HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA S158/2023
SYDNEY REGISTRY

BETWEEN: **COOK (A PSEUDONYM)**
Appellant

and

THE KING
Respondent

RESPONDENT'S SUBMISSIONS

PART I CERTIFICATION FOR PUBLICATION

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

PART II CONCISE STATEMENT OF ISSUES

2. This appeal gives rise to the following five issues:

   (a) Did the evidence excluded under s 293(3) of the *Criminal Procedure Act 1986* (NSW) (**CPA**) fall within the definitions of "sexual experience" and "events that are alleged to form part of a connected set of circumstances in which" the subject offending occurred?

   (b) Did the evidence excluded under s 293(3) of the CPA "relate to a relationship" between the appellant and the complainant "that was existing or recent at the time of the commission" of the subject offending?

   (c) Where evidence is properly excluded under s 293(3) of the CPA, should an accused person be prevented from adducing that evidence in a manner which is not captured by the prohibition in s 293(3)?

   (d) Relatedly to (c), did the terms in which trial counsel chose to adduce evidence in this case "mislead" the jury?

   (e) Can an accused person obtain an order for an acquittal under s 8 of the *Criminal Appeal Act 1912* (NSW) on the basis of the exclusion of evidence under s 293 of the CPA in circumstances where that exclusion has not been held to give rise to a miscarriage of justice and is not such as would justify a permanent stay of the proceedings?

PART III SECTION 78B NOTICE

3. The respondent does not consider that notices under s 78B are required.

PART IV STATEMENT OF FACTS

4. The respondent agrees with the summary of facts in the appellant's submissions (**AS**) at **[7]-[23]**, save for the following matters of correction and clarification.

5. It was *not* common ground that the evidence of the Qld offences was "significantly probative" to the appellant's defence at trial (cf **AS [8]**). At trial, the Crown acknowledged only that the evidence was relevant (AFM 66 [15]). Before the CCA, the Crown submitted that the probative value of the *additional* evidence as to the Qld offending, which was *not* admitted, was "not high". The respondent's position was (and remains) that the probative value of the evidence which was actually excluded was not high or "significant" (Crown CCA Submissions at [78] (RFM 97-98); CCA T23.25-32 (RFM 99)).

6. As to the parenthetical complaint at **AS [10]** that the appellant's statement in the Qld trial was tendered as "inculpatory" evidence by the Crown, two points should be noted. First, the tender occurred after the appellant's counsel put to the complainant in cross-examination that "at no time, ever, were you and [the appellant] alone when he drove you somewhere in a car" (T119.29-31 (RFM 38)). The appellant having put in issue that fact (which he had admitted in his Qld statement), the statement was tendered to counter that (false) suggestion. Second, the statement was not only used by the Crown at trial. In support of a submission to the jury that the complainant lacked credibility because she had not complained earlier, the appellant's trial counsel relied on the statement as exculpatory: he argued that "she had been urged [by the appellant] to come forward and speak to the police about the Queensland matters …. [t]he accused gave a statement to police about those matters. Statement dated 2010, you've got it there" (T296.41-49 (RFM 92)).

7. As to **AS [15]-[16]**, the evidence which the appellant sought to lead at trial was not limited to those offences to which the Qld offender ultimately pleaded guilty, but included evidence as to the four rapes in respect of which his convictions were quashed (and which were later withdrawn following a negotiated plea): VD Ex. 2 [173] (AFM 63). This assumes some significance in the context of the submission that the jury was "misled" (see below at [48]).

8. As to **AS [17]**, the complainant's answer, in its proper context, was not that she did not tell anyone about the appellant's offending because "no one believed me the first time". Rather,

the complainant was giving evidence about what the appellant had said to her when instructing her not to tell anyone what he was doing to her. The appellant said, "everyone just calls you a liar because you are a liar". The complainant's response – "that's what he was referring to me to be a liar [sic] … because no one believed me the first time" – was an explanation as to what she understood the appellant to mean (VD Ex. 2 [91] (AFM 52)). Contrary to **AS [17]**, that could not have been disputed by the excised evidence, because it was correct that the complainant had not initially been believed when she complained to her father and her stepmother (CCA [73] CAB 90). The evidence does not have the significance to the complainant's credibility which the appellant seeks to ascribe to it. That the complainant was later believed in relation to the Qld offending was otherwise before the jury: T120, T166 (RFM 39, 83).

9. As to **AS [23]**, the cross-examination as to the Qld offending was far more extensive than is extracted therein, and the cross-examination is therefore included in full at RFM 6-91. It is convenient to address the cross-examination by reference to the matters which the appellant says were erroneously excluded from the jury's consideration (**AS [24])**.

10. First, as to the "clear opportunity for complaint to be made to police and others" and the so-called "powerful weapon" she apparently possessed to stop the offending, the complainant was extensively cross-examined on this point on at least eight separate occasions during the cross-examination: see T115-117, T120, T124-126, T137-138, T147, T149-150, T163, T166-167 (RFM 35-37, 39, 43-45, 56-57, 64, 66-67, 80, 83-84). It is also important to put the significance of this "weapon" into context. As a "very, very young" child the complainant had been moved from her father's home into foster care, from there into the care of the Qld offender who assaulted her, back to her father and stepmother who did not believe her complaints about the Qld offender, and then to the home of the appellant and her aunt (T79.6-T80.2 (RFM 7-8)). Her evidence was that it was the first "real home" she had ever had: T80.4-9 (RFM 8). As the sentencing judge recognised, the complainant was an "especially vulnerable child" (CAB 41 [21]), and the appellant's offending was alleged to have commenced when the complainant was as young as 8 years old (CAB 41 [22]). Whether the complainant regarded the ability to complain to police as a "weapon" might be doubted: see T149.27-31 (RFM 66). Given the protracted course of the Qld proceedings and its outcome, it is unsurprising that the complainant "didn't want to have to go through [it] again": T134.18-19 (RFM 53). The suggestion at **AS [24(c)]** that the jury may have reasoned that her delay in reporting the offences allegedly committed by the appellant was because

they were of a different character to the Qld offending ignores that explanation.

