# HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, KEANE, NETTLE AND EDELMAN JJ

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DL APPELLANT

AND

THE QUEEN RESPONDENT

*DL v The Queen*
[2018] HCA 26
*20 June 2018*
A38/2017

**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 Town & Country 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

## DL v The Queen

Criminal law – Trial by judge alone – Adequacy of reasons – Where appellant convicted of "[p]ersistent sexual exploitation of a child" – Where offence comprised of two or more acts of sexual exploitation separated by not less than three days – Where complainant alleged various acts of sexual exploitation over many years – Where alleged inconsistencies and implausibilities in complainant's evidence – Where trial judge regarded complainant as reliable witness as to "core allegations" – Whether trial judge's reasons inadequate because failed to identify two or more acts constituting offence – Whether trial judge's reasons inadequate because failed to explain process of reasoning.

Words and phrases – "adequacy of reasons", "basis for decision", "conflict between evidence", "credibility", "inadequacy of reasons", "inconsistencies in evidence", "process of reasoning", "reasons", "trial by judge alone".

*Criminal Law Consolidation Act* 1935 (SA), s 50(1).

KIEFEL CJ, KEANE AND EDELMAN JJ.

## Introduction

1 The appellant was charged under s 50(1) of the *Criminal Law Consolidation Act* 1935 (SA) with one count of persistent sexual exploitation of a child. At the relevant time, that sub-section created 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". The appellant was tried by judge alone and convicted. He was sentenced to 10 years' imprisonment for "indecent assaults [upon the victim], acts of fellatio upon each other, the showing of pornographic magazines, masturbating in the victim's presence and causing the victim to masturbate".

2 The appellant appealed to the Court of Criminal Appeal of the Supreme Court of South Australia. One ground of appeal to that Court was that the trial judge's reasons were inadequate. The Court of Criminal Appeal (Blue J, with whom Kourakis CJ and Bampton J agreed) held that the reasons were not inadequate. The appellant appeals to this Court from that conclusion. But he relies upon a different basis for the alleged inadequacy of the trial judge's reasons. The essential basis of his appeal raised an issue that overlapped with two other matters that were also given special leave to appeal[1]. The issue in this appeal is whether the trial judge's reasons failed to identify, and to disclose the process of reasoning leading to his finding of, the two or more acts of sexual exploitation upon which the conviction was based. The appellant's submission that the trial judge's reasons were inadequate for this reason should not be accepted. For the reasons below, the appeal should be dismissed.

## The particulars and the evidence

### *The particulars of the offence charged*

3 The particulars of the offence charged in the information under s 50(1) of the *Criminal Law Consolidation Act* were that the appellant: (i) touched the complainant's genitals over the complainant's clothes; (ii) showed the complainant pornography; (iii) masturbated in the complainant's presence; (iv) encouraged the complainant to masturbate in his presence; (v) caused the complainant to perform fellatio upon him; and (vi) performed fellatio upon the complainant. The period during which the offence was alleged to have been committed began on 6 February 1984, when the appellant was 31 years old and

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**1** *Hamra v The Queen* (2017) 91 ALJR 1007; 347 ALR 586; [2017] HCA 38; *Chiro v The Queen* (2017) 91 ALJR 974; 347 ALR 546; [2017] HCA 37.

the complainant was five years old. It was alleged to have concluded on 1 September 1994, when the appellant was 41 years old and the complainant was 15 years old.

*The prosecution case*

4 At the time of the acts relied upon by the prosecution, the complainant was a child who lived with his parents and his brother and sister. The appellant was the complainant's uncle. Because of the work commitments of the complainant's parents, the complainant and his siblings, an older sister and a younger brother, occasionally stayed with the appellant's family at the appellant's house in Christies Beach. The appellant lived with his then wife and, initially, one daughter.

5 The prosecution case relied heavily upon evidence of the complainant although the prosecution also called the complainant's wife, his parents, his sister, his brother, and his aunt. The complainant's evidence was that the first occasion of a sexual assault by the appellant was when the complainant was "about five" years old, in the lounge room of the appellant's house. On that occasion, the appellant touched him on his genital area over his clothing while he and the appellant were playing with a slot car track.

6 The complainant gave evidence of other occasions when the appellant touched him on his genital area over his clothing. One occasion was at his grandmother's house on Christmas Day when he was "nine ... or seven", when the appellant gave him a remote control car. Other occasions of such touching occurred after he was "close to nine", when the appellant would take him to a slot car venue called Red Line. The complainant said that during some of the journeys to Red Line, in the appellant's car, the appellant would touch the complainant on his genital area.

7 The complainant said that when he was "about seven" the appellant began to show him pornographic videos and magazines "of Asian content". The appellant's ex-wife gave evidence that the appellant had been "quite persistent" that she watch pornographic videos with him and she recalled seeing a DVD or video of Asian pornography arrive at the house, about which she questioned him.

8 The complainant said that on three or four occasions he and the appellant masturbated after the appellant showed him what to do. He said that each time this occurred he was playing on a computer in the master bedroom at the appellant's house, although he accepted in cross-examination that the computer could have been subsequently in a different room.

9 The complainant gave evidence relating to two sheds at the appellant's house, described at trial as shed 1 and shed 2. The complainant said that when he was "past the age of nine, going on 12", accepting that his age was "somewhere in that gap", he and the appellant performed fellatio on each other in shed 2 at the appellant's house in Christies Beach. The complainant's evidence about the sheds at the appellant's house was that (i) the appellant grew marijuana hydroponically inside shed 1, which the appellant would give him to smoke nearly every time that he stayed from the age of nine, and (ii) the appellant built shed 2 and started growing the marijuana hydroponically in it when the complainant was around 12 years old.

10 The complainant described two other occasions when he and the appellant performed fellatio on each other. One occasion was when he was "over 12, 12 nearly", in Cherry Gardens, where, as the appellant's ex-wife said in evidence, the appellant grew cannabis. The second occasion was when the complainant was "close to 12", at a South Terrace unit leased by a woman with whom the appellant was in an extra-marital relationship.

11 In 1989, a second daughter was born to the appellant and his then wife. It was an agreed fact at trial that on 28 August 1994, when the appellant's second daughter was five years old and the complainant was 15, the complainant sexually assaulted her by putting his finger into her vagina. The complainant's evidence was that this occurred in shed 2 on the same day that he had performed fellatio on the appellant. He said that his act of fellatio was induced by being allowed to ride the appellant's motorbike, a privilege he said the appellant had permitted since he was "nine, ten, onwards".

12 After the complainant's assault on the appellant's daughter, the complainant was no longer permitted to stay with the appellant's family, although the complainant did continue to visit. The Crown's case, and the complainant's evidence, was that the appellant's offending ceased after the assault on 28 August 1994.

13 The complainant said that the appellant told him that the appellant would use a gun on him and his family if he told anyone about the activities between them. Around 2003 or 2004, at the beginning of his relationship with his partner, later his wife, the complainant told her that he had been abused as a child, although he did not give her any details of the abuse. The evidence from the complainant's wife was consistent with this, although she said that the disclosure was in 2001 or 2002.

14 In 2007 or 2008, the appellant's daughter, assisted by the appellant, made a claim for compensation under the *Victims of Crime Act* 2001 (SA) for the indecent assault by the complainant. She received a payment of $50,000. The

complainant was told of the claim by the Director of Public Prosecutions. He later learned that the appellant had encouraged his daughter to make the claim.

15 The complainant said that he had told his counsellor about being sexually abused as a child and that she had suggested that he do something about it, stand up for himself, and see what the appellant was doing. Around 2010, he went to see the appellant twice. On the first occasion they smoked marijuana and on the second occasion the complainant sold marijuana to the appellant. In 2011, the complainant made a complaint at the Christies Beach police station.

*The appellant's evidence*

16 The only witness called by the defence was the appellant. The appellant admitted many of the circumstances described by the complainant but he denied that any of the sexual acts constituting the s 50 offence occurred in those circumstances.

17 The appellant admitted growing marijuana in the bush near Cherry Gardens. But he denied taking the complainant there and denied that any sexual contact occurred there. He admitted growing marijuana in shed 1 and shed 2. But he denied ever supplying marijuana to the complainant prior to the complainant's sexual assault of his daughter. He admitted that there was a slot car track in shed 2 but he said that shed 2 was not built until 1991 (when the complainant was 12 years old) and, relying upon an entry in his calendar, said that he did not finish installing a slot car track in shed 2 until June 1993 (when the complainant was 14 years old).

