IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY **No. A9 of 2018**

BETWEEN: **IAN DOUGLAS JOHNSON**
Appellant

and

THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS

I PUBLICATION

1. This submission is suitable for publication on the internet.

II CONCISE STATEMENT OF ISSUES

2. Did the appellant's trial in respect of sexual offences alleged to have been committed against his sister when he was aged 17, 28 and 30 (counts 2, 4 and 5) miscarry because those counts were heard together with other counts (counts 1 and 3) in respect of which the jury wrongly returned verdicts of guilt?

3. Was evidence led in relation to count 1 (including allegations of misconduct by the appellant when he was between 6 and 8-9 years old, adduced with a view to rebutting the presumption of *doli incapax*) or count 3 admissible in relation to the other counts?

III SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)

4. Notice is not required to be given under s 78B of the *Judiciary Act* 1903 (Cth).

IV CITATION

5. *R v Johnson* [2015] SASCFC 170 (**CCA**) [CAB.143].

V NARRATIVE STATEMENT OF FACTS FOUND OR ADMITTED

6. The appellant was born on 9 June 1953. He had an older brother, Neil, who was about 4 years older than him, and a younger sister, the complainant (**VW**), who was born on 12 April 1956, making her a little less than 3 years younger than him. They grew up on a family farm at Spence, near Lucindale, in the south east of South Australia.

7. The appellant was tried on a single information with five counts of sexual offences against VW. By the time of trial in 2015, VW was 58, and the appellant was aged 61.

Caldicott Lawyers
53 Wright Street
ADELAIDE SA 5000

Telephone: (08) 8110 7900
Fax: (08) 8110 7901
Email: ccaldicott@caldicottlawyers.com.au

8. The counts are summarised below.

Count	Charge	Dates	Appellant's age	VW's age	Details
1	Indecent assault[1]	[1963 or 1964]*	No older than 10	7 or 8	'Shearing shed incident'
2	Carnal knowledge[2]	01.08.70 – 19.09.70	17	14	Lucindale (in car near Lucindale Hotel)
3	PSE[3]	09.06.71 – 11.04.73	18-19	15-16	Two or more acts of inserting penis into VW's vagina at Lucindale
4	Rape[4]	31.12.81 – 13.04.82	28	25-26	Naracoorte
5	Rape	30.11.83 – 01.01.84	30	27	Naracoorte

* The information alleged a date range of 31.12.64 - 01.01.66, but as explained below, the evidence suggested an earlier date.

9. For reasons explained by the CCA, although it was alleged in the information that the 'shearing shed incident' (count 1) occurred in 1965 (when the appellant was 11 or 12), on the evidence, it was not open to find that the appellant was any older than 10 (ie, the incident occurred in 1963 or 1964)[5]. Accordingly, the time between the allegations the subject of counts 1 and 5 was approximately 20 years. Whilst counts 1-3 were alleged to have occurred when VW was a child and living at home, counts 4 and 5 were alleged to have occurred away from the former family home and after VW had married and separated.

10. Prior to trial:

(1) the prosecution successfully applied to have the appellant tried as an adult in respect of counts 1 and 2 on the basis of the seriousness of the allegations[6];

(2) the prosecution notified its intention to adduce evidence of discreditable conduct, namely, charged and uncharged acts of sexual misconduct, including for a propensity purpose relating to sexual attraction[7];

(3) the appellant made applications seeking, inter alia, that counts 1 and 2 be heard separately to the trial on counts 3 – 5 and that the prosecution not be permitted to lead the evidence referred to in the discreditable conduct notice[8], and that counts 1 and 3 be permanently stayed[9];

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1 *Criminal Law Consolidation Act* 1935 (SA) (**CLCA**), s 56.

2 CLCA, s 55(1)(a).

3 CLCA, s 50(1).

4 CLCA, s 48(1).

5 CCA [75]-[82] CAB.182-183. See also Tr 250.9 AFM.324.

6 *Young Offenders Act* 1993 (SA) s 17(3)(c), Ruling of Senior Judge McEwen on 26 May 2014 [CAB.7].

7 The s 34P(4) notice [AFM.5] stated: "Where relevant the evidence of each act of sexual misconduct against [VW] stands as circumstantial evidence which demonstrates a specific sexual attraction to that complainant and a tendency for the accused to act in furtherance of that sexual attraction".

8 Application dated 17 October 2014 [AFM.9].

9 Application dated 27 October 2014 [AFM.16].

(4) during the argument on these applications:

(a) the appellant's counsel emphasised the extraordinary delay in the trial of count 1, the forensic prejudice due to witnesses being unavailable and the difficulty in effectively cross-examining the witnesses to count 1. Reference was made to the risk of prejudice by misuse of evidence relating to other acts in resolving the issues arising on individual counts (for example, whether the presumption of *doli incapax* could be rebutted in relation to count 1)[10]. It was submitted there was a risk of the jury throwing all the evidence in together when in substance, in relation to counts 1 and 2, as against counts 3-5, "we are really dealing with two different persons" (meaning, the child and the adult)[11];

(b) the prosecutor maintained that the evidence on each count was cross-admissible[12], and the submission culminated in the proposition that "The entire prosecution case, on the complainant's account, is that the accused was, well to her, a very bad person who did terrible sexual things to her as well as violent things and abused and threatened her and that was going on from a very very young age until her adulthood"[13];

(c) the appellant's counsel replied that given the nature of the evidence in relation to count 1 and the appellant's age it would not be cross-admissible and it would unfair to use it against him on other counts[14].

(5) The application for stays of counts 1 and 3, and for severance of counts 1 and 2, was dismissed, essentially for reasons reflecting the prosecutor's submissions[15].

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10 Transcript of argument before Soulio DCJ on 31 October 2014 (**Pre-trial transcript**), Tr 3-8 [AFM.27-32].

11 Pre-trial transcript, Tr 6-7 [AMF.30-31].

12 Pre-trial transcript, Tr 25-27 [AMF.49-51]. "[A]ll the counts are properly joined and in fact are cross-admissible with one another. ... [T]he question of the capacity of the accused in relation to count 1 to perhaps form an interest, sexual interest, and act upon that at that age is informed by – again, I go back to the behaviour that was occurring before that incident and around the time of that incident ... [I]t can be inferred that the accused was sexually interested in the complainant at that time and also one must look at the act that was performed. ... In relation to count 1, I accept it is more complicated because of the issue of age and capacity, but ... given what the complainant says was occurring, the type of act that occurred on that occasion and what had been happening to her, according to her at the hands of both of her brothers leading up to that, shows that at that young age what was being acted upon was some sort of sexual interest, and ... the charges, count 1 and 2, are cross-admissible on the later counts and ... [all uncharged and charged acts] have non-propensity and propensity uses with one another".