11. Second, as to the "inherent improbability" of the appellant offending against the complainant in the context of her being involving in legal proceedings and with police in Qld, the appellant made extensive forensic advantage of this issue: the complainant was cross-examined on the fact the alleged assaults had happened in the midst of the Qld proceedings and the appellant's involvement in them: T114-115 (RFM 34-35), and trial counsel closed on the issue of the alleged "brazenness" of the conduct in this context (T297 (RFM 93)):

> Not a word said, not a word, despite the fact that she was with the police, she was with her Aunty […], not a word. By the way the suggestion is that this man, after urging her to go to the police, and after participating in a criminal matter involving assaults upon her by another person, and being a party to that process for some 18 months, starts sexually assaulting her time and time again.
>
> Question, how do I resolve that and come to a finding of guilt beyond a reasonable doubt? Well that's why you're there. But as I say, in 2011 when many of these things are supposed to have been taking place, here is a man urging the child to go to the police and participating in the prosecution effectively of someone else, and then he says "Oh well that's all right, I'll do it myself, I'll sexually assault this child". Well it's a matter for you.

12. Third, as to the suggestion that the evidence of the "true nature" of the relationship between the complainant and appellant was excluded, again the complainant was cross-examined about the fact she had told the appellant about the Qld offending at T113-115, T120 (RFM 33-35, 39). At T120.29-40 it was put to her that "it was at [her aunt] and [the appellant]'s urging or suggestion that your dad go to the police about Queensland" (to which she agreed) and that "it wasn't until you spoke to [the appellant], personally, alone, about Queensland that even [the aunt] was prepared to help you" (to which she agreed) (RFM 39).

13. Fourth, the appellant submits that the Qld offending provided a potential source for the complainant's detailed description or memory of the offending. There are two difficulties with this. The first is that this might have some cogency in the context of a trial involving a very young child. But the complainant was 15½ years old at the time of her first complaint about the appellant and her recorded interview (CCA [86] CAB 93) and 17 years old at the time of the trial (CAB 41 [17]). In light of her age, the probative value of the excluded evidence as an explanation for the complainant's detailed description or memory is doubtful. The second is that the defence case at trial was not that the complainant had conflated or confused memories; rather, it was that she and her aunt (the appellant's ex-wife) had deliberately fabricated the allegations to enact revenge for the appellant having been violent towards the aunt and having cheated on her (T299-300 (RFM 94-95)). At trial the appellant

contended that her aunt was the source of some of the terms in which the complainant expressed herself: T106-107 (RFM 26-27)).

14. The complainant's interview did not include exchanges premised on her having "no familiarity with sexual intercourse or ejaculate" (cf **AS [57]**, relying on A505, Q/A585-587 (AFM 78-81)). Those exchanges concern the complainant's uncertainty as to whether she was at risk of pregnancy as a result of the ejaculate; that was what she did not "quite understand" (Q/A586) (AFM 81). Indeed, in the answer on which the appellant relies, the complainant explains her understanding of "sex, like, sexual intercourse, man, woman, penis in the vagina" (just not the mechanism of pregnancy) (A505 (AFM 79)). An exchange earlier in the interview puts the issue beyond doubt: Q148-149 (RFM 5). The extract on which the appellant relies does not make good the proposition which he advances, nor is it correct in light of the balance of the recorded interview.

15. These additional facts assume significance in the context of the appellant's suggestion that the excluded evidence was "critical" (**AS [25]**), as well as the suggestion that the jury was misled (ground two) or that no trial without the excluded evidence could ever be a fair one (ground three).

PART V ARGUMENT

Ground 1: section 293(4) of the *Criminal Procedure Act 1986* (NSW)

The legislative intention

16. The appellant's submissions in respect of ground one commence from the premise that the operation of s 293 in this case has effects which were both unintended by the legislature and which are unfair (**AS [29]-[32]**). Neither of these contentions are correct when regard is had to s 293 in its context, by reference to its purpose, and applying relevant principles of statutory construction.

17. First, as to legislative intention, the provision is the statutory expression of the legislature's deliberate choice to reform the rules which govern the admission of evidence of a complainant's sexual history in criminal trials. It is a provision which is intended to, and which does, exclude the admission of relevant (and therefore probative[1]) evidence. That is

[1] Because the evidence would not even fall for consideration under s 293 if it did not meet the test for relevance in s 55 of the *Evidence Act 1995* (NSW), that "if accepted could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding".

not an unintended result of the provision. Rather, it is the intended consequence of a provision that was introduced to limit the circumstances in which complainants in sexual assault cases would have to endure having what would otherwise be personal and sensitive matters examined in public.[2] The legislature has chosen to strike a particular balance "between the protection given to complainants and the rights of persons accused of prescribed sexual offences".[3] That balance is different to the one which the common law had struck. It is one of many of the "rape law" reforms both in Australia and internationally over the last 40 years which have corrected the divergence between community expectations and judge-made law.[4]

10 18. Second, the judicial criticism to which the appellant refers at **AS [30]**, by reference to the comments of Leeming JA in *Jackmain (a pseudonym) v R* (2020) 102 NSWLR 847 (***Jackmain***), was not adopted by any other member of the five-judge bench in *Jackmain* and was expressly disavowed by those judges. Bathurst CJ noted that the provision "forms part of a suite of legislative provisions designed to protect complainants in their giving of evidence" which "demonstrate the concern of the legislature to protect complainants in sexual assault cases to the greatest extent possible".[5] Justices Johnson and Button agreed with the Chief Justice on this point.[6] Justice Wilson also agreed with the Chief Justice,[7] and added in additional remarks the pertinent observation that:[8]

> The present s 293 strikes a balance between the community's interests in an
20 accused person being permitted to test to the fullest extent possible the Crown case at trial, and the community's interests in ensuring that the operation of the criminal justice system does not inhibit victims of sexual assaults from seeking the protection of the courts. Any change to that balance must be for the Parliament, and not for the court, as Leeming JA concluded.

