IN THE HIGH COURT OF AUSTRALIA **No P24 of 2018**

PERTH REGISTRY

BETWEEN **PAUL JOSEPH RODI**

Appellant

AND **THE STATE OF WESTERN AUSTRALIA**

Respondent

RESPONDENT'S OUTLINE OF ORAL ARGUMENT

Part I – Publication

1. I certify that this outline is in a form suitable for publication on the internet.

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Part II – Outline of propositions to be advanced during oral argument

Ground two – statutory regime

2. The appellant confines the allegation of a breach of the statutory duty to the duty under s 95(6).

3. The Prior Coen Evidence was not relevant when the duty under s 95(6) came to be performed.[1] The Prior Coen Evidence became relevant when its character changed to that
20 of a series of prior inconsistent statements, which only occurred after the first day of trial. The finding of the court below that it was reasonable for the trial prosecutor, prior to the commencement of the trial, not to have understood that cannabis yield evidence was relevant is unchallenged in this court. By necessary implication, it must also have been reasonable for the relevant authorised officer not to have so understood as at the date of compliance.

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[1] The date for compliance was 5 June 2013, being 42 days after committal. As at that date, the McCully statement was not in existence.

4. The only basis for the assertion that the relevant authorised officer breached her s 95(6) duty is if paragraphs [129] to [138] of ***PAH*** are correct. On this basis the factor enlivening the obligation to disclose would not be the relevance of the Prior Coen Evidence but the mere fact that Detective Coen was a person who was able to give evidence relevant to the charge (on other issues).

5. The purpose of the statutory disclosure regime under the *CPA* is to ensure that an accused is provided with all *relevant* material by the prosecution. The interpretation given to s 42 in ***PAH*** defeats such a purpose. It renders the words "relevant to a charge" and "relevant to the charge" superfluous. The requirement under s 42(2)(b) to serve prior inconsistent statements is also redundant.

Ground two – common law

6. For the purposes of this appeal the issue can be limited to whether the *CPA* codifies disclosure. The court in ***Bozzer*** specifically reserved the question of whether the provisions of the *CPA* relating to disclosure comprise an exhaustive code. The statements in ***Birch*** deal only with the court's jurisdiction to permit a change of plea, and the passages at [213] and [254] relate only to whether the *CPA* constituted a code in relation to that issue.

7. Scrutiny of repealed statutory provisions such as s 611B *Criminal Code* reveals those provisions to be temporary stopgaps, designed to supplement the common law rather than replace it. In contrast, the *CPA* specifies the laws to which the statutory disclosure obligations are subject, being the law of privilege and immunity and any other *written* law that relates to the disclosure of specific information; topics upon which the repealed s 611B was silent.[2]

8. The replacement of the subjective "sensible appraisal" test with an objective, broad test, which includes an obligation to disclose "every other document of object that may assist the accused's defence", is not an abrogation or diminution of the accused's right to a fair trial. It expands the obligations of disclosure.

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[2] s 137A *CPA*.

9. ***Hughes*** is authority for the proposition that, after committal, the obligations on the relevant authorised officer are not limited to a mechanical reliance on the certificate of compliance under s 45(5). As with the common law, there must be some practical limitation on the obligations of a prosecutor to locate and disclose material during a trial.[3] That the *CPA* accounts for such limitations does not detract from an accused's right to a fair trial.

Ground one

10. The fresh evidence is confined to a series of prior inconsistent statements as to the 'typical' range of head material obtained from naturally grown cannabis plants. The cogency of the explanation advanced as to the inconsistencies is relevant to the question of whether the fresh evidence test has been satisfied. The fresh evidence would not have had an impact on the jury's assessment of Detective Coen's expertise, credibility or the weight attributed to his evidence.

11. The appellant theorises the evidence which would have been elicited had the fresh evidence been available to him prior to the cross-examination of Detective Coen. Even if all of that evidence had been elicited, at most it would have prevented the prosecution only from making those statements complained of at paragraph [11(d)] of the appellant's submissions.

12. The prosecutor could, however, have made the same points as forcefully by directing her remarks to the two small plants in question in this trial, rather than at the higher level of yields generally. There is no expert evidence that the appellant's two small plants could have produced the quantity of head material in his possession, regardless of the metes and bounds of the typical range.

A. L. Forrester SC
Senior counsel for the respondent

Dated: 7 August 2018

[3] ***Vo*** [28]-[30], [33]-[38].