13 Pre-trial transcript, Tr 26-27 [AMF.50-51].

14 Pre-trial transcript, Tr 27 [AMF.51]. It was said: "In considering whether there is a propensity use of count 1, when someone is a young person ... if your Honour goes through the statement, while it is not specifically said that this was done at the direction of Neil, that's the clear flavour that comes through the material, rather than there is a sexual attraction on the part of [the appellant] at such a young age. So propensity use being a sexual interest in my submission doesn't have a strong probative value; it wouldn't be cross-admissible for that reason. But there is that prejudice coming the other way. ... Whether the conduct in count 1 should be cross-admissible at all raises the issue of fairness. If a person doesn't have a capacity to commit the crime, in my submission it becomes unfair to them to use that evidence against them in the proof of other offending, particularly when they are a youth at the time".

15 Ruling of the Soulio DCJ dated 31 October 2014 [CAB.23].

Evidence of charged and uncharged acts

11. At trial, VW gave evidence of the four specific incidents alleged to comprise counts 1, 2, 4 and 5. As to count 3, she gave very little detail beyond the general allegation that there were many acts of rape by way of vaginal sexual intercourse over about a two year period[16]. The appellant gave evidence denying that the events the subject of counts 2-5 occurred at all. In relation to count 1, he gave an account of an incident, but in very different circumstances to that alleged by VW.

12. Apart from the charged acts, VW alleged a number of other 'uncharged acts' of assault, both non-sexual and sexual commencing prior to the 'shearing shed incident' the subject of count 1. There were three specific alleged acts[17] prior to count 1 which were relied upon with a view to rebutting the presumption of *doli incapax* that arose in relation to count 1.

    (1) VW claimed to remember an incident in the bath when she was about 3 and the appellant about 6 when he tried to put his foot or toe in between her legs[18].

    (2) VW said when she was about 4 or 5, Neil and the appellant asked her whether she still wanted a little baby brother or sister and, when she answered yes, they took her into the implement shed, Neil took her pants off and attempted to insert his penis into her with the appellant restraining her shoulders[19].

    (3) VW also claimed that when she was about 5 or 6, Neil and the appellant came into her bedroom and held her on the bed, with Neil, and later Ian, rubbing their penises on her vagina[20].

13. As to these, the conclusion of the CCA was that upon a review of the whole of the evidence, the jury should have had a reasonable doubt that the appellant, who at the time of the time of the shearing shed incident was no more than 10 years old, actually understood that what he was allegedly doing with VW was wrong in the relevant sense for the purposes of rebutting the presumption of *doli incapax*.

14. Albeit that his account of the specific acts differed from the prosecution version, the appellant's description of what occurred as a "game" was a reasonable hypothesis as to his perception of events[21].

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16 CCA [16] CAB.153.

17 There were said to be other acts of the kind described in (3), below, but these were said to be between when VW was 5 and 10, and thus it is unclear the extent to which these allegations post-date count 1.

18 CCA [94] CAB.186, Tr 27 AFM.101.

19 CCA [95] CAB.186, Tr 27-29 AFM.101-103. Cf. Tr 248 AFM.322.

20 CCA [96] CAB.186, Tr 30-32 AFM.104-106.

21 CCA [99] CAB.186.

The limited evidence at trial and the forensic issues

15. VW's first account to police was on 27 May 2008 (when she was 52). This was after Neil had died in March 2006[22].

16. The trial took place more than 50 years after the events in question allegedly commenced and after a bitter family feud over the family farm and estate. It was plain from the evidence of VW and the appellant that there had been disputation about the family farm and their parents' affairs for some time, culminating in VW leaving her father's name off her mother's gravestone. In brief outline, the evidence disclosed the following matters.

(1) In late 1983, the parents (Royce and Gwendoline) bought a house "in town" (in Naracoorte), the appellant took over the farm and the appellant allegedly sold cattle on it belonging to VW after an argument between them[23]. The appellant took over the farm, although VW was of the belief he didn't learn anything about running a farm and did not have the temperament for stock work, and had not had a lot of input into the farm[24].

(2) VW was of the belief that the appellant was then on the farm for 8 years before it had to be sold because it was in debt even though it had previously been a viable property[25]. VW was of the belief she got nothing, monetary wise, out of the farm, albeit she appeared to accept that money came from the farm account to assist in her property settlement with her former husband[26]. She also accepted she had been permitted to agist calves and keep horses there[27].

(3) Neil borrowed funds with the farm being put up by way of security for a guarantee, and Neil's debts were paid out by their father, requiring half of the farm on the opposite side of the road to the farmhouse to be sold in the 1990's, with the effect of eliminating Neil's anticipated inheritance[28].

(4) After the remaining part of the farm was sold (with no proceeds being distributed to VW), the appellant moved to Queensland, and his parents followed, settling nearby to him in Caboolture in about 1996[29].

(5) At some stage after their parents moved to Queensland, in the early 2000's, VW invited (or persuaded) her mother to return to South Australia and rented a flat for her in Naracoorte, where she stayed for 3 or 4 years. During this time, VW

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22 Exhibit P3 AFM.443.

23 Tr 70-72 AFM.144-146, 137 AFM.211, 141-142 AFM.215-216. Cf. Tr 229-232 AFM.303-306.

24 Tr 126-127 AFM.200-201, 129 AFM.203.

25 Tr 127 AFM.201.

26 Tr 130-131 AFM.204-205.

27 Tr 135 AFM.209.

28 Tr 132-134 AFM.206-208. See also Tr 219 AFM.293.

29 Tr 138 AFM.212, 155 AFM.229. See also Tr 234-235 AFM.308-309.

obtained a power of attorney in respect of her mother, and her will was changed, excluding her husband altogether[30]. The effect of the will was that VW would receive everything. Her mother only returned to Queensland when their father had a heart attack and a decision needed to be made regarding life support. VW was not happy about the circumstances surrounding this. Her mother's will was changed again after she returned to Queensland, to the detriment of VW. Their mother was placed in a nursing home in mid-2008[31].

(6) At some point, VW's power of attorney in respect of her mother's affairs was taken away[32]. The first tribunal hearing in relation to the matter was in May 2008[33] (the same month VW made a complaint to police in relation to the appellant).

(7) Later, their mother returned to South Australia on VW's application and she died in South Australia on 23 June 2010. She was buried in Naracoorte with a headstone that mentioned only VW and VW's children and did not mention Royce[34].