19. Finally, it is important to note that the progenitor of s 293 (s 409B of the *Crimes Act 1900* (NSW)) was introduced in 1981 by the *Crimes (Sexual Assault) Amendment Act 1981*

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[2] *R v White* (1989) 18 NSWLR 332 at 340. See also New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 March 1981 at 4762-4766 (Attorney-General).
[3] *Jackmain (a pseudonym) v R* (2020) 102 NSWLR 847 at 889 [177] (Leeming JA).
[4] See Henning and Bronitt "Rape victims on trial: regulating the use and abuse of sexual history evidence" in Easteal (ed) *Balancing the scales: Rape, Law Reform & Australian Culture* (Federation Press, 1998) 76-93. See also Bronitt and Easteal, *Rape Law in Context: Contesting the Scales of Injustice* (Federation Press, 2018).
[5] (2020) 102 NSWLR 847 at 858 [24] (emphasis added).
[6] (2020) 102 NSWLR 847 at 897 [232] (Johnson J), [239] (Button J).
[7] (2020) 102 NSWLR 847 at 897 [240].
[8] (2020) 102 NSWLR 847 at 898 [244].

(NSW) and has been re-enacted in substantially the same form in 1999,[9] 2001,[10] 2005,[11] 2018[12] and 2021.[13] As Wilson J concluded in *Jackmain*, the legislative history of the section leads inexorably to the conclusion that the "legislature intended and intends that s 293 has the wide operation that it has been consistently held by this court to have in [its] decisions" and "[t]hat there is no discretion available to the courts to admit evidence otherwise excluded by the provision must also be concluded to reflect the considered will of Parliament".[14]

20. The suggestion at **AS [31]** that the legislature has inadvertently ignored the calls for reform to s 293 and its predecessors mischaracterises these legislative responses. The re-enactment of the provision in 1999 without substantive amendment can only sensibly be understood as involving the consideration and rejection of amendments recommended by the NSW Law Reform Commission in a report that was commissioned by the Attorney-General for NSW in 1996[15] and published in 1998. In any event, that submission is contrary to the orthodox proposition that courts do not attempt to discern or attribute some collective mental state to legislatures, but rather "appl[y] [the] rules of interpretation accepted by all arms of government in the system of representative democracy".[16] One of those rules is the presumption from re-enactment, as restated by this Court in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1[17] and (correctly) applied to s 293 by the Court of Criminal Appeal in *Jackmain.*[18]

21. At **AS [32]** it is said that this case involves "other child sexual abuse which may explain the complainant's behaviour or knowledge, otherwise than by reason of the charged allegations" which is "frequently excluded" by operation of s 293 in a manner which was "not anticipated by the legislature". As noted above, that contention is open to significant doubt. First,

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[9] *Crimes Legislation Amendment (Sentencing) Act 1999* (NSW), Sch 2 item 31.
[10] *Criminal Procedure Amendment (Justices and Local Courts) Act 2001* (NSW), Sch 1 item 123.
[11] *Criminal Procedure Further Amendment (Evidence) Act 2005* (NSW), Sch 1 item 10.
[12] *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW), Sch 4, item 9.
[13] *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW), Sch 2, item 4.
[14] (2020) 102 NSWLR 847 at 898 [243].
[15] In consequence of comments made by a unanimous High Court in *Grills v The Queen, PJE v The Queen* (1996) 70 ALJR 905: see NSW Law Reform Commission, *Report 87, Review of Section 409B of the Crimes Act 1900 (NSW)* (November 1998) at [1.2]-[1.3] (**Report 87**).
[16] *Zheng v Cai* (2009) 239 CLR 446 at 455-456 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ). See also *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 591-592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 649-650 [229] (Nettle and Gordon JJ). See further TF Bathurst AC, "Icecream is not 'meat': Literal Meaning and Purpose in Statutory Interpretation in Private Law" in Vines and Scott (eds) Statutory Interpretation in Private Law (Federation Press, 2019) 16.
[17] (2018) 264 CLR 1 at 20-21 [52] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
[18] (2020) 102 NSWLR 847 at 855 [12] (Bathurst CJ), 889 [177] (Leeming JA), [232] (Johnson J), [239] (Button J), 898 [243] (Wilson J).

because the legislature has repeatedly re-enacted s 293 in the face of its practical operation over some 42 years, and NSWLRC Report 87 having addressed this specific application of the law as a "problem case"[19] in respect of which reform was recommended.[20]

22. Second, because the cross-examination which the appellant now claims he was denied would necessarily involve descending into the "fine details" of the Qld offending (cf **AS [20]**). That is clear from the description of the cross-examination (**AS [24(a)]**), which the appellant submits "could have provided a source for the complainant's detailed description, and evident memory, of sexual acts". In practice, without details of the actual acts involved in the Qld offending, cross-examination as to the Qld offending would not provide an "alternative explanation for the complainant's knowledge and evident memory of sexual abuse" (**AS [57]**) or demonstrate that "she was speaking from true memory [albeit] just not of the appellant" (**AS [63]**). That cross-examination, which would require the complainant to recite the details of sexual offending against her as a 5-6 year old, is the very type of distressing cross-examination which the legislature sought to preclude.[21]

Sub-section 4(a)(i): "sexual experience", "at or about the time"

23. The appellant's argument as to the first limb of s 293(4)(a) contends that evidence of the complainant's disclosures of the Qld offences and the Qld proceeding itself was evidence of her "sexual experience", "at or about the time of" the commission of the alleged offences by the appellant. The flaws in the argument are threefold: (a) it elides disclosure with experience; (b) it elides experience with activity; and (c) it deprives the temporal limitation "at or about the time" in s293(4)(a)(i) of any meaningful work. Taken with the appellant's arguments on s 293(4)(b), the appellant's construction would effectively deprive s 293(3) of meaningful operation in most cases.

