



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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#### Important Information

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**IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY**

**BETWEEN:**

**MDP**  
Appellant

and

**THE KING**  
Respondent

**OUTLINE OF ORAL SUBMISSIONS OF  
THE DIRECTOR OF PUBLIC PROSECUTIONS (CTH) (INTERVENING)**

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## PART I INTERNET PUBLICATION

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This outline of oral submissions is in a form suitable for publication on the internet.

## PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

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### Third limb: “miscarriage of justice”

- 1 **First step:** An appellant must identify an error or irregularity in, or in relation to, the trial: **Cth [18]-[20]**.
- 1.1. If the appellant cannot identify an error or irregularity in, or in relation to, the trial, the appeal must be dismissed.
- 1.2. If the error or irregularity was “fundamental”, it is unnecessary to undertake any further assessment of whether it could have had any effect on the verdict.
- 10 (a) That is because there will have been an “inherently substantial” miscarriage of justice: see **Cth [23]-[24]**.
- (b) In such a case, it will be logically impossible for a respondent to establish that no substantial miscarriage of justice has actually occurred. That is, there will be no scope for the application of the proviso, and the appeal must be allowed.
- *HCF* (2023) 97 ALJR 978 at [7] (Gageler CJ, Gleeson and Jagot JJ) (**JBA v 6, Tab 52**).
- 1.3. If the identified error or irregularity was not “fundamental”, the analysis proceeds to the second step.
- 20 2 **Second step:** An appellant must establish that the identified error or irregularity was “material”: **Cth [26]-[35]**.
- 2.1. An error or irregularity will be “material” if an appellant establishes that the error or irregularity *could* realistically have affected the verdict of guilt that was in fact returned by the jury in the trial that was had: **Cth [36]-[44]**.
- *LPDT* [2024] HCA 12 at [7], [10], [14]-[15] (the Court) (**JBA v 6, Tab 55**).
  - *Hofer* (2021) 274 CLR 351 at [41], [47] (Kiefel CJ, Keane and Gleeson JJ), [114]-[123] (Gageler J), [125], [130] (Gordon J) (**JBA v 4, Tab 32**).
  - *HCF* (2023) 97 ALJR 978 at [2] (Gageler CJ, Gleeson and Jagot JJ) (**JBA v 6, Tab 52**).
- 30 2.2. If the error or irregularity was not “material”, there will have been no “miscarriage of justice”, and the appeal must be dismissed.

2.3. If the error or irregularity was “material”, there will have been a “miscarriage of justice”. The analysis then proceeds to the third step.

3 **Third step:** Despite the existence of a “miscarriage of justice”, the respondent may seek to establish that no “substantial miscarriage of justice” actually occurred.

3.1. To discharge that burden, the respondent must satisfy the appellate court that, on the evidence properly admissible at trial, the appellant’s guilt was established beyond reasonable doubt: **Cth [45]-[46]**.

3.2. If the respondent fails to establish that there has been no substantial miscarriage of justice, the appeal must be allowed.

10 (a) In some cases, the court will not be able to be satisfied that there has been no substantial miscarriage of justice because of the nature of the error or irregularity: **Cth [47]-[48]**.

(b) In other cases, the respondent may not seek to discharge its burden.

3.3. If the respondent establishes that no substantial miscarriage of justice actually occurred, the appeal must be dismissed.

#### **Second limb: “wrong decision” on any “question of law”**

4 **First step:** An appellant must identify a “decision” on a “question of law”.

4.1. There will be a “decision” where the judge rules on a legal question. Ordinarily, there will be no “decision” unless there is a contest between the parties about an issue,  
20 which is then resolved by the judge: **Cth Supp [10]-[16]**.

4.2. The admission of evidence may involve “decision” on a question of law, but only if the evidence is admitted over the objection of a party: **Cth Supp [25]-[27]**.

- *Soma* (2003) 212 CLR 299 at [11] (Gleeson CJ, Gummow, Kirby and Hayne JJ), [79] (McHugh J) (**JBA Supp v 2, Tab 15**).
- *Johnson* (2018) 266 CLR 106 at [52] (the Court) (**JBA Supp v 2, Tab 11**).

4.3. The giving of a direction (or refusing to give a direction) may involve a “decision” on a question of law, but only if the direction is made (or not made) following a request by a party: **Cth Supp [32]-[36]**.

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- *Dhanhoa* (2003) 217 CLR 1 at [49] (McHugh and Gummow JJ) (**JBA Supp v 1, Tab 7**).
  - *Huxley* (2023) 98 ALJR 62 at [42] (Gordon, Edelman and Steward JJ) (**JBA v 6, Tab 53**).

- 4.4. If there was no “decision” on a question of law, the appeal must be dismissed.
- 4.5. If there was a “decision” on a question of law, the analysis proceeds to the second step.

5 **Second step:** An appellant must establish that the identified decision was “*wrong*”.

5.1. Whether a decision to admit evidence was “wrong” will depend on the identification of legal error in the trial judge’s ruling on that question (judged according to the applicable standard of appellate review).

5.2. Whether the giving of a direction (or the failure to give a direction) involves a “wrong” decision on a question of law will depend on the context of the whole trial. Examination of that context may reveal there was no “wrong” decision because:

- (a) the giving (or not) of the impugned direction involved no legal error; or
- (b) there was a legal error, but the error was later corrected.

- *Huxley* (2023) 98 ALJR 62 at [23]-[24], [28]-[30] (Gageler CJ and Jagot J), [43], [67] (Gordon, Edelman and Steward JJ) (**JBA v 6, Tab 53**).

5.3. If the decision was not “wrong”, the appeal must be dismissed.

5.4. If the decision was “wrong”, there will have been a miscarriage of justice: see **Cth Supp [20]**. The analysis then proceeds to the third step.

6 **Third step:** The respondent may seek to establish that no “substantial miscarriage of justice” actually occurred: **Cth Supp [24]**.

6.1. A wrong decision on a question of law may be a “fundamental” error. In that event, the proviso can have no application: sub-paragraph 1.2 above.

6.2. Otherwise, an appeal may be dismissed on the basis of the proviso: paragraph 3 above.

**Raelene Sharp**  
*Director of Public Prosecutions (Cth)*

**Thomas Wood**

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3 December 2024