18 The appellant admitted having a pornographic video and having ordered a catalogue. But he denied ever showing pornography to the complainant. He admitted having a computer in his house but he denied any abuse of the complainant while the complainant used the computer. He also denied that the computer was located in the master bedroom; the evidence from him and his ex-wife was that the computer was located in a spare room that later became his daughter's bedroom. The appellant admitted taking the complainant to the South Terrace unit occupied by the woman with whom he had a relationship, but he said that this occurred after the complainant's assault on his daughter when the complainant was 15 years old. The appellant denied any sexual assault on that occasion and said that he had just taken the complainant there to help him cut up pieces of plastic to make a frame because, at the time, the appellant was "pretty stoned".

19 The appellant admitted that he let the complainant ride his motorbike. But he said that this only occurred sometime after the assault upon his daughter when

the complainant was at least 15 years old. The appellant denied that allowing the complainant to ride his motorbike had anything to do with fellatio.

20 The appellant admitted that he had been at the complainant's grandparents' house on Christmas Day, but he did not recall the complainant receiving a remote control car. He denied ever abusing the complainant at the house. He admitted having an air rifle and a semi-automatic firearm, which he had shot at the complainant's family's property when the family was present. But he denied ever threatening anyone with a gun.

21 Finally, the appellant gave evidence related to the complainant's evidence that in 2003 or 2004 the complainant had told his partner (later his wife) that he had been sexually abused, without giving her details. The appellant said that the complainant's father had told him that the complainant was sexually abused by a group of boys described at trial as the Moana boys. One possible inference, therefore, may have been that the sexual abuse about which the complainant had told his wife was abuse by the Moana boys. The complainant's father denied ever telling the appellant this. The trial judge expressly disregarded the complainant's evidence about his complaint of sexual abuse to his wife.

The findings and reasons of the trial judge

22 The trial judge was aware, and recorded in his reasons, that the offence in s 50 does not require the prosecution to prove every particular. The trial judge also correctly observed that even if he were to reject the evidence of the appellant, which would have to be rejected beyond reasonable doubt, he would still need to be independently satisfied beyond reasonable doubt about the allegations before he could convict.

23 The trial judge's reasons set out the background to the case, the charges, the particulars, and the essential evidence of the witnesses. One particular matter which the trial judge considered was the significance of the complainant's visits to the appellant twice around 2010. He said that although these visits, on their face, seemed inconsistent with the alleged abuse, they were part of the complainant's way of dealing with his past. The trial judge also rejected the submission that the complainant, encouraged by the appellant's ex-wife, had made false allegations due to long-term ill-feeling that the complainant and the appellant's ex-wife held towards the appellant.

24 The trial judge described a number of matters that he characterised as inconsistencies that the appellant submitted meant that the complainant could not be "relied upon about the substantive allegations" and that his account was implausible. In his summary of the appellant's case, the trial judge said that these formed "an attack upon [the complainant's] truthfulness and reliability". These

matters included: (i) the failure by the complainant to mention the final occasion of an assault on him (28 August 1994) until a proofing session with counsel for the Director of Public Prosecutions on 25 July 2013; (ii) the complainant's failure to disclose the offences by the appellant during his counselling sessions; (iii) the evidence concerning the Moana boys, which the trial judge described as confusing but not affecting the complainant's credit and reliability; and (iv) inconsistencies about when and where the cannabis was grown and when the slot car track was completed, which are discussed in further detail below.

25 When assessing the credit and reliability of the complainant generally, the trial judge described the complainant as having given evidence "in a forthright and convincing manner". He described the complainant as "a straightforward man", lacking in guile. He said that the complainant presented as "a man endeavouring to tell the truth". After discussing the complainant's demeanour he said that the complainant "was describing real events that happened to him and was not led by the suggestions of others".

26 Although finding that the complainant was endeavouring to tell the truth and was describing real events, the trial judge accepted that some of the complainant's evidence "about when some events occurred [was] inaccurate". He also said that he was conscious that the complainant was a long-term user of drugs. The trial judge then said:

> "I also accept him as a reliable witness as to the core allegations. I have scrutinised his account very carefully. Some of his estimates of his age when events occurred were not reliable (for example, when he rode the motorbike or being 'stoned'), but they were not sufficient to cause me to doubt either his truthfulness or reliability. Any exaggeration was not deliberate. As reflected in cross-examination, he had trouble remembering the process whereby statements were taken from him, who he told beforehand, who he was with and when he made particular allegations. My comments above should not be overlooked and it should not be forgotten that the conduct alleged took place many times over many years ...
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> Even though he said he lied on one occasion, I do not consider that he deliberately told an untruth, rather he was careless in the way he answered; there is a clear difference. He corrected himself ... Although it is not determinative of the case, having listened to [the complainant] over a number of days, I simply believed him and found him to be reliable. I had the same view of him at the end of all of the evidence."

27 When these paragraphs are considered in the context discussed above, the findings by the trial judge that the complainant "was describing real events that

happened to him" and that he was "a reliable witness as to the core allegations" were an acceptance that the complainant was truthful and reliable about all of the sexual acts that he had described, which fell within the particulars of the s 50 offence for which the appellant was charged. The "core allegations" to which the trial judge referred must have been a reference to those acts that were the basis for the s 50 charge, with allegations such as the complainant's particular age at the time of the sexual offences or the precise location of those offences being outside the core allegations. The reference to "core allegations" is consistent with the description by the trial judge of all the allegations of sexual conduct as the "substantive issues". It is also consistent with the distinction that he drew between the evidence concerning the "substantive allegations" and inconsistencies on other matters arising from the evidence.

The decision of the Court of Criminal Appeal and the appeal to this Court

28 The appellant relied upon three grounds of appeal in the Court of Criminal Appeal. The first was that the verdict was unreasonable or could not be supported having regard to the evidence. The second was that the trial judge had erred in his application of the burden of proof. The third was that the trial judge erred "in failing to give adequate reasons in so far as he did not deal with incontrovertible, or arguably incontrovertible inconsistencies affecting the credibility of the complainant, and consequently his conclusion of proof beyond reasonable doubt". The Court of Criminal Appeal dismissed all grounds. None of those grounds was relied upon in this Court.

29 Before this Court, there were three limbs to the appellant's sole ground of appeal. The appellant alleged that the Court of Criminal Appeal should have found that: (i) the trial judge had failed to give adequate reasons; (ii) the verdict of guilty was uncertain, unreasonable, and unsafe; and/or (iii) there was a miscarriage of justice. As the appellant clarified in oral submissions, the references to "unreasonableness" and "miscarriage of justice" were in support of the submission that the trial judge's reasons were inadequate due to a failure to identify sufficiently the actus reus of the offence. Although the appellant's oral submissions strayed at times from the grounds of appeal, the appellant's argument reduced ultimately to whether the trial judge's reasons were inadequate because they "did not identify the two or more acts of sexual exploitation found proved beyond reasonable doubt ... and the process of reasoning leading to guilt of those acts".

30 The appellant submitted that the Court of Criminal Appeal erred because it did not approach the ground of appeal concerning adequacy of reasons "by reference to the proof of actual sexual offences comprising the actus reus". The submission that the trial judge's reasons were inadequate on that basis was not made in the Court of Criminal Appeal. The submission might not have been

made in the Court of Criminal Appeal because counsel may have concluded that the trial judge's reasons, read as a whole, involved a finding that the appellant had committed all of the acts alleged in the particulars to constitute the s 50 offence.

31 At the special leave hearing and in written and oral submissions on this appeal, the appellant submitted that the failure to rely upon the ground of inadequate reasons in the terms relied upon in this Court was because the decision of the Court of Criminal Appeal in *R v Little*[2] was handed down the day before argument in the Court of Criminal Appeal in the present case. In fact, the decision in *R v Little* was handed down five months after the Court of Criminal Appeal decided the present case. Although there might have been doubt about the prospective result in *R v Little* at the time of hearing the present case in the Court of Criminal Appeal[3], the relevant part of the decision in *R v Little* was not novel. It applied earlier South Australian authority[4], which was held to be "correctly decided"[5] and consistent with the 1997 decision of this Court in *KBT v The Queen*[6], to conclude that s 50 requires that a trial judge direct the jury to agree on the same two or more acts of sexual exploitation[7].

Adequacy of reasons

32 The content and detail of reasons "will vary according to the nature of the jurisdiction which the court is exercising and the particular matter the subject of the decision"[8]. In the absence of an express statutory provision, "a judge returning a verdict following a trial without a jury is obliged to give reasons sufficient to identify the principles of law applied by the judge and the main

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**2** (2015) 123 SASR 414.

**3** Cf *R v C, G* (2013) 117 SASR 162 at 187 [88].

**4** *R v M, BJ* (2011) 110 SASR 1.

**5** *R v Little* (2015) 123 SASR 414 at 415 [4].

**6** (1997) 191 CLR 417; [1997] HCA 54.

**7** *R v Little* (2015) 123 SASR 414 at 415 [4]. See also *Chiro v The Queen* (2017) 91 ALJR 974 at 981 [19]; 347 ALR 546 at 552-553.

