IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P62 of 2018

BETWEEN:

OKS
Appellant

and

The State of Western Australia
Respondent

APPELLANT'S SUBMISSIONS

Part I: Publication

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

Part II: Statement of the issues

2. The issues that arise in this appeal are:

   2.1 The Court of Appeal of the Supreme Court of Western Australia found that the trial Judge intruded impermissibly on the function of the jury by erroneously giving them a direction that prohibited them from engaging in a process of reasoning, favourable to the appellant, in relation to fact-finding concerning the complainant's honesty and reliability (**CAB** 120, 135-136, 154-155; **CA** [122]-[124], [181]-[186], [259]-[260]). The Court unanimously concluded that the direction constituted a wrong decision on a question of law (s30(3)(b) of the *Criminal Appeals Act 2004* (WA)) (**CAB** 121, 154-155, **CA** [129], [255], [259]-[260]). A majority (Buss P and Pritchard J) also

Nigams Legal
Suite 181
Level 5, 580 Hay Street
PERTH WA 6000

Telephone: (08) 9221 1818
Fax: (08) 9221 1079
Email: nigams@nigam.com.au
Ref: Shash Nigam

concluded that it occasioned a miscarriage of justice (s30(3)(c) of the *Criminal Appeals Act*) (**CAB** 121, 133; **CA** [129], [259]).

2.2 The Court unanimously concluded that, even though the ground of appeal might have been decided in the appellant's favour, the appeal should be dismissed because no substantial miscarriage of justice occurred (s30(4) of the *Criminal Appeals Act*) (**CAB** 121-124, 154; **CA** [131]-[139], [258], [259]).

2.3 Did the Court err in concluding that the appeal should be dismissed because no substantial miscarriage of justice occurred?

10 **Part III: Notice**

3. The appellant considers that a notice under section 78B of the *Judiciary Act 1903* (Cth) is not required.

Part IV: Citation

4. The internet citation of the reasons for judgment of the Court of Appeal of the Supreme Court of Western Australia is *OKS v The State of Western Australia* [2018] WASCA 48 (**CA**).

Part V: Narrative statement of the facts

5. The appellant and the complainant's mother commenced a relationship in 1997, when the complainant was approximately 10 years old. The appellant lived in the family
20 home with the complainant's mother, the complainant's grandmother, the complainant and the complainant's three siblings.[1]

6. In 2016, the appellant was charged on indictment[2] with three counts of indecently dealing with the complainant, contrary to s320(4) *the Criminal Code* (WA) ('the

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[1] **CAB** 91, **CA** [12].
[2] **CAB** 5.

Code'). He was also charged with one count of attempting to indecently deal with the complainant, contrary to s320(4) of the Code (read with s552).[3]

7. At the time of the alleged offending the complainant was approximately 10 or 11 years old and the appellant was aged between 45 and 47 years old.[4]

8. The appellant pleaded not guilty to the charges and stood trial in the Perth District Court before his Honour Judge Stevenson between the 21st November 2016 and the 24th November 2016.

9. Count 1 alleged that the complainant (who was 10 years old at the time), the complainant's mother and younger brother, B, were together in B's room. The appellant was telling them stories about his childhood. The complainant's mother and B left the bedroom. The appellant and S were on the bed. As the appellant continued to tell her stories, the appellant tickled the complainant's back. The appellant then maneuvered the complainant so that he could tickle her front. The appellant then stroked her chest and rubbed her vagina. A noise came from elsewhere in the house and the appellant stopped touching the complainant and continued talking to her as if nothing had happened.[5]

10. Counts 2 and 3 alleged that the complainant (who was approximately 11 years old and had nearly completed grade 6 at school) was sitting on the floor in the bedroom that the appellant shared with her mother. The complainant was wrapping a Christmas present. The appellant and the complainant's mother were lying on the bed. The complainant's mother's telephone rang and she left the room to answer it. After the complainant's mother left, the appellant said words to the effect of 'I've been waiting for this'. The appellant then pushed the complainant down on to the bed. The appellant adjusted his penis so that it was over her vagina. He simulated having sex with her by moving up and down (count 2). Both the appellant and the complainant were clothed but the complainant could see the appellant's erect penis through his shorts. On the same occasion, the appellant put his hand down the complainant's pajama shorts and