24. There is no dispute between the parties that Harrison J in *GEH v R*[22] correctly described the term "sexual experience" as "encompass[ing] a state acquired over time, whether long or short, but which refers to the condition of having had experience in sexual matters" (see **AS [34]**). The contortions of that statement of principle in the appellant's submissions in this Court (at **AS [36]-[41]**) are dealt with below.

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[19] Report 87 at 45 [4.10].
[20] Report 87 at 108 [6.1].
[21] See *HG v The Queen* (1999) 197 CLR 414 at 425 [31] (Gleeson CJ), 456 [147] (Hayne J).
[22] (2012) 228 A Crim R 32 at 50 [63] (***GEH***).

Elision of disclosure and "experience"

25. To avoid the obvious difficulty that the Qld offending occurred at least 18 months before the commencement of the subject offending, the appellant is forced to characterise the *disclosure* of the Qld offences as being "evidence of sexual experience". The artificiality in this argument is that it wrongly elides the *disclosure* of past sexual activity with the concept of "sexual experience". As Adamson J correctly pointed out at CCA [114] (CAB 103), it is the sexual activity or experience *itself* that needs to have been "at or about the time" of the commission of the subject offence, not the "*reporting* of sexual activity or sexual experience". Contrary to **AS [39]**, Adamson J was not there construing the modifier "taken part in by the complainant" as operating on the expression "sexual experience or lack of sexual experience".[23] Rather, it is clear from CCA [112]-[114] (CAB 103) that Adamson J was distinguishing the factual circumstances of *Adams v R* [2018] NSWCCA 303, in which false complaints were made as to assaults said to have occurred *at or about the time* of the alleged offending in that case, in which the evidence was admissible pursuant to s 293(4)(a).

26. On the appellant's argument, each time a complainant speaks about any sexual activity in the past, that disclosure constitutes evidence of their "sexual experience" at or about the time of the disclosure. Where that disclosure is close in time to the charged offences, it would therefore be capable of satisfying the temporal requirement in s 293(4)(a). That is the only way that Beech-Jones CJ at CL's reasons at CCA [22] (CAB 74) can be understood: that "the various disclosures made by the complainant … is […] evidence 'of' the complainant's sexual experience". But the words of s 293(4)(a)(i) cannot fairly bear that meaning: evidence of a disclosure of past sexual activity is not evidence "of" the complainant's sexual experience.

27. Indeed, this is what Beech-Jones J stated in *GEH*, where his Honour accepted that (later) evidence of an inconsistent version of the offending would be evidence "of" sexual experience *at the time of the alleged offence* (not the time of disclosure).[24] It is also what Beech-Jones CJ at CL stated at CCA [20] (CAB 73) by way of clarification of the reasoning in *GEH:* "*evidence* of the disclosure of an inconsistent version of the offence with which the accused is charged is itself *evidence* of sexual experience acquired at the time of that offence (and not a sexual experience at the time of the disclosure)".

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[23] See also *GEH* (2012) 228 A Crim R 32 at 53 [80] (Beech-Jones J).
[24] (2012) 228 A Crim R 32 at 54 [84].

28. By contrast, the appellant's approach would have it that any disclosure of *past sexual activity* is itself evidence "of" the complainant's "sexual experience" at the time of the making of the disclosure. This would have the peculiar consequence that whenever a complainant told someone about their past sexual activity it would constitute evidence of their "sexual experience", and if that disclosure occurred proximate to the commission of a prescribed sexual offence, it would on the appellant's argument, be admissible.

Elision of "experience" and "activity"

29. The second difficulty with the appellant's argument is that in seeking to convert the evidence of the Qld offending (sexual activity) into sexual experience to satisfy the temporal restriction in s 293(4)(a), the distinction drawn in s 293(a) and (b) between sexual experience and activity is elided entirely. This is made clear at **AS [37]**, where the appellant says that "[e]vidence of her disclosing these incidents to the appellant was also evidence "*of*" her "sexual experience" in that it was evidence that she, at that time, "had experience of" child sexual abuse" (emphasis added). In practice — in almost every case — evidence of sexual activity will be by way of a disclosure by the complainant, and it will almost always involve an account *by the complainant.* As was emphasised by Adamson J at CCA [111] (CAB 102-103), the act of recounting prior sexual activity or experience cannot render that activity or experience contemporaneous with the recounting.

30. The effect of the appellant's argument is that disclosures of *past sexual activity* will always constitute "sexual experience" at the time of disclosure. This renders the statutory distinction between "activity" and "experience" entirely meaningless: in fact, it would involve giving "sexual activity" no work to do at all. Not only is this contrary to the long-established principle of construction that different words used within an statute are presumed to have different meanings,[25] it requires a radical departure from the reasoning in *GEH*, where Harrison J emphasised that the distinction between sexual experience and sexual activity may be "critical", given any complainant's sexual experience in the historical sense will "necessarily be his or her sexual experience 'at or about' the relevant time".[26] Justice Harrison described "sexual experience" as the "condition of having had experience in sexual matters, as opposed to a single or isolated sexual experience, or a number of them, at some particular time", noting the inquiry "appears to be related to whether the complainant was or

[25] *Taheri v Vitek* (2014) 87 NSWLR 403 at [124] (Leeming JA, Bathurst CJ and Emmett JA agreeing) quoting *King v Jones* (1972) 128 CLR 221 at 266.
[26] (2012) 228 A Crim R 32 at 50 [64].

was not 'sexually experienced'".[27] Thus, as Harrison J explained, "evidence that relates to a complainant's general state of sexual experience may more readily satisfy the temporal test" than evidence relating to "singular acts of sexual activity" (emphasis added).[28]

Circumvention of the temporal limitation

31. What flows from these two elisions is an effective circumvention of the strict temporal requirement in s 293(4)(a)(i) that the evidence be of the complainant's experience or activity (or lack thereof) "at or about the time" of the commission of the alleged offence. The Second Reading Speech introducing the provision in 1981 made clear that "[t]he key words here are 'at or about the time' of the alleged offence … he cannot inquire or bring evidence about the complainant's sexual behaviour with other persons last week, or last month or last year".[29]

32. On the appellant's construction, any past sexual activity in which a complainant has engaged is their unabating "sexual experience" and is always capable of satisfying the legislative requirement of being "at or about the time" of the commission of the alleged subject offence. That reading would tend to draw in the very evidence the legislature intended to exclude: what the complainant did with other persons "last week, or last month or last year".