(8) Shortly after Gwendoline's death, VW was served with a restraining order granted by a Queensland Court preventing her from contacting her father, Royce due to harassment (which she denied)[35].

(9) Their father Royce died on 24 October 2011[36]. VW was of the view that apart from $15,000 she was left under her father's will, and apart from what was sold to pay off Neil's debts, the appellant "got everything"[37].

17. By the time of the trial critical witnesses had died including the parents (to whom VW claimed she had made contemporaneous complaints) and Neil (who on VW's account was implicated in the early abuse involving the appellant, and had also separately abused her).

18. Apart from her parents, VW said she had made complaints or reports of various kinds to police (when she was a teenager)[38], to a doctor, Dr Vithinanthan[39], to her friend FC[40], to a friend Cherie Pycroft[41], and to another friend Rodney Angel[42].

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30 Tr 145-147 AFM.219-221.
31 Tr 148 AFM.222.
32 Tr 156 AFM.230.
33 Tr 157 AFM.231.
34 Tr 158-159 AFM.232-233, Exhibit D15 AFM.450.
35 Tr 159 AFM.233.
36 Tr 23 AFM.97, Exhibit D16 AFM.452.
37 Tr 140 AFM.214.
38 Tr 33 AFM.107, 111-112 AFM.185-186.
39 Tr 75 AFM.149.
40 Tr 117 AFM.191.
41 Tr 73 AFM.147.

19. However, with the exception of Mr Angel, no evidence was available to corroborate the fact of those complaints. There was no record of any reports to police (and she claimed "I may have said 'My name is [V]' and most people don't remember my name or don't hear it properly or don't pronounce it"[43]). When approached in 2014, Dr Vithinanthan was in a nursing home with dementia and was unable to provide a statement[44]. FC declined to provide a statement[45]. Cherie Pycroft was deceased[46].

20. Accordingly, despite the time period over which the allegations spanned, there were very few prosecution witnesses at trial, and as will be explained, the evidence pertaining to count 1 assumed central significance.

10 21. Indeed, with the exception of formal evidence from Detective Holmes, the brief evidence of complaint from Mr Angel, and a witness made available for cross-examination only[47], the only witnesses in apart from VW and the appellant were Des and Peter Flavell, whose evidence was relevant only to the 'shearing shed incident'.

22. As a consequence, count 1 was the only charge in respect of which any person apart from VW and the applicant gave evidence. Otherwise, this was a case of "word against word".

Evidence regarding the 'shearing shed incident'

23. VW recounted an incident on a day when the Flavels, her friend FC, and possibly FC's sister AC, were at the farm[48]. It was alleged that Neil and the appellant approached
20 VM and her friend FC and Neil said "We're all going over to the shearing shed", meaning he wanted FC and her to join him, the appellant and Flavels there[49].

24. Once in the shed, Neil was alleged to have said "We're going to have a root" and that the "the Flavels were going to have a go too". VW said Neil took her pants off, Neil rubbed his penis in and around VW's vagina and ejaculated onto VW's stomach. She recalled looking up and seeing faces of the others looking down from the wool bales. Neil asked or tried to encourage the Flavels to have a go (and they refused). The appellant then followed Neil, spat on his hands, rubbed against VW's vagina until he ejaculated. VW then ran away to the old dairy[50].

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42 Tr 117 (VW) AFM.191, Tr 175 (Rodney Angel) AFM.249.

43 Tr 33.31 AFM.107.

44 Tr 189.26 AFM.263.

45 Tr 189.22 AFM.263.

46 Tr 189.33 AFM.263, Exhibit P12 AFM.445.

47 Ms Lois Polak, a former girlfriend of the appellant whose evidence (Tr 181.23 AFM.255) in fact rebutted VW's account of an incident of violence which Ms Polak was supposed to have witnessed and intervened to restrain (Tr 65.13 AFM.139).

48 VW recalled that the Flavels present were "definitely Des and John and [FC]" and she "wasn't sure about Peter [Flavel] and "I'm not sure about [AC] being there either": Tr 35 AFM.109.

49 Tr 36 AFM.110.

50 Tr 35-45 AFM.109-119.

25. Des Flavel gave an account of an incident in the shearing shed. He said he had entered the shed without knowing anyone was there, had climbed on top of some wool bales, looked left and saw the appellant with his jeans pulled down "laying across the top of [VW] having intercourse". His sighting was brief – it was "just too quick" to see whether VW was clothed. He said he moved onto the wool bales and saw that Neil was having intercourse with VW's friend FC, and promptly left[51]. He was cross-examined by reference to a previous statement in which he apparently described the applicant lying "naked" on top of VW[52], in a way inconsistent with VW's evidence that when assaulted the appellant would not pull his pants right down.

26. Peter Flavel was called but his evidence was he went into the shearing shed with his brother but left after his brother said "let's get out of here" and did not witness anything or see anyone else in the shed[53]. As noted earlier, FC declined to give a statement to police, and Neil had died before any formal complaint was made.

27. The appellant, who gave evidence in the case, said that the only incident he could recall referable to the shed was when Neil or Des Flavel had told him to go into the wool packs and to lay on top of VW but he did not participate in their game. Des had hold of the appellant's arm and was trying to get him to take his clothes off. VW was not naked. Neil and Des lost interest and moved on and VW got off the bale[54].

Addresses and summing up

28. In closing address, the prosecutor did not in terms make a submission inviting propensity use of the charged or uncharged acts. However, the 'shearing shed incident' was clearly submitted to be an important and corroborated manifestation or example of a horrific course of conduct perpetrated by the appellant. It was said:

> What might not be in dispute is that something happened in the shearing shed – it's a matter for you what did happen, you've got two versions. But it should not be in dispute that **something did happen in the shearing shed**.
>
> Then we have the other allegations, those allegations where we don't have the benefit of a third party. It remains for you which version you accept, if you accept one version. None of us live in a vacuum, we all know that kids play and get up to no good sometimes but what we have here, I submit, is a persistent course of physical and sexual assault by the accused against [VW] from childhood through to adulthood.
>
> I contend to you that the persistence of the conduct makes it apparent that the accused must have known it was wrong from a very early age and that's the case even if that conduct had been learned from his older brother, Neil.
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> What we have here is not innocent conduct. **What we have is a quite horrific combination of abuse of a young girl from the age of about three right through to her 20s. It's a domination borne out of violence, fear, and a lack of being brought to account.**

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51 Tr 164-165 AFM.238-239.

