HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, KEANE, NETTLE AND EDELMAN JJ

MARCO CHIRO APPELLANT

AND

THE QUEEN RESPONDENT

Chiro v The Queen
[2017] HCA 37
13 September 2017
A9/2017

ORDER

1. *Appeal allowed in part.*

2. *Set aside the order of the Court of Criminal Appeal of the Supreme Court of South Australia made on 30 September 2015 in SCCRM-15-232, and in its place order that the appeal against sentence be allowed and the sentence be set aside.*

3. *Remit the proceeding to the Court of Criminal Appeal of the Supreme Court of South Australia for the appellant to be resentenced in accordance with the reasons of this Court.*

4. *Appeal otherwise dismissed.*

On appeal from the Supreme Court of South Australia

Representation

M E Shaw QC with B J Doyle for the appellant (instructed by Wallmans Lawyers)

C D Bleby SC, Solicitor-General for the State of South Australia with B Lodge for the respondent (instructed by Director of Public Prosecutions (SA))

CATCHWORDS

Chiro v The Queen

Criminal law – Offence of "[p]ersistent sexual exploitation of a child" – *Criminal Law Consolidation Act* 1935 (SA), s 50 – Where offence comprised of two or more acts of sexual exploitation separated by not less than three days – Where jury required to be unanimous (or agreed by statutory majority) as to same two or more acts of sexual exploitation – Where alleged acts of sexual exploitation ranged from kissing in circumstances of indecency to inserting penis into complainant's mouth – Where jury returned general verdict of guilty by statutory majority – Where not known which alleged acts of sexual exploitation jury agreed had been proved by prosecution – Whether conviction uncertain – Whether judge should have requested special verdict – Whether, after general verdict returned, judge should have asked questions of jury to identify acts of sexual exploitation found to be proved – Whether appellant should have been sentenced on view of facts most favourable to appellant in circumstances where factual basis of jury's verdict unknown.

Words and phrases – "acts of sexual exploitation", "actus reus", "course of conduct offence", "extended unanimity", "general verdict", "jury directions", "persistent sexual exploitation of a child", "special questions", "special verdicts".

Criminal Law Consolidation Act 1935 (SA), s 50.

1 KIEFEL CJ, KEANE AND NETTLE JJ. The principal question for decision in this appeal is whether, where an accused is tried before a judge and jury on a count of "[p]ersistent sexual exploitation of a child" contrary to s 50(1) of the *Criminal Law Consolidation Act* 1935 (SA) ("the CLCA"), the judge should request that the jury return a special verdict or, if the jury returns a general verdict of guilty of the offence, whether the judge should question the jury to identify the underlying acts of "sexual exploitation" which the jury found to be proved. For the reasons which follow, in such circumstances, a judge should not request the jury to return a special verdict but, if the jury returns a general verdict of guilty, the judge should request that the jury identify the underlying acts of sexual exploitation that were found to be proved unless it is otherwise apparent to the judge which acts of sexual exploitation the jury found to be proved.

The facts

2 The appellant was charged with an offence of persistent sexual exploitation of a child under s 50(1) of the CLCA. The period to which the charge related was 1 July 2008 to 19 November 2011. The appellant is a former high school teacher. From 2000, he taught at the middle-school campus of a high school in Adelaide. The complainant was a student in a class taught by the appellant and was also supervised by the appellant in the completion of a major project. Although the complainant moved to the senior-school campus of the high school in the latter part of the period to which the s 50(1) charge relates, she continued to attend at the middle-school campus ostensibly to obtain assistance from the appellant with respect to her Italian studies. The prosecution alleged that conduct of a sexual nature commenced in 2008, when the complainant was in Year 9. The conduct was alleged to have commenced with kissing, first with a "quick peck on the lips" and subsequently a "longer, open-mouthed kiss". The conduct was said to have become more intimate. It was alleged to have progressed to a point where the appellant digitally penetrated the complainant and she masturbated and fellated him.

3 The appellant was initially charged with four separate offences, contrary to ss 49(5) (unlawful sexual intercourse), 56 (aggravated indecent assault) and 58 (procuring an act of gross indecency) of the CLCA. He was convicted by a majority verdict on one count of aggravated indecent assault but his appeal from that conviction was allowed[1]. At the retrial, the Director of Public Prosecutions filed a fresh information charging the appellant with one offence of persistent sexual exploitation of a child contrary to s 50(1) of the CLCA. The information

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1 *R v C, M* (2014) 246 A Crim R 21.

on which the retrial proceeded particularised the acts comprising the offence as follows:

> "1. kissing [the complainant] on the lips, on more than one occasion,
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> 2. touching [the complainant's] vagina, on more than one occasion,
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> 3. touching [the complainant's] breasts, on more than one occasion,
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> 4. inserting his finger into [the complainant's] vagina,
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> 5. causing [the complainant] to touch his penis, and
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> 6. inserting his penis into [the complainant's] mouth."

Section 50 of the CLCA

4 The sub-section prescribing the offence of persistent sexual exploitation of a child, s 50(1), requires only two acts of sexual exploitation separated by three or more days for the offence to be complete. It provides:

> "An adult person who, over a period of not less than 3 days, commits more than 1 act of sexual exploitation of a particular child under the prescribed age is guilty of an offence.
>
> Maximum penalty: Imprisonment for life."

5 The prescribed age is 18 years in the case of an accused who is in a position of authority in relation to the child; and 17 years in any other case[2]. A teacher is a person in a position of authority[3].

6 Section 50(2) defines an "act of sexual exploitation" for the purposes of s 50(1) as follows:

> "a person commits an act of sexual exploitation of a child if the person commits an act in relation to the child of a kind that could, if it were able to be properly particularised, be the subject of a charge of a sexual offence."

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2 *Criminal Law Consolidation Act* 1935 (SA), s 50(7).

3 *Criminal Law Consolidation Act*, s 50(8)(a).

7 Section 50(7) defines "sexual offence" by reference to other offence provisions contained in the CLCA, including in Pt 3, Div 11 (Rape and other sexual offences). It was the prosecution case that the acts described in Particulars 1, 2, 3 and 5 each amounted to an indecent assault, contrary to s 56 of the CLCA, and the acts described in Particulars 4 and 6 amounted to unlawful sexual intercourse, contrary to s 49 of the CLCA.

8 An information charging an offence under s 50(1) is not required to contain the level of particularity which is demanded by the common law. Section 50(4) sets out the particulars required as follows:

> "Despite any other Act or rule of law, the following provisions apply in relation to the charging of a person on an information for an offence against this section:
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> (a) subject to this subsection, the information must allege with sufficient particularity –
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> (i) the period during which the acts of sexual exploitation allegedly occurred; and
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> (ii) the alleged conduct comprising the acts of sexual exploitation;
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> (b) the information must allege a course of conduct consisting of acts of sexual exploitation but need not –
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> (i) allege particulars of each act with the degree of particularity that would be required if the act were charged as an offence under a different section of this Act; or
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> (ii) identify particular acts of sexual exploitation or the occasions on which, places at which or order in which acts of sexual exploitation occurred;
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> (c) the person may, on the same information, be charged with other offences, provided that any sexual offence allegedly committed by the person –
>
> (i) in relation to the child who is allegedly the subject of the offence against this section; and
>
> (ii) during the period during which the person is alleged to have committed the offence against this section,

must be charged in the alternative."

9 Section 50(5) provides that a person who has been tried and convicted or acquitted of an offence against s 50(1) may not be convicted of a sexual offence against the same child alleged to have been committed during the period during which the person was alleged to have committed the offence of persistent sexual exploitation of the child.

The directions and verdict

10 In the course of her summing up to the jury, the trial judge (Judge Davison) twice directed the members of the jury that it would be sufficient to prove the offence under s 50(1) if they were satisfied to the requisite standard that the appellant had kissed the complainant on more than one occasion within the relevant period in circumstances of indecency. Those directions occurred in the context of what her Honour described as the "third element" of the offence, which she explained required that the prosecution prove beyond reasonable doubt that two or more of the acts particularised in the information as acts of sexual exploitation took place over a period of not less than three days.

11 The judge commenced her discussion of the evidence by reference to the alleged acts of kissing. She then said to the jury:

> "If you were satisfied that the [appellant] had kissed [the complainant] on more than one occasion separated by three days, and that these kisses amounted to indecent assaults as I have described to you, that is, assaults occurring in circumstances of indecency, having some sexual connotation, then that alone would be sufficient to prove this element of the offence."

12 The judge thereafter pointed out that there was other conduct alleged, and her Honour proceeded to discuss the evidence relating to the other particularised acts. Towards the end of her discussion of the third element, her Honour explained that:

> "In order to be satisfied of this element, you must be satisfied that two or more acts contained within the particulars 1-6 have occurred and be satisfied of that beyond reasonable doubt. It may be that you are satisfied that there was an act of fellatio and an act of kissing on one or more occasions. If these two events were separated by three days and if you are satisfied that the act of kissing amounted to an act of the indecent assault and the act of fellatio the offence of unlawful sexual intercourse, then this element would be proven.
>
> Alternatively, you may be satisfied that he kissed her in a way that amounted to an indecent assault on two or more occasions separated by

three days and that would suffice for proof of this element. What I am trying to illustrate is that it could be that you are all satisfied that he kissed her on more than one occasion in circumstances of indecency or that he kissed her on one occasion and caused her to touch his penis, or kissed her on one occasion and inserted his penis into her mouth. Any combination will suffice as long as you are all agreed on which acts constitute this element."

13 In the second day of deliberations, the jury asked a question of the judge. The question was not recorded, but there is no dispute that the jury enquired whether they would be asked for a verdict on indecent assault and a verdict on unlawful sexual intercourse. When the judge then raised the issue with counsel, counsel for the appellant stated that, if the jury returned a verdict of guilty, she would ask for a special verdict. The judge responded that no special verdicts would be taken. Her Honour stated that the South Australian Court of Criminal Appeal in the case of *R v N, SH*[4] had said that special verdicts should not be taken in relation to a charge under s 50(1) of the CLCA. The jury were thereafter directed to the effect that "there is one charge before this court, that is persistent sexual exploitation of a child. That's what you have to decide in this matter." The jury returned a verdict of guilty.

Sentencing

14 The judge rejected a submission for the appellant that he should be sentenced on the basis that the offence was made out only by the acts of kissing amounting to indecent assaults. Her Honour concluded that the appellant must be sentenced on the basis of those facts of which she was satisfied beyond reasonable doubt and which were consistent with the verdict of the jury. Her Honour stated that "[t]he very nature of the offence of persistent sexual exploitation of a child means that there has been a course of conduct of sexual abuse that has occurred over a period of time involving a range of conduct".

15 The judge stated that she accepted the evidence of the complainant beyond reasonable doubt, rejected the appellant's denials of the alleged conduct, and considered that the appellant should be sentenced on the basis that he had committed each of the acts particularised in the information. Her Honour observed that the appellant's offending involved a range of behaviours including offences of unlawful sexual intercourse involving fellatio and digital penetration. On that basis, her Honour identified the starting point[5] as a sentence of 10 years'

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4 [2010] SASCFC 74.

5 See *R v D* (1997) 69 SASR 413 at 424 per Doyle CJ (Bleby J agreeing at 431).

imprisonment and said that she saw no reason to reduce that term. A non-parole period of six years was set.

Proceedings before the Court of Criminal Appeal

16 The Court of Criminal Appeal[6] (Vanstone J, Kelly J and David AJ agreeing) dismissed the appellant's appeal against conviction and appeal against sentence. The Court rejected the appellant's contention that the trial judge had been in error in not taking a special verdict or asking questions of the jury after the general verdict was returned. The Court applied[7] what it considered had been said by the Court of Criminal Appeal of the Supreme Court of New South Wales in *R v Isaacs*[8] and by this Court in *Cheung v The Queen*[9] as to the considerations that militate against asking "special questions" of a jury to ascertain the factual basis of a verdict. Those considerations included[10]:

> "the fact that foreshadowing a later request to be provided with the basis of the verdict might distract the jury from its task of seeking unanimity on the general verdict and might provoke unnecessary confusion and disagreement; the answers might be of themselves uncertain; in a case where a particular verdict, such as manslaughter, might be reached in different ways, different jurors might have reached the result via those different avenues; the jury might be invited to make a decision upon which there had been no thorough address by counsel; and the judge might be embarrassed if he or she did not agree with the jury's answer."

17 The Court of Criminal Appeal noted that the plurality in *Cheung* had stated[11] that there would be very few cases in which it would be appropriate or useful to ask a jury about the process of reasoning by which a verdict was reached. Their Honours noted, too, that the Court of Criminal Appeal was critical of the trial judge in *R v N, SH*[12] for taking a special verdict after a trial on

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6 *R v Chiro* (2015) 123 SASR 583.

7 *Chiro* (2015) 123 SASR 583 at 588 [16].

8 (1997) 41 NSWLR 374.

9 (2001) 209 CLR 1; [2001] HCA 67.

10 *Chiro* (2015) 123 SASR 583 at 588 [16].

11 (2001) 209 CLR 1 at 14 [18] per Gleeson CJ, Gummow and Hayne JJ.

12 [2010] SASCFC 74 at [10]-[12].

a charge against s 50(1) of the CLCA. The Court concluded[13] that there was no need for a special verdict in this case. In their Honours' view, the task of sentencing was peculiarly that of the judge: it was for the judge to sentence the appellant on the basis of such facts as she found to be proved "so long as they were not inconsistent with the verdict of the jury". In their Honours' opinion, the situation facing a sentencing judge in relation to the offence of persistent sexual exploitation of a child under s 50(1) is little, if at all, different from the situation which faces a sentencing judge upon the return of a verdict of guilty of manslaughter in circumstances where multiple possible bases for the verdict were left to the jury.

18 The Court of Criminal Appeal also rejected[14] the appellant's appeal against sentence on the ground that the sentence imposed was manifestly excessive. In reaching that conclusion, the Court had regard to the judge's findings that each of the acts particularised was proved beyond reasonable doubt and, on that basis, it was held that the sentence reflected the range of conduct committed by the appellant, as a person in a position of trust[15].