33. Here, and contrary to **AS [38]**, Adamson J was correct to conclude (at CCA [115] (CAB 103-104)) that there is no basis on which the evidence of the complainant's disclosure of the Qld offending which had occurred in 2009 could satisfy the condition of being "at or about the time" of the subject offending which occurred, at the earliest, in January 2011 (18 months later). That is because the evidence which was in fact sought to be adduced was evidence *of* the Qld offending, and that was evidence of *sexual activity* some 18 months earlier.

The facts of this case

34. It is necessary to return to the precise two categories of evidence which the appellant says were wrongly excluded. The first was evidence of the complainant making disclosures to the appellant about the Qld offences, which occurred in late 2009 (CCA [105] (CAB 101)). The second was what was said to be the "aftermath" of the Qld offences, being interviews with police about the Qld offences in March and April 2010, and the prosecution of the Qld offender between April 2011 and March 2014 (CCA [104] (CAB 100-101)).

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[27] *GEH* (2012) 228 A Crim R 32 at 50 [63].
[28] *GEH* (2012) 228 A Crim R 32 at 50-51 [64]. See eg, *Chia v R* [2021] NSWCCA 51 at [58] (Leeming JA, Walton J agreeing); *R v Edwards* [2015] NSWCCA 24 at [30] (Harrison J, Hoeben CJ at CL and McCallum J agreeing).
[29] New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 March 1981 at 4764 (Attorney-General), as cited in *Jackmain* (2020) 102 NSWLR 847 at 891 [191].

35. As to the disclosures about the Qld offending to the appellant, the Qld offending had ceased by 17 June 2009. The complainant first complained to her stepmother in June 2009. She went to live with the appellant and his wife in July 2009, and disclosed the Qld offences to the appellant in late 2009 (CCA [74] (CAB 91)). She was interviewed by police about the Qld offences on 31 March 2010 and 1 April 2010 (CCA [75] CAB 91)). Sometime after 1 January 2011 (that is, more than a year after she told the appellant about the Qld offences) the appellant's offending against the complainant commenced (CCA [78] (CAB 92)). As explained above (at [25]-[28]), evidence of her "disclosure" to the appellant is not evidence of the complainant's "sexual experience". Further her disclosure in 2009 cannot not satisfy the statutory expression "at or about the time" of the appellant's offending because it occurred, at the earliest, some 12 months before the offending began. The same analysis applies to the complainant's interviews with Qld police which occurred in March and April 2010, again, at the earliest, nine months before the appellant's offending commenced.

36. As to the Qld proceedings generally, Adamson J was correct to find this was not evidence of the complainant's "sexual experience" at or about the time of the appellant's offending. Evidence of involvement in criminal proceedings in relation to a sexual offence is not evidence of "sexual experience" or "sexual activity", it is the "aftermath" of that experience or activity (CCA [115] (CAB 103-104)). What becomes clear is that that the evidence the appellant wants to lead at trial is simply evidence about the sexual activity which constituted the Qld offending, including not only evidence of disclosures made regarding that sexual activity and the proceedings connected with it but also evidence of the details of the offences themselves (as explained at [22] above). In that context, there is no error in the conclusion of the majority that this evidence could not satisfy the temporal requirement of s 293(4)(a). Further, there is no error in Bellew J's observation at CCA [137]-[138] (CAB 110) that in *GEH*, Basten JA referred to a period of 15 months as being incapable of satisfying the temporal element in s 293(4)(a), and his Honour's reliance on that authority to conclude that the time between the Qld offending and the subject offending could not satisfy this requirement (cf **AS [41]**).

Sub-section 4(a)(ii): "events … alleged to form part of a connected set of circumstances"

37. As for s 293(4)(a)(ii), neither the reporting of the Qld offences nor the Qld proceedings satisfy the statutory test of being part of a "connected set of circumstances" *in which* the appellant's offences were committed. In *GEH*, Beech-Jones CJ at CL described the test as asking whether the evidence was part of the "narrative of events that lead to the offence", its

"immediate aftermath", or a "piece of any jigsaw puzzle concerning the 'set of circumstances' in which the offence was said to have been committed".[30] Again, there does not appear to be any dispute between the parties at the level of principle, but rather as to its application to the facts in this case.

38. The appellant first points to the fact that the complainant was living with the appellant at a time when the Qld criminal proceedings were on foot (**AS [42]** quoting CCA [23] (CAB 74)). That is no more than contemporaneity. It cannot satisfy the more stringent test imposed by s 293(4)(a)(ii) that the disclosures were "connected" in some way to the "circumstances" of the appellants offending.

39. Second, the appellant argues that the earlier assaults "were the reason the complainant was ultimately moved and placed into the appellant's care" (**AS [45]**). The fact that the Qld offending put the appellant in a position of opportunity to commit the offences which he otherwise would not have had, does not mean those offences "form part of a set of connected circumstances" with the disclosures.

