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

S37 of 2021

BETWEEN: **THOMAS HOFER**
Appellant

and

THE QUEEN
Respondent

RESPONDENT'S OUTLINE OF ORAL ARGUMENT

PART I: PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: ARGUMENT

Whether combination of circumstances indicative of failure of trial process

2. As Gleeson CJ observed in *R v Birks* (1990) 19 NSWLR 677 ("***Birks***") and *Nudd v The Queen* (2006) ALJR 614 ("***Nudd***"), a miscarriage of justice results from a "combination of circumstances" or of "errors" reflecting a "failure of the trial process" or a "breakdown in the adversary process." When a cross-examination is said to have caused a failure of the trial process, what is of interest are the "consequences" that can be said to have flowed from the cross-examination: *Birks* at 686C.

What is meant by an "inference" or "implication of recent invention?"

3. Some precision need be given to the appellant's allegation to the effect that the impugned questioning communicated an implication or inference of recent invention in connection with the rule in *Browne v Dunn* (1893) 6 R 67 ("***Browne v Dunn***"). What makes compliance with the rule *probative* of fabrication is that it suggests that instructions have not been given by an accused to counsel on the matter in question. But that pathway of reasoning requires that the jury be taken to understand the premise of *Browne v Dunn*, being that counsel should be presumed to have complied with their duty to put matters on which they have been given instructions and that a failure to do so therefore indicates that instructions were not given.

The practical effect of the impugned questioning was not to imply recent invention

4. The CCA majority were correct in apprehending that the impugned questioning was "ineffectual": see eg CAB 124, CCA [130]. The majority properly gave attention to the "practical effect" of the questioning: *RWB v R* (2010) 202 A Crim R 209 at [103]. Here, the practical effect of the questioning can be understood only in the light of the impugned questioning itself and the answers the appellant gave, because, unlike other cases relied upon by the appellant, there was no effective reinforcement of the allegedly prejudicial inference of recent invention at later stages of the trial. The questions and answers yield the conclusion that the significance of apparent non-compliance with *Browne v Dunn* was not effectively communicated to the jury.

The jury would not have understood what was being implied

5. Because the impugned questioning was ineffectual, the jury would not relevantly have understood what, if anything, was being implied. It should, therefore, not be assumed that the jury would have acted upon such an implication. As Fagan J observed in the CCA, "*Birks* reasoning was not intuitive": CAB 137, CCA [188]. The "three premises" of Birks reasoning, referred to by Fagan J, is illustrative of this. The point is also consistent with authorities in this field, which assume that because juries know little about legal technicalities they can be easily led astray by an explanation of the significance of *Browne v Dunn* as supporting fabrication without accounting for possible alternatives: see eg *R v Manunta* (1989) 54 SASR 17 ("***Manunta***") at 23 per King CJ.

No prominence was given to the impugned questioning

6. The appellant relies on non-compliance with *Browne v Dunn* as the basis for the inference he says was wrongly made available to the jury. To the extent that any of the authority he cites may be taken to be representative of a broader principle, it is encapsulated in King CJ's concern in *Manunta* at 23 that an implication of recent invention, even one "legitimately available to the jury", can take on a "prominence" that is not warranted in the circumstances of the case and can compromise the adjudication of facts in the trial. See also Fullerton J at CAB 119-120, CCA [110]-[112]. This broader principle explains decisions such as *Llewellyn v R* [2011] NSWCCA 66 and *Picker v R* [2002] NSWCCA 78, where there were clear indications that the question of fabrication had become the focus of the trial.

The impugned questioning was peripheral and ineffectual

7. There is no indication in the present case that the impugned questioning took on the sort of prominence warned against by King CJ in *Manunta*. That is so not only because the impugned questioning ineffectually communicated the implication of recent invention but because it was peripheral and was not the subject of emphasis in addresses or summing up. The central matter at issue in the trial was whether the appellant had a reasonable belief in consent. That is readily apparent from the trial judge's summing up. The second, third, seventh and eighth areas of impugned questioning were peripheral to the appellant's case that he reasonably believed that C1 and C2 consented to the charged acts in the appellant's bedroom. The first, fifth and sixth areas of impugned questioning went to events that occurred after the appellant commenced sexual penetration: CAB 128. CCA [148], CAB 139, CCA [199]. The fourth area was, in fact, put to C2 and the prosecutor apologised for his mistake. The seventh area also involved a misapprehension by the prosecutor. The appellant explained that he had in fact told his counsel about the second and fifth areas, and provided a similar explanation regarding the eighth area.

The proviso

8. The peripherality and ineffectuality of the impugned questioning also supports the application of the proviso, if required. Fagan J was correct in applying *Weiss v The Queen* (2005) 224 CLR 300 at [43] and concluding that "if the impugned cross-examination was impermissible and to some degree prejudicial … it would or at least should have had no significance for the jury": CAB 139, CCA [195]-[197].

Ground 2

9. Ground 2 is, properly viewed, an extension of Ground 1 and stands or falls on Ground 1 being made good: RS [62]. Any failure by counsel to intervene has to be seen in the underlying context of the prejudice, if any, created by the impugned questioning. If there was no real prejudicial effect from the impugned questioning, or it was of no significance to the jury's verdict, then what counsel did or did not do does not affect that outcome.

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David Kell SC
Crown Advocate of New South Wales
Tel: (02) 8093-5506
E: david.kell@justice.nsw.gov.au

Katharine Jeffreys
Crown Prosecutor
Tel: (02) 9285 8833
E: kjeffreys@odpp.nsw.gov.au