**8** *Wainohu v New South Wales* (2011) 243 CLR 181 at 215 [56]; [2011] HCA 24.

factual findings on which the judge relied"[9]. One reason for this obligation is the need for adequate reasons in order for an appellate court to discharge its statutory duty on an appeal from the decision[10] and, correspondingly, for the parties to understand the basis for the decision for purposes including the exercise of any rights to appeal.

33 The appellant submitted that the inadequacy of the reasons to identify two or more acts of sexual exploitation and the basis upon which they were found to be proved lay in the trial judge's failure to resolve a number of factual and evidential contests at trial. Not every failure to resolve a dispute will render reasons for decision inadequate to justify a verdict. At one extreme, reasons for decision will not be inadequate merely because they fail to address an irrelevant dispute or one which is peripheral to the real issues. Nor will they be inadequate merely because they fail to undertake "a minute explanation of every step in the reasoning process that leads to the judge's conclusion"[11]. At the other extreme, reasons will often be inadequate if the trial judge fails to explain his or her conclusion on a significant factual or evidential dispute that is a necessary step to the final conclusion. In between these extremes, the adequacy of reasons will depend upon an assessment of the issues in the case, including the extent to which they were relied upon by counsel, their bearing upon the elements of the offence, and their significance to the course of the trial[12]. In particular[13]:

> "Ordinarily it would be necessary for a trial judge to summarise the crucial arguments of the parties, to formulate the issues for decision, to resolve any issues of law and fact which needed to be determined before the verdict could be arrived at, in the course of that resolution to explain how competing arguments of the parties were to be dealt with and why the resolution arrived at was arrived at, to apply the law found to the facts found, and to explain how the verdict followed."

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**9** *Douglass v The Queen* (2012) 86 ALJR 1086 at 1089 [8]; 290 ALR 699 at 702; [2012] HCA 34.

**10** Here, under *Criminal Law Consolidation Act* 1935 (SA), s 353(1). See *Douglass v The Queen* (2012) 86 ALJR 1086 at 1090 [14]; 290 ALR 699 at 703; *R v Keyte* (2000) 78 SASR 68 at 76 [38].

**11** *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 259.

**12** *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 443.

**13** *AK v Western Australia* (2008) 232 CLR 438 at 468 [85]; [2008] HCA 8 (footnote omitted).

The trial judge's reasons were not inadequate

34 In *Hamra v The Queen*[14], this Court held that s 50(4) of the *Criminal Law Consolidation Act* "modifie[d] 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))". If "two or more distinct acts can be identified, [the sub-section] 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"[15]. For instance, it would be open to a jury, and therefore also to a trial judge, to conclude that particular acts of sexual exploitation were committed every day over a two week period without "identifying an occasion and determining what is the evidence to prove that occasion"[16].

35 As described above, the reasons of the trial judge, at the outset, correctly set out the issue to be decided beyond reasonable doubt as required by s 50. He recorded that it was necessary, but not sufficient, that before he convicted he should reject the evidence of the appellant beyond reasonable doubt, which he did. He described the evidence of the witnesses and the central submissions of the parties, particularly the appellant's attack on the reliability and credibility of the complainant. He resolved that issue by finding that the complainant was honest and reliable about all of the allegations of sexual abuse.

36 The ultimate conclusion of the trial judge was that "the [appellant] sexually assaulted [the complainant] on numerous occasions over a period of some years. The sexual assaults mainly took the form of indecent assaults and mutual oral sexual intercourse." The reference to "numerous occasions" was adopted directly from the complainant's evidence that mutual oral sexual intercourse had occurred numerous times. The trial judge did not, and perhaps could not, reach any conclusion about (i) the complainant's age when various types of offending commenced, or (ii) the likely number of occasions of indecent assaults or mutual fellatio before the assaults ended on 28 August 1994. Nevertheless, his conclusion meant that the elements of the s 50 offence had been proved. The "simple and obvious logic"[17] of this conclusion was that over a

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**14** (2017) 91 ALJR 1007 at 1014 [27]; 347 ALR 586 at 594.

**15** *Hamra v The Queen* (2017) 91 ALJR 1007 at 1014 [27]; 347 ALR 586 at 594.

**16** *Hamra v The Queen* (2017) 91 ALJR 1007 at 1014 [28]; 347 ALR 586 at 594.

**17** *Hamra v The Queen* (2017) 91 ALJR 1007 at 1014 [28]; 347 ALR 586 at 594.

period of not less than three days, the appellant had committed more than one act of sexual exploitation of the complainant.

37 The appellant submitted that the failure by the trial judge to resolve some disputes of fact meant that his reasons were inadequate to explain why he had reached his conclusion beyond reasonable doubt. Some of the disputes were relied upon by the appellant only in passing. They can be disposed of shortly as either (i) matters which the trial judge expressly took into account, such as long-term drug use by the complainant, or (ii) matters that were not submitted to be relevant to any real issue and which were, in any event, expressly considered by the trial judge, such as the abuse by the Moana boys, whether the complainant received a remote control car for Christmas, and the content of pornographic videos shown to the complainant. Although the appellant made oral submissions alleging that the showing of pornography to the complainant did not constitute an act of sexual exploitation, this issue was not raised in the Court of Criminal Appeal, it was not the subject of the grant of special leave to appeal, and it was not contained in any ground of appeal or particular.

38 The appellant focused upon five factual disputes. Four of those were referred to, but not specifically resolved, by the trial judge:

(1) whether the complainant was "always stoned" because the appellant had given marijuana to the complainant to smoke from when the complainant was nine years old;

(2) whether the complainant was permitted to ride the appellant's motorbike from about the age of nine to 10 years;

(3) whether the appellant took the complainant to the bush near Cherry Gardens; and

(4) whether the appellant built shed 2 in 1991 (when the complainant was 12 years old) and the slot car track in that shed in 1993 (when the complainant was 14 years old). This would have meant that if the complainant was wrong about the time that the sexual offences were committed then the first act of fellatio occurred when the complainant was 14 years old, and the offending would have ceased when he was 15 years old.

39 If the trial judge had specifically resolved each of these issues to which he referred, there could have been no suggestion that his reasons were inadequate. Although the trial judge noted, but did not wholly resolve, these four issues, once the role of these issues in the trial is placed into context it can be seen that his reasons were not inadequate. As to issue (1), whether or not the appellant had

given marijuana to the complainant from the age of nine, as the complainant claimed, would not have established the commission or lack of commission of any of the particularised acts. It is a matter that could only have affected the credibility of the complainant. The trial judge had assessed the credibility of the complainant with the awareness that the appellant had disputed the complainant's evidence on this point. And he could not have placed much weight upon the appellant's denials on this matter, because he was "unimpressed by the [appellant's] presentation", and found answers by the appellant to be "glib and evasive on some topics" and "quite evasive" on others.

40 As to issue (2), the trial judge did not fail entirely to resolve this issue. The trial judge accepted that the complainant's estimate of his age when he rode the motorbike (nine or 10 years) was not reliable. Any assessment by the trial judge of the likely age, below 15 years, at which the complainant was allowed to ride the appellant's motorbike had little bearing on the real issues at trial. The complainant's evidence about riding the appellant's motorbike was linked to the final sexual assault by the appellant on 28 August 1994, when the complainant was 15 years old. It was not in dispute that the appellant had permitted the complainant to ride his motorbike from the age of around 15 years.

41 As to issue (3), like the other evidence of offences, the trial judge accepted the complainant's evidence on this matter, rejected the appellant's evidence beyond reasonable doubt, and concluded beyond reasonable doubt that the sexual offence occurred on that occasion. The appellant's denial that he took the complainant to the bush area near Cherry Gardens was only a denial about the precise location of that sexual offence.

42 As to issue (4), when the evidence is properly considered, there was little inconsistency between the evidence of the complainant and the appellant. A model of clarity in this respect is the reasons of Blue J in the Court of Criminal Appeal, when considering issue (4) as part of the appellant's submission that the verdict of the trial judge was unreasonable or not supported by the evidence.

43 Blue J described the alleged inconsistencies in the complainant's evidence concerning his age when the acts of mutual fellatio began in shed 2. The complainant's evidence had varied from saying that he was "around 12" when shed 2 had been built, to saying that the mutual fellatio occurred when he was "past the age of nine, going on 12", or "[a]round about nine or 12 ... I don't know the exact year that it was, how old I was" or that it "didn't start happening until I was about 13 years old". However, the complainant did not accept that he was as old as 14 years when the events began. The complainant accepted that he was "certainly not talking about when [he was] 14 years of age" and that "there was definitely something [going] on by that time".

