HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 24 Jul 2025 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S92/2025
File Title:	WHS v. The King
Registry:	Sydney
Document filed:	Form 27A - Appellant's submissions
Filing party:	Appellant
Date filed:	24 Jul 2025

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No. S 92/2025
BETWEEN:

WHS
Appellant

AND

THE KING
Respondent

APPELLANT'S SUBMISSIONS

PART I. CERTIFICATION

1.1 It is certified that these submissions are in a form suitable for publication on the Internet.

PART II. A CONCISE STATEMENT OF ISSUES

2.1 An issue that arises under ground 1 is the proper construction of s 293(6) *Criminal Procedure Act 1986* (NSW) (hereafter "CPA"), now s 294CB(6) CPA. The New South Wales Court of Criminal Appeal (hereafter "CCA") held that this exception to the prohibition on evidence of a complainant's prior sexual experience only applies where the prosecution "invites" the jury to draw an inference about lack of prior sexual experience. The appellant submits that it also applies where the evidence adduced by the prosecution is likely to lead the jury to draw that inference.

2.2 The second issue that arises under ground 1 is, if the appellant's contention with respect to the proper construction of s 293(6) is accepted, whether evidence intended to be adduced by the prosecution (and subsequently adduced by the prosecution at trial) was likely to lead the jury to draw that inference.

2.3 An issue that arises under ground 2 is whether the submission by the Crown Prosecutor to the jury in final address that it would be difficult for the complainant to disclose the sexual conduct by the appellant was unfair when the Crown Prosecutor knew there were records of the complainant having complained earlier about improper sexual conduct.

2.4 The second issue that arises under ground 2 is, if the appellant's contention that the submission by the Crown Prosecutor to the jury in final address was unfair is accepted, whether a miscarriage of justice thereby resulted.

PART III. CERTIFICATION WITH RESPECT TO SECTION 78B

3.1 It is certified that the appellant has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* and it is considered that no notice should be given.

PART IV. REPORTS

4.1 The judgment of the NSW Court of Criminal Appeal has the following internet citation: *WHS v R* [2024] NSWCCA 242.

PART V: A NARRATIVE STATEMENT OF THE RELEVANT FACTS

5.1 The appellant went to trial in 2014 charged with 8 child sexual offences allegedly committed against the foster child, MW, of his wife, DB. The offences were allegedly committed between 27.1.2010 and 1.9.2012 (when MW was aged 6-9 years old). MW is hereafter referred to as "the complainant". The complainant told her mother in November 2012 about the alleged offences and she was then interviewed by the police. The appellant was found guilty of 7 of the 8 alleged offences. However, an appeal against conviction was allowed in 2020 and a new trial ordered: *WHS v R* [2020] NSWCCA 3 (ABFM 6-23). The reason that the appeal was allowed was that the prosecution had not disclosed to the

defence material tending to show prior sexual experience on the part of the complainant. The CCA stated ([2020] NSWCCA 31 at [14]) (ABFM 9):

> The complainant was aged nine when she made her complaint about the appellant. Her statement to police provided a detailed and graphic description of sexual acts she alleged were committed against her by him. The language of her description of those acts and things she observed about his body and hers at the time of those acts was such as to give rise to an inference that, absent some other explanation for her ability and motive to describe such events in such terms, they must have happened.

10

The appeal was allowed because the material indicating prior sexual experience "could potentially explain MW's ability to describe sexual acts of the kind alleged against the appellant" (at [47]) (ABFM 18). The Court observed that "[h]er evidence at trial had a cogency which was inexplicable other than on the basis that the events she described happened." In this regard, it may be noted that the complainant's description to the police in November 2012, when she was 9 years old, of the sexual acts alleged against the appellant, included reference to:

- attempted and actual penile/anal intercourse (Counts 1, 4 and 6); and rubbing his
20 penis on her vagina
- male masturbation (related to count 1)
- kissing on mouth, using tongue (related to Count 1)
- digital/vaginal penetration (Count 2)
- digital/anal penetration (Count 5)
- biting of neck and ears (related to Counts 5 and 6)
- sucking on her breasts (Count 3)
- rubbing her vagina, her bottom and breasts (Counts 5 and 8)

