HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, KEANE, NETTLE AND EDELMAN JJ

STEPHEN JOHN HAMRA APPELLANT

AND

THE QUEEN RESPONDENT

Hamra v The Queen
[2017] HCA 38
13 September 2017
A14/2017

ORDER

Appeal dismissed.

On appeal from the Supreme Court of South Australia

Representation

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

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

CATCHWORDS

Hamra v The Queen

Criminal law – Offence of "[p]ersistent sexual exploitation of a child" – *Criminal Law Consolidation Act* 1935 (SA), s 50 – Where offence requires prosecution to prove two or more acts of sexual exploitation – Whether generalised nature of complainant's evidence meant that not possible to identify two or more acts of sexual exploitation – Whether no case to answer.

Criminal law – Permission to appeal – Where orders made included granting application for permission to appeal – Whether majority of Court of Criminal Appeal failed to consider question of permission to appeal.

Words and phrases – "acts of sexual exploitation", "distinct occasion", "distinct transaction", "double jeopardy", "extended unanimity", "no case to answer", "particularity", "particulars", "permission to appeal", "persistent sexual exploitation of a child".

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

KIEFEL CJ, BELL, KEANE, NETTLE AND EDELMAN JJ.

Introduction

1 The appellant was charged with an offence of persistent sexual exploitation of a child contrary to s 50(1) of the *Criminal Law Consolidation Act* 1935 (SA). Section 50 creates an offence where an adult person, "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". Sections 50(2) and 50(4) provide that the act of sexual exploitation must be an act in relation to the child of a kind that could be the subject of a charge of a sexual offence, although it is not required to be properly particularised other than as to the period during which the acts of sexual exploitation allegedly occurred and the alleged conduct comprising the acts of sexual exploitation.

2 At the conclusion of the prosecution case in the South Australian District Court, the trial judge (who heard the case without a jury) heard, and subsequently accepted, a no case submission. The trial judge held that the highly generalised nature of the complainant's evidence meant that it was not possible to identify two or more proved sexual offences within s 50(1). The Full Court of the Supreme Court of South Australia, sitting as the Court of Criminal Appeal, allowed an appeal and remitted the matter for retrial.

3 By special leave, the appellant relies upon two grounds of appeal. The first is that the Court of Criminal Appeal erred by concluding that there was a case to answer. The second is that the Court of Criminal Appeal erred by failing to address the appellant's submission that permission to appeal should not be granted having regard to considerations including double jeopardy. For the reasons that follow, the Court of Criminal Appeal did not err in either respect. The appeal must be dismissed.

The charge

4 The appellant was prosecuted under s 50(1) of the *Criminal Law Consolidation Act* with one count of persistent sexual exploitation of a child, "B", who was under the prescribed age of 17 years. The Information was as follows:

"Statement of Offence

Persistent Sexual Exploitation of a Child. (Section 50(1) of the Criminal Law Consolidation Act, 1935).

Particulars of Offence

> [The appellant] between the 30th day of October 1977 and the 1st day of November 1982 at Morphett Vale, and another place, committed more than one act of sexual exploitation of [B] a child under the prescribed age.
>
> It is further alleged that the acts of sexual exploitation performed by [the appellant] upon [B] were, touching [B's] genitals, placing his penis between [B's] bottom, causing [B] to touch his penis and performing fellatio upon [B]."

5 The significance of 1 November 1982 is that it was the date when B turned 17 years old.

Section 50 of the *Criminal Law Consolidation Act*

6 Section 50 of the *Criminal Law Consolidation Act* creates an offence of "persistent sexual exploitation of a child". It relevantly provides as follows:

> "(1) 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.
>
> (2) For the purposes of this section, 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.
>
> (3) If—
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> (a) at any time when an act of sexual exploitation of a child was allegedly committed the child was at least 16 years of age; and
>
> (b) the defendant proves that he or she believed on reasonable grounds that the child was of or over the prescribed age at that time,
>
> the act of sexual exploitation is not to be regarded for the purposes of an offence against this section.