44 As Blue J explained, the complainant had not purported to give his precise age in years and was addressing events that had occurred 15 to 25 years earlier. He had consistently identified the commencement of the mutual fellatio as being after the construction of shed 2 rather than by reference to his precise age[18]. The trial judge observed that "[t]he timing of the building of [s]hed 2 became an important topic during the course of the trial". At a police interview held before trial, the appellant said that shed 2 had not been built until around 1993, which would have meant that the first act of fellatio that the complainant described in shed 2 could not have occurred until the complainant was 14 years old. However, the trial judge correctly summarised the appellant's evidence at trial as being that "[s]hed 2 was built in 1991 to house the slot car track". The complainant would then have been 12 years old.

45 Considerably less significant than the evidence concerning the date of construction of shed 2 was the contents of shed 2 at the time of the acts of fellatio described by the complainant. In his evidence in chief, the complainant said that the appellant's offences occurred when shed 2 contained a slot car track. In cross-examination, the complainant also said that the acts occurred "when shed 2 was built and that's when we smoked a lot of marijuana in shed 2, that's when that was built".

46 The appellant said (relying upon his calendar) that the construction of the slot car track in shed 2 had not been completed until June 1993, when the complainant was 14 years old. He also said that he did not grow marijuana in shed 1 until 1996 or in shed 2 until late 1996 but that, although there was sometimes a mention of his crop in his calendar, he did not want to look at the calendar to see if there were details to assist with these dates.

47 The trial judge generally rejected the appellant's evidence, including in relation to the slot cars. The trial judge concluded that the appellant had been glib and evasive about the occasions when he was alone with the complainant, and had understated the complainant's interest in using the slot car track in shed 2 because that track "provided an opportunity for sexual misconduct". As Blue J noted, the trial judge was entitled to reject the appellant's evidence about the slot cars "for the purpose of assessing the complainant's credibility"[19].

48 In summary, these four issues were not so essential to the complainant's credibility and reliability that the failure of the trial judge specifically to resolve them meant that his reasons for conviction were inadequate. Further, the trial

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**18** *R v D, L* [2015] SASCFC 24 at [74].

**19** *R v D, L* [2015] SASCFC 24 at [78].

judge did refer to these issues and their potential to undermine the reliability of the complainant's evidence concerning the particulars of the s 50 offence (which he described as the "substantive allegations"). And the trial judge concluded that the complainant was reliable as to the "core allegations" and was describing "real events".

49 A fifth matter relied upon by the appellant on this appeal was that the trial judge had failed to consider an inconsistency between, on the one hand, the evidence of the complainant and, on the other hand, the evidence of the appellant and his ex-wife, concerning the location of the computer in the appellant's house. The complainant's evidence about the offences in the room containing the computer clearly identified the room as the master bedroom. But the appellant and his ex-wife gave evidence that the computer was located in the room that became the appellant's daughter's bedroom. It is unclear to what extent this alleged inconsistency was relied upon at trial. The parties did not reproduce on this appeal the closing submissions of counsel.

50 In the Court of Criminal Appeal, the appellant relied upon this alleged inconsistency as casting doubt upon the complainant's evidence about the acts that occurred while he was playing on the computer in the master bedroom. However, as Blue J explained, although the evidence from the appellant's ex-wife was that she recalled that the computer had been located in her daughter's room, she did not know whether the computer had ever been set up anywhere else in the house[20]. The evidence from the appellant's ex-wife was that the computer had been located in their second daughter's room when her daughters were living with them. Her second daughter was born in July 1989. Since the appellant's ex-wife did not say whether the computer had been located in, or moved to, her second daughter's room immediately after birth or some years later, there is no inconsistency between her evidence and the evidence of the complainant. Her evidence is equally consistent with the supposition that the computer had been located in the master bedroom and moved to her second daughter's bedroom sometime after the sexual assaults (which concluded when her second daughter was five years old). The complainant also accepted that the computer might have been located in the daughter's bedroom at times after the sexual assaults occurred.

51 The conflict in evidence therefore reduced to a conflict between the appellant's evidence that the computer was located in his second daughter's room even before she was born and the complainant's evidence that the computer had been located in the master bedroom. As Blue J observed in the Court of Criminal

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**20** *R v D, L* [2015] SASCFC 24 at [80].

Appeal[21], that conflict was subsumed into the conflict about whether the sexual assaults had occurred whilst the complainant was playing on the computer.

Conclusion

52 None of the issues raised by the appellant, singly or in combination, had the effect that the reasons of the trial judge were inadequate. The trial judge's reasons were sufficient to identify, and to disclose the process of reasoning leading to his finding of, the two or more acts of sexual exploitation upon which the conviction was based. The appeal is dismissed.

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**21** *R v D, L* [2015] SASCFC 24 at [139].

53 BELL J. This appeal is concerned with the adequacy of the reasons of a judge, trying a charge of the persistent sexual exploitation of a child contrary to s 50(1) of the *Criminal Law Consolidation Act* 1935 (SA) ("the CLCA") without a jury, to support the judge's verdict of guilt. Section 50 has since been re-enacted in different terms[22]. Reference in these reasons is to s 50 as it stood in May 2014. Section 50(1) made it an offence, punishable by a maximum penalty of imprisonment for life, for an adult person, over a period of not less than three days, to commit more than one act of sexual exploitation of a particular child under the prescribed age. An act of sexual exploitation was defined as 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[23].

54 The object of the creation of the s 50(1) offence was to permit the prosecution of offenders in cases in which the pattern of abuse left the child unable to differentiate one act of sexual exploitation from another[24]. To this end, the prosecution was relieved of the obligation to allege particulars of the acts of sexual exploitation with the degree of particularity that would be required if the acts were charged as offences[25]: the prosecution was not required to identify particular acts of sexual exploitation, or the occasions on which, places at which or order in which, the acts of sexual exploitation occurred. Nonetheless, the actus reus of the s 50(1) offence was the commission of two or more acts of sexual exploitation separated by the requisite interval.

The procedural history

55 The appellant was tried in the District Court of South Australia by a judge alone[26] (Rice DCJ) on an Information that charged him with one count contrary

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**22** The *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act* 2017 (SA) substituted a new s 50 offence of persistent sexual abuse of a child.

**23** CLCA, s 50(2). "Sexual offence" was defined in s 50(7) as an offence against Div 11 of Pt 3 (other than ss 59 and 61) or s 63B, 66, 69 or 72; or an attempt to commit, or an assault with intent to commit, any of those offences; or a substantially similar offence against a previous enactment.

**24** *Hamra v The Queen* (2017) 91 ALJR 1007 at 1013-1014 [25]-[26]; 347 ALR 586 at 593-594; [2017] HCA 38; *Chiro v The Queen* (2017) 91 ALJR 974 at 991 [57] per Bell J citing South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 25 October 2007 at 1474 (the Hon M J Atkinson, Attorney-General); 347 ALR 546 at 565; [2017] HCA 37.

**25** CLCA, s 50(4).

**26** *Juries Act* 1927 (SA), s 7(1).

to s 50(1). The particulars of the offence were that over a period of not less than three days between 6 February 1984 and 1 September 1994 at Christies Beach and other locations, the appellant committed more than one act of sexual exploitation of MGF, a child under the age of 17 years, by: touching MGF's genitals over his clothes, showing MGF pornography, masturbating in MGF's presence, encouraging MGF to masturbate in the appellant's presence, causing MGF to perform fellatio upon the appellant, and performing fellatio upon MGF.

56 The prosecution case was wholly dependent on MGF's evidence. The appellant gave evidence denying that he had engaged in any sexual activity with MGF. There were inconsistencies between MGF's evidence and the appellant's evidence as to the circumstances in which the alleged sexual activity occurred. The trial judge accepted the reliability of MGF's evidence respecting the "core allegations" without indicating with any greater degree of particularity what that finding entailed. His Honour rejected the appellant's evidence on substantive issues where the appellant denied the sexual activity, but he did not make findings with respect to the inconsistencies between the appellant's evidence of certain surrounding circumstances and MGF's evidence. His Honour concluded that the appellant sexually assaulted MGF on "numerous occasions over a period of some years" and that the sexual assaults "mainly took the form of indecent assaults and mutual oral sexual intercourse".

57 The appellant appealed against his conviction to the Court of Criminal Appeal of the Supreme Court of South Australia (Kourakis CJ, Blue and Bampton JJ)[27], contending, inter alia, that the trial judge erred in law in failing to give adequate reasons for the verdict. The appeal was argued, and judgment delivered, before the decision in *R v Little*[28], which held, conformably with the essential reasoning of this Court in *KBT v The Queen*[29], that the actus reus of the s 50(1) offence is the commission of two or more acts of sexual exploitation. The focus of the appellant's argument in the Court of Criminal Appeal was the trial judge's asserted failure to deal with "incontrovertible inconsistencies" affecting MGF's credibility, and not his Honour's failure to identify the actus reus of the offence.