5.2 However, prior to the second trial in 2023, the Crown objected to the admissibility of
30 this evidence tending to disclose prior sexual experience, contending that it was rendered inadmissible pursuant to s 293 CPA. In two pre-trial judgments (12.8.2021 ABFM 60 – 102

and 5.4.2022 ABFM 644 - 682), Traill DCJ upheld the objection and ruled that none of the evidence was admissible in the second trial. That trial proceeded in February 2023. The appellant did not dispute that he spent time with, and at times cared for, the complainant (and her brother JW), nor that the complainant was, at the relevant time, under his authority. However, the appellant gave evidence at trial in which he denied having committed any of the alleged offences. The appellant was found not guilty in respect of 2 of the alleged offences and guilty of 4. The jury was unable to reach a verdict in respect of 1 alleged offence (CAB 79 – 80). The appellant was sentenced in respect of the 4 offences for which he was found guilty on 28.7.2023 (CAB 82 – 106).

10

5.3. An appeal was brought to the CCA in respect of the convictions for those 4 offences in 2024 (CAB 113 – 151). By that time, the appellant had served the 6 year 3 month non-parole period imposed for those offences and was on parole. Three grounds of appeal were as follows:

> 1. Traill DCJ erred in excluding evidence of the complainant's "sexual experience".
>
> 1A. A miscarriage of justice resulted from the exclusion at trial of evidence of the complainant's "sexual experience".

20

> 4. A miscarriage of justice resulted from the final address by the Crown Prosecutor.

The CCA dismissed each of these grounds of appeal. However, a further ground of appeal was that the verdicts of guilty were "unreasonable" and the Court upheld this ground in respect of two of the verdicts (counts 1 and 4) and quashed those two convictions. It was ordered that the appellant be re-sentenced in respect of the remaining two convictions (counts 2 and 5). (CAB 152).

5.4 As regards the evidence tending to disclose prior sexual experience that was the subject
30 of the two pre-trial rulings by Traill DCJ, it may be summarised as follows:

- recorded instances between 2007 and 2011, extracted from Department of Community Services ("DOCS") files of sexualised and behavioural conduct exhibited by the complainant, including assertions and complaints made about other people touching the complainant in sexualised ways; and the complainant touching other people in sexualised ways, recorded in filenotes, casefiles, client information forms, contact records, psychological treatment referrals and reports, memoranda, transcripts, ROSH reports, placement reports, and teachers reports, including attendance at a Specialist Sexualised Behaviour Clinic
- records of interviews conducted by DOCS on 24/9/09 & 30/10/09 with the complainant, including sexual touching allegations about other people, including her foster mother DB
- NSW police record of interview dated 16/8/17 about allegations against AT describing child sexual abuse including anal intercourse when the complainant was aged 6–8 years old
- evidence of the complainant viewing pornography with her older cousins on 10 November 2012

5.5 Before Traill DCJ a number of arguments regarding admissibility were advanced on behalf of the appellant. However, the appeal to the Court of Criminal Appeal and the present appeal is concerned only with respect to the exception under s 293(6). The following evidence was contended before Traill DCJ as being admissible pursuant to that provision:

- 28.2.2008 file note: complainant "pulling down her pants and fingering her anus" (ABFM 418, lines 30-35)

- Undated file note: both complainant and JW (the complainant's brother) "find it normal touch each other's private parts" (ABFM 424, line 5)

- 26.8.2008 file note: complainant playing with neighbour's children "and requesting to see his private parts" (ABFM 426, lines 20)

- 27.10.2009 - finalisation submission: complainant alleged that DB touched her between her legs and on her private parts, had touched her on the bottom whilst putting on a pull-up nappy, and had sex with her and her brother (ABFM 294, lines 35, 40, 45)

- 24.9.2009 interview with complainant: "[DB] has sex at McDonalds. She took her clothes off and everyone ran outside" (ABFM 477, lines 10-15)

- 21.10.2009 interview with DB: "[complainant] said she had a shower with Eunice (her maternal grandmother). Eunice weed on her" (ABFM 502, lines 30)

- 30.10.2009 interview with complainant: complainant alleging DB touching her genitals "lots of times" and discussion of her private parts, and who she can complain to (ABFM 441- 444; “lot’s of times” is 442, line 45)