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[3] **CAB** 90, **CA** [1]-[5].
[4] **CAB** 91, **CA** [13].
[5] **CAB** 91, **CA** [16].

roughly stroked her vagina (count 3). The appellant stopped and got off the complainant when the sound of a car arriving at their home could be heard.[6]

11. In relation to Count 4, the complainant was aged 12 years old. The complainant needed some new boots. The appellant said that he would take her to an army surplus store in a Perth Suburb. On the way to the army surplus store the appellant stopped his car in a car park. He leaned over to the complainant and attempted to put his hand down her pants. The complainant resisted by holding her hands together between her legs and telling him, 'no'. The appellant became angry and said that she could not have the new boots. The appellant returned home and told the complainant's mother that the store did not have the boots in the complainant's size.[7]

12. The appellant's case at trial was that he did not do any of the acts the subject of any of the counts on the indictment (which was consistent with the appellant's electronic record of interview) and that the complainant was an untruthful and unreliable witness.[8]

13. There was a significant delay of about 20 years between the time the offences were alleged to have been committed and the time the appellant was first made aware of the allegations, when he participated in an electronically recorded interview with police on July 2015.[9] The appellant was 65 years old at the time of the trial and the complainant was 29 years old.[10]

14. At trial it was alleged that the appellant began touching the complainant sexually very soon after he commenced living with the complainant's mother, from the age of 10 until 13.[11] However, there were no witnesses to the alleged offences and the State's case that the alleged indecent dealings had occurred was almost entirely dependent on the complainant's evidence.[12]

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[6] **CAB** 92, **CA** [17]-[18].
[7] **CAB** 92, **CA** [19].
[8] **CAB** 93, **CA** [20]-[21]; **CAB** 96, **CA** [33]-[35]; **CAB** 126, **CA** [146]. See also, **CAB** 118, **CA** [118].
[9] **CAB** 93, **CA** [21].
[10] **CAB** 91, **CA** [14].
[11] **CAB** 91, **CA** [15].
[12] **CAB** 93, **CA** [25].

15. The appellant did not give or adduce any evidence at the trial.[13]

16. On the first day of the trial, counts 1 and 3 were amended on the Prosecutor's application to delete the words 'on top of her underwear'.[14] Before the jury retired to consider its verdicts the trial judge discharged the jury from returning verdicts in relation to counts 3 and 4.[15]

17. The complainant admitted, or it was alleged at trial, that she had told lies. These lies were summarised by Buss P as follows:[16]

    17.1 The complainant lied to the appellant about the amount of money that had been demanded by people who were engaging in stand over behaviour by stealing her partner's car (to satisfy a drug debt owed by the complainant). The complainant falsely told the appellant that the amount demanded was $20,000, when it was in fact $3,500.

    17.2 The complainant lied to the police about whether she had asked for $3,500.00 or $20,000.00 in a conversation that she had had with the appellant.

    17.3 The complainant did not tell the police about her involvement in drug dealing, despite her evidence at the trial to the contrary.

    17.4 In 2001, the complainant gave a false account to representatives of the Family and Children's services stating that the appellant and her were only mucking around and that there had been no contact, or deliberate contact of a sexual nature that had occurred between the appellant and the complainant.

    17.5 The complainant falsely informed medical practitioners at the Princess Margaret hospital that she had obtained a urinary tract infection as a result of having unprotected sex with someone at a party, whereas the complainant stated at trial that she had obtained the urinary tract infection from having sexual intercourse with the appellant.

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[13] **CAB** 93, **CA** [26].
[14] **CAB** 90, **CA** [7].
[15] **CAB** 93, **CA** [22] to [24].
[16] **CAB** 99-100, **CA** [56].