58 The Court of Criminal Appeal dismissed the appellant's challenge to the adequacy of the trial judge's reasons, holding that the first asserted inconsistency was implicitly resolved by his Honour's acceptance of MGF's, and rejection of the appellant's, evidence. The Court of Criminal Appeal said that it had not been necessary for the trial judge to address the remaining asserted inconsistencies

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**27** *R v D, L* [2015] SASCFC 24.

**28** (2015) 123 SASR 414.

**29** (1997) 191 CLR 417; [1997] HCA 54.

because, properly understood, MGF's evidence in these respects was not inconsistent with other evidence.

59 On 24 October 2017 Nettle and Gordon JJ granted the appellant special leave to appeal. The essence of the appellant's challenge in this Court is the trial judge's failure to identify the two or more acts of sexual exploitation of the commission of which his Honour was satisfied beyond reasonable doubt, and to explain the process of reasoning leading to that satisfaction. He submits that the failures involved legal error. For the reasons to be given, that submission should be accepted. The failure to give adequate reasons for a verdict following a trial by a judge alone is a miscarriage of justice under the third limb of the common form criminal appeal provision (here, s 353(1) of the CLCA). It is unnecessary to consider whether it is also correctly characterised as a "wrong decision on any question of law"[30] under the second limb of the provision. Relevantly, for the purposes of the consequential order, the appellant does not submit in this Court that his conviction is unreasonable, or that it cannot be supported having regard to the evidence, under the first limb of the provision. The appeal should be allowed and a new trial directed.

The background evidence

60 MGF was between 5 and 15 years old, and the appellant was between 31 and 41 years old, in the period of the alleged offending. Throughout this period the appellant was married to W, who is MGF's aunt. The offending was alleged to have taken place largely at the appellant's and W's home at Christies Beach, South Australia ("the Christies Beach house"). MGF, his older sister and, later, his younger brother stayed at the Christies Beach house during some school holidays and on some weekends. MGF first reported the offences to the police in late 2011. At the date of giving evidence, MGF was 35 years old.

MGF's evidence

61 MGF's evidence was as follows. The abuse commenced when he was aged around five years. He was playing with slot cars, which were set up in the lounge room of the Christies Beach house, when the appellant touched his "private parts" over his clothing. Indecent touching of this description "went on lots of times while I was in the lounge room". On occasions, indecent touching of the same description occurred when MGF was playing computer games in the master bedroom of the Christies Beach house. On "numerous" occasions the appellant masturbated in front of MGF in the master bedroom while MGF was playing computer games. On some of these occasions, with the appellant's

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**30** Cf *AK v Western Australia* (2008) 232 CLR 438 at 453 [47] per Gummow and Hayne JJ; [2008] HCA 8.

encouragement, MGF also masturbated. In cross-examination, MGF explained that the occasions of masturbation did not occur all the time but they occurred "more than once". When pressed, MGF put the number of occasions on which the appellant and he masturbated at "about three, four times".

62 From when MGF was about seven years old, the appellant had shown him pornographic magazines and videos. The magazines had "Asian content" and the videos were "of Asian women with Aussie men and Asian men as well". MGF gave no further description of the nature of the material.

63 MGF described some acts of sexual exploitation by reference to particular events or locations. On a Christmas Day when MGF "would have been nine years of age ... or seven years of age" and the whole family were at "Nan's" house the appellant inappropriately touched MGF as he was playing with a remote control car on the lawn at the back of the house.

64 MGF and the appellant were keen on slot cars and on occasions they visited the "Red Line" slot car raceway. In the course of a car trip to Red Line, the appellant fondled MGF's penis over the top of his clothes. MGF was close to nine years old on this occasion. In evidence in chief, MGF said that there were "a lot of incidents where it just happened going [to Red Line]". In cross-examination, MGF clarified that "it" had happened "a few – a couple of times" on the way to Red Line. From "after age nine" every time MGF saw the appellant they played slot cars, smoked marijuana and got "very high". And from this age the appellant also had allowed MGF to ride his Yamaha motorcycle.

65 There were two sheds at the Christies Beach house, which were referred to in evidence as shed 1 and shed 2 respectively. The appellant grew marijuana in shed 1. Shed 2 was constructed when MGF was around 12 years old and a slot car track was set up inside it.

66 The sexual abuse progressed to mutual oral intercourse when MGF was "past the age of nine, going on 12". The first time this occurred MGF and the appellant were inside shed 2, sitting on a crate, and playing slot cars. The appellant asked if he could give MGF oral sex. MGF pulled his pants down and the appellant fellated him. After this, MGF fellated the appellant. Thereafter acts of mutual fellatio took place on "numerous" occasions in shed 2. A couple of times MGF and the appellant engaged in mutual fellatio at a place called Cherry Gardens. The first time this happened was when MGF "would have been over 12, 12 nearly". There was one other occasion when MGF and the appellant engaged in mutual fellatio when they were not at the Christies Beach house. This was an occasion when they visited a unit at South Terrace, in which a friend of the appellant's named Lucy was living. MGF would have been "close to 12" at this time. Acts of mutual fellatio "happened in a large period of time frame", and continued when MGF was 13, 14 and 15 years old.

67 The last occasion on which an act of sexual exploitation occurred was 28 August 1994; MGF fellated the appellant and was rewarded by being allowed to ride the Yamaha motorcycle. MGF was able to date this event because on that day he sexually assaulted the appellant's five-year-old daughter, M. Shortly after the assault, M's mother, W, confronted MGF and he admitted his guilt. The sexual assault of M drastically changed the relationship between MGF's immediate family and the appellant's family. MGF did not stay at the Christies Beach house again.

68 The sexual assault of M was reported to the police and MGF was charged and appeared before the Youth Court. He was 15 years old at the time. He was required to undergo counselling. He did not tell the counsellor about the appellant's sexual abuse of him. MGF first disclosed that he had been sexually abused in a conversation with his future wife in 2003 or 2004. He did not give any details of the abuse or nominate his abuser.

69 On two occasions as an adult MGF had visited the appellant. The two had talked and smoked marijuana together. MGF was prompted to visit the appellant because he had been getting counselling for "relationship problems" with his partner and the counsellor suggested that he see the appellant and "stand up for myself". In the event, MGF did not confront the appellant about his sexual abuse of him.

70 MGF first reported the appellant's sexual abuse to the police on 21 December 2011. Just after Christmas that year he gave a more detailed account of the abuse to a detective. It appears that initially MGF described the occasions of mutual oral sex in shed 2 as having commenced when he was nine years old and he made no reference to having engaged in oral sex with the appellant on the day of the assault on M. The first time he referred to the latter incident was in a conference with the prosecutor in July 2013.

71 In cross-examination, MGF said of the commencement of oral sexual intercourse, "I don't know the exact year that it was, how old I was. That's why I stated in the – in my reports that it was about the age of nine." In his statement signed in January 2012, MGF agreed that he had clarified his initial account by stating "I mentioned that [the appellant] would bribe me to give him head jobs. This didn't start happening until I was about 13 years old." He was asked if the detective taking the statement had suggested to him that shed 2 had not been built until the early 1990s and he responded "she said that – well, they said that shed, looking at the photos, when we were looking at them, because we got photos, that would have been about that time". MGF did not agree that he had changed his account of his age at the time the oral sexual abuse commenced at the prompting of the detective.

72 After M turned 18, she applied under the *Victims of Crime Act* 2001 (SA) for compensation for the effects of MGF's sexual assault of her. She received an

award of $50,000 compensation. MGF was aware that the appellant had encouraged M to apply for compensation. He agreed that he believed the appellant had been instrumental in the failure of his, MGF's, business, and his subsequent bankruptcy, because the appellant had told members of the small community in which MGF was living about the sexual abuse of M. MGF denied that the appellant's assistance to M in her claim for compensation or his belief that the appellant was responsible for his bankruptcy had prompted him to make false allegations of sexual abuse.

The appellant's evidence

73 The appellant gave evidence and denied that he had ever sexually interfered with MGF. He put the occasions on which MGF and his siblings came to stay as occurring "two or three times a year at the most". He said that before the birth of his children (and MGF's birth) he had been interested in slot cars and a slot car track was set up in the third bedroom of the Christies Beach house ("bedroom 3"). Bedroom 3 was a spare room before M was born. Thereafter it became M's bedroom. There was only one occasion when a slot car track was set up in the lounge room. As a result of a workplace injury the appellant stopped working in 1991 and following this he had renewed his interest in slot car racing.