Actus reus of the offence and the extended unanimity requirement

19 As the South Australian Court of Criminal Appeal held in *R v Little*[16], applying this Court's decision in *KBT v The Queen*[17], because s 50(1) defines the offence of persistent sexual exploitation of a child to be constituted of underlying acts of sexual exploitation, in order to convict an accused of an offence against s 50(1) a jury must reach unanimous agreement (or, after four hours, must reach agreement by a requisite statutory majority[18]) that the Crown has proved beyond reasonable doubt that the accused committed the same two or more underlying acts of sexual exploitation separated by not less than three days. That

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13 *Chiro* (2015) 123 SASR 583 at 588-589 [19].

14 *Chiro* (2015) 123 SASR 583 at 591 [39].

15 *Chiro* (2015) 123 SASR 583 at 591 [35]-[38].

16 (2015) 123 SASR 414 at 417 [11], 420 [19]. See also *R v M, BJ* (2011) 110 SASR 1 at 28-30 [70], [72] per Vanstone J (Sulan J and White J agreeing at 6 [1], 41 [138]).

17 (1997) 191 CLR 417 at 422 per Brennan CJ, Toohey, Gaudron and Gummow JJ, 431, 433 per Kirby J; [1997] HCA 54.

18 See *Juries Act* 1927 (SA), s 57.

requirement was appropriately described by the Court in *Little* as a requirement for extended unanimity[19].

20 In *KBT*, this Court was concerned with an offence against s 229B(1) of the *Criminal Code* (Q) of maintaining "an unlawful relationship of a sexual nature with a child under the age of 16 years". Section 229B(1A) provided that a person was not to be convicted of an offence against s 229B(1) unless it was shown that the offender had, during the period in which the relationship was said to have been maintained, "done an act defined to constitute an offence of a sexual nature in relation to the child ... on 3 or more occasions" and evidence of the doing of any such act was "admissible and probative of the maintenance of the relationship notwithstanding that the evidence [did] not disclose the dates or the exact circumstances of those occasions". Hence, Brennan CJ, Toohey, Gaudron and Gummow JJ concluded[20]:

> "The offence created by s 229B(1) is described in that sub-section in terms of a course of conduct and, to that extent, may be compared with offences like trafficking in drugs or keeping a disorderly house. In the case of each of those latter offences, the actus reus is the course of conduct which the offence describes. However, an examination of sub-s (1A) makes it plain that that is not the case with the offence created by s 229B(1). Rather, it is clear from the terms of sub-s (1A) that the actus reus of that offence is the doing, as an adult, of an act which constitutes an offence of a sexual nature in relation to the child concerned on three or more occasions. Once it is appreciated that the actus reus of the offence is as specified in sub-s (1A) rather than maintaining an unlawful sexual relationship, it follows, as was held by the Court of Appeal, that a person cannot be convicted under s 229B(1) unless the jury is agreed as to the commission of the same three or more illegal acts."

21 Their Honours added that[21]:

> "it is convenient to note one other matter that arises out of the identification of the actus reus of the offence created by s 229B(1). As already indicated, sub-s (1A) of s 229B requires the doing of 'an act [which] constitute[s] an offence of a sexual nature … on 3 or more occasions', albeit that it does not require proof of 'the dates or the exact

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19 (2015) 123 SASR 414 at 417 [12].

20 *KBT* (1997) 191 CLR 417 at 422.

21 *KBT* (1997) 191 CLR 417 at 422-423.

> circumstances of [the] occasions' on which the acts were committed. The sub-section's dispensation with respect to proof applies only to the dates and circumstances relating to the occasions on which the acts were committed. It does not detract from the need to prove the actual commission of acts which constitute offences of a sexual nature.
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> ... [E]vidence of a general course of sexual misconduct or of a general pattern of sexual misbehaviour is not necessarily evidence of the doing of 'an act defined to constitute an offence of a sexual nature … on 3 or more occasions' for the purposes of s 229B(1A) ... [I]f the prosecution evidence in support of a charge under s 229B(1) is simply evidence of a general course of sexual misconduct or of a general pattern of sexual misbehaviour, it is difficult to see that a jury could ever be satisfied as to the commission of the same three sexual acts as required by s 229B(1A)."

22 In those respects, the offence of maintaining an unlawful sexual relationship with a child with which this Court was concerned in *KBT* is to be contrasted with the kind of offence prescribed by s 4(1) of the *Protection from Harassment Act* 1997 (UK), which provides as follows:

> "A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions."

The latter is truly a "course of conduct" offence[22] akin to, for instance, an offence of unlawful stalking contrary to s 21A of the *Crimes Act* 1958 (Vic)[23]. With offences of that kind, unparticularised evidence of an accused's conduct may be relevant and admissible as establishing a connection between various acts sufficient to amount to a "course of conduct" and there is no need to show that the individual acts which comprise the course of conduct are in themselves unlawful or constitute underlying offences[24]. By contrast, the offence at issue in

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22 See *R v Curtis* [2010] 1 WLR 2770 at 2775 [20]; [2010] 3 All ER 849 at 854; *R v Haque* [2012] 1 Cr App R 5 at 57 [33].

23 See *R v Hoang* (2007) 16 VR 369 at 389-390 [107]-[113] per Neave JA (Maxwell P and Eames JA agreeing at 370 [1], [3]); *Worsnop v The Queen* (2010) 28 VR 187 at 200 [70] per Ashley JA (Buchanan JA and Beach AJA agreeing at 189 [1], 203 [87]).

24 See, for example, *Curtis* [2010] 1 WLR 2770 at 2772 [4], 2774 [14]-[15], 2776 [23], 2778 [31]-[32]; [2010] 3 All ER 849 at 851, 853, 855, 856-857.

KBT was not a course of conduct offence properly so called, but one comprised of discrete underlying offences, more similar to the offence of unlawful stalking contrary to Ch 33A of the *Criminal Code* (Q)[25], and, therefore, was an offence that required unanimity by the jury as to each of the underlying offences found to have been proved.

23 In *Little*, the Court of Criminal Appeal reasoned that the same approach that this Court applied to s 229B(1) in *KBT* applies to s 50(1) of the CLCA, and thus that where an accused is tried on a charge under s 50(1) it is an error for the trial judge to fail to direct the jury that, in order to find the accused guilty of the offence charged, they must be agreed as to the commission of the same two or more acts of sexual exploitation separated by not less than three days[26]. In this case, that was not disputed.

24 Here, the trial judge directed the jury with respect to extended unanimity, and so it may be assumed that the jury reached the requisite agreement as to the commission of the same two or more acts of sexual exploitation separated by not less than three days. But, because the judge declined to ask the jury which of the acts of sexual exploitation they had so found to be proved, there was and is no way of knowing which they were. As has been recorded, her Honour took the view, consistently with what she perceived to be this Court's reasoning in *Cheung*, that it was her task for the purposes of sentencing to find the two or more offences that had been proved beyond reasonable doubt; and, on the basis of a very brief recitation of acceptance of the complainant's evidence as establishing guilt beyond reasonable doubt, the judge stated that she found that the appellant had committed all of the acts of sexual exploitation alleged. The appellant was sentenced accordingly.

The appellant's contentions

25 The appellant did not suggest that the plurality in *Cheung* was wrong to observe[27] that there will be "very few cases" in which it is useful to ask questions of a jury as to the process of reasoning by which a verdict was reached. But the appellant contended, in view of the peculiar nature of the offence prescribed by s 50(1) – an offence comprised of not less than two acts of sexual exploitation separated by not less than three days – and because of the requirement of

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25 See *R v Conde* [2016] 1 Qd R 562 at 568 [2]-[3] per McMurdo P, 578 [65]-[67] per Peter Lyons J (McMurdo P and Morrison JA agreeing at 568 [1], [5]).

26 (2015) 123 SASR 414 at 420 [19]-[20].

27 (2001) 209 CLR 1 at 14 [18] per Gleeson CJ, Gummow and Hayne JJ.

extended unanimity in respect of the underlying acts of sexual exploitation, that this case was one of the few cases in which it was necessary that the judge exercise the discretion to ask questions of the jury. More particularly, given the jury were directed that they need find no more than that the appellant committed two of the alleged acts of sexual exploitation, it was not the least improbable that the jury considered and found no more than that the appellant committed the two least serious acts of sexual exploitation alleged. It was, therefore, said to be necessary for the judge to take a special verdict, or at least to ask questions of the jury, to ascertain which of the underlying acts of sexual exploitation the jury found proved. The judge's refusal to do so had the result that it was impossible to say which of the alleged acts of sexual exploitation the jury had found to be proved and it followed, in the appellant's contention, that the verdict was uncertain and should be set aside.

26 Alternatively, it was submitted, inasmuch as justice required that the appellant not be punished on the basis of having committed any more of the alleged acts of sexual exploitation than the jury found to be proved[28], it was incumbent on the judge to ascertain which they were. But, as a result of the judge's refusal to take a special verdict or to ask questions of the jury, it was and is not known which of those offences the jury found to be proved. Consequently, there was a real chance that the appellant was sentenced on the basis of having committed a greater number of and more serious acts of sexual exploitation than the jury were satisfied were proved beyond reasonable doubt. It followed, it was contended, that the sentence should be quashed and the appellant should be resentenced on the basis of having committed no more than the two least serious alleged acts of sexual exploitation, which, in this case, were two offences of indecent assault constituted by kissing the complainant in circumstances of indecency.

The Crown's contentions

27 The Crown contended to the contrary that there was nothing uncertain about the jury's verdict and no basis for the taking of a special verdict. In the Crown's submission, it was clear from the verdict of guilty that the jury had found that not less than two of the alleged acts of sexual exploitation, separated by not less than three days, had been proved beyond reasonable doubt, and, on that basis, that the elements of the offence prescribed by s 50(1) had been proved beyond reasonable doubt. Nor was there any need or justification for the

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28 See *R v De Simoni* (1981) 147 CLR 383 at 389, 392 per Gibbs CJ (Mason J and Murphy J agreeing at 395), 395-396 per Wilson J, 406 per Brennan J; [1981] HCA 31.

purposes of sentencing for the judge to ask the jury to identify which of the alleged acts of sexual exploitation they found to be proved. Rather, it was contended, just as in any other case where it cannot be determined from a verdict whether a jury has found one way or the other as to facts that may be pertinent to sentencing, it was correct for the judge to find those facts herself, in accordance with *Cheung*, on a basis not inconsistent with the verdict.

Special verdicts

28 In *Cunningham v Ryan*[29], Isaacs J stated that "in strict law – apart from any statutory provision – a jury is entitled to choose in every case, civil or criminal, whether it will give a general or a special verdict, so long as it is intelligible". As was later noticed by O'Bryan J, however, in *Russell v Railways Commissioners (Vic)*[30], it may be that Isaacs J was using the expression "special verdict" as equivalent to a jury's answers to questions asked by the judge. Strictly speaking, mere answers to questions are not a verdict at all. Inasmuch as the trial judge and the Court of Criminal Appeal[31] in this case spoke in terms of a special verdict, it assists to bear that distinction in mind.

29 In a civil case, it is the jury's privilege to return a special verdict if in doubt as to a question of law, which is then left to the court to determine. The privilege was first conferred on juries in 1285 to alleviate the possibility of attaint for the falsity of a general verdict[32]. The same privilege was also accorded to criminal juries[33]. When formally drawn up, a special verdict should state the

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29 (1919) 27 CLR 294 at 297; [1919] HCA 75.

30 [1948] VLR 118 at 131. See also at 119-121 per Gavan Duffy J. See generally *R v Brown and Brian* [1949] VLR 177 at 183 per Barry J; *Otis Elevators Pty Ltd v Zitis* (1986) 5 NSWLR 171 at 181 per Kirby P, 197-199 per McHugh JA.

31 *Chiro* (2015) 123 SASR 583 at 584 [1], 585 [6], 587-589 [15], [17]-[19].

32 Statute 13 Edw I c 30. See Kennedy, *A Treatise on the Law and Practice of Juries*, (1826) at 32-33; Tidd, *The Practice of the Courts of King's Bench, and Common Pleas, in Personal Actions; and Ejectment*, 9th ed (1828), vol 2 at 896-898; Morgan, "A Brief History of Special Verdicts and Special Interrogatories", (1923) 32 *Yale Law Journal* 575 at 588-589.

33 See Chitty, *A Practical Treatise on the Criminal Law; Comprising the Practice, Pleadings, and Evidence which Occur in the Course of Criminal Prosecutions*, (1816), vol 1 at 642. See also *R v Shipley* (1784) 4 Dougl 73 at 119-121 [99 ER 774 at 798-799]; Hale, *The History of the Pleas of the Crown*, (1800), vol 2 at 301-302; Foster, *A Report of Some Proceedings on the Commission for the Trial of*

(Footnote continues on next page)

facts as found by the jury, and that the jury is in ignorance of how upon those facts the issue ought to be resolved and therefore prays the advice of the court. Isaacs J in *Cunningham* considered[34] that it did not follow from a jury's entitlement to give a special verdict that the jury should be informed of that option. Not infrequently, in civil cases, the parties may and do agree that the jury be directed to answer specific questions[35]. But the jury retains the right to bring in a general verdict. Thus, as Dixon J noted in *McDonnell & East Ltd v McGregor*[36], even where the parties are agreed as to specific questions, the proper course is to obtain a general verdict by direction in accordance with the jury's answers to the questions unless the parties are agreed that there is no objection to forgoing that formality.

30 In *Solomon and Triumph*[37], the Criminal Division of the Court of Appeal for England and Wales held that it is no longer possible for a jury in a criminal case to bring in a special verdict strictly so called: the only verdicts open to a jury in a criminal trial are general verdicts of guilty or not guilty of the offence charged. But it is to be observed that s 354(3) of the CLCA provides that:

> "Where on the conviction of the appellant the jury has found a special verdict and the Full Court considers that a wrong conclusion has been arrived at by the court before which the appellant has been convicted on the effect of that verdict, the Full Court may, instead of allowing the

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the Rebels in the Year 1746, in the County of Surry; and of other Crown Cases: to which are added Discourses Upon a Few Branches of the Crown Law, 3rd ed (1809) at 255-256, 279; Morgan, "A Brief History of Special Verdicts and Special Interrogatories", (1923) 32 *Yale Law Journal* 575 at 581, 588-590.

