HIGH COURT OF AUSTRALIA

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### Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: MALCOLM LAURENCE ORREAL
Appellant

and

THE QUEEN
Respondent

# APPELLANT'S REPLY

**Part I:** The appellant certifies that these submissions are in a form suitable for publication on the internet.

**Part II:**

1.1 The focus of the majority in the Court of Appeal in this matter was on whether the admitted miscarriage of justice was a substantial miscarriage of justice so as to prevent the application of the proviso.

1.2 McMurdo JA correctly identified that the Crown's dependence on the complainant's evidence for proof of guilt meant that it was not possible to apply the proviso.[1] His Honour correctly pointed to the natural limitations of an appellate court's task as articulated by this Court in *Baini v The Queen*.[2]

[1] CAB, 80 L 36-39.
[2] [2012] HCA 59; (2012) 246 CLR 469 at 480 [29]

1.3 The respondent's submissions[3] seek to defend the reasoning by the majority in the Court of Appeal by reprising the majority's conclusion that there was no reasonable possibility that the impugned evidence, in the context of statements by the prosecutor and comments by the learned trial judge, could have caused the jury to reason towards a finding of guilt. This is combined with an argument[4] that it might be possible for the appellate court to place some, albeit, reduced weight on a jury's verdict where a miscarriage of justice has occurred.

1.4 It may be accepted that the majority of the Court of Appeal participated in a qualitative assessment of the errors in the case and their potential impact on the jury's reasoning, particularly, their potential impact on the jury's approach to the credibility of the complainant.

1.5 The difficulty is that the results of that assessment were wrong. For the reasons developed in the appellant's primary submissions,[5] the evidence was very capable of affecting the jury's conclusions, particularly, the jury's conclusions as to the credibility of the complainant.

1.6 It is insufficient for an appellate court to have followed an appropriate procedure if the results of the process are unreasonable or wrong.

1.7 The failure of the trial judge to direct the jury to disregard, totally, the impugned evidence was the type of error which is very likely to preclude the application of the proviso. The engagement by the majority of the Court of Appeal in a process of reasoning that the jury must have reached the same result, as they did, if they were instructed properly is the type of reasoning which, in *Lane v The Queen*,[6] was held to involve the appeal court in performing the constitutional function of

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[3] Respondent's submissions, 5.12 and following
[4] Respondent's submissions, 5.15-5.17, referring to *Pell v The Queen* (2020) 268 CLR 123 at [39]; *Baiada Poultry v The Queen* (2012) 264 CLR 92 at [27]; and *Collins v The Queen* (2018) 265 CLR 178 at [36]
[5] Appellant's submissions, [34] and [37]-[47]
[6] [2018] HCA 28; (2018) 265 CLR 196 at 207-209 [41]-[44]

the jury. To allow the jury to rely upon evidence which they should have been directed to disregard falls into the category of a breach of the presuppositions of the trial as also discussed in *Lane v The Queen*.[7]

1.8 To find, as the majority did, that the impugned evidence could not have had any bearing on the jury's assessment of the reliability and credibility of the complainant's evidence is speculative and ignores the real prospect that a substantial miscarriage of justice did occur.

Dated:

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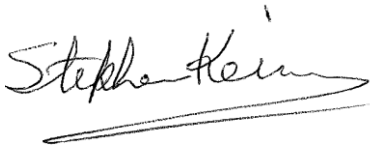

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Name: S Keim SC

P F Richards

Telephone: (07) 3229 0381

Email: s.keim@higginschambers.com.au

[7] [2018] HCA 28; (2018) 265 CLR 196 at 207-210 [44]-[48]