(4) 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:

(a) subject to this subsection, the information must allege with sufficient particularity—

(i) the period during which the acts of sexual exploitation allegedly occurred; and

(ii) the alleged conduct comprising the acts of sexual exploitation;

(b) the information must allege a course of conduct consisting of acts of sexual exploitation but need not—

(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

(ii) identify particular acts of sexual exploitation or the occasions on which, places at which or order in which acts of sexual exploitation occurred;

(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.

(5) 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 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.

...

(7) In this section—

prescribed age, in relation to a child, means—

(a) in the case of a person who is in a position of authority in relation to the child—18 years;

(b) in any other case—17 years;

sexual offence means—

(a) an offence against Division 11 (other than sections 59 and 61) or sections 63B, 66, 69 or 72; or

(b) an attempt to commit, or assault with intent to commit, any of those offences; or

(c) a substantially similar offence against a previous enactment.

..."

The evidence at trial

7 The appellant was tried by judge alone. The evidence at trial was given by the complainant, B, and the complainant's parents. The focus before the trial judge, and on the appeals, was upon B's evidence. Although there were some inconsistencies between his evidence and the evidence of his mother concerning the rooms in which B slept and when, the primary judge treated this as a matter which was irrelevant to the no case submission but noted that it would be relevant to the ultimate verdict if the case had progressed that far[1].

8 At the time of trial B was 50 years old. B's evidence was that he and his two brothers grew up and lived with their mother and father at their three bedroom home in Morphett Vale. For a couple of years before B's grandmother moved into a nursing home she also lived with the family. B said that he thought that this was until he turned 12 or 13 or possibly 14. While his grandmother lived with the family the sleeping arrangements were as follows: the parents

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1 *R v Hamra (No 2)* [2016] SADC 8 at [12].

slept in bedroom one; the grandmother slept in bedroom two; and B and his two brothers slept in bedroom three. After his grandmother moved out, B slept in bedroom two for about three years, while he was in high school, before moving back into bedroom three when he was "roughly 16" or possibly 17.

9 B said that he first met the appellant at a surprise birthday party for his mother when B was around 11 years old. The appellant, who was a school teacher, subsequently visited B's home regularly as a friend to B's parents and to assist B's brother with his school work. B gave evidence that the appellant's sexual abuse of him ceased after he was "probably 17, nearly 18" and after he had obtained his driver's licence at 16 years of age. B's evidence of sexual offences can broadly be described in four groups.

10 First, B gave evidence of the first occasions on which the appellant touched B's genitals. B said that the touching first occurred when he was "probably about 12, maybe 13". At that time, B was sleeping in bedroom three. His brothers, who shared bedroom three with him at that time, were in bed sleeping. The appellant would sometimes sleep over at B's family house. Sometimes the appellant would sleep on the lounge and on other occasions he would sleep in bedroom three between the boys' beds. The appellant had, on previous nights, got into B's bed, although there had been no contact with B's genitals. The first occasion when there was contact with B's genitals was in bedroom three when the appellant got into B's bed and touched B's genitals over his pyjamas. "[F]urther down the track" the appellant started touching B's genitals inside his pyjamas.

11 Secondly, B described how the touching became more frequent when he moved to bedroom two. He later said that he was 13, and possibly 14, when he moved into bedroom two, which was after his grandmother had moved out. B explained that while he was in bedroom two, the appellant would sleep over on the lounge nearly every weekend because "he was like part of the family". The incidents progressed from the appellant touching B under his pyjamas to mutual fondling and ejaculation. B described how he was always asleep in bedroom two before the appellant entered. When B was in bedroom two, the appellant touched B's genitals every time he stayed over.

12 Thirdly, B gave evidence of sexual abuse that occurred every night during a period of 10 to 14 days when his parents left Australia to holiday in Fiji. B said the acts were the "same as every other time except there was twice that he actually put my penis in his mouth". Those were the only occasions when fellatio occurred and B described those occasions in some detail. B said that he

thought that the incidents would have occurred in 1981 because he was 15, turning 16, at the time.

13 Fourthly, B gave evidence of occasions when he stayed at the house of the appellant's parents in Kurralta Park. The appellant drove him to the Kurralta Park house and he stayed there overnight several times. On a couple of those occasions the appellant caused mutual touching of his and B's genitals until ejaculation. Again, B described the manner of these incidents in detail.