34 (1919) 27 CLR 294 at 297-298.

35 See generally, for example, *Ryan v Ross* (1916) 22 CLR 1; [1916] HCA 43; *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749; *Mourani v Jeldi Manufacturing Pty Ltd* (1983) 57 ALJR 825; 50 ALR 519; *Bromley v Tonkin* (1987) 11 NSWLR 211; *Skalkos v Assaf* (2002) Aust Torts Reports ¶81-644; *Law v Pinkerton* [2002] VSCA 20; *Nationwide News Pty Ltd v Aitken* [2004] NSWCA 311; *David v Abdishou* [2012] NSWCA 109.

36 (1936) 56 CLR 50 at 55-56 (McTiernan J agreeing at 63); [1936] HCA 28. See also *Jackson v The Queen* (1976) 134 CLR 42 at 45 per Barwick CJ (Mason J agreeing at 45), 47-49 per Jacobs J; [1976] HCA 16.

37 (1984) 6 Cr App R (S) 120 at 126. See also *Isaacs* (1997) 41 NSWLR 374 at 378-379.

appeal, order such conclusion to be recorded as appears to the Court to be in law required by the verdict and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law."

31 That provision contemplates that it is possible for a jury in a criminal case in South Australia to bring in a special verdict[38]. If so, it remains that it is for the jury to determine whether and when to exercise the privilege to do so. It is not for a trial judge to require a jury to bring in a special verdict.

Separate questions

32 By contrast, where a jury has returned a general verdict of guilty of an offence of persistent sexual exploitation of a child, there is nothing in principle, or necessarily in practice, to prevent the trial judge asking the jury specific questions to ascertain the basis for the verdict. As Stephen J observed in *Veen v The Queen*[39], in cases where an accused had been tried for murder and the jury returned a general verdict of guilty of manslaughter, it was the practice in England from at least 1887 for trial judges to ask specific questions of juries in order to determine the reason for their verdicts. The same applied in Queensland[40]. And although a trial judge's power so to question the jury is undoubtedly discretionary, Stephen J considered[41] that ordinarily in such cases the discretion should be exercised in favour of asking questions.

33 In *Isaacs*, the New South Wales Court of Criminal Appeal stated[42] to the contrary that, although the power to question a jury as to the basis on which it returned a verdict of manslaughter had long been acknowledged, there was "disagreement" as to the wisdom of the practice. To characterise the then present

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38 See *R v Spanos* (2007) 99 SASR 487 at 488-489 [2] per Debelle J, 496-497 [33] per Layton J (Nyland J agreeing at 492 [15]); *R v Abdulla* (2010) 200 A Crim R 365 at 373-374 [22] per Bleby J (Anderson J agreeing at 412 [154]), 405 [130] per Gray J.

39 (1979) 143 CLR 458 at 466; [1979] HCA 7. See, for example, *R v Doherty* (1887) 16 Cox CC 306 at 309. See also Morgan, "A Brief History of Special Verdicts and Special Interrogatories", (1923) 32 *Yale Law Journal* 575 at 591-592.

40 See, for example, *R v Rolph* [1962] Qd R 262 at 290 per Hanger J. See also *R v Schubring; Ex parte Attorney-General* [2005] 1 Qd R 515.

41 *Veen* (1979) 143 CLR 458 at 466-467.

42 (1997) 41 NSWLR 374 at 379.

state of authority as one of "disagreement" was, however, something of an exaggeration. In *Petroff*[43], a case that is notable as much for its early recognition of the propriety of providing juries with written directions as for its recognition of the rectitude of a sentencing judge asking a jury questions to ascertain the basis on which it found an accused to be guilty of manslaughter, Nagle CJ at CL, with whom Street CJ agreed, held that it was both permissible and appropriate for a trial judge to make such enquiries of a jury. Nagle CJ at CL stated[44] the position clearly as follows:

> "[I]t is submitted that as the question of the proper sentence to impose and the facts on which this should be based are matters for the trial judge it is wrong to seek any guidance from a jury. I cannot agree with this submission as the practice both here and in England for some years has been that juries have been asked to give the reasons for the verdict at which they arrive. But it is said that it is advisable if reasons are sought that they should be informed that they need not comply with the request. It is only necessary to refer to the judgment of Stephen J in *Veen* and the cases therein cited. Other illustrations of the practice are to be found in *Storey* [1931] NZLR 417, at p 439; and *Curry* [1969] NZLR 193, at p 208."

34 Roden J dissented for reasons which his Honour stated thus[45]:

> "This requirement of the jury that they answer the manslaughter questions separately, and the terms in which the requirement was made, seem to be open to a number of objections:
>
> 1. The requirement called for a unanimity as to grounds, which the law does not require; and could, as suggested above, have led to an inappropriate verdict, or an inappropriate failure to return a verdict.
>
> 2. It added needlessly to what was already a difficult and complex task for the jury.
>
> 3. It is contrary to the principle that the jury's verdict should be taken, without reason or explanation being sought.

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43 (1980) 2 A Crim R 101.

44 *Petroff* (1980) 2 A Crim R 101 at 122 (citation omitted).

45 *Petroff* (1980) 2 A Crim R 101 at 135.

4. In the terms in which the requirement was made, it improperly, in my view, suggested to the jury before verdict that it was their function, in certain circumstances, to give guidance as to sentence.

5. In any event, it is contrary to the principle that for sentencing purposes it is for the trial judge to make his own findings of fact, consistent with the jury's verdict."

His Honour added that:

> "There is no other field of criminal law within which judges adopt the practice of seeking the assistance of jurors in this way when it comes to establishing the appropriate factual basis for sentencing. I do not believe that manslaughter verdicts should be made an exception to this general rule. Neither Stephen J's remarks [in *Veen*], nor the authorities to which he referred, require this."

35 Notwithstanding Roden J's dissent in *Petroff*, in *Low*[46], Lee CJ at CL, with whom McInerney J and Sharpe J agreed, reaffirmed the appropriateness of a trial judge asking questions of a jury as to the basis on which it found an accused not guilty of murder but guilty of manslaughter. After referring to the remarks of Stephen J in *Veen*, Lee CJ at CL continued:

> "In the light of the statement which I have just read, it seems to me that the judges of this Court should adopt the practice in all cases where provocation and diminished responsibility are raised – and also, I would say in cases where manslaughter by unlawful and dangerous act and manslaughter by provocation, or manslaughter by diminished responsibility are raised – of telling juries that they will be asked upon what basis the verdict of manslaughter was found. Asking that question equips the judge with the jury's finding in cases where provocation and diminished responsibility are raised as defences, for each has the very significant legal effect of reducing a crime of murder to a crime of manslaughter."

36 Thus stood the state of authority in New South Wales until *Isaacs* was decided. In that case, however, the New South Wales Court of Criminal Appeal, comprised of Gleeson CJ, Mason P, Hunt CJ at CL, Simpson and Hidden JJ, stated[47], contrary to what had been held in *Petroff* and *Low*, that the following

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46 (1991) 57 A Crim R 8 at 15-16 (McInerney J and Sharpe J agreeing at 19).

47 *Isaacs* (1997) 41 NSWLR 374 at 379-380.

considerations should lead trial judges to refrain from questioning a jury as to the basis of a verdict of manslaughter save in exceptional circumstances:

> "First, to inform the jury, in the course of a summing-up, that they will later be invited to answer a question, or questions, as to the basis of the verdict, may distract them from their task of seeking unanimity on a general verdict, and provoke unnecessary confusion and disagreement as to the basis of the verdict.
>
> Secondly, the jury's response to any such question may be unclear. A response that indicated two grounds of decision might, depending upon the circumstances, indicate that the jury were unanimous on both grounds, or that some jurors adopted one ground, and the remainder adopted another. The response may create more uncertainty than previously existed.
>
> Thirdly, there may be various possible views of the evidence in a case; different jurors may adopt different views and yet, consistently with their directions, reach a common verdict. To invite them to refine their verdict may be productive of mischief.
>
> Fourthly, there is a substantial risk that the jury will be invited to make a decision upon which they have not been properly addressed by counsel. The present case provides a good example. Trial counsel never addressed the jury on provocation. Rarely would defence counsel's address to a jury be expressed in terms appropriate to a plea in mitigation.
>
> Fifthly, where there are two or more accused the jury might choose to answer the question with respect to one or more and not with respect to another or others. This would be invidious.
>
> Sixthly, the judge may be embarrassed if he or she does not agree with the jury's answer to the question.
>
> Seventhly, where two or more partial defences are advanced, if the jury were to come to a conclusion favourable to an accused on the first defence they considered, they might not consider the other or others; if that occurred, an answer to the question might convey a false impression of having considered and rejected the other or others."

37 Evidently, those observations were largely based[48] on Roden J's dissenting judgment in *Petroff*: in particular, his Honour's expressed "objections" to the

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48 See *Isaacs* (1997) 41 NSWLR 374 at 379.

practice of asking a jury to identify the basis on which it found an accused not guilty of murder but guilty of manslaughter[49]. But, whatever the force of those objections in relation to such a verdict, it is necessary to observe that they do not apply in the same way to a jury that returns a verdict of guilty of an offence of persistent sexual exploitation of a child contrary to s 50(1) of the CLCA. Inasmuch as the actus reus of the offence is comprised of discrete underlying acts of sexual exploitation that are defined by reference to sexual offences found in the CLCA, and inasmuch as the requirement of extended jury unanimity applies to each of those underlying acts of sexual exploitation, most of Roden J's objections adopted by the New South Wales Court of Criminal Appeal in *Isaacs* are in this case irrelevant.

38 In particular, the first objection – that the questions asked in cases like *Petroff* called for a degree of unanimity in the jury's reasoning process which the law did not require, and thus could have led to an inappropriate verdict, or an inappropriate failure to return a verdict – does not apply to an offence of persistent sexual exploitation of a child contrary to s 50(1) because the requirement for extended unanimity, which derives from this Court's decision in *KBT*, necessitates that the jury be unanimous as to each of the underlying acts of sexual exploitation which they find to be proved. No prospect of distraction or inappropriate verdicts arises from questioning a jury so as to identify those acts. For that reason, the submission put on behalf of the Crown that the extended unanimity requirement is of no import in relation to how facts are to be found for the purposes of sentencing cannot be accepted.

39 The second objection – that it would add "needlessly" to the task of the jury – is similarly inapplicable. Given that, in the case of an offence of persistent sexual exploitation of a child under s 50(1), each of the underlying acts of sexual exploitation is part of the actus reus of the offence, and that it is for the jury alone to find the actus reus of an offence alleged[50], it must be for the jury, and the jury alone, to determine which of the alleged acts of sexual exploitation they find to be proved. It does not add to the jury's burden to require them to state which of the alleged acts of sexual exploitation they find to be proved.

40 The third objection – that to ask such questions is "contrary to the principle that the jury's verdict should be taken, without reason or explanation being sought" – takes the matter no further. In effect, it simply reiterates the

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49 (1980) 2 A Crim R 101 at 135.

50 See *Cheung* (2001) 209 CLR 1 at 9-10 [5]-[6] per Gleeson CJ, Gummow and Hayne JJ, 28-29 [76] per Gaudron J.

dissenting view of Roden J in *Petroff*, which was adopted by the New South Wales Court of Criminal Appeal in *Isaacs*, that it is inappropriate for a trial judge to ask the jury the basis on which they returned a verdict of not guilty of murder but guilty of manslaughter. Contrary to that view of the matter, as has been seen, there was a substantial history[51] of trial judges in England, and, until *Isaacs* was decided, also in this country, asking juries in such circumstances to identify the basis on which they had found the accused to be guilty of manslaughter. It was that practice of which Stephen J expressly approved in *Veen*[52]. Further, although the practice was generally confined to ascertaining the basis of a verdict in cases of manslaughter, there were instances of it being applied in cases of other offences too[53]. And most importantly for present purposes, whether or not the practice somehow implied that it was necessary to achieve a degree of unanimity in relation to manslaughter which the law did not require, that is not so in relation to an offence of persistent sexual exploitation of a child contrary to s 50(1): the law does require extended unanimity in relation to each of the elements which constitute the offence, and thus requires extended unanimity in relation to each of the underlying acts of sexual exploitation found to be proved.

41 That is also the answer to the fourth objection – that to ask a jury to identify the basis on which an accused was found to be guilty of manslaughter "improperly" suggests that it is the jury's function, in certain circumstances, to give guidance as to the way in which the accused should be sentenced. For, a trial judge having directed the jury that they must be unanimous as to each of the underlying acts of sexual exploitation which they find to be proved, as a jury must be directed[54], the only significance which the jury would likely attribute to being told that they would be asked to identify such of the alleged acts as they find to be proved is that, because they are required to be unanimous as to the underlying acts of sexual exploitation, they are required to state which they are.

42 The same applies to the fifth objection – that it would be contrary to the principle that, for sentencing purposes, it is for the trial judge to make his or her

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51 See, for example, *R v Matheson* [1958] 1 WLR 474; [1958] 2 All ER 87; *R v Lipman* [1970] 1 QB 152; *R v Picker* [1970] 2 QB 161. See and compare *Cawthorne* [1996] 2 Cr App R (S) 445.

52 (1979) 143 CLR 458 at 465-467.

53 See, for example, *R v Warner* [1967] 1 WLR 1209 at 1213-1214 per Diplock LJ; [1967] 3 All ER 93 at 96. See generally *Archbold: Criminal Pleading, Evidence and Practice*, (2015) at 614 [5-87].

54 *Little* (2015) 123 SASR 414 at 417 [11], 420 [19]-[20].

own findings of fact consistent with the jury's verdict. As the plurality observed in *KBT*[55], an accused cannot be convicted of an offence of this kind unless the jury are agreed as to the commission of at least the requisite number of underlying acts. Each of the underlying acts of sexual exploitation comprises an element of the actus reus of the offence prescribed by s 50(1), and it is for the jury alone, not the sentencing judge, to find the acts which constitute the actus reus[56].