40. Third, the appellant suggests that the Qld offending "formed part of the relationship of confidence" between the appellant and the complainant in which the subject offences were committed (**AS [45]**). There was no evidence of such a "relationship of confidence". The context of the first disclosure to the appellant arose because the complainant did not want to sit in the front seat of the car, as she was scared of being sexually assaulted as she had been in the past. The disclosure emerged from her seeking reassurance that the appellant would not touch her if she did sit in the front seat of his car (**AFM 96-97 [4]-[8]**). The fact that a child tells their adult guardian about offending committed by a previous carer does not, *ipso facto*, generate a "relationship of confidence". The submission is devoid of merit.

41. Finally, the appellant refers to the "extreme riskiness, and so, the inherent unlikelihood, of the appellant assaulting the complainant at the time she was actively participating in the prosecution of a prior sexual assaulter" (**AS [45]**). That is not a connecting circumstance, it is the forensic purpose to which the appellant sought to put the excluded evidence. In any event, it ignores the reality of the vulnerability of the complainant (see [10] above), and that an adult who engages in sexual misconduct with a child does so in response to uncontrolled sexual urges.

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[30] (2012) 228 A Crim R 32 at 54 [82].

42. As for the reliance on *R v Morgan* (1993) 30 NSWLR 543 at **AS [46]**, in that case the leading judgment was delivered by Mahoney J, who addressed the question of whether the offence and a later act of (consensual) intercourse on the same evening were a "connected set of circumstances". Mahoney J discerned an ambiguity in the legislation and found it should be resolved in a way favouring the liberty of the accused.[31] That is what Gleeson CJ was in turn referring to when his Honour stated that "no narrow approach" should be taken to the exception in (now) s 293(4).[32]

43. These comments are inapposite here, in circumstances where the appellant points to nothing more than contemporaneity to satisfy the requirement of connection in s 293(4)(a)(ii). That cannot be sufficient, because the statutory requirement of connection in that subsection is additional to the temporal requirement of s 293(4)(a)(i). Evidence of the Qld offences (or their disclosure) does not fall within a "connected set of circumstances" in which the subject offending took place.

Sub-section 4(b): "related to a relationship"

44. In relation to the s 293(4)(b) exception, the appellant argues that evidence of the disclosure of the Qld offences to him by the complainant is evidence that "relates to" a relationship between them. Again, there is no dispute between the parties as to the principles set out at **AS [49]**.

45. However, as Adamson J correctly concluded, "the disclosure by C to A of offences perpetrated on C by B" cannot be said to "'relate to' the relationship between C and A" (CCA [121] (CAB 105)). The appellant leaves unexplained how the balance of the evidence (outside the disclosure *to him*) could conceivably fall within this exception: nothing about the complainant's participation in the Qld proceedings "relates to a relationship" between her and the appellant, nor, as Beech-Jones CJ at CL recognised, does evidence of the Qld offending itself (CCA [16] (CAB 71-72). Even Beech-Jones CJ at CL did not accept that the evidence supported a conclusion as to any relationship between the appellant and the complainant (CCA [16] (CAB 71-72)).

46. If, contrary to the above submissions, the Court is minded to uphold Beech-Jones CJ at CL's conclusion that the evidence *could* relate to a relationship of confidence (**AS [54]**), his Honour concluded that there was insufficient evidence before the Court to determine the

[31] (1993) 30 NSWLR 543 at 551.
[32] (1993) 30 NSWLR 543 at 544.

existence of any such relationship. It would follow that this matter should be determined by the trial judge on the retrial of the appellant, not in this Court.

Ground 2: "misleading" the jury

47. Ground two alleges that the CCA erred in "holding it permissible to mislead a jury in order to attempt to counteract unfairness occasioned by the exclusion of the s 293 evidence". There are three responses to this ground. The first is that the jury was not in fact misled. The second is that review of the cross-examination which was conducted, demonstrates that the appellant extracted the very forensic benefit he claims he was denied, based on a formulation of the Qld offending which the appellant's trial counsel proposed (but which the appellant now seeks to disavow as "unfairly prejudicial" (**AS [62]**)). The third is that the appellant's arguments on this ground would effectively fetter the right of an accused to lead relevant evidence in a manner of his choosing that does not infringe s 293. It is not in the interests of justice that accused persons should be prevented from leading such evidence.

48. As to the first point, the premise of the ground is that the description of the Qld offences as "physical" assaults rendered that evidence misleading or a "lie by omission". That is not the case. The offences to which the Qld offender pleaded guilty included taking the 5- or 6-year-old complainant's hands and pushing them up and down on his penis and straddling the complainant and rubbing his penis on her stomach until ejaculation (AFM 25-26). Those are physical assaults. The appellant also sought to lead evidence as to the four rapes of which the Qld offender was originally convicted (see [7] above), which unquestionably amounted to physical assaults. No explanation is suggested for the unsupportable submission that "physical assault" "could only be interpreted" as "expressly *not* involving sexual offending" (cf **RS [56]**).

49. The submission at **AS [60]** misinterprets Adamson J's reasoning to suggest that her Honour concluded that misleading a jury by omission is permissible. That is not correct. Her Honour correctly reasoned that "there is a distinction between not being told the whole truth and being told something which is untrue", and then concluded that the evidence here fell into the "former category" (CCA [131] (CAB 108)). Whilst acknowledging the "force" of counsel's submission that the jury was misled, Adamson J then found that the jury was not misled in this case (CCA [130]-[131] (CAB 108]-109)).

50. In that regard, the course of the cross-examination was not dissimilar to the course of most criminal trials, where evidence which is relevant is excluded by the operation of one or more

exclusionary provisions, ranging from the hearsay rule (s 59 *Evidence Act 1995* (NSW)), to discretionary exclusions in favour of an accused person (ss 135/137 *Evidence Act*), to public interest immunity which might exclude, for example, information in respect of an informant or undercover operative (s 130). The absence of such information has not generally been held to impermissibly "mislead" a jury, much less render a trial unfair.