17.6 The complainant lied to her mother about an incident involving the appellant.

18. The appellant was convicted by a majority verdict of at least 10 jurors of the offence the subject of count 1 and was found not guilty by a unanimous verdict of count 2.[17]

Part VI: Argument

Background

19. The appellant appealed against his conviction to the Court of Appeal on the basis that the trial Judge made a wrong decision on a question of law (s30(3)(b) of the *Criminal Appeals Act*), or that a miscarriage of justice had occurred (s30(3)(c) of the *Criminal Appeals Act*), because the jury were directed that they should 'not follow a process of reasoning to the effect that just because [the complainant] is shown to have told a lie or she has admitted she told a lie, that all of her evidence is in fact dishonest and cannot be relied upon'.[18]

20. The impugned direction was in the following terms:

> 'Members of the jury, it is for you to decide what significance the suggested lies in relation to the evidence of the complainant have to the issues in this case. The fact that a person has told a lie maybe a factor in your assessment of their credibility. That is a matter for you to consider. You may wish to take it into account in assessing whether or not the complainant is telling the truth in relation to the touching the subject of counts I and 2 on the indictment. **But do not follow a process of reasoning to the effect that just because she is shown to have told a lie or she has admitted she told a lie, that all of her evidence is in fact dishonest and cannot be relied upon.** So, members of the jury, if you in your deliberations think she has told a lie or you accept when she says she did tell a lie that she did so, that is a factor you may take into account when you come to assess her credibility in relation to the alleged

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[17] **CAB** 57-58. **CAB** 90, **CA** [8].
[18] **CAB** 96, 128-130, **CA** [36], [158]-[162]. The **CA** referred to the direction as the 'impugned direction'.

touching the subject of counts 1 and 2 in the indictment with which you are concerned.'[19] (emphasis added) (the **impugned direction**)

21. On 24 April 2017 the Court of Appeal granted leave to appeal[20] and the appeal was then heard on 20 October 2017.

22. The State did not, in its written submissions or at the hearing of the appeal, contend that if the impugned direction constituted a wrong decision on a question of law, or that it occasioned a miscarriage of justice, then the appeal should be dismissed because no substantial miscarriage of justice had occurred (s30(4) of the *Criminal Appeals Act* – the 'proviso').[21]

10 23. However, after the hearing of the appeal, by letter dated 25 October 2017 the Court of Appeal sought further submissions from the parties as to whether the proviso could and should be applied if the Court were to conclude that the ground of appeal had been made out.[22]

24. The respondent submitted that should error be found then the proviso should not be invoked.[23] The appellant submitted that the proviso should not be invoked and that no notice had been given of any process of reasoning that might support or underpin the application of the proviso, and that the State had not complied with Practice Direction 7.4 in providing a schedule of evidence.[24] The appellant also submitted that the proviso should not be applied because of the central importance of the complainant's
20 credibility in circumstances in which the jury were bound to comply with the impugned direction.[25]

25. By letter dated 9 March 2018 the Court of Appeal informed the parties of a specified basis on which it may be open to apply the proviso and sought further written submissions.[26]

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[19] **CAB** 35.
[20] **CAB** 97, **CA** [37].
[21] **CAB** 98, **CA** [48].
[22] **CAB** 98, **CA** [49].
[23] Respondent's submissions dated 27 November 2018 at [5]-[9] (AFM Vol 2 at 576).
[24] **CAB** 98-99, **CA** [51]-[53].
[25] **CAB** 99, **CA** [53].
[26] AFM Vol 2 at 589-593.

26. The State filed submissions withdrawing its concession that the proviso could not be applied in light of its review of the principles outlined in *Kalbasi v The State of Western Australia* [2018] HCA 7 at [15].[27]

27. The appellant filed further submissions that argued that in a case where the evidence of conviction relied solely upon the credibility of the complainant (which was contested), the effect of the direction was to condition the other directions so that the jury were unable to effectively weigh the evidence of the complainant. Further, that the natural limitations on proceeding on the record of trial would exclude the Court of Appeal from determining guilt, particularly where no evidence schedule had been provided to it by the State for its consideration.[28]

