HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN: **MATHEW CUCU BRAWN**
Appellant

and

THE KING
Respondent

APPELLANT'S REPLY

Part I: Certification as to publication

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

Part II: Argument in reply

The materiality threshold for a miscarriage of justice: **RS [34]-[37]**

2. What the respondent seeks to do is adopt the low threshold language of capacity, preferred by Edelman and Steward JJ in *HCF* at [75], without the important qualifying words, *"... rather than whether it might or might not actually have done so"*. In this way, the respondent seeks to utilize the **language** of capacity at the expense of the **meaning** that it truly conveys.
3. The respondent's submissions express the materiality threshold at a level which is apparently verbally coherent with a functional proviso, in that a distinction is drawn between capacity and substance (**RS [35]**), but which in reality leads to the collapsing of the test for a miscarriage of justice into the proviso.
4. The error of approach is laid bare in **RS [37]**, where the respondent submits that its formulation of the materiality threshold requires a **causal** connection between the irregularity and the result of the trial. If a miscarriage of justice requires a defendant to demonstrate that the irregularity was the cause, or even a cause, of the result, the guilty verdict, a high hurdle indeed is created.

5. The proviso is left practically otiose. The respondent's formulation cannot stand. If there is a materiality threshold, the formulation set out at **AS [72]** is preferable, for the reasons explained in the appellant's submissions. Any error or irregularity that has the capacity to affect the outcome of a trial, to the prejudice of a defendant, is a miscarriage of justice. This is so irrespective of whether the outcome of the trial might, or might not, have actually been different had the error or irregularity not occurred.

If disclosure had been made, the appellant's defence might have been conducted differently, to his advantage. The irregularity had the capacity to affect the outcome of the appellant's trial, to his prejudice.

6. Whilst the respondent is correct to say at **RS [11]** that the appellant did not challenge at trial that the complainant had been sexually abused by someone around the period of time alleged,[1] the appellant did not admit, and did challenge, that the acts of sexual abuse occurred precisely when, where and how the complainant alleged they had occurred.[2] The respondent's submissions fail to acknowledge and deal with this.
7. If the possibility that the appellant's father had the opportunity to commit all of the alleged acts of sexual abuse against the complainant was not supported by the evidence (which the appellant denies), that was not a bar to the father being the true offender. The complainant's account was strewn with inconsistencies about the timing, dates and places of the alleged sexual acts.[3] The possibility of mistakes in these details given by the complainant could not be excluded.
8. In any event, the assertion at **RS [12], [66]** and **[68]**, that the appellant's father did not have opportunity to commit the offending, is not supported by the evidence. The respondent's argument as to why the appellant's father can safely be excluded as the true offender appears to boil down to the father having an "alibi" for some of the alleged acts of sexual abuse (**RS [68]**). The extent of the evidence on that topic (see the footnotes to **RS [68]**) was:
   8.1. The complainant said she was being sexually abused daily for a period of time;
   8.2. The appellant's father went to Melbourne for a weekend during that period. He left on Friday and returned on Sunday; and

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[1] The nature of this "concession" is explained at RBFM at 79 (Accused Opening at trial transcript 32) and RBFM 393 (Accused Closing at trial transcript 430).
[2] See for example RBFM at 396, 401 – 408 (Accused Closing at trial transcript 433, 438-445). As the Appellant's case was that he did not commit any acts of sexual abuse against the complainant, he could not concede anything about when, where or how such acts occurred. These matters were all in issue.
[3] As the jury were told in the appellant's counsel's closing address: RBFM at 396, 401 – 408 (trial transcript 433, 438-445).

8.3. The appellant could not remember whether his father had gone to Melbourne, but allowed for that possibility.

9. The supposed "alibi" was hardly a bar to the appellant's father being the true offender. On the prosecution case at its highest, there was one full day (Saturday) when he was not in Adelaide. The possibility existed that the complainant was mistaken about whether there was a one (or even two) day break in what she said was constant sexual abuse. Had the appellant's father been the focus of the defence case, the complainant could have been cross-examined to that effect. In the event, and given the non-disclosure, she was not.

10. For the above reasons, the respondent is incorrect to say that *"the availability of a single offender, other than the appellant, for all of the acts of abuse was unavailable on the evidence"* (**RS [12]**).

11. Furthermore, even if the respondent was correct to say this, the asserted "unavailability" of a single alternative offender was in part a result of the state of prosecution disclosure at the trial, because that necessarily affected the appellant's approach to the presentation of his defence, including his cross-examination of witnesses and the evidence he led at the trial. A deficiency in prosecution disclosure that has the capacity to affect the way in which a defence case is run, to the prejudice of a defendant, is a miscarriage of justice. *Grey* and *Mallard* confirm that is not necessary for an appellant to prove definitively, or precisely, how he was prejudiced and how he **would** have run the trial if full disclosure had been made.

12. It is not even correct for the respondent to say that *"nomination of the Appellant's father as the perpetrator was explored to the extent that it was available"* **RS [13]**. The complainant and other witnesses were not cross-examined about the father's whereabouts in respect of each and every particular of the charged conduct. The complainant was not pressed on precisely how long it was that she claimed the appellant's father was in Melbourne.

13. Most tellingly, no submission was made to the jury by the appellant's trial counsel in her closing address that it was possible the Appellant's father was the true offender.

14. The respondent's argument effectively assumes that the appellant would have run his case concerning the identity of the true offender in the same way if proper disclosure had been made (**RS [4], [62]**). But this assumption is not one that can or should be made.

15. The respondent's argument treats the actual events at the trial as determinative of the counter-factual in which proper disclosure was made. The argument ignores what might

have, but did not, happen at trial because of the failure of disclosure. To this end, the Appellant repeats **AS [33]-[35]** and **[80]-[82]**.

16. The material disclosed after the trial had the capacity to change how the appellant ran the defence case at the trial, not just in his cross-examination, but in the evidence he called to support his defence. Had he received full disclosure, the appellant might have called his father's complainant to give evidence. Contrary to the view of the Court of Appeal at **Reasons [49]; CAB 42**, the appellant did not have to positively prove that he could or would have called her as a witness, in order for the non-disclosure to be a miscarriage of justice. Just as in *Grey* and *Mallard*, the non-disclosure in the present case had the capacity to affect the way the Appellant ran his defence. The irregularity therefore had the capacity to affect the outcome of the appellant's trial, to his prejudice.

The Court of Appeal's reliance on a concession

17. The respondent's recourse at **RS [64]** to **Reasons [72] CAB 47** to overcome the Court of Appeal's reliance on a concession that was not made is misplaced. At **Reasons [72]**, the Court did no more than explain that it was not bound by the assertion of counsel that the case at trial would have been conducted differently had proper disclosure been made.
18. That was a different issue to the purported concession that is the subject of the second ground of appeal.
19. The second ground of appeal concerns the purported concession by the Appellant that he could not have called evidence of his father's commission of sexual acts against another female child: see **Reasons [50], [76] and [83] CAB 42, 47 and 49**.
20. On any fair reading of the judgment as a whole, and in particular the conclusory **Reasons [83]**, the Court of Appeal dismissed the appeal in reliance on a concession that was not in fact made by the Appellant.

Dated: 21 November 2024

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