HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S158/2023
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Important Information

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **COOK (A PSEUDONYM)**

Appellant

AND:

THE KING

Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE RESPONDENT

PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

The excluded evidence

2. The Qld offending occurred between January 2008 and June 2009; the complainant was 5 ½ to 7 years old. The subject offending occurred between January 2011 and December 2014; the complainant was 8 to 12 years old (**ABFM 6-7**). There was a gap of at least 18 months (but potentially 2 ½ years) between the last of the Qld offences and the commencement of the subject offences.

3. The evidence sought to be admitted and excluded was not limited to the indecent assaults to which the Qld offender pleaded guilty, but included all of the offences with which he had been charged, including 4 counts of rape (**ABFM 32**). There were three categories of evidence sought to be adduced: (a) the details of the Qld offences, (b) the disclosures of the Qld offences to the appellant, and (c) the investigation and prosecution of the Qld offences (**ABFM 45, 61, 62, 63**; cf **CCA [7] CAB 67, CCA [16] CAB 71-2, CCA [22] CAB 74**).

4. The only matter about the Qld offences excluded from evidence was the detail that it was *sexual* offending. There was extensive cross-examination on behalf of the appellant in relation to the matters which the appellant now contends he was precluded from advancing (**RBFM 6-91**; cf **AS [24]**), including the "inherent improbability" of the offending (**RBFM 34-35, 93**), the so-called "powerful weapon" (**RBFM 35-37, 39, 43-45, 56-57, 64, 66-67, 80, 83-84**), and the alleged "true nature" of the relationship (**RBFM 33-35, 39**). Cross-examination on the prospect of "false memories" based on offending by others is properly precluded by application of s 293, consistently with the legislative intention.

The statutory purpose and the presumption from re-enactment

5. The progenitor of s 293 (s 409B) was first introduced in 1981 and has been re-enacted in substantially the same form in 1999, 2001, 2005, 2018 and 2021 (**RS [19]**). The provision was and remains the statutory expression of Parliament's deliberate choice to reform the rules which govern the admission of evidence of a complainant's sexual history, to protect complainants: see *Jackmain (a pseudonym) v The Queen* (2020) 102 NSWLR 847 at [24], [244] (**Vol 4, Tab 22**). The NSWLRC reviewed the operation of former s 409B in 1998 (**Vol 5, Tab 29**). By its re-enactment substantially unamended, the legislature has

affirmed the absence of a judicial discretion. The operation of s 293 in this case is not a result unanticipated by the legislature (cf **AS [32]**; see NSWLRC Report 87 at [4.8], [4.10] (**Vol 5, Tab 29**)). S158/2023

Section 293 of the *Criminal Procedure Act 1986* (NSW) (ground 1)

The evidence was not evidence of "sexual experience" (s 293(4)(a)(i))

6. *Eliding disclosure, experience and activity.* The term "sexual experience" in s 293(3)(a) describes "a state acquired over time, whether long or short, but which refers to the condition of having had experience in sexual matters": *GEH v R* (2012) 228 A Crim R 32 at [63]-[66] (**Vol 4, Tab 20**). Evidence of the disclosure of the Qld offences is not "evidence of sexual experience" at the time of the disclosure (**CCA [20] CAB 73**; **RS [25], cf AR [7]**). It is evidence of past sexual activity (**RS [26]**). The act of recounting prior sexual activity does not render that activity contemporaneous with the recounting (**CCA [111], [114] CAB 102-103**).

7. *Subversion of the temporal limitation*. The legislative purpose is to preclude an accused "inquir[ing] or bring[ing] evidence about the complainant's sexual behavior with other persons last week, or last month or last year": Second Reading Speech (**Vol 5, Tab 28**). The appellant's construction would subvert that purpose.

8. Neither the Queensland offending nor the disclosure of that offending in 2009 was "at or about the time of" the subject offending, which occurred, at the earliest, in January 2011 (**CCA [115] CAB 103-104**). The Qld offending had ceased by 17 June 2009, and was disclosed in late 2009. Sometime after 1 January 2011, the appellant's offending commenced (**CCA [74], [78] CAB 91, 92**). As for the Qld proceedings, the interviews with police occurred in March and April 2010, and the prosecution occurred between April 2011 and March 2014. Involvement in criminal proceedings is not evidence of "sexual experience" or "sexual activity" (**CCA [114], CAB 104**).

The excluded evidence was not part of a connected set of circumstances (s 293(4)(a)(ii))

9. The matters relied on by the appellant — that the complainant was living with him and that the Qld offences were the reason she was living with him — amount to no more than a description of opportunity and the circumstance of contemporaneity, they do not involve *connection* (cf **AS [42], [45]**). The purported riskiness of the offending (**AS [45]**) is a conclusion sought to be drawn from facts, and the forensic purpose sought to be made of the evidence. It is not a fact capable of constituting connection.

The excluded evidence did not "relate to a relationship" (s 293(4)(b))

10. The evidence at trial did not establish such a relationship. Disclosure to the appellant arose because the complainant did not want to sit in the front seat of his car (**ABFM 96-97**), when she made a comment at a hardware store upon seeing cable ties (**ABFM 32, RBFM 34**), and with two further disclosures in a car and house (**RBFM 97**). A child telling an adult about offending by a previous carer does not generate a "relationship of confidence" or the connection required by the terms of the provision (cf **AS [53], AR [10]**). The reasoning of Adamson J is correct (**CCA [121] CAB 105**).

There was no "misleading" of the jury (ground 2)

11. Indecent assault and rape are conduct capable of bearing the descriptor "physical assault" (**ABFM 25-26; ABFM 63**). There was no misleading, nor any "lie by omission". Multiple evidentiary and procedural rules exclude the admission of relevant evidence in criminal trials, and witnesses are routinely questioned so as not to adduce evidence of a particular topic: *Jackmain* at [227] (**Vol 4, Tab 22**).

12. The cross-examination was based on a formulation of the Qld offending which the appellant's trial counsel proposed, but he now seeks to disavow as "unfairly prejudicial" (**CCA [124] CAB 106;** cf **AS [62]**). The appellant's trial counsel sought the forensic benefit of cross-examining on the disclosure and prosecution of the Qld offences without referring to its sexual nature (**RBFM 33, 36**). The appellant obtained the forensic benefits he sought through extensive cross-examination (**RBFM 6-91**). No part of the evidence was so distorted as to be misleading (**RBFM 33, 36;** cf **AS [61]**). An accused person's right to lead evidence in a manner which does not infringe s 293 should not be fettered. The course taken in this case was the one expressly approved of in *Jackmain* at [218]-[227] (**Vol 4, Tab 22**).

There should be no order for an acquittal (ground 3)

13. Ground three only arises if the evidence is not admissible at the retrial. The appellant proposes a construction of s 8(1) of the *Criminal Appeal Act 1912* (NSW) that its terms cannot reasonably bear. The "miscarriage" referred to in s 8 is that which is established by an accused on appeal pursuant to s 6(1). The appellant seeks a remedy equivalent to a permanent stay, but he cannot satisfy the conventional test for this drastic remedy (*Jago v District Court of NSW* (1989) 168 CLR 23 (**Vol 3, Tab 17**); see **CCA [130] CAB 108**).

Dated: 15 May 2024

Sally Dowling SC **Monica Millward** **Naomi Wootton**