28. On 11 April 2018 the Court of Appeal unanimously dismissed the appellant's appeal[29] and published reasons for its decision. The Court of Appeal concluded that although the ground of appeal had been made out, no substantial miscarriage of justice had occurred.[30]

The reasoning of the Court of Appeal

29. The Court of Appeal's reasoning that lead to the conclusion that the appeal should be dismissed because no substantial miscarriage of justice had occurred is set out in the reasons of Buss P, at **CAB** 121-124.[31]

30. Buss P found that the impugned direction was a direction of law that the jury was bound to follow and that it was not merely a comment on the evidence. He also concluded that the impugned direction was intended by the trial judge to be a direction of law and would have been understood by the jury as a direction that they were bound to follow.[32]

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[27] AFM Vol 2 at 594-597.
[28] AFM Vol 2 at 598-601.
[29] **CAB** 124, 154, **CA** [140], [258]-[259].
[30] **CAB** 121-124, 154, **CA** [258]-[259].
[31] **CA** [130]-[139]; Beech JA at **CAB** 154 [258] and Pritchard J at **CAB** 154 [259] both agreed with Buss P.
[32] **CAB** 118-119, **CA** [119].

31. Buss P concluded that it was open to the jury to conclude that the complainant was a dishonest or an unreliable witness because of the lies that she admitted telling, as well as any other alleged lies they found that she had told. If the jury concluded that she was a dishonest or unreliable witness it was also open to them to conclude that her evidence in relation to counts 1 and 2 could not be relied on, and that the State had failed to prove those counts beyond reasonable doubt, without the jury evaluating all of the evidence relating to those counts.[33]

32. As Buss P noted at **CA** [124],[34] the effect of the impugned direction was to *prohibit* the jury from engaging in a process of reasoning, that was *favourable to the appellant*, in relation to fact-finding concerning the complainant's honesty and reliability as a witness *that was open to them*. Significantly, Buss P held that the trial judge 'intruded impermissibly on the function of the jury'.

33. Beech JA reasoned that the impugned direction might reasonably have been taken by the jury to have precluded a process of reasoning that was open to them.[35] After examining the nature of the reasoning process that was precluded by the impugned direction at **CA** [182]-[184],[36] Beech JA concluded that the impugned direction removed from the jury a mode of reasoning *that was available to it* in its performance of the task of evaluating the evidence to determine whether it was satisfied beyond reasonable doubt of the truthfulness and reliability of the complainant's evidence. Ultimately, Beech JA found that the ground of appeal must be upheld on the basis that the impugned direction constituted a wrong decision on a question of law. He then expressly noted that he would apply the proviso, for the reasons given by Buss P.[37]

34. Pritchard J agreed with Buss P.[38] She also expressed agreement with Beech JA's conclusion that the impugned direction amounted to a wrong decision on a question of law, with one reservation that is not relevant for the purposes of this appeal.[39]

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[33] **CAB** 120, **CA** [123].
[34] **CAB** 120. See also **CAB** 121-122, **CA** [131].
[35] **CAB** 135-136, **CA** [181]-[186].
[36] **CAB** 135-136.
[37] **CAB** 154, **CA** [258].
[38] **CAB** 154, **CA** [259].
[39] **CAB** 155, **CA** [260]-[263].

35. Buss P reviewed the principles to be applied when the Court of Appeal determines that an appeal against conviction should be dismissed on the basis that, although a ground of appeal has been decided in an appellant's favour, no substantial miscarriage of justice has occurred, in accordance with s30(4) of the *Criminal Appeals Act*.[40]

36. Having identified the relevant principles, Buss P then gave 8 reasons for reaching the conclusion that the proviso should be applied.[41] Those reasons can be summarised as follows:

36.1 The trial judge gave other directions to the jury that required them to scrutinise the complainant's evidence with special care, and to not convict the appellant unless satisfied beyond reasonable doubt that she had given truthful and reliable evidence, having regard to any prior inconsistent statements, and to any lies that they found had been told by the complainant.[42]

36.2 There was no reason to suspect that the jury did not understand and follow the trial judge's directions, and that the different verdicts for counts 1 and 2 demonstrated that they did follow and understand those directions.[43]