43 It is therefore no answer to say, as the Crown contended in this case, that, in the absence of questions being asked of the jury, a sentencing judge's consideration of the acts of sexual exploitation that might have comprised the actus reus of the offence as found will not be inconsistent with the jury's verdict because it is not known which of the alleged acts of sexual exploitation formed the basis of the verdict. To repeat, it is for the jury alone, not the judge, to find the acts which constitute the actus reus. Judges dealing with charges under s 50(1) should bear that in mind when exercising their discretion as to whether to ask questions of the jury designed to identify which of the underlying acts of sexual exploitation they have found to be proved.

44 It is true, as the Crown contended, that an offence under s 50(1) is but one single offence, albeit constituted of two or more underlying acts of sexual exploitation separated by not less than the requisite number of days, and it is also true that, despite the allegation of a multiplicity of alleged acts of sexual exploitation, the jury need be satisfied of no more than that the accused committed two of those acts separated by a period of three days. If the accused is convicted, however, the sentence to be imposed is to be determined by reference to each sexual offence which the alleged acts of sexual exploitation would constitute if charged separately, as if the accused had been convicted of each of those offences[57]. For that reason, the principle laid down in *R v De Simoni* is

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55 (1997) 191 CLR 417 at 422-423 per Brennan CJ, Toohey, Gaudron and Gummow JJ.

56 See *Kingswell v The Queen* (1985) 159 CLR 264 at 274-276, 280-281 per Gibbs CJ, Wilson and Dawson JJ, 282-283 per Mason J, 287-289 per Brennan J, 321-322 per Deane J; [1985] HCA 72. See also *R v Courtie* [1984] AC 463 at 466-468, 472-473 per Lord Diplock (Lord Fraser of Tullybelton, Lord Scarman, Lord Roskill and Lord Bridge of Harwich agreeing at 473-474); *R v Kidd* [1998] 1 WLR 604 at 607; [1998] 1 All ER 42 at 44-45.

57 See *D* (1997) 69 SASR 413 at 420-421 per Doyle CJ, 428-429, 430 per Bleby J. See also *ARS v The Queen* [2011] NSWCCA 266 at [231]-[233] per Bathurst CJ (James J and Johnson J agreeing at [236], [237]).

instructive[58]. Plainly, an accused is not to be sentenced for an offence which the jury did not find the accused to have committed. Insofar as *R v N, SH*[59] held to the contrary, it should no longer be followed.

45 The passage in *Cheung*[60] to which the Court of Criminal Appeal referred[61] does not gainsay that. In that case, it was noted that there had been some discussion in the course of oral argument about whether the trial judge could or should have questioned the jury as to the process of reasoning by which they came to their verdict. But the point assumed no importance in the reasoning on the appeal. The trial judge had not been asked to do so and it was not suggested that he should have done so of his own motion. Gleeson CJ, Gummow and Hayne JJ merely remarked that there would be very few cases in which it would be appropriate to do so, for the reasons given in *Isaacs*. So understood, *Cheung* does not stand as authority for the proposition that questions should not be asked of a jury and in any event *Cheung* did not concern an offence such as that arising under s 50(1) of the CLCA.

The verdict and questions in this case

46 In this case, the judge was right not to direct the jury to bring in a special verdict, and the jury's general verdict of guilty of the offence charged was not uncertain. This was a case, however, in which, after the jury had returned the general verdict, the judge should have exercised her discretion to ask the jury to specify which of the particularised acts of sexual exploitation they were agreed had been proved. For the reasons stated, the considerations which the Court of Criminal Appeal identified as weighing against the exercise of that discretion were inapposite in the context of an offence under s 50(1) of the CLCA[62].

47 There was also nothing to prevent the judge directing the jury before they retired to consider their verdict that, if they reached a verdict, they would be asked whether they found the accused guilty or not guilty of the offence charged and, if their verdict was guilty, they would be asked to state which of the alleged

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58 (1981) 147 CLR 383 at 389 per Gibbs CJ (Mason J and Murphy J agreeing at 395), 395-396 per Wilson J, 406 per Brennan J.

59 [2010] SASCFC 74 at [11].

60 (2001) 209 CLR 1 at 14 [18] per Gleeson CJ, Gummow and Hayne JJ.

61 *Chiro* (2015) 123 SASR 583 at 588 [16].

62 *Chiro* (2015) 123 SASR 583 at 588 [18].

acts of sexual exploitation they were unanimously agreed (or agreed by statutory majority) had been proved. It would have been appropriate for her Honour to do so. Such an instruction would also have been aided by listing each of the acts of sexual exploitation particularised in the information on the aide memoire of the elements of the offence that was issued to the jury, so as to enable the jury, as it were, to tick off each of the alleged acts of sexual exploitation that they were agreed had been committed. Of course, in cases in which the alleged acts of sexual exploitation are not as clearly particularised as they were here, or in cases where the evidence of the complainant and the conduct of the trial involves allegations of a more general nature, a trial judge might need to adapt the form of his or her questions commensurate with the detail of the acts alleged.

48 Counsel for the Crown submitted that so to direct the jury would or could wrongly have conveyed to the jury that they could not convict the appellant of the offence charged unless they were agreed on all of the alleged acts of sexual exploitation, or would or could have wrongly conveyed to the jury that, despite having reached agreement that the appellant had committed two or more of the alleged acts of sexual exploitation, the jury were required to persist in endeavouring to reach agreement as to the remaining allegations. And in counsel's submission, so to influence the jury would have tended to engender uncertainty amongst them and thus to dissuade them from convicting the appellant of the offence charged when the evident object of s 50(1) was to minimise uncertainty and so increase the prospects of conviction in cases in which a complainant is unable to attest to the underlying acts of sexual exploitation with the same particularity as was previously required.

49 Those submissions should be rejected. If a judge directs a jury that, in order to convict an accused of an offence under s 50(1) of the CLCA, the jury need not be satisfied of anything more than that the accused committed at least two of the alleged acts of sexual exploitation separated by the requisite period of time, but that they cannot find that the accused committed an alleged act of sexual exploitation unless they are agreed that the commission of that act has been proved beyond reasonable doubt, the jury will be made to understand, as they should, that they cannot find that the accused committed an offence against s 50(1) unless they are satisfied that he or she committed not less than two of the alleged acts of sexual exploitation and that they cannot find that he or she committed any of the alleged acts of sexual exploitation unless they are agreed that that alleged act has been proved beyond reasonable doubt. In those circumstances, there is no reason to suppose that, by the judge then telling the jury that if they return a verdict of guilty of the offence charged they will be asked to state which of the alleged acts of sexual exploitation they are agreed have been proved, the jury would be caused to think that they could not convict the accused of the offence charged without finding that more than two of the alleged acts of sexual exploitation have been committed. And if, against the

odds, a judge were to conclude that it might have that effect, the judge could rapidly dispel that possibility by repeating the admonition that, in order to convict, it is not necessary to find more than two of the alleged acts of sexual exploitation separated by the requisite period of time. Alternatively, or as well, a judge might choose to explain to the jury[63] that, although any combination of two or more of the alleged acts of sexual exploitation separated by the requisite period of time would be sufficient to find the accused guilty of the offence under s 50(1), if they do find the accused guilty of that offence they will be asked which of the acts of sexual exploitation they found to be proved in order to assist the court with the sentencing process.

50 Possibly it is true, as the Crown contended, that so to direct a jury might increase the possibility of the jury answering that they were agreed as to no more than two of the alleged acts of sexual exploitation, and, because a judge could not then make findings as to the other alleged acts, might increase the possibility of an accused being sentenced on the basis of having committed no more than two of the acts of sexual exploitation. In counsel's submission, that would be productive of injustice in a case where it was proved beyond reasonable doubt that the offender had committed more than two of the alleged acts of sexual exploitation, but the jury did not deliberate in respect of more than two of those allegations, particularly given the stipulation in s 50(5) of the CLCA that a person who has been tried and convicted or acquitted of a charge of persistent sexual exploitation of a child may not be convicted of a sexual offence against the same child alleged to have been committed during the period to which the offence of persistent sexual exploitation of that child related.

51 That submission should also be rejected. By the adoption of the form of the offence prescribed in s 50(1), Parliament has signified that the actus reus of the offence of persistent sexual exploitation of a child is comprised of discrete underlying acts of sexual exploitation and that an accused is not to be convicted or sentenced on any basis other than having committed only those acts of sexual exploitation which the jury are agreed have been proved. Consequently, whether or not that may be productive of a risk of injustice of the kind contended for by the Crown is essentially beside the point. The risk is also overstated. It is in the hands of the Crown to avoid, or at least substantially mitigate, the risk by taking care not to allege in one information a greater number or diversity of alleged acts of sexual exploitation, or a greater period of offending, than will enable the jury effectively to concentrate on each of the alleged acts of sexual exploitation and decide upon them individually, as the legislation requires them to do, rather than

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63 See, for example, *Mills, Sinfield and Sinfield* (1985) 17 A Crim R 411 at 415-416 per Street CJ (Mahoney JA agreeing at 429).

being inclined to switch off from that task because of an overly large number of alleged acts or an overly large period of alleged offending.

The sentence in this case

52 Since *Cheung*, this Court has taken the view that, generally speaking, a judge is not required to sentence on a view of the facts most favourable to an offender, but should make his or her own findings as to the aggravating and mitigating circumstances of the offence of which the offender has been convicted[64]. But in the case of an offence under s 50(1) of the CLCA, the position is different. Where an accused stands trial before a jury for an offence of a continuing nature, such as, for example, trafficking a prohibited drug over a period of time[65], the jury need not be unanimous (or agreed by statutory majority) as to each of the particular acts which are alleged to have comprised the actus reus of the offence. But, as already stated, in the case of an offence under s 50(1) of the CLCA the underlying acts of sexual exploitation are the actus reus of the offence and it is for the jury to find the acts which comprise the actus reus. Otherwise, it would not be a trial by jury[66]. Of course, as has been observed, a jury cannot be compelled to explain the basis of its verdict[67]. Consequently, where a jury returns a verdict of guilty of a charge of persistent sexual exploitation of a child contrary to s 50(1) and the judge does not or cannot get the jury then to identify which of the alleged acts of sexual exploitation the jury found to be proved, the offender will have to be sentenced on the basis most favourable to the offender.

53 In this case, since the judge did not ascertain which of the alleged acts of sexual exploitation the jury were agreed were proved, the appellant should have been sentenced on the view of the facts most favourable to the appellant: that the jury had convicted the appellant of persistent sexual exploitation of the

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64 *Cheung* (2001) 209 CLR 1 at 9-11 [5]-[10], 24-25 [55] per Gleeson CJ, Gummow and Hayne JJ; *Filippou v The Queen* (2015) 256 CLR 47 at 72 [70] per French CJ, Bell, Keane and Nettle JJ; [2015] HCA 29.

65 See *Giretti* (1986) 24 A Crim R 112; *R v McCulloch* (2009) 21 VR 340 at 345-346 [14]-[17]; *Mustica v The Queen* (2011) 31 VR 367 at 374-375 [30]-[33] per Ashley JA (Bongiorno JA and Hansen JA agreeing at 385 [94], [95]). See also *R v Kovacs* [2009] 2 Qd R 51 at 70 [40]-[41] per Muir JA (de Jersey CJ and Fraser JA agreeing at 61 [1], 85 [108]).

66 *Kidd* [1998] 1 WLR 604 at 607; [1998] 1 All ER 42 at 44-45.

67 See generally *Otis Elevators* (1986) 5 NSWLR 171 at 199-201 per McHugh JA.

complainant on the basis of having committed no more than the acts of sexual exploitation alleged in Particular 1, namely, kissing the complainant on more than one occasion in circumstances of indecency. In fact, as will be recalled, the judge had expressly directed the jury that it was open to find the appellant guilty on that basis. The appellant was sentenced, however, as if he had been found to have committed all of the alleged acts of sexual exploitation. The sentence imposed was therefore not only infected by error, but also manifestly excessive.

Conclusion and orders

54 In the result, the appellant's appeal against the Court of Criminal Appeal's rejection of his appeal against conviction should be dismissed. The appellant's appeal against the rejection of his appeal against sentence should, however, be allowed. The sentence should be set aside and the matter should be remitted to the Court of Criminal Appeal for the appellant to be resentenced.

55 BELL J. The factual background and procedural history, which I am grateful to adopt, are set out in the joint reasons of Kiefel CJ, Keane and Nettle JJ. I agree with the orders that their Honours propose.

56 The offence of persistent sexual exploitation of a child under s 50 of the *Criminal Law Consolidation Act* 1935 (SA) ("the CLCA") ranks among the most serious offences in the criminal calendar. It is punishable by life imprisonment. The actus reus of the offence is the commission of more than one act of sexual exploitation of the same child over a period of not less than three days. An act only qualifies as an act of sexual exploitation if it is an act that, were it able to be properly particularised, could be the subject of a charge of a sexual offence[68]. The inability to properly particularise is addressed in s 50(4)(b), which provides that the Information need not be pleaded with the degree of particularity that would be required if the act were charged as an offence under another section of the CLCA. It suffices if the prosecution avers with sufficient particularity the period during which the acts of sexual exploitation are alleged to have occurred and the conduct on which the prosecution relies as comprising the acts of sexual exploitation[69]. The latter requirement does not necessitate the identification of particular acts of sexual exploitation or the occasions on which, or places at which, or the order in which, acts of sexual exploitation occurred[70].

57 The evident purpose of the creation of the offence is to permit the prosecution of offenders in cases in which the pattern of abuse is such that the child is unable to differentiate one act of sexual exploitation from another[71]. The selection of the charge is within the discretion of the Director of Public Prosecutions and it is not argued that the capacity to particularise acts of sexual exploitation and charge them as discrete offences, as might have been done here, precludes the bringing of a charge under s 50(1)[72].

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68 Section 50(7) defines "sexual offence" as: an offence against Pt 3, Div 11 (other than ss 59 and 61) or s 63B, 66, 69 or 72; or an attempt to commit, or assault with intent to commit, any of those offences; or a substantially similar offence against a previous enactment.

69 CLCA, s 50(4)(a).

70 CLCA, s 50(4)(b)(ii).

71 South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 25 October 2007 at 1474 (the Hon M J Atkinson, Attorney-General).