52 Tr 171 AFM.245.

53 Tr 187-188 AFM.261-262.

54 Tr 249-253 AFM.323-327.

29. The trial judge directed the jury several times that the applicant should be tried on the evidence relating to the relevant charges and not on evidence relating to things done on another occasion[55], although he directed the jury that if they found a witness lying in relation to one count that might reflect on their credibility on other counts[56].

30. In relation to count 1, the trial judge summed up on the basis that the appellant was 11 or 12 years old[57], whereas, as the CCA (with respect, correctly) held, the evidence could not justify a finding that he was older than 10.

31. The trial judge's summing up reflected the way in which the 'shearing shed incident' had assumed special significance. First, as he emphasised more than once, apart from count 1, the charges were entirely uncorroborated[58]. Secondly, although he warned the jury not to engage in propensity reasoning of a kind which involved a leaping to guilt simply because the accused was the sort of person who might commit such offences[59], the learned trial judge articulated what were said to be permissible uses of uncharged acts and more than once emphasised that such an act might be relevant to subsequent but not prior charged offending[60]. It is submitted that these considerations would have made it natural for the jury to proceed chronologically, and to resolve the corroborated account before proceeding to counts 2-5.

32. As to these permitted uses, the learned trial judge directed that evidence of prior uncharged sexual acts could be used in support of later counts if the jury was satisfied of the earlier act beyond reasonable doubt, in which case the evidence was relevant to "place their relationship in context", to "explain the confidence the accused might have had in performing the charged offences" and because it "might explain why she did not complain about the accused's sexual misconduct until much later"[61]. (In fact, VW's evidence was in fact that she **did** make contemporaneous complaints to her parents and others.)

33. In relation to uncharged violent conduct, the jury were directed it was before them for the purpose of showing "an alleged pattern of possessiveness accompanied by aggression and domination by the accused" and "to explain the complainant's submission to the accused's alleged conduct"[62]. (In fact, VW's evidence was not that she submitted to the sexual assaults.)

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55 SU7 CAB.37, SU17 CAB.47, SU36 CAB.66.
56 SU32 CAB.62.
57 SU37 CAB.67, SU41 CAB.71.
58 SU33 CAB.63, SU35 CAB.65.
59 SU8 CAB.38, SU36 CAB.66, SU53 CAB.83.
60 SU42 CAB.72, SU56 CAB.86.
61 SU54-56 CAB.84-86.
62 SU57 CAB.87.

Appeal to the CCA

34. Before the CCA, the grounds of appeal[63] included that:

(1) the applicant's trial miscarried as a result of being tried with other charges on the information[64];

(2) the applicant's trial miscarried as a result of the failure to adequately identify evidence of discreditable conduct admitted pursuant to s 34P of the *Evidence Act* 1929 (SA) and provide directions pursuant to s 34R;

(3) the verdicts on all counts were unreasonable, but with particular emphasis upon counts 1 and 3.

10 35. The CCA quashed the applicant's convictions in respect of counts 1 and 3 and entered acquittals, but upheld the convictions in relation to counts 2, 4 and 6.

Treatment of severance and miscarriage contentions

36. Peek J (Sulan and Stanley JJ agreeing) dealt with the question of severance **before** he addressed the (ultimately successful) appeals on grounds 1 and 3. He observed[65]:

> [T]he charges all relate to alleged sexual offences committed against the same person against the same alleged victim over a long period of time. The evidence on counts 2 to 5 was clearly cross-admissible on each of those counts. The appellant was aged at least 16 years ten months at the time of count 2 and all counts charged sexual misconduct against the same complainant. The basis of cross-admissibility in such a case may be found on the basis of the relationship between the two persons
> 20 (drawing on such cases as *R v Nieterink*[66] and the High Court decision in *Roach v The Queen*[67]) or on the basis of "sexual attraction" (drawing on such cases as the High Court in decisions in *HML v The Queen*[68] and *BBH v The Queen*[69]). ...
>
> While the shed incident (count 1) was different in that the appellant was then considerably younger, the prosecution case was that the evidence of VW demonstrated that a violent relationship between the appellant and VW had developed even by that time[70]. The evidence relevant to count 1 was admissible on the later counts 2 to 5, but clearly the evidence on counts 2 to 5 was not admissible on the earlier count 1.
>
> **However, this departure from full cross-admissibility does not present a difficulty concerning severance for the following reasons.** First, the cases which hold that severance should usually occur
> 30 in sexual cases ... address the situation of multiple complainants and not that of a number of charges against an accused in relation to the same complainant. In the latter situation, it may sometimes be the case that the appropriate decision on a severance application is that the case should proceed on all charges even if there is less than full cross admissibility on each count.

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63 Final Proposed Grounds of Appeal, CAB.137.

64 In particular, counts 1 and 3, because, (a) count 1 was not cross-admissible and evidence led in relation to count 1 upon the consideration of the question of *doli incapax* was prejudicial and involved evidentiary considerations irrelevant to the other counts; and (b) count 3 was not cross-admissible as specific findings of fact could not be made so as to permit cross-admissibility.

65 CCA [20]-[24] CAB.156-157.

66 (1999) 76 SASR 56.

67 (2011) 242 CLR 610.

68 (2008) 235 CLR 334.

69 (2012) 245 CLR 499.

70 This being quite irrespective of whether the appellant was or was not *doli incapax* and irrespective to what extent the relationship was a sexual one by the time of the shed incident.

> Second, in this case the Judge gave full directions to the jury concerning the fact that the evidence pertaining to counts 2 to 5 was not to be used on count 1 (although the evidence on count 1 could be used on the other counts).
>
> Third, in any event, the position becomes moot in this case because the appeal in relation to count 1 is to be allowed for quite different reasons, **thus rendering the question of joinder and severance otiose** in relation to the fate of count 1.

Treatment of count 1 (shearing shed incident)

37. Peek J referred to the relevant authorities concerning the presumption of *doli incapax*[71] and, in circumstances where the applicant was no older than 10 at the time, concluded that the whole of the prosecution evidence was incapable of rebutting the presumption of *doli incapax,* so that an acquittal must be entered[72]. This analysis predated, but is consistent with, this Court's decision in *RP v The Queen*[73].

Treatment of count 3 (persistent sexual exploitation)

38. The evidence on this count (persistent sexual exploitation[74]) rose no higher than an assertion that the applicant had vaginal sexual intercourse with VW on many occasions over a period of two years, with no point of identification of any act, let alone any two acts, which could be delineated and agreed upon by the jurors. Accordingly, Peek J held that an acquittal must be entered[75].