- 13.9.2010 file note: DB reports on 6/9/10 complainant displaying sexualized behaviours on two occasions - "the other incident was when some teenage boys were at their home and [complainant] told to have a bath, and she came out without clothes on" (ABFM 531, line 40)

13.9.2010 file note: DB reported on 10/9/10 "major sexualized incident at the weekend". Complainant had JW in a headlock and was "kissing him full on the mouth and had her hands inside James' pants." (ABFM 533 line 50)

- 25.5.10 - Client Information Form: complainant displaying sexualized behaviours including touching her own genitals in public and touching other children's genitals (ABFM 519 line 40)

- 3.3.2011 - file note: DB reported complainant "touching and rubbing herself and on another occasion taking her clothes off and sitting naked on a bed in the presence of some school friends" (ABFM 537 line 15)

It was submitted in written submissions that the "young age of the complainant necessarily implies that she is a person with no sexual experience or has not taken part in sexual activity ... whether or not it is explicitly raised during the trial" (submissions dated 10/7/2021 at [32]). (ABFM 642). Oral submissions included an argument that this was "an implied or almost inherent part of the Crown case" (T 6.9 on 28.7.2021) (ABFM 29) and that the evidence sought to be adduced provided "an ultimate answer to what is going to be the jury's ultimate reasoning" (T 13.20) (ABFM 36). It was contended that even if the Crown did not place any explicit reliance on the "nature of the allegations" it was "almost inherent or implied within the Crown case that the complainant has a lack of sexual experience . . . because the jury is certainly coming to court with that preconceived notion when you're talking about a child . . . interviewed by police about that alleged conduct at the age of nine" (T 22.42) (ABFM 45). In the written submissions, it was contended that the evidence of prior sexualised behaviour had very significant probative value, given that it included that the complainant "was treated at a Specialist Sexualised Behaviour Clinic" and had "numerous reports…made to DOC's …". (ABFM 643). The accused and his then wife expressed concerns to authorities concerning this behaviour. The level of concern was such that DOC's provided advice to the foster parents and set in place strategies to guard them against allegations of sexual impropriety" (submissions dated 10/7/2021 at [35]-[36]; ABFM 643).

5.6 In the CCA, it was contended that other evidence adduced before Traill DCJ in 2021 that was sought to be admitted relying on s 293(4)(a) was also admissible pursuant to s 293(6). It was contended in the CCA that a miscarriage of justice resulted from the exclusion at trial of this evidence. In an interview conducted with the police[1] on 16.8.2017 the complainant stated that, when she was aged 6-8 (A 42 and A 509) (ABFM 551 and 597) (that is, between 2009 and 2011, prior to the interview of 13.11.2012), a young man who

[1] The same police officer who was the informant in the appellant's trial.

was some years older than her had talked to her about sex (A 48) (ABFM 551), including "gross things ...like wanking, fingering people and like licking vaginas and that" (A 143) (ABFM 60) and when asked if he said how he knew this stuff, she replied, "Most kids … these days get it from movies" (A 484 – 485) (ABFM 595). She stated that he had "fingered" her (A 156)(ABFM 561), tried to "stick his ... penis up my vagina hole" (A 205) (ABFM 566-567), he "kept rubbing it" (A 236) (ABFM 569), "lick . . . my vagina" (A 253-4) (ABFM 571), "trying to stick his penis in my bum hole" (A 328) (ABFM 579) and "…it went in" (A329) (ABFM 579) when she was "bent over [and] my bum was up in the air" (A 325) (ABFM 579), "I remember the first time it hurt" (A 354) (ABFM 581), he was "humping" (A 357) (ABFM 582), "then he just pulled his pants up and he was . . . I'm going to the toilet" (A 365) (ABFM 582). She stated that "as I got older he did more sexual stuff, sort of thing…" (A 380) (ABFM 584), "when I got 8 that's when he did, the like, more bum…involved stuff" (A 381-382) (ABFM 584). She also said that he had put his penis in her "bum" and vagina, on more than one occasion (A 528 and A 532) (ABFM 599 and 600).