72 *Maxwell v The Queen* (1996) 184 CLR 501 at 534 per Gaudron and Gummow JJ; [1996] HCA 46; *Likiardopoulos v The Queen* (2012) 247 CLR 265 at 279-280 [37] per Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2012] HCA 37.

58 The Information charged the appellant with the sexual exploitation of AB over a period of three years and approximately four months. The acts particularised in the Information ranged from indecent kissing on the lips to more serious forms of sexual exploitation including unlawful sexual intercourse[73]. By his plea of not guilty the appellant joined issue as to the occurrence of each of the acts particularised as an act of sexual exploitation.

59 The jury was correctly directed as to the elements of the offence including the necessity for it to be unanimous (or for a statutory majority to agree after a period of deliberation of four hours or more)[74] as to the commission of at least the same two acts of sexual exploitation. The jury returned a majority verdict of guilty, signifying its satisfaction that at least two of the same acts of sexual exploitation were proved. I agree with the joint reasons that the circumstance of the verdict not disclosing which two or more acts of sexual exploitation were proved does not render the verdict uncertain.

60 I also agree with the joint reasons that the trial judge did not err in refusing to invite the jury to return a special verdict. The appellant's complaint in the Court of Criminal Appeal was not so much with this refusal as with the trial judge's failure to question the jury following the return of the verdict as to the acts of sexual exploitation which the jury found proved[75]. Vanstone J, giving the leading judgment in the Court of Criminal Appeal, considered the trial judge was right not to do so. Her Honour referred with approval to the statement in *R v*

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73 The Information stated:

> "Marco Chiro between the 1st day of July 2008 and the 19th day of November 2011 at Rostrevor, over a period of not less than 3 days, committed more than one act of sexual exploitation of [AB], a child under the prescribed age, and in relation to whom he was in a position of authority.
>
> The acts comprising the persistent sexual exploitation were:
>
> 1. kissing [AB] on the lips, on more than one occasion,
> 2. touching [AB]'s vagina, on more than one occasion,
> 3. touching [AB]'s breasts, on more than one occasion,
> 4. inserting his finger into [AB]'s vagina,
> 5. causing [AB] to touch his penis, and
> 6. inserting his penis into [AB]'s mouth."

74 *Juries Act* 1927 (SA), s 57(1).

75 *R v Chiro* (2015) 123 SASR 583 at 588 [16].

Isaacs[76] that, save in exceptional cases, trial judges should refrain from asking the jury the basis of a verdict of manslaughter. Her Honour considered that there is no relevant distinction between the return of a verdict of manslaughter in a case in which the verdict might have been returned on more than one basis, and the verdict in the appellant's case.

61 The sentencing of offenders in South Australia is governed by the *Criminal Law (Sentencing) Act* 1988 (SA), which is expressed, subject to any contrary intention, not to displace common law sentencing principles[77]. The appeal raises two issues of common law principle. The first is whether the proper exercise of discretion was against asking the jury which acts of sexual exploitation it found proved.

62 The power of the trial judge to question the jury as to the factual basis of its verdict is not in issue. Differing views have been expressed about the wisdom of doing so. The issue has tended to arise in cases in which the jury returns an alternative verdict of manslaughter. The practice was deprecated by the English Court of Criminal Appeal in *R v Larkin*[78]. A few years later, that Court modified its stance in *R v Matheson*[79]. Lord Goddard CJ proposed in *Matheson* that where manslaughter is left on the ground of diminished responsibility and some other ground, the trial judge should ask the jury whether the verdict is returned on diminished responsibility or on the other ground or both[80]. It may be, as Roden J suggested in *Petroff*[81], that the *Matheson* practice reflected the availability of special sentencing orders for offenders found to be of diminished responsibility, which were not available in the Australian jurisdictions. Be that as it may, it is evident that the *Matheson* practice was adopted in Australia, at least on occasions.

63 The difficulties that the *Matheson* practice may occasion were illustrated in *Veen v The Queen*[82]. It appears that the trial judge asked the foreman of the jury if the verdict was returned on the ground of diminished responsibility. The

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76 *R v Chiro* (2015) 123 SASR 583 at 588 [16] citing (1997) 41 NSWLR 374 at 379.

77 Section 9E(1).

78 [1943] KB 174.

79 [1958] 1 WLR 474; [1958] 2 All ER 87.

80 [1958] 1 WLR 474 at 479-480; [1958] 2 All ER 87 at 90.

81 (1980) 2 A Crim R 101 at 138-139.

82 (1979) 143 CLR 458; [1979] HCA 7.

form of the question and the foreman's answer gave rise to an aspect of the sentence which troubled Stephen J: the answer did not dispose of the issue of provocation, as the trial judge appeared to have thought it did. Stephen J's consideration of the *Matheson* practice was focussed on the need to ensure that the foreperson is capable of answering a question as to the basis of the verdict, given the absence of necessity for unanimity on the ground on which the verdict may be returned[83].

64 Difficulties of the kind that Stephen J identified in *Veen* informed the analysis in *Isaacs*. The reasons given for the conclusion that, save in an exceptional case, a trial judge should refrain from questioning the basis of a verdict of manslaughter stem from the absence of a requirement for unanimity as to the ground on which the verdict is returned. So understood, in my view the reasons are compelling and apply with equal force to the sentencing for any offence in which individual jurors may have reasoned to the conclusion of guilt upon differing bases.

65 The *Isaacs* analysis, however, has nothing to say about the desirability of asking the jury which acts of sexual exploitation it found proved following the return of a verdict of guilty on the trial of a s 50(1) offence, at which the jury is required to be agreed (either unanimously or by a statutory majority after more than four hours' deliberation) on the same two or more acts of sexual exploitation. Of the seven reasons identified in *Isaacs* for not questioning the jury as to the factual basis of its verdict[84], the first five and the seventh have no application to the trial of a s 50(1) offence in light of this requirement. The sixth reason, that the judge may be embarrassed if he or she does not agree with the jury's answer to the question, is inapt on the trial of a s 50(1) offence for the reasons explained below in dealing with the appellant's second ground of appeal.

66 The respondent submits that the proper exercise of discretion, including on the trial of a s 50(1) offence, is against questioning the jury following the return of the verdict. This, it is argued, is because the jury should not be vexed with the prospect of answering questions after it has discharged its constitutional function, and because that prospect may distract it from the performance of that function.

67 Our adversarial system of criminal justice is posited upon acceptance that jurors will understand and apply the trial judge's directions. There is no reason to apprehend that a properly directed jury would feel pressure to extend its deliberations in order to answer questions which its members were not otherwise disposed to address. Nor is there reason to apprehend difficulty in the foreperson

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83 *Veen v The Queen* (1979) 143 CLR 458 at 466-467.

84 (1997) 41 NSWLR 374 at 379-380.

being asked to identify those acts which the jury is satisfied (unanimously or by statutory majority after four hours' deliberation) the accused committed, in the event a verdict of guilty is returned. In my experience, jurors are mindful of the serious responsibility with which they are charged. I think it unlikely that, after attending to the evidence, and to counsel's submissions on the issue of whether the acts particularised in the Information occurred, jurors would find the prospect of being asked to inform the court of the outcome of their deliberations burdensome. At the trial of a s 50(1) offence in which acts of sexual exploitation of varying seriousness are particularised, the exercise of discretion following the return of a verdict of guilty will usually favour asking the jury to identify those acts which it finds proved.

68 The second issue in the appeal is whether, in circumstances in which the acts of sexual exploitation which the jury found proved are unknown, it was open to the trial judge to sentence the appellant upon a view that his culpability for the offence was to be assessed on the basis that he committed all of the acts of sexual exploitation particularised in the Information.

69 As earlier noted, the Court of Criminal Appeal considered that there was no material distinction between sentencing for a s 50(1) offence where the acts of sexual exploitation found by the jury are unknown and sentencing for manslaughter. Consistently with the principles explained in *Cheung v The Queen*[85], the Court of Criminal Appeal said that the trial judge was right to sentence the appellant on such of the facts as she found proved so long as the findings were not inconsistent with the verdict[86].

70 The principles stated in the joint reasons in *Cheung* were correctly identified by the Court of Criminal Appeal: it is the role of the judge to determine the facts relevant to sentencing, subject to the constraint that the determination must be consistent with the verdict[87]. It is the content of the constraint that is in question here. *Cheung* is an illustration of a common category of case in which the jury's verdict does not imply a finding on an issue which is nonetheless highly material in sentencing[88]. As the joint reasons in *Cheung* explain, while the nature and extent of Cheung's knowing involvement in the importation of the commercial quantity of heroin may have been of significance to some, or all, of the jurors in the process of reasoning to guilt, these were not matters on which issue was joined. They were matters on which

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85 (2001) 209 CLR 1; [2001] HCA 67.

86 *R v Chiro* (2015) 123 SASR 583 at 588 [19].

87 (2001) 209 CLR 1 at 14 [17] per Gleeson CJ, Gummow and Hayne JJ.

88 See the discussion in Thomas, *Principles of Sentencing*, (1970) at 313-314.

the verdict was silent[89]. There was one importation of heroin and issue was joined on Cheung's knowing involvement in it.

71 By contrast, the offence with which the appellant was charged was constituted by the commission of more than one act of sexual exploitation over an interval of not less than three days. The acts on which the prosecution relied to establish the offence were particularised in the Information and issue was joined as to the commission of each. The verdict establishes conclusively that the appellant engaged in the sexual exploitation of AB by the commission of at least two of the particularised acts over a period of not less than three days, and no more. To sentence the appellant on the basis that he committed all of the particularised acts upon which issue was joined is to deprive the requirement of consistency with the verdict of practical content.

72 Gibbs CJ, with whose reasons Mason and Murphy JJ agreed, in *R v De Simoni* observed that "the general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted"[90]. Recognition of this and the allied principle respecting proof of matters of aggravation led the plurality in *Kingswell v The Queen* to adopt a rule of practice requiring the factors aggravating sentence under s 235(2) of the *Customs Act* 1901 (Cth) to be pleaded in the indictment[91]. The principles enunciated in *De Simoni* and *Kingswell* cannot stand with acceptance of the respondent's submission that, absent knowing which acts of sexual exploitation were found by the jury to have been proved, it was open to the judge to sentence the appellant upon her assessment that he engaged in all of them.

73 The respondent calls in aid s 50(5), which provides that a person who has been tried and convicted or acquitted on a charge of persistent sexual exploitation of a child may not be convicted of a sexual offence against the same child that is alleged to have been committed during the period specified in the Information. The respondent points to the risk that the jury may return a verdict based upon satisfaction of the commission of the same two acts without troubling to consider the remainder, precluding the further prosecution of the offender for those acts. So much may be allowed, but that submission provides no principled reason for authorising the sentencing of an offender for acts the occurrence of which were in issue on the trial, and which are not shown to have been found adversely to the

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89 *Cheung v The Queen* (2001) 209 CLR 1 at 10 [6] per Gleeson CJ, Gummow and Hayne JJ.

90 (1981) 147 CLR 383 at 389; [1981] HCA 31.

91 (1985) 159 CLR 264 at 280 per Gibbs CJ, Wilson and Dawson JJ; [1985] HCA 72.

offender by the jury. In a case in which the complainant is able to differentiate the acts of sexual exploitation to which he or she claims to have been subject, prudence may favour charging those acts as sexual offences under other provisions of the CLCA.

74 In circumstances in which the jury was directed, relevantly, that the appellant's guilt would be established upon proof that he kissed AB in circumstances of indecency on more than one occasion, and where the jury was not asked to identify the acts of sexual exploitation that it found proved, the trial judge was constrained to sentence upon the basis that the appellant's culpability for the offence was confined to the acts of indecent kissing averred in Particular 1 of the Information.

EDELMAN J.

Introduction

75 This appeal was heard jointly with *Hamra v The Queen*[92]. Both appeals concerned an offence of persistent sexual exploitation of a child contrary to s 50(1) of the *Criminal Law Consolidation Act* 1935 (SA). On this appeal a central submission of the appellant was that the sentencing judge could not sentence him for the many acts of sexual exploitation that the sentencing judge was satisfied beyond reasonable doubt that the appellant had committed. Instead, the appellant submitted that the sentencing judge was required to sentence him on the basis of the facts that were the most favourable to him. He submitted that the facts upon which he was sentenced could only be found by the jury so that in the absence of findings by the jury, which could only have been elicited (if at all) by special questions of the jury, the sentencing judge was required to assume that he had committed the offence in the least culpable way.

76 The appellant did not refer to any case in which any Australian court had ever adopted this approach. It was rejected by three judges of this Court in 2001 and, in that context, it was described as contrary to long-standing Australian sentencing authority and practice[93]. For a time, it appeared to be a position favoured in England in limited circumstances. But the English courts also now reject it. It is an approach which could only be taken if it were found that the common law had somehow been modified by s 50.

77 The common law approach to sentencing permits a sentencing judge to find facts provided that the finding is not inconsistent with the verdict of the jury and provided that any facts found adversely to the accused are established beyond reasonable doubt. That approach was not modified by s 50 to require sentencing on a deemed basis, most favourable to an offender, if special questions are not asked. To the contrary, as I explain later in these reasons, the application of the deemed basis for sentencing proposed by the appellant would have peculiar consequences for s 50 offences. Whether or not the appellant's approach would be applied might depend, as it would in this case, upon the manner in which the prosecution chose to particularise the acts charged. The application of the approach might also depend upon the fortuity of the order in which the jury decided to answer the special questions or the time that the jury took to reach a decision. Further, the process by which the sentencing judge would determine the most favourable basis for sentencing the offender could be a fraught exercise which, on one view, would require sentencing on the basis of facts that do not correspond with either the way the case was run or the findings

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92 [2017] HCA 38.

93 *Cheung v The Queen* (2001) 209 CLR 1 at 22-23 [48]; [2001] HCA 67.

that were reasonably open to the jury. Yet, despite all of these peculiarities, the appellant could not subsequently be tried for any of the remaining acts[94]. I do not accept that s 50, properly construed, requires that approach.