Treatment of contention that other verdicts were unreasonable

39. When considering the applicant's challenge to the verdicts on counts 2, 4 and 5, Peek J noted the very lengthy delays, the absence of relevant witnesses, the absence of corroboration apart from on count 1, the applicant's sworn denials and the fact that official complaints had first been allegedly made following a "family feud" concerning disputes as to sale of livestock, testamentary and power of attorney matters, restraining orders, proprietary rights and money matters in general (CCA [119]). He was not, however, persuaded that the inconsistencies and shortcomings referred to by the applicant were otherwise than may be explained by the advantage that the jury had in seeing and assessing the witnesses and he did not conclude that the jury should have reasonably held a doubt[76] (CCA [123]). In reaching that conclusion, Peek J said[77]:

> I also have regard to the fact that the verdicts on counts 1 and 3 are being set aside with judgment of acquittal being entered. However, as appears above, those acquittals **are in no way inconsistent with the appeal being dismissed on counts 2, 4 and 5**. The verdict on count 1 is set aside not, because the evidence of VW as to the facts occurring in the shed is suspect, but rather on the basis that the whole of the evidence could not rebut the presumption of *doli incapax*. The verdict on count 3 is set aside, not because the evidence of VW as to the facts concerning this count is suspect, but rather on the basis that that evidence was, as a matter of law, insufficient to prove the charge that was laid.

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71 Eg, *The Queen v M* (1977) 16 SASR 589, *C v Director of Public Prosecutions* [1996] 1 AC 1.

72 CCA [93]-[100] CAB.185-186.

73 (2016) 259 CLR 651.

74 Section 50(1) of the CLCA, cf *Hamra v The Queen* (2017) 91 ALJR 1007; [2017] HCA 38 at [43]-[46].

75 CCA [114]-[116] CAB.193-195.

76 CCA [119]-[123] CAB.194-195.

77 CCA [120]-[121] CAB.195.

> Further, I make clear in the context of the argument that invalid joinder of counts 1 or 3 leads to miscarriage of justice in relation to counts 2, 3 [*scil.* 4] or 5, that such arguments are rejected. **The evidence led in support of counts 1 and 3, although insufficient to make out those counts, was, and remained, admissible on counts 2, 3 [*scil.* 4] and 5 on the bases explained above, principally, that of "relationship evidence".**

VI SUCCINCT STATEMENT OF ARGUMENT

40. The appellant respectfully submits that the CCA erred in that:

(1) the question whether the non-severance of counts 1 and 3 caused a miscarriage of justice was to be assessed on the footing that the evidence led in support of those counts was insufficient to establish guilt and that the jury erred in finding guilt, with the focus of the inquiry then being whether there was an unacceptable risk of prejudice by virtue of the appellant having been subjected to a trial (and a wrong verdict) on those counts. That inquiry is not conclusively answered by pointing to the potential for the same evidence to have been led as evidence of uncharged acts. That was not how the trial was conducted;

(2) moreover, the evidence led in relation to counts 1 and 3 was not properly cross-admissible (under s 34P) in relation to counts 2, 4 and 5. The evidence in relation to those counts was highly prejudicial and of limited (if any) probative value.

Failure to sever counts may lead to a miscarriage of justice

41. It will usually be appropriate for a trial judge to sever an indictment containing multiple sexual offences where the evidence against each is not admissible against the others: *Sutton v The Queen*[78], *De Jesus v The Queen*[79], *Hoch v The Queen*[80].

42. It is true, as Peek J observed, that *Sutton* and *De Jesus* (and, indeed *Hoch*) involved multiple complainants. But where evidence in respect of multiple allegations in respect of the same complainant is not cross-admissible the same risk, namely, that directions as to use may prove ineffective, exists.

43. The applicant respectfully contends that here, the evidence relating to counts 1 and 3 was not properly cross-admissible on all other counts; but that, in any event, by being led as evidence on counts in respect of which the jury were required to give a verdict the trial differed fundamentally from the trial that might have occurred had the evidence been led as uncharged "relationship" or "background" evidence.

44. On appeal, the primary focus should not be upon whether the trial judge's discretion to order severance miscarried on the material before him or her in advance of trial, but on

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78 (1984) 152 CLR 528.

79 (1984) 152 CLR 528.

80 (1986) 61 ALJR 1.

whether in fact the trial has produced a miscarriage of justice in the sense of depriving the appellant of a fair trial[81].

45. So, it is submitted, it is necessary to examine the forensic context of the trial to ascertain whether, in the events that have occurred, the joint trial has caused a miscarriage of justice. This should be done consistently with the CCA's analysis of the sufficiency of the evidence to make out the charged acts.

Miscarriage in this case

46. Focussing upon count 1, in the present case, the appellant was subjected to a trial at which the jury were invited to consider, on the basis that the appellant was 11 or 12 at the time, whether the shed incident occurred as alleged by VW (and partly corroborated by Des Flavel), and whether, if they were to reject the appellant's sworn account beyond reasonable doubt, they could be satisfied the appellant knew his conduct was seriously wrong. They were invited to reach a conclusion about the latter issue by focusing upon three alleged uncharged acts pre-dating count 1.

47. But as the CCA held, the evidence relating to count 1 disclosed that the shearing shed incident occurred when the appellant was no older than 10 and the evidence relating to it (even if the evidence of the earlier uncharged acts was accepted) was simply not capable of negating the hypothesis that the appellant's involvement was in the nature of a childish game. That is to say, the appellant was subjected to a trial in which the jury were invited to (and did in fact) reach a conclusion not properly open to them, and to do so by focusing on highly prejudicial allegations of misconduct by the appellant at a very young age.

48. For reasons earlier identified, the jury is likely to have placed special significance upon count 1 as the first, and only corroborated, charged act, and as arguably setting the scene for the prosecution case of a prolonged relationship of dominance and subjugation by the appellant of VW. Even if, contrary to the argument to be developed, the events the subject of count 1 **could** have been led as 'uncharged acts' despite the prosecution's inability to rebut *doli incapax*, that is not how the trial was conducted.