The decisions below

14 At the conclusion of the prosecution case, counsel for the appellant made a no case to answer submission. The trial judge accepted the submission and delivered a verdict of not guilty. His Honour found that B's evidence, taken at its highest, was highly generalised and non-specific as to times and dates. The trial judge held that B had been unable to relate any incident to any particular occasion, circumstance or event beyond "what typically or routinely or generally occurred" so that it was impossible to identify two or more of the requisite acts[2].

15 The prosecution appealed to the Full Court of the Supreme Court of South Australia sitting as the Court of Criminal Appeal. The Court of Criminal Appeal held, and there is now no dispute, that the Crown had the power to appeal from an acquittal in a trial by a judge alone[3]. The central issue concerned the construction and application of s 50 of the *Criminal Law Consolidation Act*.

16 In the Court of Criminal Appeal the majority – Kourakis CJ, with whom Kelly, Nicholson and Lovell JJ agreed – held that the primary judge erred in directing himself that B's evidence was not capable of proving the commission of two or more acts of sexual exploitation over a period of three days or more. The Chief Justice held that s 50 did not require evidence which allowed the occasion of each act of sexual exploitation to be identified in such a way that it was distinguished from other acts of sexual exploitation[4]. He concluded that B's evidence concerning the conduct in bedroom two and bedroom three, as well as the incidents while B's parents were in Fiji, if believed, was capable of proving

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2 *R v Hamra (No 2)* [2016] SADC 8 at [27].

3 *R v Hamra* (2016) 126 SASR 374 at 380-383 [18]-[29].

4 *R v Hamra* (2016) 126 SASR 374 at 389 [47].

the commission of two or more acts of sexual exploitation[5]. The application for permission to appeal was granted; the appeal was allowed and the verdict of acquittal quashed; and the case was remitted for a new trial, with the decision left to the District Court as to whether the new trial would be before the same judge or a different judge of the District Court[6].

17 Peek J agreed with the majority that the trial judge erred in finding that there was no case to answer[7]. However, his Honour would have ordered that the matter be remitted back only to the trial judge "with a direction to further hear and determine the case according to law"[8]. He reached this conclusion in the course of considering the submission by the appellant that permission to appeal should not be granted having regard to considerations of double jeopardy and the alleged weakness of the case against the appellant[9].

The operation of s 50 of the *Criminal Law Consolidation Act*

18 The essence of the appellant's submission concerning the construction of s 50 of the *Criminal Law Consolidation Act* is that s 50 does not ameliorate the requirement that the State must prove, and therefore that the evidence must be capable of particularising, a "distinct occasion" or "distinct transaction" constituting each alleged sexual offence. The appellant referred to passages from the reasons of Dixon J in *Johnson v Miller*[10], that an accused is "entitled to be apprised not only of the legal nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge". Consistently with these reasons, the appellant submitted that it was necessary that each "occurrence or transaction, the subject of the charge ... be identified and distinguished from other occurrences or transactions alleged to have occurred"[11].

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5 *R v Hamra* (2016) 126 SASR 374 at 390 [52].

6 *R v Hamra* (2016) 126 SASR 374 at 393 [66].

7 *R v Hamra* (2016) 126 SASR 374 at 407 [112].

8 *R v Hamra* (2016) 126 SASR 374 at 413 [132], [134].

9 *R v Hamra* (2016) 126 SASR 374 at 409-411 [117]-[121].

10 (1937) 59 CLR 467 at 489; [1937] HCA 77.

11 *Johnson v Miller* (1937) 59 CLR 467 at 490.

The appellant also referred to the judgment in that case of Evatt J, who said that it is "of the very essence of the administration of criminal justice that a defendant should, at the very outset of the trial, know what is the specific offence which is being alleged against him"[12].