78 There is an additional dimension of concern raised by the appellant's submission. Under the guise of respecting the power of the jury, the submission actually has the effect, to paraphrase Thayer[95], of taking power away from the people by effectively requiring explanations of their decisions. As a policy decision, that approach might be favoured because it would ensure that an offender would be sentenced on the most favourable basis unless told by the jury that convicted him or her of the basis for the conviction. But there are other concerns of policy involved before introducing a requirement of special questions for effective sentencing. The cost of presenting special questions to a jury might be an impairment of "the jury's power to render a general verdict without explaining itself"[96]. One reason why this has been said to be undesirable was expressed in *United States v Spock*[97] by Aldrich CJ, who said that there "is no easier way to reach, and perhaps force, a verdict of guilty than to approach it step by step".

79 It is a large change to the common law to require the balancing of these considerations in favour of requiring special questions without which, and sometimes even with which, a duty arises to sentence on a most favourable basis. That change was not made by Parliament by enacting s 50, which was described at the time of its introduction as serving the purpose of ensuring that the law would no longer inadequately punish a person who offended against a child so persistently that the child could not differentiate the occasions of abuse.

80 The appeal should be dismissed.

The issues on this appeal and the manner in which they arise

81 The appellant was convicted after a trial before judge and jury of persistent sexual exploitation of a child contrary to s 50(1) of the *Criminal Law Consolidation Act*. The appellant was the child's school teacher. The sentencing judge explained that the appellant had grossly abused his position of authority as

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94 *Criminal Law Consolidation Act* 1935 (SA), s 50(5).

95 Thayer, *A Preliminary Treatise on Evidence at the Common Law*, (1898) at 218-219.

96 Nepveu, "Beyond 'Guilty' or 'Not Guilty': Giving Special Verdicts in Criminal Jury Trials", (2003) 21 *Yale Law and Policy Review* 263 at 266.

97 416 F 2d 165 at 182 (1969).

a school teacher to take "advantage of a young girl throughout her high school years for [his] own sexual satisfaction". For the purpose of sentencing, the judge made findings of fact, consistently with the verdict of the jury, that the acts of persistent sexual exploitation of the child fell into six categories: (i) kissing her on the lips on more than one occasion; (ii) touching her vagina on more than one occasion; (iii) touching her breasts on more than one occasion; (iv) inserting his finger into her vagina; (v) causing her to touch his penis; and (vi) inserting his penis into her mouth. Importantly, these categories were not mutually exclusive. Some of the acts alleged to fall within category (i) also fell within categories (ii), (iii), and (iv). The appellant was sentenced to a term of 10 years imprisonment with a non-parole period of six years. Appeals against conviction and sentence to the Full Court of the Supreme Court of South Australia, sitting as the Court of Criminal Appeal, were dismissed.

82 In this Court, the appellant submitted that his conviction was uncertain because it was impossible to know which of the alleged acts of sexual exploitation had been found to be proved by the jury. I agree with the joint reasons that this submission should not be accepted. The appellant's alternative submission was that his sentence should be set aside, and that he should be resentenced on the basis that the only acts that occurred were the least serious acts of kissing because the judge should have asked the jury to answer special questions about the basis for the verdict. These are questions that at common law the judge is not required to ask and the jury is not required to answer.

The ability of a sentencing judge to find facts

83 On this appeal, the approach that the appellant submitted should be adopted in this case is very similar to the submission made, but rejected by this Court, in *Cheung v The Queen*[98]. The submission in that case was that "if a jury's verdict is consistent with two views of the facts, and it would have been possible to amend the indictment to obtain the jury's view, then a sentencing judge is obliged to sentence upon the basis of the view more favourable to the offender"[99]. In this case, the appellant, in essence, adapted that submission by saying that he was entitled to be sentenced on the most favourable basis because the jury should have explained its view of the facts in answer to special questions rather than (as in *Cheung*) by different counts in an indictment. The basis for the appellant's submission, like that in *Cheung*, was that a sentencing judge is precluded from making any findings of fact (i) which would constitute an element of the offence charged, or (ii) which would constitute other offences for which the offender would be sentenced but which were not shown by the jury's verdict to be proved.

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98 (2001) 209 CLR 1.

99 *Cheung v The Queen* (2001) 209 CLR 1 at 22 [48].

I will return to the decision in *Cheung* below but it is necessary first to place that decision in the context of the long line of Australian authority of which it forms a part.

84 Fifty-six years ago in *R v Harris*[100] the Full Court of the Supreme Court of Victoria said:

> "The responsibility of awarding punishment once a jury have convicted a prisoner lies solely upon the judge. He has to form his own view of the facts and to decide how serious the crime is that has been committed, and how severely or how leniently he should deal with the offender. The learned judge in forming his view of the facts must not, of course, form a view which conflicts with the verdict of the jury, but so long as he keeps within those limits, it is for him and him alone to form his judgment of the facts. ... He has presided at the trial and he has seen the witnesses and has seen how the trial has progressed, and he can form his own judgment of the seriousness or other character of the offence."

85 This approach has been applied many times[101]. Twenty-four reported cases applying this approach were cited by Callinan J in *Cheung*[102]. Subject to the requirement of consistency with the verdict of the jury, and subject to the duty of the judge to find matters adverse to the convicted person beyond reasonable doubt, a sentencing judge has long been entitled to find facts for the purpose of sentencing.

86 The ability of a sentencing judge to find facts for the purpose of sentencing applies also to facts that might be part of the mental or physical elements of the offence. With the two standard qualifications, there is no bar to a sentencing judge finding facts for sentencing purposes where the facts constitute the actus reus of the offence but are not implicit in the verdict of the jury. The two qualifications are that the facts adverse to the offender must be found beyond reasonable doubt and the facts must be consistent with the verdict of the jury. A common example is where an accused person is convicted of manslaughter. In some circumstances a conviction for manslaughter might be given for different

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100 [1961] VR 236 at 236-237.

101 For instance, *R v Webb* [1971] VR 147 at 152-153; *R v Kane* [1974] VR 759 at 762; *R v Thompson* (1975) 11 SASR 217 at 221 per Bray CJ; *R v Isaacs* (1997) 41 NSWLR 374 at 377-378 per Gleeson CJ, Mason P, Hunt CJ at CL, Simpson and Hidden JJ; *Cheung v The Queen* (2001) 209 CLR 1 at 12-13 [14] per Gleeson CJ, Gummow and Hayne JJ.

102 (2001) 209 CLR 1 at 53 [166] fn 196.

reasons. In *R v Isaacs*[103], two of those reasons that were left to the jury were provocation and homicide by an unlawful and dangerous act. In a joint judgment, five judges of the New South Wales Court of Criminal Appeal held that the task of the sentencing judge was to "find for himself the facts material to sentencing, consistently with the jury's verdict of manslaughter, and bearing in mind that the appellant was to be given the benefit of any reasonable doubt"[104]. The Court of Criminal Appeal held that the trial judge was not required to ask special questions of the jury to ascertain the basis upon which the appellant had been convicted. Indeed, the Court explained that such special questions were to be discouraged.

87 The decision in *Isaacs* was consistent with the decision of this Court in *Savvas v The Queen*[105]. Mr Savvas was convicted, after trial before a judge and jury, of conspiring with others to import heroin contrary to Commonwealth law and of conspiring with others to supply heroin contrary to State law. Mr Savvas was sentenced by the judge to lengthy concurrent terms of imprisonment. As part of the sentencing, the sentencing judge found beyond reasonable doubt that heroin had in fact been imported and distributed pursuant to the conspiracy and that Mr Savvas had been involved in those events. On appeal to this Court, Mr Savvas argued that the sentencing judge had gone beyond any facts that the jury must have found and had sentenced him for offences with which he had not been charged. The appeal was dismissed. In a unanimous decision, this Court held that the conspiracy was continuing during the implementation of it[106] and that it is "artificial to ignore ... 'considerations which advert to the content and duration and reality of the conspiracy'"[107]. Although the jury's verdict did not necessarily require a conclusion that the conspiracy was implemented, this Court rejected the submission that a sentencing judge "must always sentence on the basis that the conspiracy was not implemented"[108].

88 The issue again arose in *Cheung*[109]. In that case, the appellant was tried before a judge and jury on a charge that he had been knowingly concerned in the

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103 (1997) 41 NSWLR 374.

104 *R v Isaacs* (1997) 41 NSWLR 374 at 380.

105 (1995) 183 CLR 1; [1995] HCA 29.

106 *Savvas v The Queen* (1995) 183 CLR 1 at 8-9.

107 *Savvas v The Queen* (1995) 183 CLR 1 at 7, quoting *R v Kane* [1975] VR 658 at 661.

108 *Savvas v The Queen* (1995) 183 CLR 1 at 8.

109 (2001) 209 CLR 1.

importation of heroin, which was imported on 9 May 1989, between 1 August 1988 and 12 May 1989. The appellant was a senior Customs official. An accomplice gave evidence that the involvement of the appellant consisted of instigating, planning, co-ordinating, financing, and supervising the importation over the nine months contained in the charge. The appellant was convicted and sentenced to life imprisonment with a non-parole period of 21 years and 11 months. The sentencing judge accepted the evidence of the accomplice. On appeal to this Court the appellant submitted that he should have been sentenced on the basis most favourable to him, that, contrary to the evidence of the accomplice, the offence was committed over a period during April and May 1989. The appellant submitted that the indictment could have been framed by constructing two counts which separated the possible dates of his involvement, and that the consequential absence of any finding by the jury as to the relevant dates did not permit the sentencing judge to find those matters as facts.

89 In *Cheung*, the joint judgment of Gleeson CJ, Gummow and Hayne JJ rejected the submission that the findings of the sentencing judge, which included matters going to the actus reus of the offence, "encroached upon [the appellant's] right to trial by jury"[110] or that the indictment should have been framed as two different charges so that the jury's verdict could have been obtained on the different bases upon which the prosecution had presented the evidence to establish the actus reus[111]. Their Honours gave six reasons why it was neither necessary nor desirable for the indictment to be framed by two different charges in the manner submitted by the appellant[112]. Critically for present purposes, the fourth reason relied upon the English decision in *Dowdall and Smith*[113].

90 The decision in *Dowdall and Smith* concerned an indictment for theft of a pension book. The accused offered to plead guilty on one, favourable, version of the actus reus, that he had found the pension book and had decided to keep it. The Crown would not accept a plea on that basis and instead split the indictment into two counts: one count charging the accused of stealing the book by taking it from the victim's bag, and the other charging the accused of stealing the book by finding it. On appeal from conviction, Taylor LJ, delivering the decision of the Court of Appeal, held that the indictment should not have been split into two counts. Immediately prior to a passage quoted with approval by this Court in *Cheung*, Taylor LJ described the argument of counsel that the indictment needed to be split into two counts so that the jury could give a verdict which explained

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110 *Cheung v The Queen* (2001) 209 CLR 1 at 18 [32].

111 *Cheung v The Queen* (2001) 209 CLR 1 at 20 [40].

112 *Cheung v The Queen* (2001) 209 CLR 1 at 20-22 [42]-[47].

113 (1992) 13 Cr App R (S) 441.

the actus reus that the jury had found. Then, in the passage quoted with approval by the joint judgment in *Cheung*[114], Taylor LJ gave the following two examples[115]:

> "On a charge of burglary the Crown's case is that the defendant entered the house by night whilst an elderly occupier was asleep but the defendant asserts he entered by day when the house was empty. The *actus reus* was at different times in those two versions, but each version amounts to guilt of the offence charged. Likewise, where an indecent assault is alleged to have included digital penetration of a girl's vagina, an assertion by the appellant that he had only touched her breast would be taken as a plea of guilty despite the difference as to the *actus reus* between the two versions. In such cases, if sentence turns upon which version is right, a judge can either accept the defence account or try an issue as to the circumstances of the burglary or the nature of the assault. It would not be appropriate to proliferate alternative counts."

91 The reference by Taylor LJ to the judge trying an issue as to the circumstances of the burglary, including the actus reus of the offence, was to a *Newton* hearing, by which the sentencing judge conducts a hearing for the purposes of sentencing to determine contested questions of fact[116].

92 In *Cheung*, the only authorities which arguably supported the appellant's submission were decisions of the English Court of Appeal in *Stosiek*[117] and *Efionayi*[118]. The joint judgment in *Cheung* observed that *Efionayi* was decided ex tempore, without any argument from the prosecution, and without reference to the earlier decision in *Dowdall and Smith* (quoted above), which represents the law in Australia[119]. In any event, to the extent that the appellant's submission was ever the proper approach in England, the Court of Appeal has recently explained that the *Stosiek* line of authority has been "subsumed" within the "correct

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114 (2001) 209 CLR 1 at 21-22 [45].

115 *Dowdall and Smith* (1992) 13 Cr App R (S) 441 at 445.

116 *Newton* (1983) 77 Cr App R 13; *R v Ali (Ahmed)* [2011] 2 Cr App R 22 at 297 [36] per Thomas LJ.

117 (1982) 4 Cr App R (S) 205.

118 (1995) 16 Cr App R (S) 380.

119 *Cheung v The Queen* (2001) 209 CLR 1 at 23 [49].

approach"[120] and that, despite contrary suggestions, *Efionayi* does not provide any support for a view contrary to that correct approach. The correct approach is that where there is more than one possible interpretation of a jury's verdict then the judge must make up his or her own mind, and must do so beyond reasonable doubt where the interpretation is adverse to the offender[121].

Does s 50 of the *Criminal Law Consolidation Act* require a new sentencing approach?

93 The appellant's submission that the terms of s 50 of the *Criminal Law Consolidation Act* require a new approach, departing from the established common law approach to sentencing, is curious for a number of reasons.

94 First, the section was enacted against the background of the decision in *Harris*, which had stood for half a century. That decision had referred to the only constraints upon a sentencing judge as being (i) a requirement that the sentencing be consistent with the verdict of the jury, and (ii) a requirement that facts found adversely to the offender be found beyond reasonable doubt. Section 50 was also enacted a decade after the decision of the New South Wales Court of Criminal Appeal in *Isaacs*, a decision that had been applied on many occasions including by Gleeson CJ, Gummow and Hayne JJ in 2001 in *Cheung*. There was no suggestion in *Harris* or in *Isaacs* that sentencing was required to be conducted on a basis that is most favourable to the offender unless the jury answered special questions.