49. Where uncharged acts are admissible to assist in the proof of charged acts it will usually be necessary for the jury to be directed they should not act on the uncharged acts unless they are found beyond reasonable doubt. However, the making of findings on uncharged acts is in no sense mandated. The jury might make no finding about them. By contrast, where there are multiple counts charged, an accused who wishes to

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81 *R v Collie* (1991) 56 SASR 302 at 310 (King CJ), referring to *R v Demirok* [1975] VR 244, *R v Gibb & McKenzie* [1983] 2 VR 155. Those authorities involved multiple accused, but it is submitted the principle is general. Indeed, in *Sutton v The Queen* (1984) 152 CLR 528 at 538, Murphy J went as far as to say that the prosecution took the risk of the whole trial miscarrying by unfair prejudice if it failed to establish that the applicant accused was involved in all three charged incidents.

give evidence is, practically speaking (if not legally[82]), bound to give evidence denying or answering each count, and having done so, the jury necessarily had to consider whether to reject as a reasonable possibility that the accused's account is reasonably possibly true[83]. It follows therefore that in a case of "word against word" the accused's credit must be assessed (and here must have been rejected) on each count.

50. Whilst in a strict sense a witness' credit is not indivisible[84], in the sense that the fact of an acquittal on one of multiple counts involving a single complainant does not usually[85] dictate that a guilty verdict on another count is necessarily either inconsistent or otherwise unsafe, the practical reality is that credit assessments of a complainant may and will often carry across multiple counts[86]. The position of an accused's credit is subtly different. A guilty verdict **does** imply positive rejection of an accused's sworn account. In any case, it accords with ordinary experience that if a jury finds an accused guilty of count 1 which he denied on oath, the jury will find it difficult to accept as reasonably possibly true his denial of count 2[87].

51. Furthermore, even if it might have been open to adduce evidence going to count 1 as evidence of uncharged acts committed whilst *doli incapax* but as remaining significant with a view to explaining the impact upon the complainant, that is not how the evidence was left to, or treated by, the jury. The jury, *ex hypothesi* wrongly, found beyond reasonable doubt that the appellant committed the alleged offending knowing it to be seriously wrong. In law, the appellant was entitled to a trial at which the jury did not proceed on that wrong basis[88].

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82 As to the question of adverse inference, where a witness is called but not questioned on particular topics the principles in *Jones v Dunkel* (1959) 101 CLR 298 have been extended and applied: *Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 at 418-419 (Handley JA), referred to in *Kuhl v Zurich Financial Services Pty Ltd* (2011) 243 CLR 361 at [63] (Heydon, Crennan and Bell JJ). While it is not generally appropriate to apply the principles stated in *Jones v Dunkel* to a criminal trial (*Dyers v The Queen* (2002) 210 CLR 285), whether a failure in evidence to address a particular matter might stand differently has not been definitively resolved: see, eg, *R v Guiren* [1962] NSWR 1105, *R v Navarolli* [2010] 1 Qd R 27 at [128], *Brayisch v The Queen* (2011) 243 CLR 434 at [57] (Heydon J).

83 *Liberato v The Queen* (1985) 159 CLR 507 at 515 (Brennan J).

84 Eg, *The Queen v Scott* (2009) 22 VR 41; [2009] VSCA 20 at [72], *R v Ware* [1997] 1 VR 647 at 650.

85 There may be circumstances where confusion can be excluded with the consequence that other verdicts based on the same essential contest of credit must be regarded as unsafe: see, eg, *Jones v The Queen* (1997) 191 CLR 439 at 453 (Gaudron, McHugh and Gummow JJ).

86 In *R v Girgines* (Unreported, Victorian Court of Appeal, 27 March 1996), Hayne JA and Southwell AJA said (at p 15-16): "No doubt, the fact that a witness is not believed on one issue is a matter, often a very important matter, to be taken into account in deciding whether that witness's evidence on other matters of controversy is to be believed, but disbelief of the witness on one subject does not lead to the automatic rejection of other evidence of the witness".

87 Indeed, in addition to the prejudice to his credit by having been charged with and necessarily disbelieved on count 1, on one view, the appellant was prejudiced by being practically required to address the 'shearing shed incident', which involved his confirming that there was indeed an incident in the shearing shed (but with a very different complexion to that alleged by the complainant VW).

88 The joinder and non-severance of counts 1 and 3 also subtly undermined the applicant's election whether to give evidence or remain silent on counts 2, 4 and 5. An election by an accused not to avail himself of the right to silence but to give sworn evidence denying the charges is an important and difficult one: *Azzopardi v The Queen* (2001) 205 CLR 50 at [48] (Gaudron, Gummow, Kirby and Hayne JJ). An accused has to weigh up whether, where more than one count is charged, the denial or contradiction of each charge can be maintained with the same degree of force: *RPS v The Queen* (2000) 199 CLR 620 at [34] (Gaudron ACJ,

52. There was also a significant risk of prejudice created by the evidence relating to count 3 being led in the trial as evidence in support of a charged offence when, as the CCA held, that evidence was in fact incapable of proving that offence. In *KBT v The Queen*[89], Kirby J, agreeing with the plurality, observed that:

> **There is a special danger of unfairness where, as here, a crime which permits imprecise and general evidence to be proved is coupled in the indictment with other sexual offences specified with particularity.** This Court has noted the special risks of unfairness where a number of sexual offences are charged together. Although, as a matter of procedure, that course is permitted by the Code, the dangers inherent in the possibility that a jury may infer guilt of several offences from the proof of guilt of one or some, requires care in the joinder of counts, attention to the possible need to order separate trials, appropriate judicial warnings against the dangers of propensity reasoning and vigilant consideration of complaints of unfairness when these are brought on appeal following conviction.

53. Those observations were made in the context of a provision similar to s 50 of the CLCA in respect of which an extended unanimity direction had not been given. They apply *a fortiori* where the evidence led with a view to proving the offence of persistent sexual exploitation is in fact so generalised as to be incapable of proving the offence. All the forensic risks associated with defending charges which comprise ill-defined or uncertain allegations, and which have often been remarked upon by this Court[90], were present. An accused faced with such charges suffers a real forensic disadvantage[91].

54. Accordingly, by being subjected to a trial at which the jury were invited to (and did) reach conclusions not properly open to them, the appellant suffered a risk of prejudice in relation to the other counts which entailed a miscarriage of justice. That is so even if, contrary to the argument made below, the evidence led in relation to counts 1 and 3 could have been made cross-admissible on the other counts as uncharged acts.

55. This case is very different from *Bounds v The Queen*, where misjoinder (to which no objection was taken at trial) of one count caused no substantial miscarriage because in light of the physical evidence and admissions, the case on the other count was "overwhelming"[92].

Cross-admissibility

56. In the CCA, Peek J accepted that the evidence on counts 2-5 was not admissible in relation to count 1 which preceded them, but considered that because the conviction on

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Gummow, Kirby and Hayne JJ). Likewise the number of counts may persuade an accused that answering evidence is practically essential.