19 The appellant relied upon the application of these principles by this Court in *S v The Queen*[13]. In that case, S was convicted of three counts of carnal knowledge of his daughter. Each count had charged one act of carnal knowledge on a date unknown. The three counts specified separate periods of 12 months within which each offence was alleged to have occurred. The complainant gave evidence of two acts of sexual intercourse but there was no evidence to link those acts to any of the periods. She also gave evidence that sexual intercourse occurred "every couple of months for a year" during a two year period before she left home at 17. A majority of the Court allowed the appeal. Gaudron and McHugh JJ relied upon *Johnson v Miller* and said[14]:

> "The evidence of a number of offences said to have been repeated at two-monthly intervals over a period of one year (which period might fall anywhere within a period of almost three years) had the same practical effect that was noted by Evatt J in relation to the course proposed in *Johnson v Miller*. Effectively, the applicant was required to defend himself in respect of each occasion when an offence *might* have been committed. Additionally, by reason that the offences were neither particularized nor identified, the accused was effectively denied an opportunity to test the credit of the complainant by reference to surrounding circumstances such as would exist if the acts charged had been identified in relation to some more precise time or by reference to some other event or surrounding circumstance." (emphasis in original)

20 The common law principle upon which the appellant relied, which requires the prosecution to be able to identify from the evidence the particular occurrences or transactions which are the subject of the charge, is not based merely upon a concern with forensic prejudice to an accused person. It is based also upon ensuring certainty of the verdict including enabling a plea of autrefois

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12 *Johnson v Miller* (1937) 59 CLR 467 at 497.

13 (1989) 168 CLR 266; [1989] HCA 66.

14 *S v The Queen* (1989) 168 CLR 266 at 286.

convict or autrefois acquit[15], ensuring jury unanimity[16], and ensuring that the court knows the offence for which the person is to be punished[17].

21 The decision in *S v The Queen* predated the introduction of s 50 of the *Criminal Law Consolidation Act*. However, the appellant submitted that the same principles applied to s 50(1) of the *Criminal Law Consolidation Act*. In order to consider the extent to which that common law principle survived the introduction of s 50, it is necessary to say something about the legislative history of s 50.

22 The progenitor of s 50 was a new provision, s 74, that was inserted in 1994 into the *Criminal Law Consolidation Act*[18]. Section 74(1) provided for an offence of "persistent sexual abuse of a child". By s 74(2) that offence consisted of "a course of conduct involving the commission of a sexual offence against a child on at least three separate occasions (whether the offence is of the same nature on each occasion or differs from occasion to occasion)". Section 74(5) required that the jury "be satisfied beyond reasonable doubt that the evidence establishes at least three separate incidents, falling on separate days" in the relevant period and that the jury "be agreed on the material facts of three such incidents in which the defendant committed a sexual offence of a nature described in the charge (although they need not be agreed about the dates of the incidents, or the order in which they occurred)".

23 In 1993, in the Second Reading Speech in the Legislative Council, where this provision was introduced, the then Attorney-General described the decision in *S v The Queen* and addressed the difficulties confronting the prosecution in historical, persistent child sexual abuse cases[19]. The legislation was later re-

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15 *S v The Queen* (1989) 168 CLR 266 at 276 per Dawson J, 284 per Gaudron and McHugh JJ.

16 *S v The Queen* (1989) 168 CLR 266 at 276 per Dawson J, 287 per Gaudron and McHugh JJ.

17 *S v The Queen* (1989) 168 CLR 266 at 284 per Gaudron and McHugh JJ.

18 By the *Criminal Law Consolidation (Child Sexual Abuse) Amendment Act* 1994 (SA).

19 South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 13 October 1993 at 546-547.

introduced by the following government[20]. In the House of Assembly, the Deputy Premier's Second Reading Explanation was near identical to the 1993 Second Reading Speech. He too described the facts and decision in *S v The Queen* and said[21]:

> "The decision of the High Court poses great difficulty in charging defendants where the allegations involve a long period of multiple offending. In some cases, like S, the child – or the adult recalling events which took place when he or she was a child – cannot specify particular dates or occasions when the offence is alleged to have taken place. The result is that defendants are being acquitted even where juries clearly indicate that they accept the evidence that abuse took place at some time.
>
> Legislation has been introduced in all Australian jurisdictions except the Northern Territory to deal with this problem. The Directors of Public Prosecutions in all jurisdictions have agreed that such legislation is necessary. In late 1993, the South Australian Director of Public Prosecutions had requested that legislation be introduced as a matter of urgency, and the former Government did so, just before the election.
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> ...
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> While the various models differ in detail, the essence of the legislation in other jurisdictions is, in general, the creation of a new offence of having a sexual relationship with a child or, as is proposed here, persistent sexual abuse of a child. That offence is proved by proving that the defendant commits a sexual offence against a child on three or more separate occasions. The effect is that it is not necessary to specify the dates, or in any other way to particularise the circumstances, of the alleged acts.
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> The Bill follows these models. It is a necessary reform to the way in which the criminal law copes with these particularly difficult cases."