51. As to the second point, the consequence of the operation of s 293(3) in this case meant that evidence which disclosed (expressly or impliedly) the sexual assaults perpetrated on the complainant by the Qld offender was not admissible at trial. The appellant had available two courses: to proceed to take the forensic benefit he sought and cross-examine on the Qld offences without revealing their full nature, or not pursue that line of cross-examination. The appellant's counsel suggested the former course to the trial judge, and that suggestion was acceded to (CCA [124] (CAB 106)).

52. It was counsel for the appellant who framed the terms of the cross-examination. Insofar as it concerned the Qld offending itself, it was limited to two questions, neither of which were misleading or inaccurate. The complainant was asked whether she had been "on a number of occasions, physically assaulted by a person in Queensland" to which she answered "yes" (CCA [9] (CAB 68)), and whether the person later "pleaded guilty to doing things, to physically assaulting you in Queensland, didn't he" (CCA [10] CAB 69). That questioning did not purport to involve a comprehensive description of what took place in Queensland. Indeed, the question asked made clear it was not; counsel expressly stated, "I won't go into the detail" (CCA [10] (CAB 69)). Contrary to the suggestion at **AS [56]** that the jury would "naturally presume they would be told if the prior offending was sexual", they were informed they *would not* be told about the detail of that offending.

53. As noted above at [10]-[12], there was extensive cross-examination about why the complainant did not report the appellant's offending, her opportunity to do so in the context of the Qld offending, and that it was the appellant to whom she who she had spoken about the Qld offending. Contrary to **AS [58]**, a review of the whole of the cross-examination (RFM 6-91) reveals that the appellant obtained the forensic benefits he sought, and that no part of it was "so distorted" as to become misleading (cf **AS [61]**).

54. The third point is that accepting the appellant's arguments on ground two would ultimately result in the proposition that where evidence of sexual activity or experience is excluded by s 293, but there is a way in which relevant evidence can be put to the jury by excising the sexual aspect of that activity/experience, an accused person is fettered in their ability to

advance that evidence in their defence. The point is made good by a review of the cross-examination which was conducted here, through which a substantial attack was launched on the complainant's credit by reason of the evidence which was permitted to be led.

55. It is also necessary to deal with the suggestion at **AS [65]** that facts "integral" to the defence case were not tendered by operation of s 293 in this case. That is not correct. The sexual nature of the Qld offending was not integral to any aspect of the appellant's defence: it was not even a contention advanced on his behalf (his contention was that the complainant had deliberately concocted the allegations with her aunt). The only matter which the appellant could not put to the complainant was that she was in fact recounting her memories of the Qld offending when she recounted what she said the appellant had done to her (see **AS [63]**). But that is the consequence of the ordinary application of s 293 in any case involving a child who has been sexually abused on a prior occasion, and has been the case since at least the decision of *HG v The Queen* (1999) 197 CLR 414. It is not a matter which could be said to be so integral to the defence case here as to render the trial unfair (cf **AS [65]**).

Ground 3: retrial pursuant to s 8 of the *Criminal Appeal Act 1912* (NSW)

56. Ground three only arises for consideration if the appellant fails on ground one, and the evidence is not admissible at his retrial (**AS [68]**). In those circumstances, he says the CCA should not have ordered any retrial pursuant to s 8(1) of the *Criminal Appeal Act 1912* (NSW). That provision is in the following terms:

> (1) On an appeal against a conviction on indictment, the court may, either of its own motion, or on the application of the appellant, order a new trial in such manner as it thinks fit, if the court considers that a miscarriage of justice has occurred, and, that having regard to all the circumstances, such miscarriage of justice can be more adequately remedied by an order for a new trial than by any other order which the court is empowered to make.

57. On the premise that ground one has not been established, the only "miscarriage" arises from the error on which he was successful before the CCA (the erroneous employment by the trial judge of written jury directions to the exclusion of oral directions: *Trevascus v The Queen* (2021) 104 NSWLR 571). That is because if the evidence has been properly excluded pursuant to ground one, there is no other "miscarriage of justice" which could enliven the power under s 8 to order a retrial. The appellant seeks to obtain a permanent stay of the

proceedings through the mechanism of s 8 without satisfying the conventional test for such a drastic remedy.[33]

58. Contrary to **AS fn 3,** it is not "strictly immaterial" whether CCA ground three (ground one in this Court) is separately determined to constitute a miscarriage. Ground three in this appeal arises only where ground one fails, and so the only trigger for the operation of s 8 is the *Trevascus* error found in relation to CCA ground one.

59. Acceptance of the appellant's contention that "the issues" raised by CCA ground three (ground one in this Court) render a retrial "unjust and inadequate" would introduce radical incoherence into the law (**AS [71]**). It would mean that an accused person who seeks a permanent stay before trial would need to satisfy the very high threshold required to justify a permanent stay, namely that the exclusion of evidence pursuant to s 293 necessarily rendered any trial unfair.[34] In contrast, a convicted offender who establishes on appeal some other error amounting to a miscarriage could obtain the equivalent remedy by meeting some lower (as yet unarticulated) threshold. The appellant's criticism in this Court of the majority of the CCA for importing the test required for a permanent stay ignores his submission before the CCA that that test applied (CCA [38] CAB 78-79).

