration of whether the appellant was guilty beyond reasonable doubt; and second, whether the error was of a nature to preclude the application of the proviso (CA at [179]-[180], [192]-[214]). Further, the order in which their Honours considered these two aspects of the proviso deflected attention away from proper regard to the nature of the error and its effect (cf. RS at [33]). This is because their Honours' determination that there was no arguable defence on 'intention' was based on their earlier finding that they were satisfied beyond reasonable doubt that the appellant attempted to possess the total quantity (CA at [214]). Giving consideration in the first instance to the nature of the error and its effect gives effect to the statutory language of s30(4) of the *Criminal Appeals Act* and places appropriate emphasis on the significance of the error (*Baiada* at [26], [28], [34]).

9. The plain reading of *Weiss* appears to offer some support for the approach taken by their Honours as under *Weiss* the appellate court is to consider whether the accused's guilt is established beyond reasonable doubt and then determine whether the error is of such a nature as to preclude the application of the proviso (*Weiss* at [41], [45], see RS at [34]). The decision of *Nudd v The Queen* (2006) 80 ALJR 614, however, does not support dividing consideration of the proviso in this way (cf. RS at [34]). In *Nudd* Gleeson CJ considered process and outcome to be related concepts and not distinct from one another as 'the object of due process is to secure a just result' (at [7]).

10. *Filippou* does not support dividing consideration of the proviso into process and outcome aspects (cf. RS at [35]). Nor did their Honours consider whether the appellant lost a chance of acquittal as required by *Filippou* at [15]. The test of a lost chance of acquittal is far broader than consideration of whether an accused's guilt is

established beyond reasonable doubt. The test of a lost chance of acquittal directs attention squarely to the significance of the error and is not necessarily determined by satisfaction of an accused's guilt. Application of such a test does not involve assessing whether the outcome was ultimately correct.

The appellant's case

11. The misdirection in the appellant's case was more significant than is suggested at RS [39]. It reversed the onus of proof and the trial judge told the jury that there was no issue with 'intention' and that they could give this element a tick (CA at [97]). The court's jurisdiction to convict and sentence the appellant was limited by the elements of the offence (*Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at [74]). The misdirection in the appellant's case effectively withdrew from the jury's consideration an element of the offence namely whether he possessed the substituted drug with the intent to sell or supply it to another. The consequence of this was that the jury found the appellant guilty without consideration of that element. The element withdrawn from the jury's consideration was the element which rendered him liable to a maximum penalty of 25 years imprisonment (see AS at [85]).

12. The respondent contends that, having regard to the directions and the context of the trial, the jury's verdict is consistent only with a conclusion that it was satisfied that the appellant possessed all of the substituted drug at the relevant time (RS at [53]-[57]). However, at no point in the directions were the jury told that they had to be satisfied that the appellant possessed the entire quantity of substituted drug and, accordingly, their verdict said nothing on that subject (see *Baiada Poultry* at [28], [34]; cf. RS at [57]). This is so even though no such direction was legally required (see RS at [37]).

13. The respondent contends that the sole issue at trial was possession and that it was 'unsurprising that there was no issue at trial as to the intention of the appellant' (RS at [41]-[44], [55]). However, the appellant's case was to put the prosecution to proof (CA at [81]). To suggest that the appellant only put in issue the element of possession denies the generality of a not guilty plea (*Krakouer v The Queen* (1998) 194 CLR 202 at [36]). Further, the element of intention could only be considered once the jury had determined whether there had been possession and of what quantity.

14. The State alleged possession of the total quantity. However, it is not possible to conclude from the jury's verdict that they were satisfied of this beyond reasonable doubt. Further, the way in which the State case was put on possession (that is, that he dealt with or did something in respect of the substituted drugs) raised the prospect that the jury were satisfied of possession of a smaller quantity.

15. Finally, the misdirection arose due to a mistaken apprehension that s11 of the *Misuse of Drugs Act* applied to the appellant's case (see CA [186]-[188]). Their Honours accepted that there was no deliberate forensic decision involved in defence counsel's acceptance that s11 of the *Misuse of Drugs Act* applied (CA at [188]; cf. the

suggestion at RS [59] which also assumes the State could make out its case that the appellant possessed the entire quantity). Further, unlike in *Krakouer*, the trial judge, prosecutor and defence counsel all shared this misapprehension (CA at [97]). It is therefore not known whether the case would have been conducted differently if it had been recognised that the presumption in s11 of the *Misuse of Drugs Act* did not apply (see *Handlen v The Queen* (2011) 245 CLR 282 at [42]-[45]).

16. The analysis conducted in *Handlen,* namely, consideration of the effect of the error on the entire case, was the analysis that was required in the appellant's case (cf. RS at [58]-[59]). As with the appellant's case, the error in *Handlen* related to the existence and scope of criminal liability (cf. RS at [58]-[59]). For the reasons at AS [74]-[76], *Krakouer* did not support the application of the proviso to the appellant's conviction appeal (cf. RS at [52], CA at [206]-[213]).

Dated: 21 July 2017

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