HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No. S92/2025

BETWEEN:

WHS
Appellant

and

The King
Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE APPELLANT

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

Part II: OUTLINE OF APPELLANT'S ORAL SUBMISSIONS

1. The primary issue raised under ground 1 is the correct construction of what at the time of the appellant's trial was s 293(6)(a) of the NSW *Criminal Procedure Act 1986* (JBA 8-9) and which when first enacted in 1981 was s 409B(5)(a) *Crimes Act 1900* (JBA 21-2) and is currently s 294CB(6)(a) *Criminal Procedure Act 1986*.

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2. The critical words in s 293(6)(a) are "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 … a lack of sexual experience, of a general or specified nature …".

3. Prior to the appellant's trial, defence counsel submitted that this provision would be engaged because evidence would be adduced that the complainant was 9 years old when she first gave an account of the alleged offences to the police in November 2012 and the jury would infer from this that, if those offences were not committed, she lacked sexual
20 experience sufficient to fabricate the account she gave to the police (ABFM, vol 1, 29.10, 36.20, 45.40). The Crown Prosecutor contended it would not be engaged because lack of sexual experience would not be "explicitly raised during the trial" by the prosecution (ABFM, vol 1, 49.1). Traill DCJ accepted the prosecution submission, noting that the Crown Prosecutor would make no 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 vol 1, 97 [123]). In the CCA, Fagan J accepted that there was "a real risk" that the jury would infer a lack of prior sexual experience from the complainant's age but also held that the provision had not been engaged because the Crown Prosecutor had not presented the prosecution case so as to "effectively invite" the jury to draw an inference about lack of prior sexual experience
30 or activity on the basis of age (CAB 134, [37]-[38]).

4. The issue of construction, then, is whether the provision is engaged not only where the Crown Prosecutor says something to the jury to invite the inference on the basis of age but

also where the evidence adduced in the prosecution case makes it likely, or at least creates a real risk, that the jury will draw the inference.

5. The appellant's argument is that there are these two alternative ways in which it may be "disclosed or implied in the case for the prosecution … that the complainant has or may have … a lack of sexual experience". To support that construction, we have advanced the various arguments at AWS [6.6]. They are in no particular order and we do not give priority to any particular argument. We submit they all support the construction for which we contend.

10 6. As regards arguments pointing to the construction that the primary judge and the CCA have adopted, the primary one appears to be a proposition that the words "the case for the prosecution" imply the putting of a case by the Crown Prosecutor in submissions to the jury. We say that is an unduly restrictive construction of those words.

7. The respondent has deployed an argument at RS [52] relying on s 293(3) to contend that the age of a child "is not inadmissible evidence to which s 293(3) is directed" and it would be "incoherent" to accept that such evidence is "not inadmissible" under s 293(3) but nonetheless satisfied the requirements of s 293(6)(a). We have replied in detail to that argument in our Reply at [4]-[7]. We say the argument is flawed for at least three reasons,
20 as explained in the Reply. An aspect of our argument is that we say that the case for the prosecution is not established by any one piece of evidence but the overall effect of all the evidence adduced by the prosecution. Thus, adducing evidence that the complainant was very young would not imply lack of sexual experience if other evidence adduced by the prosecution tended to establish sexual experience or there was an agreed fact to that effect.

8. The respondent has also argued at RS [54] (consistently with what was put to Traill DCJ: ABFM, vol 1, 49.2) that the construction advanced by the appellant would mean that every young child complainant could be cross-examined about their prior sexual experience if the court was satisfied the accused might suffer unfair prejudice. We have replied to that at Reply
30 [8] pointing out that that would not be the case where, as in *Munn v R; Miller v R*, other prosecution evidence showed that "the complainant did not lack [sexual] experience" and, in

any event, the defence would need to establish in the absence of the jury that there was in fact evidence of prior sexual experience as well as unfair prejudice to the accused if the cross-examination was not permitted.

9. If the appellant's construction is accepted and s 293(6)(a) was engaged in the present case, the evidence summarised at AWS [5.6] supported a conclusion that the appellant "might be unfairly prejudiced if the complainant could not be cross-examined" about her prior sexual experience (s 293(6)(b)). We adopt the conclusion of the first CCA judgment (ABFM, vol 1, 18 [47]) that the complainant's prior sexual experience could provide an (innocent) explanation for her ability to describe sexual acts of the kind alleged against the appellant in November 2012. That also supports a finding required under s 293(4), for the purposes of the application of s 293(4)(f), that the probative value of the evidence would outweigh "any distress, humiliation or embarrassment that the complainant might suffer as a result of its admission" (JBA, 9).

10. Traill DCJ erred and a substantial miscarriage of justice resulted. In the unusual circumstances of this case, there should not be a third trial in respect of counts 2 and 5. The Crown failed to disclose the evidence of prior sexual experience until after the first trial in 2014. The Crown conceded the first appeal in 2020 on that basis (ABFM, vol 1, 7[6], 13[32]) and placed no reliance on s 293 (with the consequence that any resolution of potential s 293 issues would be delayed). Then the Crown prior to the second trial relied on s 293 in order to successfully oppose admission of all the evidence of prior sexual experience despite the unfair prejudice thereby caused to the appellant at the second trial. By the time of the second CCA appeal in 2024 the appellant had been released to parole. The Crown should not be given the opportunity of a third trial. The appropriate order is acquittal.

11. As regards ground 2, the appellant relies on the written submissions.

Stephen Odgers SC
Counsel for the Appellant

Sophie Anderson