36.3 After examining the trial record the impugned direction would have had no significance in the jury's determination of the verdict of guilty on count 1.[44]

36.4 The court could give 'very significant weight to the jury's verdict of guilty on count 1 because the jury must have followed the trial judge's directions, and they had the advantage of seeing and hearing the complainant and other witnesses give evidence at the trial'.[45]

36.5 He was satisfied that the appellant was proved to be guilty of count 1 beyond reasonable doubt.[46]

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[40] **CAB** 108-116, **CA** [83]-[109].
[41] **CAB** 121-124, **CA** [131]-[139].
[42] **CAB** 122, **CA** [132].
[43] **CAB** 122, **CA** [133].
[44] **CAB** 123, **CA** [134].
[45] **CAB** 123, **CA** [135].
[46] **CAB** 123, **CA** [136].

36.6 The nature of the impugned direction was not such as to preclude the court from being satisfied that no substantial miscarriage of justice had occurred.[47]

36.7 The appellant was not denied a chance of acquittal on count 1 that was fairly open to him.[48]

36.8 The court was not precluded from applying the proviso because the State did not contend that it should be applied.[49]

37. Although 8 reasons were given for reaching the conclusion that the proviso could properly be applied, there were in fact 2 main reasons:

37.1 Firstly, the Court of Appeal was satisfied that based on the record of the trial, including the guilty verdict on count 1, the appellant was proved beyond reasonable doubt to be guilty of the offence the subject of count 1, and that it was open to the Court to so conclude.[50] This is the combined effect of the first to fifth, and the seventh reasons. In summary, Buss P concluded that the impugned direction would have had no effect on the jury's determination of the verdict of guilt in light of the other directions that were referred to at **CAB** 122, **CA** [132].

37.2 Secondly, the Court of Appeal was satisfied that the impugned direction did not give rise to a conclusion that, even though the Court was satisfied that based on the record of the trial, the appellant was proved beyond reasonable doubt to be guilty, this was not a case in which, nevertheless, a substantial miscarriage of justice was caused. This is the effect of the sixth reason.

38. In relation to the eighth reason that was given by Buss P, the appellant did not ultimately contend that it was not open to the Court of Appeal to apply the proviso. Accordingly, the eighth reason is not relevant to the determination of this appeal.

Argument

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[47] **CAB** 124, **CA** [137].
[48] **CAB** 124, **CA** [138].
[49] **CAB** 124, **CA** [139]
[50] *Weiss v The Queen* [2005] HCA 81; 224 CLR 300, [44].

39. The appellant submits that the Court of Appeal erred in concluding that, based on the record of the trial, it was satisfied that the appellant was proved beyond reasonable doubt to be guilty. Further, the Court of Appeal erred in determining that, having regard to the nature of the error, the proviso could and should be applied.

40. The Court of Appeal erred in its approach to the 'negative proposition', referred to by this Court in *Weiss v The Queen* [2005] HCA 81; 224 CLR 300 at [44],[51] when it concluded that it was persuaded that the evidence properly admitted at the appellant's trial proved his guilt, beyond reasonable doubt.

41. *Firstly*, the reasons of the Court of Appeal reveal that it failed to undertake its own independent assessment of the evidence, or that it failed to give adequate reasons for reaching the conclusion that the appellant had been proved guilty of count 1 beyond reasonable doubt.

42. *Secondly*, the Court of Appeal failed to conclude that, given the nature and effect of the erroneous direction, it was not possible for it to be satisfied that the appellant's guilt had been proven at the trial beyond reasonable doubt.

43. The statutory task required by the proviso:

> ...is to be undertaken in the same way an appellate court decides whether the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence. The appellate court must make its own independent assessment of the evidence and determine whether, making due allowance for the 'natural limitations' that exist in the case of an appellant court proceeding wholly or substantially on the record, the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty.[52]

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[51] See also *Kalbasi v The State of Western Australia* [2018] HCA 7 at [12]; *Lane v The Queen* [2018] HCA 28 at [38].