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20 South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 9 March 1994 at 188; South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 20 April 1994 at 536.

21 South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 4 May 1994 at 1005.

24 The new provision, s 74, did not dispense with the common law requirement for particulars of the three or more offences other than, in s 74(4), to provide that the charge (i) need not state the dates on which the sexual offences were committed, (ii) need not state the order in which the offences were committed, and (iii) need not differentiate the circumstances of commission of each offence.

25 In 2008, s 74 of the *Criminal Law Consolidation Act* was replaced by the present s 50[22]. In the Second Reading Speech of the Criminal Law Consolidation (Rape and Sexual Offences) Amendment Bill 2007 (SA), which introduced s 50, the then Attorney-General described the purpose of the proposed section as follows[23]:

> "The current offence of persistent sexual abuse was enacted to overcome problems such as those identified by the High Court in the case of S v the Queen and by the South Australian Court of Criminal Appeal in R v S. In that case multiple offences against the same child were charged as having occurred between two specified dates, each one being part of an alleged continuous course of conduct. Because the evidence given of the alleged course of conduct was not sufficiently related to the particular charges, in that the child could not identify particular occasions and link them with particular counts, an appeal against conviction was allowed and an acquittal entered.
>
> The offence of persistent sexual abuse is rarely charged because it fails to overcome the very problem of particularity that it tried to remedy. Children are still unable to identify precisely each separate incident of abuse that is required to prove the offence.
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> The new offence has the same aim as the current offence: to punish the persistent sexual abuse of a child, and not just the sexual acts that can be identified with enough particularity to be charged as specific offences in themselves.

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22 By the *Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act* 2008 (SA).

23 South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 25 October 2007 at 1473-1474.

> Often, children who have [been] subjected to long-term sexual abuse can remember in some detail when the abuse started and when it ended, so that the first and last alleged acts are often capable of being charged as specific offences, but can't remember the detail of when and where each of the many intervening acts occurred enough to distinguish each one from the other. That is why all these acts cannot be charged as specific offences, and why, when convicted of only the acts that can be so charged, the law fails to recognise or punish the full extent of the abuse. The current offence aims to overcome this but has not worked.
>
> The Bill proposes to replace the current offence with a new one of persistent sexual exploitation of a child. The new offence focusses on acts of sexual exploitation that comprise a course of conduct (persistent sexual exploitation) rather than a series of separately particularised offences.
>
> Under the Bill, an act of sexual exploitation is an act of a kind that could, if it were able to be properly particularised, be the subject of a charge of a specific sexual offence."

26 The offence of persistent sexual abuse in s 50 has the same underlying purpose as s 74, which preceded it. It was designed as a response to decisions such as *S v The Queen* to create a new, but single, offence that focused upon acts of sexual exploitation. However, the language of s 50 departed from s 74, most notably in that only two or more acts were required rather than three or more.

27 The basic difficulty for the appellant's submission is the plain terms of s 50(4). That sub-section outlines the required particularity of an information charging a person with an offence under s 50(1). It modifies the common law by providing that although the information must allege a course of conduct consisting of acts of sexual exploitation it need not "identify particular acts of sexual exploitation or the occasions on which, places at which or order in which acts of sexual exploitation occurred" (s 50(4)(b)(ii)). The sub-section requires the jury to find the same two or more acts committed over a period of three or more days in order for the accused to be convicted but, provided that two or more distinct acts can be identified, it does not require the occasions of those acts to be particularised other than as to the period of the acts and the conduct constituting the acts. In this respect, s 50(4)(b)(ii) has the same effect as its predecessor provision, which, in s 74(4), did not require particulars to "differentiate the circumstances of commission of each offence".

28 An example which illustrates this point is evidence of a complainant that an act of sexual exploitation was committed every day over a two week period.