74 Shed 2 was built in 1991, but the slot car track was not completed and functional until June 1993. The appellant was able to date this event by reference to entries on the 1993 family calendar: the entry for 1 April 1993 recorded the purchase of the copper braid for the track, the entry for 27 May 1993 recorded "braided track. One lane going". It was a three-track raceway. The entry for 16 June 1993 recorded the visit of several friends who had raced slot cars on the track. The appellant said the track could have been in use a couple of days before this.

75 The appellant said that the computer was kept in bedroom 3 and not the master bedroom. W, the appellant's former wife, gave evidence in the prosecution case. She agreed that the computer at the Christies Beach house was set up in the room that became M's bedroom. She identified her handwriting and the appellant's handwriting on entries on the 1993 family calendar.

The trial judge's reasons

76 The trial judge commenced his analysis by observing that "in a practical sense" the question of whether the prosecution had proved the offence beyond reasonable doubt depended upon whether MGF was a truthful and reliable witness. His Honour addressed some of the appellant's criticisms of MGF's evidence. He rejected that the reliability of MGF's evidence was adversely affected by his failure to tell the police about the last occasion of sexual abuse, the episode of fellatio on the day of the sexual assault of M. His Honour assessed that the incident with M had been the real focus of MGF's disclosure in

his dealings with the police. His Honour accepted MGF's evidence, that despite his initial concerns he had been reassured that he was not required to pay the compensation awarded to M, and he rejected that the matter had provided MGF with a motive to make a false allegation against the appellant.

77 His Honour assessed MGF as having given evidence in a "forthright and convincing manner", albeit that the evidence was not without "problems in terms of apparent inconsistencies and implausibility". Nonetheless, his Honour considered that MGF was "a man endeavouring to tell the truth" and that he "was describing real events that happened to him". Relevant to this assessment was the estimate that MGF was "a straightforward man, lacking in keen intellectual and verbal skills". While some of MGF's estimates of his age when events occurred were not reliable, as with his account of riding the appellant's motorcycle and being "stoned" when he was nine years old, these did not cast doubt on MGF's truthfulness or reliability. His Honour noted that he had observed and listened to MGF over a number of days and that "I simply believed him and found him to be reliable".

78 By contrast, his Honour was unimpressed by the appellant's presentation. He found the appellant's answers "glib and evasive on some topics", in particular about the number and duration of occasions when MGF and his siblings stayed at the Christies Beach house or the number of occasions when the appellant was alone with MGF. His Honour found that the appellant had understated MGF's interest in slot cars and in the use of the track in shed 2 because the use of the slot car track had provided an opportunity for sexual misconduct. In the result, his Honour rejected the appellant's evidence "on substantive issues where he denied the alleged sexual conduct".

79 At the commencement of his reasons, the trial judge observed that it was alleged that there were many acts over the years of indecent assault, mutual fellatio, showing MGF pornography, masturbating in MGF's presence and causing MGF to masturbate, and that the prosecution was not required to prove "each type of sexual conduct alleged, just two or more acts of sexual exploitation". After summarising MGF's evidence, his Honour recorded his acceptance of MGF "as a reliable witness as to the core allegations". After noting, and rejecting, the appellant's evidence on substantive issues where he denied the alleged sexual abuse, his Honour found that the appellant sexually assaulted MGF on "numerous occasions" and that the sexual assaults had "mainly" taken the form of indecent assaults and mutual oral sexual intercourse.

The obligation to give reasons

80 South Australia was the first of the Australian jurisdictions to provide for the trial of a criminal offence on Information by a judge alone[31]. The *Juries Act* 1927 (SA) does not contain an equivalent to the provisions of the New South Wales[32] and Western Australian[33] statutes, considered in *Fleming v The Queen*[34] and *AK v Western Australia*[35] respectively, which each require the judge to include in reasons for judgment the principles of law applied and the findings of fact on which the judge relied. In *Douglass v The Queen*[36], the Court referred with evident approval to Doyle CJ's statements in *R v Keyte*[37] concerning the general law obligation on the judge to provide reasons for verdict following a trial by judge alone under s 7(1) of the *Juries Act* 1927 (SA)[38]. The correctness of Doyle CJ's conclusion that the failure to state adequate reasons following such a trial is an error of law[39] was assumed in *Douglass* and is not in issue in this Court. The statements in *Fleming* and *AK* are informative with respect to the rationale for, and the content of, the reasons for verdict of a judge trying a criminal charge without a jury.

81 Section 7(4) of the *Juries Act* 1927 (SA) provides that if a criminal trial proceeds without a jury under s 7(1), the judge may make any decision that could have been made by a jury and such a decision will, for all purposes, have the same effect as a verdict of a jury. A person convicted following a trial, whether by judge alone or with a jury, may appeal against the conviction as of right on any ground that involves a question of law alone and on any other ground with the permission of the Full Court[40]. The failure of a trial judge, sitting without a jury, to give reasons for his or her decision may make it impossible for the

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**31** *Juries Act* 1927 (SA), s 7(1).

**32** *Criminal Procedure Act* 1986 (NSW), s 33 (now s 133).

**33** *Criminal Procedure Act* 2004 (WA), s 120(2).

**34** (1998) 197 CLR 250; [1998] HCA 68.

**35** (2008) 232 CLR 438.

**36** (2012) 86 ALJR 1086; 290 ALR 699; [2012] HCA 34.

**37** (2000) 78 SASR 68.

**38** *Douglass v The Queen* (2012) 86 ALJR 1086 at 1090 [14]; 290 ALR 699 at 703.

**39** *R v Keyte* (2000) 78 SASR 68 at 79 [51].

**40** CLCA, s 352(1)(a).

appellate court to determine whether or not the verdict was based on an error of law or other error within s 353(1) of the CLCA[41].

82 The trial judge was required to identify the principles of law to be applied in determining whether guilt had been proved, to resolve material disputed factual questions, to address the parties' submissions and to explain (albeit not necessarily at any length) the process of reasoning by which his Honour arrived at the verdict[42].

The parties' submissions

83 The appellant submits that the trial judge's conclusion, that MGF was a reliable witness with respect to his "core allegations", amounted to reasoning to guilt without satisfaction that the actus reus of the offence had been proved. He argues that it was necessary to explain why parts of his evidence, which seemingly were not rejected, did not give rise to a reasonable doubt as to the proof of the acts that constituted the actus reus. The generality of the finding, in the appellant's submission, did not allow the Court of Criminal Appeal to meaningfully assess the safety of the verdict. In the result, the appellant submits, the Court of Criminal Appeal's analysis was confined to the sufficiency of the reasons to explain the trial judge's preference for the evidence of MGF over his evidence and did not consider the capacity of MGF's evidence to support a conclusion on the criminal standard that the acts of sexual exploitation constituting the actus reus occurred.

84 The respondent's essential argument is that the appellant's criticism of the trial judge's reasons does not come to terms with the holding in *Hamra v The Queen*, that the inability to delineate one offence from another by reference to circumstances of time and location does not preclude a conclusion of guilt[43]. A fair reading of the reasons is said to make clear that his Honour was satisfied that each of MGF's allegations of misconduct amounting to an act of sexual exploitation was proved beyond reasonable doubt. MGF said that there were "numerous" occasions on which mutual oral intercourse occurred; whether these occasions took place over a period of several years or a lesser time frame, it is evident they took place over an interval of not less than three days.

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**41** *Fleming v The Queen* (1998) 197 CLR 250 at 260 [22] citing *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 381-382, 385, 388.

**42** *Fleming v The Queen* (1998) 197 CLR 250 at 262-263 [28]; *AK v Western Australia* (2008) 232 CLR 438 at 453 [44] per Gummow and Hayne JJ, 468 [85] per Heydon J; *R v Keyte* (2000) 78 SASR 68.

**43** *Hamra v The Queen* (2017) 91 ALJR 1007 at 1017 [45]-[46]; 347 ALR 586 at 598-599.

The adequacy of the trial judge's reasons

85 It remains that the omnibus finding, that the appellant sexually assaulted MGF on numerous occasions, does not identify two or more acts of sexual exploitation over an interval of not less than three days, the commission of which was proved beyond reasonable doubt. The trial judge's acceptance of MGF's reliability with respect to the "core allegations" reflected a favourable assessment based on MGF's demeanour. While it may be accepted that demeanour is not always a sound guide to reliability[44], commonly on the trial of sexual offences the conclusion of guilt will ultimately depend upon acceptance of the complainant's account alone. Nonetheless, no matter how favourable an impression is formed of a witness' reliability, demonstrated inconsistencies between the witness' evidence and other evidence may not permit a finding based on the witness' evidence beyond reasonable doubt. This is not to suggest that it was not open to the trial judge to accept MGF's evidence as proof of the commission of each of the acts of sexual exploitation that he described on the criminal standard. It is to accept the force of the appellant's submission that the trial judge was required to address critical inconsistencies between MGF's evidence of the circumstances in which some acts of sexual exploitation occurred and other cogent evidence. It was necessary to explain why evidence in at least two respects, on which the defence relied, did not give rise to a reasonable possibility that particular acts of sexual exploitation did not occur as MGF described and did not cast doubt on the reliability of MGF's evidence more generally.