95 Secondly, the rarity of special questions is a further reason why it is difficult to construe s 50 as impliedly requiring a new approach to sentencing where, without answers to special questions, the sentencing judge is required to sentence only on the most favourable basis to the offender. In *Cheung*, Gleeson CJ, Gummow and Hayne JJ reiterated that, for the reasons given in *Isaacs*, there will be "very few cases in which it is appropriate or useful" for the trial judge to question the jury members about "the process of reasoning by which they came to their verdict"[122]. The only instance where special questions to elucidate the basis for a verdict were once suggested to be "common practice" was in cases of a verdict of manslaughter. That suggestion originated from Diplock LJ, the progenitor of the Northern Ireland criminal courts without juries, in *R v Warner*[123]. It was repeated by the English Court of Criminal Appeal in

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120 *R v King* [2017] 2 Cr App R (S) 6 at 36-37 [34]. See also *R v Bertram* [2004] 1 Cr App R (S) 27 at 190 [21].

121 *R v King* [2017] 2 Cr App R (S) 6 at 36-37 [34]-[35].

122 *Cheung v The Queen* (2001) 209 CLR 1 at 14 [18].

123 [1967] 1 WLR 1209 at 1213-1214; [1967] 3 All ER 93 at 96.

Solomon and Triumph[124]. But it might be doubted whether the practice was ever common. In *Petroff*[125], Nagle CJ at CL, with whom Street CJ agreed, said "doubt must be expressed as to how 'common' the practice in fact was, or is, in manslaughter cases where there is no question of diminished responsibility". The same doubt had also been expressed by the Appellate Division of the Supreme Court of Hong Kong in *Kwok Yau Shing v The Queen*[126], and Professor J C Smith in his commentary on that case[127], where it was observed that there was an inconsistency between, on the one hand, any "common practice" to ask special questions in manslaughter cases and, on the other hand, the decision of the Court of Criminal Appeal in *R v Larkin*[128]. In any event, however common the use of special questions in manslaughter cases, in *Isaacs* the New South Wales Court of Criminal Appeal observed that the use of special questions was "a practice which was not taken up, with any degree of generality, in relation to other offences"[129], and that the "wisdom of the practice" had been questioned[130].

96 Thirdly, even if s 50 could be said to have contemplated, or created the need for, the use of special questions, the accepted position was that when a special question is put to the jury, the judge is not required to accept the answer given by the jury, and is entitled to form his or her own view of the facts in the light of the evidence[131]. The answers to a special question are not a verdict. It is hard to see how s 50 could have required a judge to sentence on the most favourable basis to an offender unless special questions were asked where (i) the judge was not required to ask the special questions, (ii) the jury was not required to answer the special questions, and (iii) the judge was not bound by the answers to the special questions.

97 Fourthly, and most fundamentally, s 50 creates only one offence. The general verdict of the jury is a verdict for that one offence. If s 50 created two or

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124 (1984) 6 Cr App R (S) 120 at 126.

125 (1980) 2 A Crim R 101 at 137.

126 [1968] Crim LR 175.

127 *Kwok Yau Shing v The Queen* [1968] Crim LR 175 at 177.

128 [1943] KB 174.

129 (1997) 41 NSWLR 374 at 378.

130 (1997) 41 NSWLR 374 at 379.

131 *Solomon and Triumph* (1984) 6 Cr App R (S) 120 at 126; *Wilcox* (1984) 6 Cr App R (S) 276 at 278-279; *R v Ali (Ahmed)* [2011] 2 Cr App R 22 at 298 [37].

more offences then the sentencing judge could not sentence for multiple offences based on a single general verdict. But since s 50 creates only one offence, any factual issues that are not implicit within the verdict for the single offence can be found by the sentencing judge. This fourth point needs to be explained in some detail to illustrate its importance.

98 In submissions, senior counsel for the appellant submitted, again and again, that s 50 requires proof of two or more offences. Even the appellant's description of the definition of an "act of sexual exploitation" misdescribed s 50(2) to suggest that it requires an act of sexual exploitation to be an act which amounts to a sexual offence. It does not.

99 Section 50, unlike s 74, which preceded it, is not expressed in terms that require the acts constituting the offence of persistent sexual exploitation of a child to be separate offences. The terms of s 50(2) require only that the act "could, if it were able to be properly particularised, *be the subject of a charge* of a sexual offence" (emphasis added). In this respect, s 50 consciously departed from the language of its predecessor, s 74, which had required "the commission of *a sexual offence* against a child on at least three separate occasions" (emphasis added). The plain words, and plain meaning, of s 50 involve a focus upon particular *acts* of sexual exploitation, although the requirements of such acts are identified by reference to matters that could be *charged* as particular sexual offences if the acts could be properly particularised. The plain words of s 50 illustrate the simple point that the acts might not even be capable of being charged as other offences, still less that they would constitute other offences. The way in which s 50(2) operates is effectively to use the physical elements (but not the precise defences) of particular sexual offences as a dictionary for the purpose of the offence in s 50(1).

100 Even if the "act" could be charged as a different offence this does not require that the other offence would be committed. Acts can be *charged* under a section even if there is a defence that an accused person could prove which would mean that the act is not a sexual offence under that section. A simple example of an act of sexual exploitation which could be an act charged within the meaning of s 50(2) but which would *not* constitute a separate offence under the section by which it is charged is an act of incest. Incest is an offence under s 72(1) of the *Criminal Law Consolidation Act*. It is subject to a defence under s 72(2), which is not replicated in s 50, where the accused can prove that he or she did not know and could not reasonably have known that the person with whom he or she had sexual intercourse was a close family member. If the accused could prove this then the act would not be an offence. But the act could still be one which could have been *charged* as an act of incest even if it would not be successfully prosecuted.

101 The appellant's error that s 50(1) required proof of the commission of two or more sexual offences engendered a further misunderstanding. The further

misunderstanding was that the process of sentencing for an offence committed under s 50(1) must be undertaken as though the offender had been tried for, and convicted of, offences constituting each of the charged acts. The authority cited for that proposition by the appellant, *R v D*[132], does not support the proposition. Not only was that case concerned with the meaning of sub-sections in the predecessor provision to s 50 (ie s 74) that were not reproduced in s 50 but, in *R v D*, Doyle CJ, with whom Bleby J agreed, emphasised that it was not appropriate for him to establish "exhaustive guidelines for the imposition of sentences under s 74"[133].

102 The appellant's proposition had more potency in relation to the predecessor provision to s 50, namely s 74. But the two essential matters upon which Doyle CJ relied in *R v D* were not replicated in s 50 when it replaced s 74. The first is that s 74(2) required the offence to consist of "a course of conduct *involving the commission of a sexual offence* against a child on at least three separate occasions" (emphasis added). The second is that s 74(7) required the sentence to be a "term of imprisonment proportionate to the seriousness of the offender's conduct". These two features were relied upon by Doyle CJ in *R v D* for his reasoning that the approach to sentencing required the court to "identify the different offences involved and the maximum punishment that they attract"[134]. In light of a section that required the underlying offences to be proved, one can readily appreciate the premise for Doyle CJ's conclusion that s 74(7) "should be taken as a reference to the seriousness of that conduct as it would have been assessed by the court ... when dealing with distinct offences"[135]. But, even under s 74, the offender would not have been sentenced by reference only to the maximum punishment for the underlying offences. The maximum punishment for the offences would simply form the basis for assessing an overall sentence for the course of conduct concerned[136]. Importantly, unlike the process of sentencing for a particular offence, Doyle CJ said, in a passage quoted with

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132 (1997) 69 SASR 413.

133 *R v D* (1997) 69 SASR 413 at 421.

134 *R v D* (1997) 69 SASR 413 at 420.

135 *R v D* (1997) 69 SASR 413 at 420.

136 *R v D* (1997) 69 SASR 413 at 420.

approval by the New South Wales Court of Criminal Appeal[137], that it was not necessary for sentencing to identify the number of offences with precision[138].

103 The appellant submitted that offences under s 50(1) require his proposed new approach to sentencing because, when convicting of an offence under s 50(1), the jury members are required to be unanimous, or agree by a statutory majority, in respect of the same two or more acts that constitute the offence[139]. The appellant's counsel submitted that it is therefore "impossible to say ... that the jury found that the appellant committed more than two acts amounting to sexual offences" and that "no one should be punished for an offence of which he has not been convicted"[140].

104 Once s 50 is understood as involving only one offence, based upon two or more acts, then as a matter of principle there should be no difference between the approach taken to sentencing for an offence under s 50 and the approach taken to sentencing for an offence of manslaughter, or for drug trafficking in cases such as *Savvas* and *Cheung*. In each case, the sentencing judge makes findings of fact as to acts, including acts that could, and sometimes must, constitute the actus reus of the single offence. The process of finding the acts that constitute the actus reus of manslaughter, drug trafficking, or sexual exploitation of a child does not involve the offender being sentenced for an offence that he or she did not commit.

105 When the joint judgment in *Cheung* remarked that the decision as to the degree of culpability of the offender's conduct is a matter for the sentencing judge "save to the extent to which it constitutes an element of the offence charged"[141], their Honours were not suggesting that a sentencing judge could never make findings of fact that might involve elements of the actus reus. Such a suggestion would have contradicted the conclusion that was reached in that case. It would have contradicted the approval that their Honours gave to the *Dowdall and Smith* decision. Rather, the statement was made in the course of explaining

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137 *ARS v The Queen* [2011] NSWCCA 266 at [231]-[233] per Bathurst CJ, James and Johnson JJ agreeing at [236], [237].

138 *R v D* (1997) 69 SASR 413 at 420.

139 *R v Little* (2015) 123 SASR 414 at 417 [11], 419 [15], 420 [19], applying *KBT v The Queen* (1997) 191 CLR 417 at 422 per Brennan CJ, Toohey, Gaudron and Gummow JJ, 431, 433 per Kirby J; [1997] HCA 54.

140 *R v De Simoni* (1981) 147 CLR 383 at 389 per Gibbs CJ, Mason and Murphy JJ agreeing; [1981] HCA 31.

141 *Cheung v The Queen* (2001) 209 CLR 1 at 9 [5].

that where an element of the offence was "reflected in an issue presented to the jury for decision by verdict" then "the sentencing judge will be bound by the manner in which the jury, by verdict, expressly or by necessary implication, decided that issue"[142].

106 Two other circumstances should also be distinguished. In *Kingswell v The Queen*[143], this Court considered circumstances in which legislation that uses the language of a single offence might, on its proper construction, create two offences. A majority of this Court in *Kingswell* rejected that construction of the legislation in that case. However, where, on its proper construction, legislation creates two offences then an accused can only be sentenced for both of those offences if the jury has found the accused guilty of both. On a trial by judge and jury, it is not sufficient for the jury to find the accused guilty of one and for the judge to find the accused guilty of the other. For the reasons given above, that is not this case. Indeed, when pressed on the point in oral submissions the appellant conceded that s 50 involved a conviction of only one offence.

107 Nor is it relevant to this case to consider the "rule of practice" about which Gibbs CJ, Wilson and Dawson JJ spoke in *Kingswell*, and which even in 1985 it was an "exaggeration to say ... [had] been generally applied"[144]; that is, where circumstances of aggravation increase the maximum punishment but do not change the offence then the circumstances should be determined by a jury. This rule of practice is not a rule of law, the contravention of which necessarily requires a sentence to be set aside[145]. It does not assist in determining whether facts that might constitute the actus reus of an offence must be determined by a jury. Indeed, in *Kingswell*, Mason J considered that the relevant legislation, which imposed the duty to be satisfied of the aggravating circumstances on "the Court", required the aggravating circumstances to be determined by the sentencing judge and not the jury[146].

Potential consequences of the appellant's submission

108 Four consequences can be described, all of which illustrate difficulties for the appellant's construction of s 50 as having somehow modified the common

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142 *Cheung v The Queen* (2001) 209 CLR 1 at 9 [5].

143 (1985) 159 CLR 264; [1985] HCA 72.

144 *Kingswell v The Queen* (1985) 159 CLR 264 at 280.

145 *R v Meaton* (1986) 160 CLR 359 at 364-365 per Gibbs CJ, Wilson and Dawson JJ; [1986] HCA 27.

146 *Kingswell v The Queen* (1985) 159 CLR 264 at 282-283.

law to require the judge to sentence on the most favourable basis to an offender in the absence of special questions that could reveal the acts upon which the jury's verdict was based. These four consequences militate powerfully against a conclusion that s 50 could have the effect proposed by the appellant.

The first potential consequence

109 Suppose that a jury of 12 is told before retiring, as it was in the appellant's trial, that only a unanimous verdict can be returned within four hours of deliberations. The jury members are told, correctly, that after four hours a verdict upon which 10 or 11 of them are agreed can be returned. Suppose that the jury members are also given a list of special questions to answer, to indicate which of the acts the jury has found to be proved and whether unanimously or by the statutory majority. A statutory majority of 10 or 11 jurors in a jury of 12, under s 57 of the *Juries Act* 1927 (SA), is permissible if the jury has been in deliberation for at least four hours and the jurors have not then reached a unanimous verdict. The following two hypothetical scenarios based upon the allegations in this case can be compared.

110 In the first scenario, the jury returns with a verdict of guilty after only 15 minutes of deliberations. The jury answers the special questions concerning its decision by saying that the jury members are unanimous about two particular acts of kissing and that there is a statutory majority of 11 as to the remaining acts. For two reasons, it is hard to see how the existence of a provision allowing for a statutory majority for a *verdict* could have any legal effect on answers to special questions that are not unanimous. First, the jury decision was delivered within four hours. Secondly, the verdict delivered by the jury is a unanimous verdict so the provision concerning majority verdicts does not apply.

111 In the second scenario, the jury returns with a verdict of guilty after 10 hours of deliberations. The jury answers the special questions concerning the verdict given by statutory majority by saying that the statutory majority of 10 jurors are agreed as to all of the alleged acts of sexual exploitation.

