HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF NEW SOUTH WALES

BETWEEN:

THOMAS HOFER
Appellant

and

The Queen
Respondent

APPELLANT'S REPLY

Part I: Certification

1. It is certified that these submissions are in a form suitable for publication on the internet.

Part II: A reply to the Respondent's submissions

Ground 1

2. At RS [4] it is asserted that for a miscarriage of justice to occur in circumstances where the prosecutor cross-examined the appellant on the basis that he had fabricated his evidence, given that his defence counsel had not complied with the rule in *Browne v Dunn* (1893) 6 R 67 ('Browne v Dunn'), it was necessary for the "wrongful inference" to be "made explicit" by the prosecutor, confirmed or not corrected by the trial judge, and not remedied by defence counsel.

3. The adoption by the majority of "the three step test" represents a significant departure from principles established in other, earlier cases, as identified by Garling J in *Llewellyn v R* [2011] NSWCCA 66 at [136]-[137]. Such a test is unsupported by logic or authority.

4. The fact that cases such as *R v Birks* (1990) 19 NSWLR 677, *Nudd v R* (2006) 80 ALJR 614, *R v Manunta* (1989) 54 SASR 17 and *R v Abdallah* (2001) 127 A Crim R 46 involved circumstances where juries also heard addresses and were given directions as to the significance of the rule in *Browne v Dunn* does not provide a basis for concluding that there was no miscarriage of justice in this matter.

5. At the appellant's trial for sexual assault it was extensively put to him by the prosecutor that what he was saying in his evidence had not been put by his counsel to relevant prosecution witnesses and that he was making up his evidence as he gave it. In the NSW Court of Criminal Appeal ('the CCA') it was accepted that the appellant's trial counsel in fact did have instructions supporting each aspect of the appellant's evidence that had not been put to the prosecution witnesses and this was because of failings of his own counsel. (CCA at [97]) The appellant's trial counsel (who knew the allegations to be false) could have easily rectified the unfairness and prejudice arising from the pointed cross-examination, however he failed to do so. The prosecutor's address commenced almost immediately after the completion of the cross-examination of the appellant. The prosecutor invited the jury to find that the appellant's evidence was untruthful, noting twice[1] that the appellant had given evidence of matters never raised with the two complainants by the appellant's counsel. The appellant's counsel again did nothing to correct the situation. The trial judge was not asked to give directions to the jury on the alternative explanations for trial counsel's omission to raise the various matters with the prosecution witnesses.

6. Contrary to the respondent's submission at RS [29] and [36], neither intuition nor an explanation of the rule in *Browne v Dunn* was required for the jury to appreciate the basis for the cross-examination of the appellant; namely to undermine his credibility by demonstrating the clear link between matters not put to the complainants and the accusation of recent invention. The inference of recent invention was inescapable. It was

[1] At T533.01 AF 796 and T540.15 AF 803

expressly and repeatedly asserted to be the case by the prosecutor, as detailed by McFarlane JA at CCA [44]-[49]; CAB 108-9.

The proviso

7. At RS [59] it is asserted that the evidence in the prosecution case was sufficiently compelling that even if there had been a miscarriage of justice it was one to which the proviso in s6(1) of the *Criminal Appeal Act 1912* (NSW) applied. This is incorrect, for the reasons identified by Macfarlan JA at CCA [60]-[63].

8. The evidence at trial required the jury to determine the credibility of both complainants and the appellant. It could not be said that the impermissible cross-examination of the appellant could not have had any significance in the jury's assessment of the appellant's evidence. Impermissible cross-examination and the absence of any attempt by the trial judge or the appellant's counsel to rectify the prejudice to the appellant that flowed from the cross-examination meant that the jury verdicts could not be relied upon. As Macfarlane JA observed at CCA [59]:

> "Even if the jury here accepted the complainant's evidence, it still had to consider whether the appellant's evidence might "reasonably possibly" be true, that is, that the appellant had believed that C1 and C2 consented to the sexual activity (even if they did not).

Ground 2

9. At RS [62] it is said that Ground 2 stands or falls on whether or not the prosecutor's impugned questioning constituted a miscarriage of justice. It is accepted that common issues are relevant to both grounds, however the failure of trial counsel to object to the impermissible cross-examination or to clarify the situation by establishing that the failure to relevantly cross-examine the complainants had been his failing and not that of the appellant or to seek appropriate directions from the trial judge added potency to the miscarriage of justice, as explained by Macfarlane JA at CCA [48]-[49] and [96]-[99].

Dated: 18 June 2021

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