HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA S158/2023

SYDNEY REGISTRY

**BETWEEN:** **Cook (A Pseudonym)**

Appellant

and

**The King**

Respondent

**APPELLANT'S REPLY**

**Part I:** This Reply is in a form suitable for publication on the internet.

**Part II: Reply to the Argument of the Respondent**

1. The Respondent's submissions on the "facts" (and grounds 2-3) depend on this Court accepting that there is no significantly probative difference between a child complainant with a history of physical assaults, and one with a history of sexual assaults: see, e.g. RS [5], [10]-[12], [14]-[15], [48], [52]-[53], [63]. That proposition is unsustainable. Changing the nature of her prior experience from "physical" to "sexual" assaults enlivens an explanation of the complainant's evidence consistent with innocence that does not arise *at all* on a bare account of "physical assaults" (that she had a different source of memories and knowledge of sexual abuse). It also significantly enhances the exculpatory force of the fact she was, to the appellant's knowledge, actively engaging with multiple other adults with respect to criminal charges of child *sexual* assault. The respondent's attempts to reframe this case as about evidence of peripheral relevance must be rejected.
2. RS [10] repeats the majority's error: because the respondent can articulate a way a jury *might* rationalise the excluded evidence consistent with guilt, there can be no relevant unfairness. That is not the test. This is not a fresh evidence appeal.
3. As to RS [13]-[14], while a teenager is expected to have knowledge of sexual acts, it is quite another thing for a 15-year-old to give detail-rich descriptions (including demonstrations: AS [62]) of such acts by an adult against a young child. In her interview with police, the complainant is clearly expressing that her *younger self* did not know what ejaculate was when she saw it and was accordingly "freaking out": *contra*. RS [14]. Moreover, the overall tenor of the police questioning (e.g. "it probably shows me how young you were, 'cause you don't quite understand it all": AFM 81, Q586), implied her sexual *in*experience at that age, falsely enhancing the probative value of her allegations

to a jury that did not know she had previously been molested. Further, *contra* RS [8], the complainant says *both* that "no one believed me the first time" *and* that this is what the appellant meant when, she alleges, he said "everyone calls you a liar": AFM 52, VD Ex 2, [91]. The fact that she *was* ultimately believed is precisely what renders the excised evidence that no one believed her "the first time" probative of her credibility.

4. It is nonsensical to suggest there was no unfairness to the appellant because the very part of the case he was prevented from running – that the complainant had a different source of first-hand knowledge of child sexual assault – was (thereby) not part of his case: cf. RS [13], [55], [64]; see, e.g. AFM 56, VD 2 [120] and AS [62]. The case he was left with – that the complainant must be fabricating from whole cloth – was also significantly diminished by the excluded evidence. Had the evidence been admitted, it would be open to him to tell the jury *both* that his ex-wife could have been the source of the false complaints, *and* that, in any event, the complainant had an independent basis for her memories. This had the capacity to significantly increase the jury's experience of doubt.

5. **Ground 1** While it is true that irrelevant evidence should not reach s 293, it is misleading to suggest the legislature *intended* to exclude relevant evidence of the kind in this case: cf. RS [17]. The expressed intention was actually to exclude "irrelevant" evidence about prior sexual behaviour (based in myth and misogyny), as it was feared "the long-standing practice of the courts to allow wide-ranging and *really irrelevant* cross-examination about prior sexual history" would otherwise continue: New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 March 1981 4763.5, and see 4761.5 and 4764.5. "Preserv[ing] the rights of the accused" was another stated purpose, with exceptions to the exclusionary rule "intended to cover an area where fairness requires that some evidence or cross-examination as to prior sexual history be permitted": 4758.1, 4763.5. In any event, putting before the jury that the complainant had previously experienced child sexual assault of a similar kind to what she was now alleging, would not "necessarily involve" descending into the "fine details" of the *sexual activities* of the Qld offender: *contra*. RS [22]. Nor, even were this necessary, need the totality of that *detailed* evidence be put *to the complainant*, in order to be put before the jury.