89 (2016) 257 CLR 300 at [62]-[63].

90 *Johnson v Miller* (1937) 59 CLR 467, *S v The Queen* (1989) 168 CLR 266 at 284, 288 (Gaudron and McHugh JJ), *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at [14]-[15], [28]-[30] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), *KBT v The Queen* (1997) 191 CLR 417 at 431-433 (Kirby J), *KRM v The Queen* (2001) 206 CLR 221 at [15]-[18] (McHugh J), [84]-[92] (Kirby J).

91 As Peek J recognised at CCA [113] CAB.193.

92 (2006) 80 ALJR 1380; [2006] HCA 39 at [12], [14] (Gleeson CJ, Hayne, Callinan and Crennan JJ). Compare Kirby J in dissent who considered that despite the strength of the Crown case the accused had not had a fair trial uncomplicated by "extraneous and legally impermissible considerations": [42], [102].

count 1 was to be set aside for other reasons, rendering that issue otiose[93]. However, Peek J considered that counts 2-5 **were** cross-admissible *inter se* (either on the basis of relationship or sexual attraction) and that count 1 was admissible in relation to the later counts[94]. These propositions are respectfully disputed.

Admissibility of evidence led in relation to counts 1 in relation to counts 2, 4 and 5

57. In relation to count 1, the evidence that was led was not limited to that of VW and the Flavel brothers regarding the shearing shed incident. Because capacity was in issue, it was considered that three earlier uncharged acts were relevant and admissible to the question whether, by the time of the alleged shed incident, the applicant was able to appreciate that the alleged conduct was seriously wrong. Peek J appeared to accept that at least one of those three alleged incidents, when the applicant and VW were bath together aged 6 and 3 years old respectively, "was not suggested to have any relevance to counts 2 to 5"[95]. It is submitted that none of those earlier incidents was probative in respect of counts 2 to 5.

58. Further, the evidence of count 1 itself was also not properly admissible on the later counts. Contrary to the approach of Peek J, who said admissibility could be justified as an uncharged act by reference to "relationship" or "sexual attraction", the question of cross-admissibility as an uncharged act would have had to be considered by reference to s 34P[96], requiring a close analysis of the probative value of any permissible use and a consideration of the prejudicial effect of the evidence.

59. If the evidence of discreditable conduct was sought to be relied on to demonstrate a "particular propensity or disposition of the defendant as circumstantial evidence of a fact in issue", the evidence was required to have "strong probative value": s 34P(2)(b). In any case, the judge would need to have been satisfied that the probative value of any permissible use "substantially outweighs any prejudicial effect it may have on the defendant": s 34P(2)(a), having regard to whether the permissible use can be kept sufficiently separate and distinct from the impermissible (general propensity) use: s 34P(3).

60. Given that the evidence relating to the shearing shed incident (and the earlier incidents) was incapable of rebutting *doli incapax*, what was its probative value in relation to the other counts, two of which involved allegations of rape of VW nearly 20 years later and after she had married? Can the acts of a child who is not capable of appreciating the wrongness of an indecent assault encouraged by his older brother seriously be

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93 CCA [24] CAB.157. For reasons already submitted, the impact of the verdict on count 1 on the later counts meant the issue was not rendered otiose in relation to those later counts.

94 CCA [20]-[21] CAB.156-157.

95 CCA [33] AB.163. Whether or not that was conceded by the prosecution, it is submitted, that conclusion was plainly correct. Accordingly, the evidence of uncharged acts prior to count 1 was not cross-admissible on counts 2 to 5.

96 Considered in *Perara-Cathcart v The Queen* (2017) 91 ALJR 411; [2017] HCA 9 and *Castle v The Queen* (2016) 259 CLR 449.

considered to evidence a (relevant or enduring) sexual interest? Does an act committed in the company of a number of other children demonstrate any relevant "relationship" or "context"[97] which assists in the proof of acts of rape decades later?

61. At common law, the use of the labels "sexual attraction" or "relationship" has been regarded as dangerous without deeper analysis[98]. In the context of s 34P, their use was even more problematic[99]. First, it had to be considered whether the identified mode of reasoning relied on a specific propensity, in which case the "strong probative value" test had to be passed. Secondly, and in any case, an assessment had to be made of whether, without reliance on impermissible propensity reasoning, the evidence demonstrated a state of affairs which was probative of guilt in relation to counts 2-5 (for example, because it supported the complainant's credibility or was necessary to explain otherwise incomprehensible allegations) and probative to a degree which substantially outweighed its prejudicial effect.

"Sexual attraction"

62. In so far as "sexual attraction" might have been relied on, it is submitted this would engage propensity reasoning attracting the higher hurdle of admissibility in s 34P[100].

63. The evidence lacked the probative value to clear that hurdle. Accepting that specific propensities may be probative or even highly probative without the alleged conduct demonstrating sufficiently common or similar features so as to demonstrate a relevant pattern, it was nevertheless necessary to consider whether the evidence relating to count 1 by itself or together with other evidence strongly supported proof of the relevant propensity and whether that propensity strongly supported proof of the later charges[101].

64. Here, having regard to the appellant's age, and the way in which the shearing shed incident was alleged to have occurred, neither was shown. On VW's account, older brother Neil was the initiator and the appellant in effect followed suit when others present declined to do so. A child's behaviour towards an even younger child in these circumstances could not be said to demonstrate any sexual attraction (nor a violent disposition) of a kind relevant to charges involving allegations decades later.

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97 The potential for acts committed whilst *doli incapax* to have relevance to "context" in an explanatory way was acknowledged in *Director of Public Prosecutions v Martin (a pseudonym)* [2016] VSCA 219.

98 *R v Nieterink* (1999) 76 SASR 56 at [45]-[47] (Doyle CJ). Cf. *BBH v The Queen* (2002) 245 CLR 499 at [62]-[63] (Hayne J)

99 *R v Maiolo (No. 2)* (2013) 117 SASR 1 at [80], [111], [115] (Peek J, Kourakis CJ and Stanley JJ agreeing).

100 While evidence of "relationship" may conceivably be relevant without engaging in propensity reasoning (eg, *Roach v The Queen* (2011) 242 CLR 610 at [44] (French CJ, Hayne, Crennan and Kiefel JJ), the better view is that evidence of "sexual attraction" does engage a specific form of propensity reasoning, see, eg, *HML v The Queen* (2008) 235 CLR 334 at [493] and [510] (Kiefel J). Likewise, in so far as counts 1 and 3 disclosed or were said to disclose an alleged pattern of aggression (SU 58 [CAB.88]), this must have engaged propensity reasoning.