The first critical inconsistency

86 The first respect concerned the reliability of MGF's account of the time when the abuse progressed to mutual oral sexual intercourse. MGF described "numerous" occasions of mutual oral sexual intercourse. While in his initial disclosure to the police he dated this development to when he was 9 years old, in evidence he was consistent in describing occasions of mutual oral sexual intercourse from when he was around 12 years old. And he was consistent in claiming that abuse of this kind took place over a number of years, commencing on an occasion when he and the appellant were playing slot cars in shed 2. This account was inconsistent with the appellant's evidence concerning the completion of the slot car track in shed 2.

87 The Court of Criminal Appeal observed that the trial judge had identified the conflict between MGF and the appellant on the issue of the timing of the

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**44** *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In liq)* (1999) 73 ALJR 306 at 328-329 [88(4)] per Kirby J; 160 ALR 588 at 617-618; [1999] HCA 3.

construction of the slot car track in shed 2. Their Honours considered it evident that the trial judge's acceptance of MGF's evidence, and rejection of the appellant's evidence, extended to this conflict[45].

88 It is correct that the trial judge noted the conflict between MGF's evidence and the appellant's evidence concerning the date of completion of the slot car track. It is, with respect, not apparent that his Honour's preference for MGF's evidence resolved the conflict. His Honour found that some of MGF's estimates of his age when events occurred were not reliable. The rejection of the appellant's evidence "where he denied the alleged sexual conduct" is not in terms a rejection of the appellant's evidence of the date the slot car track was completed. Rejection of the appellant's evidence on this question required a reasoned explanation: the appellant's evidence was supported by entries in the calendar; W, his former wife, acknowledged the appellant's handwriting on entries in the calendar; and, critically, the appellant was not challenged on his evidence on the date of the completion of the slot car track by reference to the calendar.

89 The appellant's evidence of the date of completion of the slot car track placed the commencement of mutual oral sexual intercourse, on MGF's account, at a time when MGF was not less than 14 years and 4 months old. It provided a closed period of a little over a year during which any acts of mutual oral sexual intercourse as alleged by MGF could have occurred. Acceptance of the reasonable possibility that the slot car track was not completed until June 1993 did not mean that it was not open to be satisfied that the appellant and MGF had engaged in mutual oral sexual intercourse on occasions between mid-1993 and August 1994. The reliability, however, of MGF's evidence of "numerous occasions" of mutual oral sexual intercourse needed to take into account the frequency with which MGF stayed at the Christies Beach house between June 1993 and 28 August 1994. The trial judge accepted the "general thrust" of the varying estimates given by MGF's father and mother and W in this respect: "sometimes on the weekends and sometimes for a week or two during school holidays", "a day or two over a weekend or during school holidays", and "mainly school holidays for a couple of days or a week" respectively. The difference between MGF's account of acts of mutual oral sexual intercourse taking place over a span of years and acceptance of the reasonable possibility that any such conduct must have occurred over a notably shorter interval was material to the determination of whether the acts were proved to the criminal standard.

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**45** *R v D, L* [2015] SASCFC 24 at [138].

The second critical inconsistency

90 The second respect was the inconsistency between MGF's account of indecent assaults and acts of gross indecency that occurred when he was playing computer games in the master bedroom, and the evidence of the appellant and W that the only computer in the Christies Beach house was set up in bedroom 3. The Court of Criminal Appeal said it had not been necessary for the trial judge to address this claimed inconsistency because it had been put to MGF that the computer was kept in bedroom 3 and he had acknowledged that "it could have been. What I remember it was in bedroom 1." And in cross-examination, W had been asked whether the computer was ever set up anywhere else in the house and she said that she really did not know[46]. The Court of Criminal Appeal considered that in light of these answers there was no conflict between MGF's and W's evidence. Their Honours said the conflict between MGF's and the appellant's evidence as to the location of the computer was subsumed in the larger conflict as to whether there had been any inappropriate conduct. Again, the trial judge's acceptance of MGF's, and rejection of the appellant's, evidence was said to have made it unnecessary for his Honour to address the issue[47].

91 The Court of Criminal Appeal's analysis did not address the substance of the appellant's complaint. MGF described the location of the computer within the master bedroom by reference to a plan. His account of the circumstances in which the appellant masturbated while he, MGF, was playing computer games was not without detail referable to the master bedroom: on numerous occasions as MGF played computer games, the appellant masturbated while sitting on the red chaise lounge, which MGF said was in front of the curtains in the master bedroom. MGF maintained in cross-examination that on the occasions when he used the computer it was in the master bedroom, that he had never used the computer in bedroom 3, and that he had never seen the computer in bedroom 3. W's evidence was supportive of the appellant's account that the computer was set up in bedroom 3. Her answer, that she really did not know if the computer had been set up elsewhere, reads in the transcript as a slim foundation for finding that there was no conflict between her account and MGF's account in this respect; W's memory was that the computer was set up in bedroom 3.

92 On the face of things, there was an inconsistency between MGF's account of the circumstances in which some indecent assaults and the acts of masturbation took place, and the appellant's evidence. And on the face of things, there was independent support for acceptance of the appellant's account. Of course, acceptance of the appellant's evidence in this respect did not require

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**46** *R v D, L* [2015] SASCFC 24 at [79]-[81], [139].

**47** *R v D, L* [2015] SASCFC 24 at [139].

rejection of MGF's account of acts of sexual exploitation that occurred in association with his memory of playing computer games. It was a material inconsistency, however, which the trial judge needed to address in reasoning to the verdict.

93 In the event, in circumstances in which it is not known what is encompassed in the reference to the "core allegations", it is unclear whether the omnibus finding, that the appellant sexually assaulted MGF on numerous occasions, included the acts of sexual exploitation which MGF said occurred in the master bedroom. The finding that the sexual assaults mainly took the form of indecent assaults and mutual oral sexual intercourse might include the indecent assaults that MGF said happened on occasions when he was playing computer games. The finding that the acts of sexual exploitation "mainly" took one of two forms does not exclude acceptance of MGF's account that the appellant masturbated in MGF's presence and encouraged MGF to masturbate in the appellant's presence. These are acts that if able to be particularised could have been charged as acts of gross indecency[48]. The point to be made is that the omnibus finding may, or may not, be a finding that all of the acts of sexual exploitation described by MGF occurred.

A controversy over one particular

94 The particulars of sexual exploitation contained in the Information included the showing of pornography to MGF. There was a controversy in this Court as to whether, during the period covered by the Information, the showing of pornography to a child was an act that could be charged as an offence within the meaning of s 50(7) of the CLCA. The respondent submits that throughout the period, the showing of pornography to a child amounted to an act of gross indecency, an offence within s 50(7) of the CLCA[49]. The appellant disputes that is so. It is an arid controversy given that it is not known whether the acts of sexual exploitation on which the verdict was returned included the showing of pornography to MGF. In the event that his Honour considered that the showing of pornography to a child was an act that could be charged as a sexual offence[50], it is not known whether MGF's laconic description of the material that he was shown – "Asian content" with respect to magazines, and "Asian women with Aussie men and Asian men as well" with respect to videos – sufficed to prove to the criminal standard that the showing of it was in fact an act of gross indecency. The controversy is apt to highlight the inadequacy of reasons stated with the generality of acceptance of "core allegations".

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**48** CLCA, s 58(1)(a) and (b).

**49** CLCA, s 58(1)(a) and see *R v M, BJ* (2011) 110 SASR 1.

**50** See fn 23 for the definition of "sexual offence".

Conclusion

95 The respondent's reliance on *Hamra* is misconceived. *Hamra* recognises that, by a process of inferential reasoning, a jury, or a judge sitting without a jury, may reason to satisfaction beyond reasonable doubt that two or more acts of sexual exploitation were committed over a period of not less than three days notwithstanding that the complainant is unable to differentiate one act from another. The example given is of a complainant who gives evidence of an act of sexual exploitation occurring on each day over a two week period[51]: the jury, or a judge sitting without a jury, might reason upon acceptance of the complainant's evidence that two or more acts must have occurred over a period of not less than three days. There is no question in such a case of the identification of the acts constituting the actus reus of the offence.

96 Here, MGF gave evidence of a variety of acts capable of being found to be acts of sexual exploitation committed from time to time over a period of years. The trial judge's omnibus finding, that the appellant sexually assaulted MGF on numerous occasions, is not expressed to be a finding of the commission of each act of sexual exploitation described by MGF. It is a conclusion that reflected his Honour's earlier identification of the issue "in a practical sense" as whether the prosecution proved that MGF was a truthful and reliable witness. The issue, however, did not reduce to the trial judge's preference for MGF's account over that of the appellant. His Honour was required to identify the acts of sexual exploitation constituting the actus reus of the offence which he found proved and, in so doing, to explain why the evidence on which the appellant relied did not give rise to a reasonable doubt as to the commission of those acts.