6. If the legislature has affirmed prior judicial consideration of s 293, that *assists* the appellant, as it is the majority who depart from pre-re-enactment authority on the meaning of "sexual experience": AS [34]-[41]; cf. RS [19]-[20]. (This is not a case about previous false complaint of the kind encountered in *Jackmain*).

7. ***Subs 4(a)*** – The appellant does not elide disclosure and experience: *contra*. RS [25]-[28]. Disclosure of sexual experience is not sexual experience, but *evidence of* disclosure of sexual experience or activity *is evidence of* sexual experience: CAB 75, CCA [22].
8. The temporal requirement in subs (4)(a)**(i)** is in respect of "sexual experience". At "the time of the commission of the alleged prescribed sexual offence[s]", the complainant's "sexual experience" included having experienced childhood sexual abuse: cf. RS [25]. Contrary to RS [26], subs (4)(a)**(ii)** does *not* include a temporal element. Subs (4)(a)**(ii)** requires only that the evidence be "of events that are alleged to form part of a connected set of circumstances". Evidence of the complainant's former abuse, her disclosure of it to others, including the appellant and police, and the ongoing criminal proceedings in Queensland, is all, perforce, evidence *of* the fact of her "sexual experience" at the time of the alleged offending (subs (4)(a)(i)), *and* evidence "alleged to form part of a *connected set of circumstances* in which the alleged prescribed sexual offence was committed": subs (4)(a)(ii). Contrary to RS [28], it is not at all "peculiar" that if a complainant makes a disclosure of this kind that is both ***relevant*** to the accused's defence ***and*** its probative value outweighs any distress, humiliation or embarrassment to the complainant (two critical steps RS [28] ignores), it should be admitted. The respondent tortures the language of s 4(a) in order to make it do the work that is really done by subs (3), the subsequent balancing exercise in subs (4), *and* s 56 of the *Evidence Act 1995*.
9. Meanwhile, it is the *respondent's* construction which elides "activity" and "experience": *contra*. RS [29]-[30]. On the respondent's reasoning, "sexual experience" has no work to do, as it inherently stems from sexual activity and so must always satisfy the more stringent temporal requirements for "activity": RS [30]. There is nothing troubling about the fact that disclosing a past sexual activity generally *does* also constitute disclosure about a person's state of sexual experience. This follows from the reasoning in *GEH,* which the respondent purports to accept: RS [30]. The meaningful difference between the terms, consistent with the appellant's construction, is explained at CAB 74, CCA [22]; the bare fact that evidence of sexual experience is rendered admissible by subs (4)(a) does not mean detailed evidence of underlying activity necessarily can be led.
10. The respondent's attempt to parse the clearly connected set of circumstances by considering each in isolation should also be rejected: RS [37]-[41]. The contemporaneity set out at RS [38] must be understood in light of RS [41] as the "narrative of events that lead to the [alleged] offence" and as critical pieces of the "jigsaw puzzle concerning the set of circumstances in which the offence was said to have been committed": *GEH* [82].

Why the relationship between the appellant and complainant came to be, as well as the relationship of confidence (which is a necessary part of a child disclosing sexual offending to an adult carer) are integral connected circumstances in which the alleged offences were said to be committed. At RS [41], the respondent again conflates a jury submission it *might* have made, with a reason to reject the admissibility of probative, exculpatory evidence. The suggestion at RS [41] that it is effectively irrelevant that the alleged offending would have been extremely risky and brazen because, in the respondent's view, it is simply fact that someone who abuses a child "does so in response to uncontrolled sexual urges", is not sustainable. Section 293(4) applies not only to the Crown's allegations, but to the accused's narrative also.