The appellant submitted that such evidence would be insufficient because, even if the jury (or judge in a trial by judge alone) were to conclude that those acts had occurred in that way, this would invite "deductive reasoning", "rather than identifying an occasion and determining what is the evidence to prove that occasion". In other words, it is impermissible to use logic to deduce from the occurrence of acts of sexual exploitation every day for two weeks that two or more acts must have occurred over a period of "not less than 3 days". The submission cannot be accepted. Neither the common law nor s 50 of the *Criminal Law Consolidation Act* precludes a judge or jury from deducing a conclusion by simple and obvious logic, provided, of course, that the members of the jury reach the conclusion as to the same two or more acts unanimously, or by a statutory majority where a majority verdict is permitted[24].

The application of s 50 to the facts

29 The issue before the trial judge raised by the no case to answer submission was "not whether on the evidence as it stands [the appellant] ought to be convicted, but whether on the evidence as it stands he *could* lawfully be convicted"[25] (emphasis in original). In other words[26]:

> "if there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision. Or, to put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty."

30 The evidence of B, taken at its highest, demonstrates that there was a case to answer. The fourth category of alleged acts, concerning the incidents at the house of the appellant's parents in Kurralta Park, can be put to one side. The respondent conceded that there was nothing to link B's evidence about those incidents to a period when B was under 17 years old. The issue, therefore, was whether B's evidence was capable of being believed in respect of each of the alleged acts of sexual exploitation in the first, second, and third categories.

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

25 *May v O'Sullivan* (1955) 92 CLR 654 at 658; [1955] HCA 38.

26 *Doney v The Queen* (1990) 171 CLR 207 at 214-215; [1990] HCA 51.

31 It is convenient to commence with the first and second categories of B's evidence, which concerned alleged offending in bedroom three and then bedroom two. The appellant submitted that there was no case to answer in relation to those categories for the following reasons: (i) the bedroom three allegations could not have occurred when B was 12 or 13 because B's family only met the appellant after he finished his teaching studies in 1978, and B turned 14 on 1 November 1979; (ii) the allegations concerned undifferentiated offending and were therefore incapable of constituting the s 50 offence; and (iii) taking the evidence at its highest, it was not open to conclude beyond reasonable doubt that any of the bedroom two allegations occurred before B turned 17. Each of these submissions should be rejected.

32 As to (i), the timing of the appellant's commencement of teaching in 1979 did not preclude him meeting B's family, and the occurrence of the alleged offending in bedroom three, before B turned 14 on 1 November 1979. But even if it did, the alleged acts would still constitute an offence if B was 14 rather than 13.

33 As to (ii), this submission is based on an incorrect understanding of s 50. As explained above, the Crown was not required to provide particulars, or prove the s 50 offence, in a way that differentiated the circumstances of each act of sexual exploitation. It was open to conclude that there were two or more acts of sexual exploitation committed if, for instance, the judge concluded beyond reasonable doubt that the appellant committed the bedroom two acts of sexual exploitation every time he stayed over, which was nearly every weekend for months, and possibly years, from when B was 13 or possibly 14.

34 As to (iii), there was a case to answer that B was under the age of 17 when the offending in bedroom three, and then bedroom two, occurred. B's evidence was that he moved from bedroom three to bedroom two when he was 13 or possibly 14. His evidence was that while he was in bedroom two, the appellant would sleep over on the lounge nearly every weekend and he said that the appellant touched B's genitals every time he stayed over. Although B's mother's evidence conflicted with B's evidence about which room B slept in, her evidence supported the conclusion that B was under the age of 17 when his grandmother moved out of bedroom two. This was the time when B said that he moved into bedroom two. B's mother's evidence was that B's grandmother passed away in January 1982 and that she had been in the nursing home for three to four years, which would be from January 1978 or January 1979. On this evidence, therefore, B's grandmother moved to the nursing home, and B moved bedrooms, when B was 12 or 13.

35 The appellant's submission concerning the third category of B's evidence, namely the acts which took place while his parents were in Fiji, also cannot be accepted. The appellant's submission was that it could not be excluded beyond reasonable doubt that B had turned 17. The date when B turned 17 was 1 November 1982.