112 Comparing these two scenarios, the effect of the appellant's submission is that the sentencing judge would be required (i) in the first scenario to sentence the offender on the basis that the only acts that occurred were two acts of kissing, and (ii) in the second scenario to sentence the offender on the basis that all of the alleged acts occurred. These scenarios might not be uncommon. The effect would appear to be that where some of the acts of offending are so clear that the jury is unanimous then the offender cannot be sentenced for any of the other acts even where 11 jurors agree that those acts were committed, and where the sentencing judge would conclude beyond reasonable doubt that the offender committed the remaining acts. But if none of the acts of offending are so clear, so that there is only a statutory majority for all of the acts charged, then the offender can be sentenced for all of the acts.

The second potential consequence

113 A second curious consequence of the appellant's submission could arise if the jury returned with a general verdict of guilty based upon two acts upon which the jury was unanimous without attempting to reach a conclusion, unnecessary for a verdict, on the remaining acts. Properly instructed, the jury would be aware that (i) a verdict of guilty could be returned where the members of the jury were agreed upon two acts, and (ii) the members of the jury were not required to answer any of the special questions, the function of which is to give the jury "the opportunity without any attempt to force them, of recording the actual facts as established in their finding"[147]. For a long time in England and Australia juries have not been able to be compelled to state the reasons for their verdict by answers to special questions[148]. And once the jury gave its general verdict, and limited answers, it could not deliberate further on any other answers[149].

114 If the jury properly returned a general verdict of guilty based on two acts, without the need to answer the special questions, then the particular two acts upon which the members of the jury were agreed might simply be due to the happenstance of how the members of the jury chose to deliberate. They might be the most serious. Or they might be the least serious. The offender could not be tried separately in relation to the remainder of the alleged acts[150]. So the happenstance of whichever acts the jury first chose to deliberate upon could determine the basis upon which the offender is sentenced with the remainder of the acts to be ignored and never to be the subject of a separate trial.

The third potential consequence

115 A third potential consequence of the appellant's approach is the extraordinary complexity for the sentencing process in many situations. Consider this case as an example. Suppose that in this case, in the course of summing up, the trial judge had told the jury that special questions would be asked at the time the verdict was taken. The jury might be given a checklist to tick each of the six categories of acts that the jury found to have been committed for the purpose of the verdict: (i) kissing the complainant on the lips on more

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147 *Mack v Elvy* (1916) 16 SR (NSW) 313 at 319 per Cullen CJ, Street J agreeing.

148 *Mayor and Burgesses of Devizes v Clark* (1835) 3 Ad & E 506 at 511 per Lord Denman CJ, 511 per Patteson J [111 ER 506 at 508]; *Mack v Elvy* (1916) 16 SR (NSW) 313 at 319 per Cullen CJ (Street J agreeing), 322 per Gordon J.

149 *Arnold v Jeffreys* [1914] 1 KB 512 at 514 per Lush J; *Barnes v Hill* [1967] 1 QB 579 at 587-588 per Lord Denning MR, Danckwerts and Winn LJJ agreeing.

150 *Criminal Law Consolidation Act* 1935 (SA), s 50(5).

than one occasion; (ii) touching her vagina on more than one occasion; (iii) touching her breasts on more than one occasion; (iv) inserting his finger into her vagina; (v) causing her to touch his penis; and (vi) inserting his penis into her mouth.

116 Suppose that the jury ticked (i), but not any of the others. On what basis then would the sentencing judge pass sentence? How many acts of kissing occurred? Which acts of kissing occurred, and in which aggravating circumstances? If the appellant's submission were accepted then it should be just as impermissible for the sentencing judge to determine which of the alleged acts of kissing, including their aggravating circumstances, constituted the actus reus of the s 50(1) offence as it is for the sentencing judge to determine which of the alleged acts of kissing or other indecent assaults constituted the actus reus of the s 50(1) offence. It would seem that the only solution would be for the jury to be given special questions asking precisely which acts of kissing had been found to have been committed and in which aggravating circumstances. In many cases the answers would not be simple.

117 If these more complicated questions were not put to the jury then other issues would arise concerning how the offender could be sentenced on the most favourable basis. As the Solicitor-General for South Australia submitted, the difficulty with sentencing on the "most favourable basis" is that the exercise is speculative. Alternatively, the exercise of determining the "most favourable basis" upon which to pass sentence would involve numerous assumptions or fictions. The circumstances of this case provide a good example of this. The following was the evidence given by the complainant of acts of sexual exploitation that fell within the category alleged for the purposes of s 50(1) of "kissing [the complainant] on the lips, on more than one occasion":

(1) There was an incident during year nine when the appellant was "leaning against the desk" in his office. The complainant "walked up to him and kissed him and he had his arms ... around [her] waist". The complainant said that this was an "open-mouth kiss" and that the appellant kissed her back.

(2) In year 10 the appellant and the complainant "would kiss a lot and there were times where he'd pull [her] against him while [they] were kissing and rub himself against [her]". The appellant would "rub his whole groin area ... side to side against [her] body". She described one example of these incidents of kissing for "a few minutes" during a lunch break where she thought the classroom doors were closed. She also said that while kissing, the appellant would put his hands up her skirt, "touch [her] butt sometimes", "touch [her] vagina" ("sometimes with the underwear there" and sometimes with "his hands under [her] underwear"), and "put his hands up [her] top" and "under [her] bra".

(3) Another incident described by the complainant was "a time in the computer room where [they had] been kissing and ... were standing up". She said that the appellant put "one of his hands in [her] underwear" and put a finger in her vagina.

(4) On another occasion in the computer room in year 10, the appellant and the complainant had "been kissing" when "he took out his penis and lifted up [her] skirt and pulled [her] underwear out a bit and put his penis in [her] underwear against [her] vagina". He "turned [her] around so [she] was facing away from him and he bent [her] over slightly and did the same thing from behind", namely "put his penis in [her] underwear from behind and rubbed it against [her] butt".

(5) There was a further occasion in the computer room in year 10, during which the complainant was sitting at a computer in front of the window. The appellant was kneeling down next to the complainant on her right. She said "I turned my head and we were kissing and he had a hand up my shirt, I think under my bra".

(6) There was also an incident in year 11 in the "portable room". The complainant said:

> "we went there once and we were kissing and he turned me around so that my back was against him and he was kissing my neck and he had one hand go up my skirt, up my underwear and the other one go into my top and touching my breast".

118 If the sentencing judge were to sentence the appellant on the most favourable basis, how would that be determined? The evidence of act (1) is only a single act. It would not suffice to constitute two or more acts of sexual exploitation. How would the other act or acts that constitute the offence be determined? Would the "most favourable basis" require the sentencing judge to select only one other incident so that the sentencing of the appellant was conducted on the basis only of two acts of kissing? How could the second act be chosen? Could it be chosen by filleting some part of the complainant's evidence from other parts? Although the jury could, of course, have accepted only part of the complainant's evidence, would such filleting be permissible without any identified basis upon which the jury might have accepted beyond reasonable doubt only that this other single incident occurred? If not, then how would that identified basis be determined by the sentencing judge without engaging in the very process said to be prohibited involving finding facts that constitute the actus reus? If so, and if a single incident of kissing were deemed to be the "favourable basis", then would the sentencing judge also be required to fillet from the jury's finding any evidence of aggravating circumstances surrounding that incident

where those circumstances could also have been charged as an indecent assault contrary to s 56(1) of the *Criminal Law Consolidation Act* or, in the case of (3), charged as unlawful sexual intercourse under s 49?

119 Another view might be that the most favourable basis would be to treat the accused as if he had been convicted of all the acts in only the first category, namely all the acts of kissing in circumstances of indecency. But, as set out above, some of the circumstances of the acts in category (i) would also satisfy categories (ii), (iii), and (iv). The appellant's assumption seemed to be that those acts which could have fallen within category (ii), (iii), or (iv) would be ignored for the purposes of sentencing. That, of course, would mean that the fortuity of how a prosecution particularised an offence would determine whether the more serious acts falling within category (i) would be required to be ignored or not. It would create the anomaly that the sentencing judge would be permitted to make a finding that incidents of kissing occurred in circumstances in which the appellant touched the complainant's bottom (which was not particularised separately) but that the sentencing judge could not make a finding that incidents of kissing occurred in circumstances in which the appellant touched the complainant's breasts (which was particularised separately). There are further problems with this approach. Ignoring the acts of kissing within category (i) that also fell within category (ii), (iii), or (iv) might be contrary to the obligation upon the sentencing judge, in s 10(1) of the *Criminal Law (Sentencing) Act* 1988 (SA), to have regard to the circumstances of the offence when sentencing.

The fourth potential consequence

120 The fourth potential consequence is the inconsistency between, on the one hand, the appellant's approach to special questions being required to enable sentencing for all the alleged acts and, on the other hand, the situation that would exist if an offender were sentenced after a plea of guilty. If an offender pleaded guilty but contested various acts upon which the s 50(1) conviction was based then, as the appellant accepted in oral argument, the sentencing judge could conduct a trial of the issues to determine which acts were proved beyond reasonable doubt and which were not. It is a difficult construction of s 50 to conclude that the section has the effect that a sentencing judge can determine the actus reus of the offence on a plea of guilty, provided that the judge acts consistently with the plea, but not upon a verdict of guilty, even if the judge acts consistently with the verdict.

121 The appellant attempted to deal with this anomaly, and also to avoid the absurdity of denying the sentencing judge the power to find facts on a plea of guilty in relation to s 50, by submitting that an offender who pleads guilty is no longer "in the hands of the jury". But even if the appellant's argument on the construction of s 50 were accepted, and the effect of s 50 were somehow to require that only a jury could determine any fact that might fall within the actus reus of the offence, then it is hard to see why s 50 would carve out an exception

so that an accused who pleads guilty somehow gives up the right to have a jury determine disputes about the content of the actus reus.

Conclusion

122 A fiction deems to be true that which is known not to be so or that which is unproved. The purpose of a fiction is "to reconcile a specific legal result with some premise or postulate"[151]. That postulate is generally an unexpressed consideration of social and economic policy[152]. The consideration of social policy underlying the appellant's submission that the sentencing judge should have sentenced him on the basis that he committed only the most minor acts alleged must be that facts constituting the s 50 offence must be found by a jury and not by a judge. This would mean that in many cases involving offences charged under s 50(1), a general verdict of the jury would no longer be sufficient for proper sentencing.

123 The European Court of Human Rights has held that in the absence of reasons from a jury the right to a fair trial might require safeguards, including questions to the jury, to enable an accused to understand the reasons for his conviction[153]. That conclusion was reached based upon provisions in the European Convention on Human Rights. Such provisions might be thought by some to be desirable. But in the Anglo-Australian legal tradition there has never been an effective duty on judges to ask special questions. Indeed, when judges have historically attempted to exercise a power to do so, there has been resistance to that power. In 1898, Thayer observed that the jury had historically withstood attempts by judges to exert pressure on juries to secure special verdicts and answers to special questions. He continued[154]:

> "Logic and neatness of legal theory have always called loud, at least in recent centuries, for special verdicts, so that the true significance of ascertained facts might be ascertained and declared by the one tribunal fitted to do this finally and with authority. But considerations of policy have called louder for leaving to the jury a freer hand. The working out of the jury system has never been shaped merely by legal or theoretical considerations. That body always represented the people, and came to

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151 Fuller, *Legal Fictions*, (1967) at 51.

152 Fuller, *Legal Fictions*, (1967) at 71; *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 387 [163] per Gummow J; [1998] HCA 3.

153 *Taxquet v Belgium* (2012) 54 EHRR 26 at 956-957 [91]-[92].

154 Thayer, *A Preliminary Treatise on Evidence at the Common Law*, (1898) at 218-219.

> stand as the guardian of their liberties; so that whether the court or the jury should decide a point could not be settled on merely legal grounds; it was a question deeply tinged with political considerations. While it would always have been desirable, from a legal point of view, to require from the jury special verdicts and answers to special questions, that course would have given more power to the king and less to the people. It is one of the eccentricities of legal history that we, in this country, while exalting in some ways the relative function of the jury far beyond all English precedent, are yet, in some parts of the country, greatly cutting down their powers in the particular here referred to."

124 The same point, about history rather than logic, was made by Sir Patrick Devlin in his Hamlyn Lectures in 1956 when he spoke of the inability of the jury to give reasons as a principle that is "open to rational criticism" but one that has been "largely retained and is still an essential characteristic of the system"[155]. He later added that "any regular practice of interference with the generality of the criminal verdict might impair the freedom and independence of the jury, and it is therefore rarely, if ever, asked for"[156]. Similar concerns underlie statements that "beyond all question" it is "improper to ask the jury for the reasons for its decision"[157] by asking special questions after a general verdict without notice to the jury. In *Brown v The Bristol and Exeter Railway Co*[158], Martin B said, when refusing an application to show cause in relation to a trial he had previously conducted, that he should not have asked the jury a special question, even for the purposes of determining whether the finding was on one count or another, because "having summed up, [the judge's] duty is over, and it is for the jury to find a verdict".

125 Parliament did not make the decision to interfere with the power of the jury in this way in legislation that was introduced for the purpose of ensuring that where persistent child abuse has occurred the law would no longer fail "to recognise or punish the full extent of the abuse"[159]. Contrary to the appellant's submissions, the sentencing judge was not required to sentence the appellant on

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155 Devlin, *Trial by Jury*, 3rd ed (rev) (1966) at 14.

156 Devlin, *Trial by Jury*, 3rd ed (rev) (1966) at 88-89.

157 *Mack v Elvy* (1916) 16 SR (NSW) 313 at 319 per Cullen CJ.

158 (1861) 4 LT 830 at 832. See also *Arnold v Jeffreys* [1914] 1 KB 512 at 514 per Lush J; *Barnes v Hill* [1967] 1 QB 579 at 587-588 per Lord Denning MR, Danckwerts and Winn LJJ agreeing.

159 South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 25 October 2007 at 1474.

the "most favourable" basis to him, whatever that expression might mean. The sentencing judge was not required to disregard numerous acts of sexual exploitation. That disregard would be contrary to her findings, which (i) were made beyond reasonable doubt, and (ii) were not inconsistent with the jury verdict. The appeal should be dismissed.