101 *Hughes v The Queen* (2017) 92 ALJR 92; [2017] HCA 20 at [41] (Kiefel CJ, Bell, Keane and Edelman JJ).

"Relationship" or "context"

65. Apart from use of the label "relationship" evidence, the CCA did not identify the non-propensity significance that there might be in seeking to establish that a violent or abusive "relationship" commenced whilst the appellant was aged 10 or under, nor was consideration given to whether any such probative value could strongly outweigh the plainly prejudicial effect of such evidence.

66. First, this was not a case where uncharged acts were important to explain why VW did not make contemporaneous complaints. On VW's account, she made numerous complaints. She said she complained to her mother and that her father had to change locks repeatedly on her bedroom door[102]. She said she complained to police and to others[103]. Indeed, she said that in relation to the incident the subject of count 5 she rang her father and said "Ian's just been here again. He's just raped me and now he is threatening to sell all my cattle"[104].

67. Secondly, this was not a case where it might be suggested that the events preceding and including the 'shearing shed incident' were necessary to explain submission[105] to later acts of sexual abuse or the alleged acts of rape nearly twenty years later, because the evidence was that there was no such submission. On VW's account, whilst at the farm, apart from fighting back, she would move a large three door wardrobe across the door of her bedroom[106]. She described a physical fight and resistance in relation to the allegation the subject of count 2[107]. She generally described the assaults as involving violence, with resistance and screaming on her part[108].

68. That leaves for consideration the category of cases in which the probative value may lie in its capacity to show the charged offending was not "out of the blue", or in the circumstance that, if the evidence were not permitted, the complainant's account would seem incomprehensible or impossible to accept. Whilst it might be thought that to rely on past conduct to confront the improbability that an accused would act as alleged must involve propensity reasoning[109], it has been accepted that evidence of uncharged acts may be seen as appropriate or even necessary in fairness to the witness complainant or to avoid artificiality[110].

69. Ultimately, the probative value of, or practical necessity for, such evidence, must turn on the forensic issues in the case, and, in all cases, under s 34P, a comparative

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102 Tr 57-59 AFM.131-133.

103 Tr 33 AFM.107, 48 AFM.122, 73 AFM.147.

104 Tr 72 AFM.146.

105 Cf. *R v West* [2003] EWCA Crim 3024.

106 Tr 46 AFM.120.

107 Tr 52 AFM.126.

108 Tr 64 AFM.138, 66 AFM.140, 70 AFM.144.

109 Cf. *BBH v The Queen* (2012) 245 CLR 499 at [78] (Hayne J).

110 See, eg, *HML v The Queen* (2008) 235 CLR 334 at [316]-[335] (Heydon J).

evaluation with the prejudicial effect remains necessary, given that even where "background" evidence is not relied on for a propensity use it may have that effect[111].

70. The "out of the blue" consideration is most readily seen where there is a single charge[112]. That is not this case. Nor, given the significant qualitative difference between the allegations that pre-dated and included the shearing shed incident on the one hand, and the allegations of abuse committed when the appellant was aged 17 and older (counts 2-5) on the other, would evidence of the later allegations have been incomprehensible without evidence of the former allegations.

Prejudice

71. In addition to the forms of prejudice that typically attend evidence of discreditable conduct (including the risk of misuse, overestimation of weight, and moral outrage), in the present case, there were special risks of prejudice associated with permitting evidence of allegations preceding and including count 1. There is a prejudice in an adult effectively meeting allegations relating to events in one's early childhood nearly 50 years after the event. Further, where, as here, the alleged victim of the relevant uncharged act was even younger than the alleged culprit, the sympathy likely to be evoked in the jury may magnify the risk of prejudice in a way that cannot be justified given the marginal (if any) probative value of that evidence.

Admissibility of evidence in relation to count 3 in relation to counts 2, 4 and 5

72. In relation to **count 3**, the evidence was uncorroborated, and thus the observations of the plurality in *IMM v The Queen*[113] were apposite on the question of probative value for cross-admissibility purposes:

> In a case of this kind, the probative value of this evidence lies in its capacity to support the credibility of a complainant's account. In cases where there is evidence from a source independent of the complainant, the requisite degree of probative value is more likely to be met. That is not to say that a complainant's unsupported evidence can never meet that test. It is possible that there may be some special features of a complainant's account of an uncharged incident which give it significant probative value. **But without more, it is difficult to see how a complainant's evidence of conduct of a sexual kind from an occasion other than the charged acts can be recognised as having the requisite degree of probative value.**
>
> Evidence from a complainant adduced to show an accused's sexual interest can generally have limited, if any, capacity to rationally affect the probability that the complainant's account of the charged offences is true. It is difficult to see that one might reason rationally to the conclude that X's account of charged acts of sexual misconduct is truthful because X gives an account that on another occasion the accused exhibited sexual interest in him or her.

73. Further, for reasons explained earlier, and as acknowledged by Peek J, there is a distinct prejudice associated with meeting allegations as general as were led in relation to count 3.

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111 See, eg, *HML v The Queen* (2008) 235 CLR 334 at [320] (Heydon J).

112 See, eg, *Roach v The Queen* (2011) 242 CLR 610 at [42] (French CJ, Hayne, Crennan and Kiefel JJ).

113 (2017) 257 CLR 300 at [62]-[63] (French CJ, Kiefel, Bell and Keane JJ).

Conclusion

74. The evidence led in relation to counts 1 and 3, and to rebut the presumption of *doli incapax* in relation to count 1, lacked sufficient probative value to be admissible in relation to counts 2-5.

75. Even if that evidence could have been led as evidence of uncharged acts, and careful directions given about that evidence, that was not what occurred. The trial miscarried by reason of the applicant being subjected to a joint trial involving two counts in respect of which, although the evidence was incapable of demonstrating guilt, the jury found otherwise. In doing so necessarily rejected the appellant's evidence (and the creditworthiness of his account) as a reasonable possibility.

VII ORDERS SOUGHT

76. That the appeal be allowed.

77. That order 3 made by the CCA be set aside and in lieu thereof it be ordered that the verdicts of guilty on counts 2, 4 and 5 be quashed and a retrial of those counts directed.

VIII ESTIMATE OF ORAL ARGUMENT

78. The appellant will require approximately 1.5 hours to present his oral argument.

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M E Shaw QC
P: 0412 076 482
E: mshaw@senet.com.au
Counsel for the appellant

B J Doyle
P: (08) 8212 6022
E: bdoyle@hansonchambers.com.au