11. ***Subs 4(b)*** – The relationship evidence *was* put as a subset of the wider evidence: contra RS [45]. If this Court finds Beech-Jones CJ at CJ correct with respect to subs 4(b) (which the Appellant maintains for the reasons at AS [48]-[53], with which the respondent does not substantively contend) final determination as to admissibility would occur at retrial.
12. **Ground 2 -** The relevance of the complainant's prior experience of sexual abuse is so patent that a jury would reasonably assume they would be told if prior "physical assaults" included a sexual aspect: *contra* RS [48]. In all the circumstances (including the interview cited above at [3], and the Crown closing address cited at AS [62]) they were misled. The appellant otherwise repeats AS [56]-[67], and [1], [4] above.
13. Notably, the Respondent makes no substantive answer to the following: AS [61] regarding lies by omission; AS [62]-[63] regarding the Crown closing address compounding and highlighting the misleading effect; and AS [64]-[66] addressing the exclusionary statutes pointed to by Adamson J (and the respondent) as also capable of causing relevant evidence to be excluded, which regularly triggers consideration of whether a trial should proceed in the absence of that evidence.
14. **Ground 3 -** There is no basis for the submission at RS [59]. Disposing of an appeal according to the terms of the s 8 introduces no "radical incoherence" into the law. To the contrary, there are three substantive differences between a pre-trial stay and s 8 disposal.
15. First, unlike a pre-trial stay, on appeal there is a complete trial record demonstrating the inevitable unfairness of any retrial. Second, s 8 is a statutory test under which myriad circumstances have been held to render retrial a "less adequate" remedy because it is not "in the interests of justice": AS [69]-[70]. A retrial that would be "unfair" to the accused could never be "in the interests of justice". The oft cited passage of Mason CJ in *Jago v District Court of NSW* (1989) 168 CLR 23 contemplates that a trial may be unfair to an

accused without necessarily constituting an abuse of process of the court warranting a stay. There is thus a meaningful and coherent difference between the cases to which s 8 applies and the threshold for a stay, and no warrant for importing the higher test into s 8. Third, the appellant has already endured, and the State has already funded, one unfair trial. Where there is a significant prospect this would reoccur – even if not a certainty (c.f. RS [60]) – this is a relevant consideration as to the "more adequate remedy".

16. In any event, the Appellant submits that the facts of this case (assuming ground 1 is dismissed) would satisfy the test for miscarriage *and* a permanent stay.[1] The respondent misapprehends the appellant's reliance on Leeming JA's uncontroversial[2] recitation of the trenchant criticism of s 293 since its inception, and the unfair operation in cases such as this. That background demonstrates that, while each case must be considered on its facts, it is no great leap to expect that the operation of s 293, as presently narrowly construed, *will* produce unfair trials: *contra*. RS [60], [62]. This is particularly so in cases with excluded false prior complaint evidence, or prior child sexual abuse: AS [30]-[32]. It is hardly a "significant step" (cf. RS [62]) to conclude that a rule of evidence which has attracted more sustained, and universal, criticism for its unfair effect on the accused than any other in New South Wales, and which has been amended, read down or ruled unconstitutional in virtually every other jurisdiction in which it had been adopted, has, on the facts of a case such as this, produced a trial that was so unfair as to constitute an abuse of process (*a fortiori*, a miscarriage). The Appellant has been denied probative evidence capable of providing an explanation consistent with innocence, and the attempted "relief" against this unfair consequence is ineffective *and* misleading.
17. With respect to RS [63]-[64], the Appellant simply repeats [1], [3]-[5] above.

Dated: 14 March 2024


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[1] If either be the applicable test. Note that in the CCA, the appellant did not dispute that the test for whether CCA ground 3 constituted a *miscarriage* was "the same in substance as the high test for a stay" (T32.39-44), which appears to have been misunderstood as a submission that this was the test if ground 1 otherwise enlivened s 8: cf. RS [59].

[2] The division in the Court in *Jackmain* concerned the correctness of *M v R*, a matter not in issue in this case. Bathurst CJ acknowledged the trenchant criticisms, and Wilson J's remarks at [244], cited at RS [18], were not adopted by other members of the five judge bench.