36 B's evidence was that he thought that the incidents would have occurred in 1981 when he was about 15, turning 16. Although, in cross-examination, he accepted that the date could have been 1982, he said that he had placed the date at 1981, and his age at 15, because after his parents had holidayed in Fiji, his parents took him on a subsequent trip to Fiji when he was 17, and before he left school. B also said that he was still sleeping in bedroom two at the time his parents holidayed in Fiji. His evidence had been that he moved from bedroom two back to bedroom three when he was "roughly 16" although he accepted in cross-examination that with the passage of time it was possible that he was 17 when he moved from bedroom two.

37 B's evidence that the acts while his parents were in Fiji took place before he turned 17 on 1 November 1982 was also supported by evidence from his mother. Her evidence, based upon passport dates, was that when she went to Fiji without the children her mother was still alive. As noted above, her mother passed away in January 1982. B's mother also gave evidence that the subsequent trip to Fiji when the children were taken was in the September school holidays on children's fares, which she presumed meant that B was under 16. B finished school in 1983. Even on the subsequent trip, if it occurred in September 1982, B would not have been 17. Taken at its highest, the evidence of B and his mother plainly permitted the conclusion beyond reasonable doubt that B had not turned 17 at the time his parents took their trip to Fiji.

38 This ground of appeal must be dismissed.

The grant of permission to appeal by the Court of Criminal Appeal

39 The appellant's second ground of appeal was that the Court of Criminal Appeal erred by failing to address the appellant's submission that permission to appeal should not be granted. It is an error of law to fail to consider, and decide, an application for leave to appeal before allowing an appeal[27]. The appellant submitted that, apart from the observation by Kourakis CJ that permission to

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27 *Malvaso v The Queen* (1989) 168 CLR 227; [1989] HCA 58.

appeal was sought[28], there was an absence of reasons on the question of permission by the majority of the Court of Criminal Appeal. The appellant pointed specifically to the absence of any consideration of double jeopardy issues. From the absence of reasons on the question of permission, it was said, the conclusion should be drawn that the majority of the Court of Criminal Appeal had failed to consider, expressly or by implication, the question of permission to appeal. The appellant submitted that this Court, in considering that question afresh, should find that permission should have been refused.

40 Although Kourakis CJ did not expressly give reasons for why permission to appeal should be granted, or advert to considerations such as double jeopardy, when his Honour's reasons are considered in context it is apparent that the issue was considered and decided. His reasons began by explaining that the Director of Public Prosecutions sought permission to appeal[29]. The orders made included granting the application for permission to appeal. Kourakis CJ also addressed the possibility of the intermediate position, adopted by Peek J, that permission to appeal should be granted on the basis that the matter be remitted to the trial judge for further hearing according to law. That position was intermediate in the sense that it did not involve adopting the position of the Crown that there should be a retrial de novo before a different judge, nor did it involve adopting the position of Mr Hamra that permission to appeal should not be granted. Kourakis CJ gave reasons explaining why there was no power to make an order to resume the completed trial in which the order for acquittal was wrongly made[30].

41 The most fundamental reason why permission to appeal was granted is revealed from the circumstances of the case and the conclusion reached. The Court of Criminal Appeal acceded to a request from the Director of Public Prosecutions for a coram of five judges to hear the application for permission to appeal, on the basis that the application would involve a challenge to the recent decision in *R v Johnson*[31]. Before the Court of Criminal Appeal, that decision was challenged by the Director. It was relied upon by Mr Hamra as the respondent. In his reasons for decision, Kourakis CJ made various observations

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28 *R v Hamra* (2016) 126 SASR 374 at 377 [2].

29 *R v Hamra* (2016) 126 SASR 374 at 377 [2].

30 *R v Hamra* (2016) 126 SASR 374 at 390-393 [54]-[66].

31 [2015] SASCFC 170.

explaining, and confining, that decision[32]. The approach taken by the trial judge, in reliance upon *R v Johnson*, was found to have been in error[33]. The conclusion of the majority was that in a trial by judge alone the judge had made an error of law on an important matter concerning the nature of the offence.

42 Although Kourakis CJ did not discuss in his reasons the consideration that an order for a retrial would involve jeopardy to Mr Hamra, in the sense of being subjected to the power of the State in relation to the same subject matter on more than one occasion, it is not necessary in every case to refer to every factor which has weight in a discretionary decision. What is sufficient in each case does not depend upon any rigid formula and will be informed by all the circumstances of the case, including the submissions that were made[34]. In this case, the Court of Criminal Appeal did not err by failing expressly to refer to considerations of jeopardy as a factor weighing against the consideration of whether to grant permission to correct an error of law.