[52] *Weiss v The Queen* [2005] HCA 81; 224 CLR 300 at [41]. See also [47] where this Court noted that although the requirement to review the whole record of trial may tend to prolong appellate hearings and increase the burden on intermediate appellate courts, this is what the common form criminal appeal provisions requires.

44. Although Buss P said (at **CA** [136][53]) that he had carried out an independent assessment of the evidence and had made due allowance for the natural limitations that existed, and indicated at **CA** [133]-[136] and [137][54] that he had examined the trial record, the only extent to which the evidence that was adduced at the appellant's trial was expressly referred to by Buss P is as follows:

44.1 A very brief summary of the relationship between the parties.[55]

44.2 A summary of the State's case in relation to each count on the indictment,[56] and the appellant's case.[57]

44.3 Identification of the State's witnesses called to give evidence at the trial, and a noting of the fact that the appellant did not give evidence.[58]

44.4 A summary of the party's closing addresses, focusing on submissions that were made about the complainant's credibility.

44.5 A summary of the admitted or alleged lies told by the complainant.[59]

45. Other than these references to the evidence, the reasons for decision do not expressly include any analysis of the evidence, or any discussion about how, despite the natural limitations that existed (including the fact that the Court of Appeal did not have the benefit of seeing and hearing the one witness whose credibility was critically important)[60] the Court reached the conclusion that the appellant's guilt had been proved beyond reasonable doubt.

46. Of note is the absence of any, or any substantive, analysis of the evidence that was given by the complainant, or any of the other evidence, in circumstances in which there were significant issues touching upon the complainant's credibility.

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[53] **CAB** 123.
[54] **CAB** 122-124.
[55] **CAB** 91, **CA** [10]-[14].
[56] **CAB** 91-92, **CA** [15]-[19].
[57] **CAB** 93, **CA** [20]-[21].
[58] **CAB** 93, **CA** [25]-[26].
[59] **CAB** 99, **CA** [56].
[60] *Fox v Percy* [2003] 214 CLR 118, 125 at [23].

47. The separate reasons for decision of Beech JA and Pritchard J only indicate that they agreed with the reasons given by Buss P for applying the proviso. However, it is not clear how it was possible for their Honours to have agreed with Buss P's independent assessment of the evidence, and to have accepted that due allowance had been made for the natural limitations that existed, when those matters had not been expressly articulated by Buss P.

48. In any event, it is not possible to know from the reasons for decision whether the Court of Appeal properly approached its task of making its own independent assessment of the evidence in accordance with the principles in *Weiss v The Queen* [2005] HCA 81; 224 CLR 300.

49. The Court of Appeal also erred in finding that the evidence properly admitted at the appellant's trial proved his guilt, beyond reasonable doubt, and by giving 'very significant weight' to the jury's verdict of guilty in the course of reasoning to that conclusion.[61]

50. As was noted in *Kalbasi v The State of Western Australia* [2018] HCA 7 at [15], and more recently in *Lane v The Queen* [2018] HCA 28 at [39], some errors will prevent an appellate court from being able to assess whether guilt was proved beyond reasonable doubt, including cases (such as this one) that turn on issues of contested credibility.[62] This Court also emphasized that it is necessary to consider the nature and effect of the error in every case.

51. The Court of Appeal concluded that the nature and effect of the error was to expressly prohibit the jury from engaging in a process of reasoning that was favourable to the appellant in relation to the complainant's honesty and reliability as a witness, and that was otherwise open to them.[63] Further, '[b]y giving the impugned direction, his Honour intruded impermissibly on the function of the jury.'[64]

52. The jury's assessment of the complainant's credibility was fundamental to the State's prospects of establishing, beyond reasonable doubt, that the appellant was guilty of

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[61] **CAB** 123, **CA** [135]-[136].
[62] *Castle v The Queen* [2016] HCA 46.
[63] **CAB** 120, **CA** [123]-[124], **CAB** 134-136, **CA** [179]-[186].
[64] **CAB** 120, 136, **CA** [124], [179], [182], [184].

count 1. The nature and effect of the impugned direction was to remove a process of reasoning relevant to an assessment of the complainant's credibility that the Court of Appeal found was open to the jury to adopt and one that was favourable to the appellant.