5.7 Further, in the CCA it was contended that other evidence the subject of the second application made pursuant to s 293(4)(a) determined by Traill DCJ on 5.4.2022, that is:

(a) evidence (proposed to be called) from the appellant, and through DB, that on 10 November 2012, the complainant reported to DB after having returned to Cameron Park from a visit with her extended biological family, that she and her older cousins had viewed pornographic movies[2], and

(b) evidence of the complainant's interview with police on 16.8.2017 in which the complainant recounted the conversation with the young man when she was aged 6-8 regarding how to "finger people", "wanking" and "licking vaginas" (ABFM 544-601)

[2] Submissions by trial counsel for the appellant dated 31 August 2021, paragraphs 5 – 12 (ABFM 685-686) and Pre-trial Judgment dated 5 April 2022 at paragraph 5 (ABFM 667).

was admissible pursuant to s 293(6). It was noted in the CCA that it was contended before Traill DCJ on 2.9.2021 that, in the absence of this evidence, "the jury is going to come to Court as lay persons with a belief that a nine-year-old child is not going to have any form of sexual experience that would allow any type of explanation for how she can give such a description in the absence of any explanation at all that can be provided by the accused" (T9.10 on 2.9.2021) (ABFM 657). It was contended in the CCA that while counsel for the appellant had not relied upon s 293(6) in respect of this evidence, a miscarriage of justice had nonetheless resulted because the evidence was admissible pursuant to that provision.

PART VI. THE ARGUMENT

Ground 1

6.1 At the time that Traill DCJ determined the admissibility of the "sexual experience" evidence sought to be adduced on behalf of the appellant, s 293(3) CPA provided that evidence

> that discloses or implies-
>
> (a) that the complainant has or may have had sexual experience or a lack of sexual experience, or
>
> (b) has or may have taken part or not taken part in any sexual activity,
>
> is inadmissible.

This appeal proceeds on the basis that the evidence of "sexual experience" evidence sought to be adduced on behalf of the appellant was caught by s 293(3). As in *Cook (a pseudonym) v The King* [2024] HCA 26, 98 ALJR 984, the evidence "was one of the 'problem cases' described by the New South Wales Law Reform Commission in 1998 which fell within the prohibition in s 293(3), namely, a case where the complainant was a child, the accused denied that the alleged abuse occurred and the relevant evidence was about sexual experience or activity (or lack of it) rather than evidence of sexual reputation" (Gordon A-CJ, Edelman, Steward and Gleeson JJ at [36]). Section 293(6) provided an exception to the prohibition in s 293(3):

If the court is satisfied--

(a) that it has been disclosed or implied in the case for the prosecution against the accused person that the complainant has or may have, during a specified period or without reference to any period--

(i) had sexual experience, or a lack of sexual experience, of a general or specified nature, or

(ii) had taken part in, or not taken part in, sexual activity of a general or specified nature, and

(b) the accused person might be unfairly prejudiced if the complainant could not be cross-examined by or on behalf of the accused person in relation to the disclosure or implication,

the complainant may be so cross-examined, but only in relation to the experience or activity of the nature (if any) so specified during the period (if any) so specified.

Of course, this provision does not, in itself, make "the [sexual] experience or activity" admissible but only permits cross-examination of the complainant with respect to that experience or activity. If the complainant denies or does not admit the experience or activity, the usual rules with respect to admitting evidence of matters denied in cross-examination would apply.

6.2 It was contended before Traill DCJ that it would be "disclosed or implied in the case for the prosecution against the accused person that the complainant has or may have … had … a lack of sexual experience … and … the accused person might be unfairly prejudiced if the complainant could not be cross-examined by or on behalf of the accused person in relation to the disclosure or implication". It was argued on behalf of the appellant before Traill DCJ that the "young age of the complainant", bearing in mind that she was 9 years old when she first provided the detailed and graphic description of sexual acts she alleged were committed against her by the appellant, "necessarily implies that she is a person with no sexual experience or has not taken part in sexual activity … whether or not it is explicitly raised during the trial" (ABFM 642) and this was "an implied or almost inherent part of the Crown case" (ABFM 29) and that

the evidence of prior sexual experience provided "an ultimate answer to what is going to be the jury's ultimate reasoning".(ABFM 36)