The notice of contention

43 The respondent filed a notice of contention which alleged that the Court of Criminal Appeal erred in failing to find that *R v Johnson*[35] was wrongly decided. It is strictly unnecessary to consider the notice of contention in light of the conclusion we have reached that the appeal must be dismissed. However, several points should be made about the issues raised in the notice of contention.

44 Despite its terms, the notice of contention was not, it seems, concerned with the correctness of the result in *R v Johnson*. The respondent did not descend into a detailed consideration of the facts of that case or the application of the legal principles to those facts. The respondent's submissions about *R v Johnson* were confined to the failure by the Court of Criminal Appeal in this case expressly to reject a statement of principle in *R v Johnson* by Peek J[36], with

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32 *R v Hamra* (2016) 126 SASR 374 at 389-390 [47]-[50].

33 *R v Hamra* (2016) 126 SASR 374 at 387-388 [43].

34 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 270, 272-273 per Mahoney JA.

35 [2015] SASCFC 170.

36 *R v Johnson* [2015] SASCFC 170 at [111].

whom Sulan and Stanley JJ agreed[37]. That statement of principle was that the requirement of jury unanimity as to each of the two or more acts of sexual offending meant that[38]:

> "there must be a minimum amount of evidence adduced by the prosecution to enable jurors in the jury room to delineate two offences (at least) *and* to agree that *those* two offences were committed." (emphasis in original)

45 On its terms, that statement of principle is correct. Section 50(1), read with s 50(2), plainly requires the jury to identify two or more acts, over a period of three days or more, which could be charged as sexual offences. However, as Kourakis CJ correctly observed in the Court of Criminal Appeal in this case, s 50 does not always require evidence which allows acts of sexual exploitation to be delineated *by reference to differentiating circumstances*[39]. Of course, as the text of s 50(1) prevents a jury from convicting without agreement upon two or more acts of sexual exploitation, this requires the jury to identify the two or more acts separately. However, the particular, unique circumstances of each separate occasion need not always be identified in order for a conclusion to be reached that two or more separate acts occurred, separated by three days or more. In this case, for example, there was a case to answer by reference to B's evidence even if all of the separate, individual acts alleged in each category could not be delineated by particular, different circumstances.

46 The relevant question before the Court of Criminal Appeal in *R v Johnson* was whether the verdict of the jury was unreasonable. The decision of the Court of Criminal Appeal turned upon the factual question of whether the evidence proved that two or more acts of sexual exploitation occurred over the prescribed period of time. As we have explained, that required consideration of the evidence in that case, which was not the subject of submissions in this Court. However, some of the reasoning of Peek J in *R v Johnson* appeared to suggest, as a proposition of law, that it is impossible to convict an accused person if the evidence did not identify two particular acts of sexual exploitation which could be delineated from many other acts of sexual exploitation by reference to

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37 *R v Johnson* [2015] SASCFC 170 at [1].

38 *R v Johnson* [2015] SASCFC 170 at [111].

39 *R v Hamra* (2016) 126 SASR 374 at 389 [47].

particular circumstances[40]. Put another way, to use expressions of Sulan and Stanley JJ, it seemed to be suggested that an accused person could never be convicted unless the complainant were able to identify two or more particular acts of sexual exploitation with a "degree of specificity" so as to differentiate them from other such acts[41]. To the extent that those propositions suggest that some greater degree of particularity is required beyond that which sufficiently identifies two or more particular acts within s 50(1), separated by three days or longer, those propositions are incorrect. To adapt the example given earlier in these reasons, it would be sufficient if the jury (or judge in a trial by judge alone) were to accept that acts which could be the subject of a charge of a sexual offence occurred every night, or every weekend, over a period of two months without any further differentiation of the particular occasions of the offending.

Conclusion

47 The appeal must be dismissed.

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40 *R v Johnson* [2015] SASCFC 170 at [114].

41 *R v Johnson* [2015] SASCFC 170 at [9].