53. It was also a process of reasoning that the appellant relied on at trial.[65]

54. It is not possible to conclude that the impugned direction would have had no effect on the jury's determination of the verdict of guilty on count 1, even when regard is had to the other directions that were given to the jury, which were referred to by Buss P at **CAB** 122, **CA** [132].

10 55. Apart from the effect of the impugned direction that was identified by the Court of Appeal,[66] the impugned direction also erroneously conveyed to the jury the notion that the weight that they were permitted to give to the lies that they found had been told by the complainant was, as a matter of law, less than the weight that they would otherwise have been entitled to have given them in the exercise of their function.

56. Although the jury were told that if they found that the complainant had lied then that was a factor that they could take into account in assessing her credibility in relation to counts 1 and 2, and that they must scrutenise her evidence with care, the impugned direction required the jury to proceed on the basis that those lies were not *capable* of themselves of leading to a conclusion that all of her evidence was dishonest and could
20 not be relied on, or that they must otherwise be afforded less weight than the jury were entitled to give them.

57. In those circumstances, and where the natural limitations that exist when an appellate court is required to proceed on the record were significant, it was not open to the Court of Appeal to decide that the appellant's guilt in relation to count 1 had been proved beyond reasonable doubt.

58. It was also not open to the Court of Appeal to give 'very significant weight' to the verdict of guilty.[67] As this Court said in *Collins v The Queen* [2018] HCA 18 at [36],

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[65] **CAB** 34, at lines 31 to 35.
[66] Ibid at [51].
[67] **CAB** 123, **CA** [136].

where 'proof of guilt is wholly dependent on acceptance of the complainant, and the misdirection may have affected that acceptance, the appellate court cannot accord the weight to the verdict of guilty which it otherwise might.'[68]

59. In addition to the matters raised above, it is well established that it is possible that some errors or miscarriages of justice will preclude the application of the proviso even if an appeal court is persuaded that the evidence properly admitted at an appellant's trial proved his or her guilt, beyond reasonable doubt.[69]

60. It has been observed that the statutory requirement to determine whether a substantial miscarriage of justice has occurred does not involve consideration of the question by reference to categories of 'fundamental defects'.[70] As the plurality in *Lane v The Queen* [2018] HCA 28 noted, at [38]-[39]:

> The course of authority establishes that an error at trial may be such as to preclude the application of the proviso in the sense of precluding a conclusion that there was no substantial miscarriage of justice, irrespective of the appellate court's view as to whether the evidence properly admitted at trial proved the appellant's guilt beyond reasonable doubt. Put in a verbal formulation that amounts to the same assessment, some errors will establish a substantial miscarriage of justice even if the appellate court considers that conviction was inevitable.
>
> A misdirection by a trial judge always involves an error of law, but 'sometimes [it] will prevent the application of the proviso; and sometimes it will not.' It is necessary for the appellate court to consider the nature and effect of the error in every case.

61. The Court of Appeal concluded that the impugned direction was not[71]:

> ... 'so fundamental' or involving 'such a departure' from the essential requirements of a fair trial as to preclude this court from being satisfied, in terms of the proviso, that no substantial miscarriage of justice has occurred. The nature of the misdirection, in the circumstances of the case, including [the trial judge's]

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[68] *Collins v The Queen* [2018] HCA 18 at [36].
[69] *Weiss* at [45]. See also *Lane v The Queen* [2018] HCA 28 at [38], and the authorities listed by the plurality in footnote 30.
[70] *Baiada Poultry Pty Ltd v The Queen* [2012] HCA 14; (2012) 246 CLR 92 at [23].
[71] **CAB** 124, **CA** [137].

> summing up considered as a whole, does not constitute a denial of procedural fairness or a serious breach of the presuppositions of a criminal trial so as to preclude this court from applying the proviso.'