6.3 Traill DCJ rejected this argument, holding that the exception in s 293(6) did not apply because the Crown Prosecutor stated that the Crown was not intending to lead evidence of the complainant's prior sexual experience in the prosecution case and, "cognisant of an abundance of evidence relating to MW's prior sexual experience or activity", the Crown Prosecutor accepted that "it would be unfair if the Crown made a submission to the jury to the effect, "How could MW give such a graphic account of the sexual acts if those sexual acts were not true?" (ABFM 659)

6.4 In the CCA, it was contended that, while the Crown Prosecutor had given an undertaking that he would not invite the jury to draw an inference about lack of prior sexual experience or activity of the complainant (other than in the events charged), it was likely, if not inevitable, that the jury would infer from her age when she was interviewed by the police, and the absence of the evidence ruled inadmissible under s 293, that she did lack such prior experience. It was argued that "case for the prosecution" was not just what was submitted by the Crown Prosecutor in address but also, in addition, what the evidence adduced by the Crown implied. The young age of the complainant "implied … that the complainant has or may have … had … a lack of sexual experience". On that basis it was contended that Traill DCJ erred in determining the application of s 293(6) on the basis of the undertaking of the Crown Prosecutor. It was also contended that other evidence of prior sexual experience was within the scope of s 293(6), even though that argument had not been advanced before Traill DCJ.

6.5 In the CCA, Fagan J (Chen J and Sweeney J agreeing) stated at [37] (CAB 134):

> I accept it would likely be the common experience amongst jurors that, up to the age of nine, it would not be expected that a girl would have gained sexual experience or engaged in sexual activity, within the meaning of the section, unless in circumstances of abuse.

However, Fagan J held at [38] that "nothing in the presentation of the Crown case … *effectively invited* the jury to draw an inference about lack of prior sexual experience or activity

of MW (other than in the events charged), on the basis of her age" (emphasis added) (CAB 135). It was expressly held that s 293(6) would not be engaged even if there was a real risk that the jury "would infer a lack of prior sexual experience or activity (other than with the appellant) from the circumstance of the complainant being only nine years old".

6.6. It is submitted that this analysis is erroneous. A minor criticism is that the primary question was whether Traill DCJ was correct in ruling, prior to trial, that s 293(6) did not apply because the Crown Prosecutor gave an undertaking that he would not invite the jury to draw an inference about lack of prior sexual experience or activity of the complainant from the age of the complainant when she spoke to the police. It was not what actually transpired at trial. The much more serious error is to construe s 293(6) as requiring an "invitation" from the Crown to engage in particular reasoning where it may be concluded that a jury is likely to engage in the reasoning without any such invitation. It is submitted that s 293(6) should be construed to recognise two alternative ways in which "the case for the prosecution" "disclosed or implied" that a complainant "has or may have … had … a lack of sexual experience". One way is where the prosecutor "invites" the jury to reason that the complainant has or may have had a lack of sexual experience. The other is where the evidence adduced in the prosecution case by itself points to or raises the implication that the complainant had or may have had a lack of sexual experience. This construction is supported by the following considerations:

> First, the alternatives of disclosure "in the case for the prosecution" and implication "in the case for the prosecution" suggest that "the case for the prosecution" should not be understood as exclusively constituted by how the Crown Prosecutor formulates that case in submissions to the jury. The anticipated circumstance of "the case for the prosecution" *implying* that the complainant "had" a lack of sexual experience or "may have … had" a lack of sexual experience suggests a broader understanding of the term "the case for the prosecution". In this context, it should be accepted that "no narrow approach should be taken to that part of the statutory provision which permits [the evidence's] reception".[3]

---

[3] *R v Morgan* (1993) 30 NSWLR 543 at 544 (cited by Gordon A-CJ, Edelman, Steward and Gleeson JJ in *Cook (a pseudonym) v The King* [2024] HCA 26, 98 ALJR 984 at [37]).

Second, it may reasonably be inferred that the purpose of s 293(6) was to prevent a jury having a misconception regarding some aspect of the complainant's prior sexual experience which might unfairly prejudice the accused. It is not a question of determining fault or seeking to punish the prosecution for some fault. The purpose is to prevent the misconception, regardless of how it might arise.