60. It may be accepted that many circumstances may render a retrial a "less adequate" remedy than acquittal in any given case (**RS [70]**). But in circumstances where the Court has concluded that the evidence was properly excluded by operation of s 293, the dismissal of ground one would not constitute such a circumstance. That is because, first, if a permanent stay of the proceedings is not justified, then a retrial should be ordered. A retrial is not a "less adequate" remedy than acquittal because the appropriate remedy is that the appellant be afforded a fair trial according to law, and a trial with the evidence pursuant to s 293 excluded will *prima facie* be a fair trial according to law. Second, that conclusion could only be displaced if the Court concluded that the appellant could never have a fair trial according to law with the evidence excluded under s 293. But if that be the conclusion, then that is because the Court has applied the test for a permanent stay of proceedings and not some lesser test simply because another error on appeal enlivens the s 8 power.[35]

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[33] See *Jago v District Court of NSW* (1989) 168 CLR 23 at 31 (Mason CJ); *Dupas v The Queen* (2010) 241 CLR 237 at 245 [18]; *R v Glennon* (1992) 173 CLR 592 at 605-606 (Mason CJ and Toohey J).
[34] *R v Edwards* (2009) 83 ALJR 717 at 720-721 [23] (Hayne, Heydon, Crennan, Kiefel and Bell JJ) referring to *Walton v Gardiner* (1993) 177 CLR 378 at 392 (Mason CJ, Deane and Dawson JJ).
[35] *Dupas v The Queen* (2010) 241 CLR 237.

61. As to the suggestion that the test for a pre-trial stay would be met in this case, that should be rejected. First, no application for a stay has ever been made, and one can still be made before the trial judge on any retrial. The appropriate forum for any such application is before a trial judge fully appraised of all relevant evidence. The appellant would have the ordinary rights of appeal open to him if such application were unsuccessful.

62. Second, as a matter of substance, that argument would be rejected. The exclusion of the evidence pursuant to s 293 does not produce a "fundamental defect at the root of the trial" (cf **AS [74]**). There may be a circumstance where the proper application of the rules of evidence will give rise to such unfairness as to warrant a stay.[36] But it would be a significant step for a Court to conclude that the proper application of a law expressly designed to "exclude to a significant degree cross-examination concerning a complainant's sexual activity or experience with only limited exceptions"[37] has the effect that the continuation of the trial amounts to an abuse of process, noting the competing public interests at play. Indeed, in *Jackmain* the CCA dismissed an appeal against a refusal to grant a permanent stay in circumstances where the complainant had made false complaints against other people. The CCA held that – as was done here – allowing the complainant to be cross-examined on the subject matter of that evidence without revealing its sexual nature would adequately ameliorate the prejudice.[38]

63. Here, Adamson J was entirely correct to conclude that the only disadvantage to the appellant was the lost opportunity to "fully" exploit evidence that may or may not have been forensically beneficial to him (CCA [130] (CAB 108)). The challenged ruling did not preclude the appellant cross-examining the complainant as to the fact that she had reported offences committed against her in Qld or that her involvement in the Qld proceedings brought with it opportunity to complain about the subject offending. As noted above at [9]-[10], such cross-examination was vigorously pursued.

64. The assertion that the appellant's inability to expose the precise nature of the offences occasioned irremediable unfairness ignores the purposes to which the cross-examination was directed. Those purposes were well served by the cross-examination which was pursued (see [9]-[10] above). In light of those matters, it cannot be said that the present case was such a rare or exceptional case as to justify the exceptional remedy of a permanent stay;

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[36] *KS v Veitch (No 2)* (2012) 84 NSWLR 172 at 181-182 [38].
[37] *Jackmain* (2020) 102 NSWLR 847 at 856 [15] (Bathurst CJ).
[38] *Jackmain* (2020) 102 NSWLR 847 at 896 [225] (Leeming JA), [231] (Johnson J), [239] (Button J).

particularly having regard to the competing public interest in the disposition of charges for serious offences according to law.

65. And the residual unfairness which is suggested at **AS [74]** as to cross-examination on "knowledge and memories" is not productive of "manifest unfairness" such as to constitute a "fundamental defect at the root of the trial". Such evidence is excluded as a matter of course by operation of s 293 in criminal trials, and is precisely the type of cross-examination the legislature is taken to have intended be precluded. As Hayne J stated in *HG v The Queen*, rejecting the argument that former s 409B was limited to evidence of consensual acts:[39]

> There is no warrant for reading the provision as confined to consensual acts. Nothing in the language used suggests any intention other than to extend the reach of the provisions as broadly as possible. It was submitted that the provisions should be read in the manner suggested because the mischief to which s 409B is directed is the prevention of distress, humiliation and embarrassment of complainants of sexual crime. Accepting that this is so, it by no means follows that a distinction between consensual and non-consensual sexual acts is warranted. Distress, humiliation and embarrassment are very likely present for any person required to describe, in a public forum, sexual activity in which they have engaged. There is no basis for suggesting that the distress, humiliation or embarrassment felt in having to describe these matters would be less if the activity occurred as a result of the unlawful conduct of another or others.

PART VI ESTIMATE OF HOURS

66. The respondent estimates that no more than 2 hours will be required for the presentation of the respondent's oral argument.

Dated: 22 February 2024

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[39] (1999) 197 CLR 414 at 456 [147].

ANNEXURE TO THE RESPONDENT'S SUBMISSIONS

LIST OF STATUTES AND STATUTORY INSTRUMENTS REFERRED TO IN SUBMISSIONS

1. *Crimes Act 1900* (NSW), as in force from 14 July 1981 to 31 December 1999, s 409B
2. *Criminal Appeal Act 1912* (NSW), current version, s 8
3. *Criminal Procedure Act 1986* (NSW), as at 30 July 2019, s 293
4. *Evidence Act 1995* (NSW), current version, ss 55, 59, 130, 135, 137
5. *Crimes (Sexual Assault) Amendment Act 1981* (NSW), assented to on 15 May 1981, Sch 1 item 15
6. *Crimes Legislation Amendment (Sentencing) Act 1999* (NSW), assented to on 8 December 1999, Sch 2, item 31
7. *Criminal Procedure Amendment (Justices and Local Courts) Act 2001* (NSW), assented to on 19 December 2001, Sch 1, item 123
8. *Criminal Procedure Further Amendment (Evidence) Act 2005* (NSW), assented to on 31 May 2005, Sch 1, item 10
9. *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW), assented to on 27 June 2018, Sch 4, item 9
10. *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW), assented to on 8 December 2021 Sch 2, item 4