62. However, in considering the nature and effect of the impugned direction the Court of Appeal determined that the jury had been given a direction, that they would have understood that they were bound to follow, that impermissibly prohibited them from engaging in a process of reasoning about the critical issue at the appellant's trial, namely, the complainant's credibility. As Buss P put it, 'by giving the impugned direction, [the trial judge] intruded impermissibly on the function of the jury'.[72]

10 63. Given the above, and having regard to what was said in *Azzopardi v The Queen* [2001] HCA 25; (2001) 205 CLR 50 at [49] and [50], by Gaudron, Gummow, Kirby and Hayne JJ, namely that there is a:

> ... fundamental division of functions in a criminal trial between the judge and the jury. It is for the jury to decide the facts of the case. It is for the judge to explain to the jury so much of the law as they need to know in deciding the real issue or issues in the case. In the course of directing the jury, the judge must give the jury such warnings as may be called for by the particular case, not only against following impermissible paths of reasoning, but also about the care that is needed in assessing some types of evidence such as evidence of identification.
>
> 20 It is, however, not the province of the judge to *direct* the jury about how they may (as opposed to may *not*) reason towards a conclusion of guilt. That is the province of the jury. The judge's task in relation to the facts ends at identifying the issues for the jury and giving whatever warnings may be appropriate about impermissible or dangerous paths of reasoning,

the Court of Appeal should have decided that it was not open to apply the proviso and have allowed the appellant's appeal against conviction.

64. The Court of Appeal should have decided it was not open to apply the proviso, consistently with the observation that was made by the plurality in *Lane v The Queen* [2018] HCA 28 at [48], namely, that a 'misdirection that is apt to prevent the

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[72] **CAB** 120, **CA** [124].

performance by the jury of its function, without more, will result in a substantial miscarriage of justice'.

Conclusion

65. As a result of the nature and effect of the impugned direction, it was not open to the Court of Appeal to conclude that the appellant was proved beyond reasonable doubt to be guilty of count 1.

66. Further, it was not open to the Court of Appeal to reach a conclusion that no substantial miscarriage of justice occurred.

67. As a result, the Court of Appeal erred in applying the proviso pursuant to section 30(4) of the *Criminal Appeals Act 2004* (WA).

PART VII: Applicable Provisions

Section 30, *Criminal Appeals Act 2004* (WA)

30 . Appeal against conviction, decision on

(1) This section applies in the case of an appeal against a conviction by an offender.
(2) Unless under subsection (3) the Court of Appeal allows the appeal, it must dismiss the appeal.
(3) The Court of Appeal must allow the appeal if in its opinion —
  (a) the verdict of guilty on which the conviction is based should be set aside because, having regard to the evidence, it is unreasonable or cannot be supported; or
  (b) the conviction should be set aside because of a wrong decision on a question of law by the judge; or
  (c) there was a miscarriage of justice.
(4) Despite subsection (3), even if a ground of appeal might be decided in favour of the offender, the Court of Appeal may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.
(5) If the Court of Appeal allows the appeal, it must set aside the conviction of the offence (offence A) and must —
  (a) order a trial or a new trial; or
  (b) enter a judgment of acquittal of offence A; or
  (c) if —
    (i) the offender could have been found guilty of some other offence (offence B) instead of offence A; and

(ii) the court is satisfied that the jury must have been satisfied or, in a trial by a judge alone, that the judge must have been satisfied of facts that prove the offender was guilty of offence B,

enter a judgment of conviction for offence B and impose a sentence for offence B that is no more severe than the sentence that was imposed for offence A; or

...

Part VIII: Orders Sought

68. The following orders are sought:

1. The appeal is allowed;

2. The orders of the Court of Appeal of the Supreme Court of Western Australia are set aside.

3. The conviction is quashed.

4. There be a re-trial.

Part IX: Estimate

69. It is estimated the presentation of the appellant's oral argument will require 1½ hour.

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Sam Vandongen
Francis Burt Chambers
Tel: (08) 9220 0444
Fax: (08) 9325 9894
Email: svandongen@francisburt.com.au

Shash Nigam
Nigams Legal
Tel: (08) 9221 1818
Fax: (08) 9221 1079
shash@nigam.com.au