Third, s 293 has been described as striking "a balance between the community's interests in an 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": *Jackmain (a pseudonym) v R* [2020] NSWCCA 150 at [244] (per Wilson J). If the trial judge is satisfied that the accused person might be unfairly prejudiced if the complainant could not be cross-examined by or on behalf of the accused person regarding that prior sexual experience, application of the exception in s 293(6) would achieve the intended balance between "the community's interests in an 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".

Fourth, it would be absurd that a misconception that might unfairly prejudice the accused may be prevented where the prosecution actively fosters the misconception but cannot be prevented where evidence adduced by the prosecution inherently creates the risk that the misconception will occur (and the prosecution does nothing to prevent the misconception). The injustice experienced by the accused is the same.

Fifth, the Attorney-General made it clear in the Second Reading Speech made at the time of the introduction of the predecessor to s 293, in 1981, that the equivalent to s 293(6) was intended to apply in two alternative circumstances:

> It will allow cross-examination concerning prior sexual history where it has been disclosed or implied in the case for the prosecution that the complainant was of particularly limited sexual experience at the time of the alleged offence. For example, if it is said by the prosecution that the complainant was a chaste married woman, or a virgin, the accused ought to be entitled to cross-examine about that. Just as the fact of prior sexual experience with others ought not be used prejudicially against the complainant witness, the fact of the complainant having limited or no prior sexual experience ought not be used prejudicially against the accused. Thus, if it is somehow suggested during the prosecution case - for example through the evidence of the police surgeon - that the complainant was a virgin prior to the events, then the accused may explore that matter by cross-examination, if he sees any benefit in it.[4]

The first "example" was where "it is said by the prosecution" that the complainant lacked sexual experience. The second "example" was where evidence adduced in the prosecution case (a police surgeon giving evidence of observations of the physical condition of a complainant) itself pointed to, or implied, a lack of prior sexual experience without any "invitation" from the prosecutor.

Sixth, there is pre-existing NSW authority recognising the two alternative ways in which "the case for the prosecution" "disclosed or implied" that a complainant "has or may have … had … a lack of sexual experience". In *Munn v R; Miller v R* [2006] NSWCCA 61 Barr J (Spigelman CJ and Simpson J agreeing) stated at [29]:

> I do not think that the material put before his Honour raised an implication likely to be relied on by the Crown that the complainant lacked experience. The Crown Prosecutor did not say that he intended to present the case in that way. As far as the evidence went, the Crown case was that the complainant did not lack experience. There were her references to what the twelve year old boy had done,

---

[4] New South Wales, Legislative Assembly, Parliamentary Debates (Hansard), 18 March 1981. (ABFM 950 Lines 17 – 28)

> to what she had seen on television and to what she had seen otherwise. Her answers that what the twelve year old boy had done was "normal" sex implied the opposite of a lack of experience. I do not consider that, as the Crown case then appeared, subs (6) had any application.

Barr J considered what the Crown Prosecutor said regarding how he intended to present the prosecution case and then separately considered the evidence adduced by the prosecution, holding that the evidence in that case "implied the opposite of a lack of experience". While neither basis for admissibility was established in the circumstances of that case, there was an acceptance of the two alternative ways in which "the case for the prosecution" may disclose or imply that a complainant "has or may have … had … a lack of sexual experience".

6.7 In the CCA, Fagan J also observed at [43] that the appellant could at trial "identify to the level of a reasonable possibility an alternative explanation for the complainant's ability to describe in graphic terms the sexual acts she said had been committed upon her" (CAB 137), such as prior sexual experience, without actually adducing evidence of such experience or raising it with the complainant in cross-examination. A number of points should be made about this analysis:

> First, even if defence counsel were permitted in final address to suggest that it was "possible" that the complainant had prior sexual experience, without actually adducing evidence of such experience or raising it with the complainant in cross-examination, the real risk would remain that the jury would disregard that possibility and proceed on the assumption that the complainant lacked sexual experience.
>
> Second, in the present case defence counsel certainly did not in final address suggest to the jury that it was possible that the complainant had prior sexual experience, presumably considering that it would be improper to make such a suggestion, particularly in circumstances where the complainant had not been given an opportunity in cross-examination to respond to the suggestion.

> Third, the question under s 293(6) is whether it is disclosed or implied in the case for the prosecution that the complainant had or may have had a lack of sexual experience, not whether defence counsel might theoretically adopt strategies designed to reduce the consequent risk of the jury proceeding on the assumption that the complainant had or may have had a lack of sexual experience.

6.8 It should be concluded that a substantial miscarriage of justice resulted from the exclusion of the evidence of the complainant's sexual experience. Notwithstanding the view of the NSW Court of Criminal Appeal in 2020 that the non-disclosure of evidence tending to show prior sexual experience on the part of the complainant led to a miscarriage of justice because, "absent some other explanation for her ability and motive to describe such events in such terms", a jury would infer that alleged offences "must have happened", none of that evidence was put before the second jury. The fact that two of the verdicts of guilty were "unreasonable" supports the likelihood that the jury reached its verdicts on the basis of false assumptions about the complainant.

Ground 2

6.9 If ground 1 is allowed, it would not be necessary to determine this ground.

6.10 The Crown Prosecutor did not explicitly invite the jury to infer that the complainant lacked sexual experience (other than in the events charged) when she was 9 years old. Consistent with the undertaking given to Traill DCJ, the Crown Prosecutor did not make a submission to the jury to the effect "how could the complainant give such a graphic account of the sexual acts if those sexual acts were not true?". However, the Crown Prosecutor did make the following submission in final address (T 345) (ABFM 882):

> You might think though it's one thing to make a complaint about being disciplined, it's another to talk and describe something as personal as being sexually touched and abused in the way that [MW] was telling Detective Barrett. About sexual things the man

> as she knew as [DB's] husband was doing to her. … Understandably, you might think it would be difficult for a young girl to tell anybody about a man with a relationship to her does with his rude part to her middle hole – well, where she does a poo. Understandably, you might think that'd be hard for any child, let alone a child in the situation of [MW], a foster child.

Reference was made by the Crown Prosecutor to the explanation offered by the complainant regarding her failure to tell her counsellor that "I just didn't know how to say it". This submission was in anticipation of a defence argument that the complainant's credibility was reduced by the fact that she had not taken opportunities to complain to her DOCS counsellor and psychologist, her teacher, grandmother or aunty about the alleged sexual abuse at the hands of the appellant notwithstanding that she had complained about other alleged misconduct by the appellant, including the alleged use by the appellant of "a cricket bat" to hit her. That argument was subsequently advanced by defence counsel in final address (T 395) (ABFM 931):

> [the complainant], you know, had a caseworker. She had a number of caseworkers. I think there were about three that were mentioned during the period of time that these allegations were said to have occurred. There were regular meetings with those caseworkers. There was not one complaint to any of those caseworkers about any of these sexual assault allegations, and you've got to compare that of course to the willingness to complain about the two physical allegations we know, the smacking at Nelson Bay, and the striking with the cricket bat. The purpose of the caseworker, you heard this evidence, was to check in on [the complainant] to make sure that the placement was going okay, and to make sure that she is okay, and you might think that that was a prime opportunity to have raised with any one of her caseworkers what was happening.
>
> …I invite you to check what [the complainant] said about her explanation for why she didn't tell her grandmother, and you'll find that at pp 150 and 151 of the pre-record on 5 April 2022, and she was asked, "Why didn't you…things to you?" and her answer was this, "I don't know…her or anything." Well it's up to you to make what you will

of that statement, but what would she be lying about if she was telling her grandmother the truth about these allegations that she says is the truth about these allegations? (ABFM 932)

6.11 As Sweeney J accepted at [81], and contrary to the analysis of Fagan J (Chen J agreeing) at [51], the submission by the Crown Prosecutor to the jury "that it would be difficult for the complainant to disclose the sexual conduct by the appellant was unfair, when the Crown knew there were records of the complainant having complained earlier about inappropriate sexual conduct by the appellant's partner" (CAB 151). The reference to it being "hard for any child" was a suggestion that it would hard for any young girl to talk about "sexual things". The focus was on the sexual nature of the alleged abuse, not the fact that the abuse was at the hands of a foster-father. That was quite unfair where the Crown Prosecutor was aware that, in the evidence of sexual experience sought to be adduced by the defence but ruled inadmissible, there was evidence of several complaints made by the complainant regarding "sexual experience", some of which related to the complainant's foster mother, and several other statements regarding sexually related matters. That evidence is, in part set out above at 5.5, but included instances as follows:

- 27.10.2009 - finalisation submission: complainant alleged that DB touched her between her legs and on her private parts, had touched her on the bottom whilst putting on a pull-up nappy, and had sex with her and her brother James (ABFM 294 lines 35, 40, 45)

- 24.9.2009 interview with complainant: "[DB] has sex at McDonalds. She took her clothes off and everyone ran outside" (ABFM 477 lines 10-15)

- 30.10.2009 interview with complainant: complainant alleging DB touching her genitals "lots of times" and discussion of her private parts, and who she can complain to (ABFM 441- 444; "lot's of times" is 442, line 45)

While none of the records relied upon by the appellant revealed that the complainant had previously made a complaint of sexual misconduct against a male caregiver, the jury may well have considered that even complaints about sexual misconduct by a female caregiver would tend to show that the complainant had been prepared to complain about sexual matters. The Crown Prosecutor's submission was quite unfair in the circumstances of this case, as Sweeney J accepted.

6.12 Sweeney J considered that no miscarriage of justice resulted from this unfairness, noting at [81] that "trial counsel did not take issue with the Crown Prosecutor's submission, and she made comprehensive submissions to the jury about the lack of complaint, presumably in the context of the issues in the trial" (CAB 151). However, trial counsel provided an affidavit to the CCA in which she stated that she did not turn her mind to the possibility that that portion of the Crown Prosecutor's address might be objectionable in light of the pre-trial rulings. This was not a case where an appellate court could proceed on the basis that defence counsel had formed the view that the Crown Prosecutor's address caused no unfairness to the appellant. As regards trial counsel making "comprehensive submissions to the jury about the lack of complaint", one submission trial counsel was prevented from making was that the complainant had made several prior complaints about sexual matters involving persons other than the appellant and this made more significant her failure to complain about the alleged sexual abuse by the appellant. The appellant was not only deprived of that submission by the construction given to s 293(6), the submission of the Crown Prosecutor in final address unfairly diminished the potential significance of the complainant's delay in complaint about the alleged sexual abuse by the appellant. That submission increased the likelihood that the jury would proceed on the basis of a false assumption that the complainant might have no difficulty complaining about a non-sexual assault but would refrain from complaining about "sexual things". As noted above, the fact that two of the verdicts of guilty were "unreasonable" supports the contention that it is likely that the jury reached its verdicts on the basis of false assumptions about the complainant.

PART VII. APPLICABLE PROVISIONS

7.1 The applicable provisions are contained in an annexure.

PART VIII. ORDERS SOUGHT

8.1 The orders sought are: appeal allowed, set aside the orders made by the New South Wales Court of Criminal Appeal on 20 December 2024, uphold the appeal against conviction in respect of counts 1, 2, 4 and 5 and quash the convictions in respect of those counts. It is submitted that no new trial order should be made bearing in mind the history of this matter and the fact that the appellant was released to parole on 3 June 2024. As noted above, while the sentence imposed by Whitford SC DCJ does not expire until 4 September 2030, the CCA quashed the convictions in respect of counts 1 and 4 and it was ordered that the appellant be re-sentenced in respect of the remaining two convictions (counts 2 and 5). It may be expected that the aggregate sentence of 12 ½ years would be significantly reduced on re-sentence.

PART IX. TIME ESTIMATE

9.1 It is estimated that 1.5 hours are required for the presentation of the appellant's oral argument.

Dated: 24 July 2025

Stephen Odgers SC
Counsel for the Appellant
Forbes Chambers
Telephone: (02) 9390 7777
Email: odgers@forberschambers.com.au

Sophie Anderson
Counsel for the Appellant
Commercial Bank Chambers

ANNEXURE A:
LIST OF STATUTES AND STATUTORY INSTRUMENTS

The appellant sets out below a list of the statutes and statutory instruments referred to in these submissions.

No.	Title	Version as at relevant date
	Statutes	
1.	*Criminal Procedure Act 1986* (NSW) – s293	Historical version as 1 January 2010 – 10 November 2012
2.	*Criminal Procedure Act 1986* (NSW) – s 294	Current