97 The appeal should be allowed and a new trial directed.

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**51** *Hamra v The Queen* (2017) 91 ALJR 1007 at 1014 [28]; 347 ALR 586 at 594.

98 NETTLE J. Following a trial before judge alone in the District Court of South Australia, the appellant was convicted of one count of persistent sexual exploitation of a child contrary to s 50(1) of the *Criminal Law Consolidation Act* 1935 (SA) ("the CLCA") and sentenced therefor to 10 years' imprisonment with a non-parole period of seven years. His appeal against conviction to the Full Court of the Supreme Court of South Australia (sitting as the Court of Criminal Appeal) was dismissed. By grant of special leave, he now appeals to this Court.

Relevant statutory provisions

99 At the time of trial, s 50(1) of the CLCA provided that:

> "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."

100 Section 50(2) of the CLCA provided that, for the purposes of s 50, an adult 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. Section 50(7) defined "sexual offence" by reference to other provisions of the CLCA including, relevantly, in Pt 3, Div 11 (Rape and other sexual offences).

101 The "prescribed age" for the purposes of s 50 of the CLCA was 18 years in the case of an adult person who was in a position of authority in relation to the particular child and 17 years in any other case[52].

102 As was recently explained in *Chiro v The Queen*[53], because s 50(1) defined the offence of persistent sexual exploitation of a child as an offence constituted of underlying acts of sexual exploitation, in order for a jury to find an accused guilty of the offence the jury must reach unanimous agreement (or, after four hours, must reach agreement by a requisite statutory majority[54]) 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. It is thus an error of law productive of a miscarriage of justice for a trial judge to fail to direct a jury that they cannot convict an accused of an

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

**53** (2017) 91 ALJR 974 at 981 [19] per Kiefel CJ, Keane and Nettle JJ; 347 ALR 546 at 552-553; [2017] HCA 37.

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

offence of persistent sexual exploitation of a child unless they are unanimously agreed that at least the same two acts of sexual exploitation separated by not less than three days have been proved beyond reasonable doubt. Similarly, in the case of trial by judge alone, the judge cannot find an accused guilty of an offence of persistent sexual exploitation of a child unless the judge directs himself or herself as to the need to be, and is, satisfied beyond reasonable doubt of the commission of two or more of the alleged acts of sexual exploitation separated by a period of not less than three days[55].

The Crown case at trial

103 The complainant was born in February 1979. The Crown case at trial was that the appellant, who was the complainant's uncle, was guilty of the charged offence of persistent sexual exploitation of a child which allegedly took place between 6 February 1984 and 28 August 1994[56]; the latter date being the same day on which the complainant had indecently assaulted the appellant's five year old daughter. The alleged acts of sexual abuse were, in effect, comprised of ten distinct groups of alleged acts of sexual exploitation delineated by reference to the type and time of commission of the alleged conduct. They were:

(1) When the complainant was around five years old, there were "lots of times" when he was playing with slot cars, which he alleged were set up in the appellant's lounge room in front of some chairs, a fire place and a television, when the appellant stood behind the complainant and touched him on his private parts over his clothing.

(2) When the complainant was "about seven years of age", the appellant showed the complainant pornographic videos and magazines of "Asian content" which the complainant alleged were kept in a cupboard "right in front of the main entrance to the [appellant's] house".

(3) When the complainant was seven or nine years of age, the appellant gave the complainant a remote control car as a present when the family were all together on Christmas Day at the complainant's grandmother's home, and when the complainant was playing with the remote control car on the lawn outside the home the appellant

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**55** See *R v Keyte* (2000) 78 SASR 68 at 76 [38] per Doyle CJ (Wicks J agreeing at 84 [80]); *Douglass v The Queen* (2012) 86 ALJR 1086 at 1090 [14]; 290 ALR 699 at 703; [2012] HCA 34.

**56** The period given in the information for the offence was 6 February 1984 to 1 September 1994, but on the complainant's evidence the offending last occurred on 28 August 1994.

inappropriately touched the complainant over his clothes and said that he should not say anything about it because the appellant could get into trouble.

(4) When the complainant "would have been close to nine", the appellant drove the complainant from the appellant's home to a slot car racing venue called "Red Line" and, on the way there in the car, the appellant fondled the complainant's penis on top of his clothes, which made the complainant "pretty hard", and the appellant threatened the complainant with consequences if he said anything to anyone about it.

(5) From the time that the complainant was about nine years old until he was 15, the appellant would allow the complainant to ride the appellant's motor bike, which he kept in a shed at his house, in return for acts of oral sex. In cross-examination, the complainant accepted that the motor bike was as shown in a photograph, which was tendered in evidence, but denied that he would have been physically incapable of riding such a bike from the age he alleged.

(6) When the complainant was "growing up", there were "numerous times" (later, in cross-examination, described as "about three, four times") when the appellant sat on the chaise lounge in the master bedroom of his home "wanking himself off" while the complainant played games on the computer in the bedroom. The complainant pulled his pants down and the appellant showed the complainant how to masturbate but the complainant could not ejaculate at that time.

(7) When the complainant was "the age of nine going on to 12", he was playing with slot cars at the slot car track set up in the second shed at the appellant's house ("Shed 2") when the appellant came behind the complainant "feeling [him] down on [his] genitals" and then asked him if the appellant could give him oral sex. The appellant performed oral sex on the complainant and the complainant performed oral sex on the appellant as well. This was the first act of oral intercourse that had occurred between them.

(8) When the complainant "would have been close to 12", the appellant took the complainant to a two storey unit in South Terrace to look at some hydroponic plants "that [the appellant] had with a lady called Lucy". The appellant went up to the hydroponic room in the unit. The complainant sat at a table at the back of the unit and "[the appellant] came back down and smoking [cannabis] again, getting high and then it was oral sex again". The complainant and the

appellant had "a good talk" and then the appellant performed oral sex on the complainant.

(9) When the complainant was "over 12, 12 nearly", the appellant took the complainant to a place at Cherry Gardens where the appellant grew cannabis. They sat there, "[had] cones on [the appellant's] brass pipe and [got] stoned" and then performed oral sex on each other.

(10) Lastly, on 28 August 1994, when the complainant was 15 and a half years old, he had a ride on the appellant's motor bike and in return gave the appellant oral sex. The complainant was then playing with slot cars in Shed 2 when the appellant's daughter began "jumping all over [his] back" and the complainant went to grab her and "felt her between the legs and … stuck [his] finger … into her vagina and broke her hymen".

104 Following the complainant's indecent assault of the appellant's daughter, the complainant underwent three years of court appointed psychological counselling. He did not at any time throughout those three years say anything to the counsellor about having been sexually abused by the appellant. According to the complainant, the first time he ever spoke to anyone about it was in 2003 or 2004, when he told his partner that he had been sexually abused, without saying by whom, when or where. The complainant's partner gave evidence that the complainant had told her that "he had had a rough childhood, he had been sexually abused as a child", but he did not say by whom or give any detail.

105 When the appellant's daughter turned 18 years of age, the appellant assisted her to make a claim for compensation under the *Victims of Crime Act* 2001 (SA) in respect of the complainant's indecent assault of her. On 22 October 2009, she was awarded $50,000 compensation.

106 According to the complainant, the next time that he complained to anyone about the appellant having sexually abused him was in about 2010 or 2011 when he was receiving counselling for relationship problems with his partner. He said that he told the counsellor about the alleged sexual abuse and that she advised him that he should stand up for himself and go and see what the appellant was up to. The counsellor was not called to confirm that advice. The complainant said that, shortly thereafter, he went to the appellant's home and knocked on the door and the appellant let him in. They smoked cones of marijuana together and the appellant showed the complainant the cannabis plants that he was growing in Shed 2. The complainant asked for and received a cutting from one of the plants. The complainant said that, at that time, he was also growing marijuana, and he gave the appellant a telephone number on which to contact him if the appellant wished to purchase some of it. There was then a second occasion on which the complainant went back to the appellant's home to sell him some of the marijuana.

The complainant did not say anything to the appellant about sexual abuse on either of those occasions.

107 The first complaint that the complainant made to the police was on 21 December 2011, 17 years after the last of the alleged acts of sexual abuse.

The defence case at trial

108 The appellant gave evidence that he had never sexually assaulted the complainant. In particular, the appellant stated that there had only ever been one occasion on which slot cars had been set up in his lounge room, which was for someone else and the complainant was not there on that occasion. He deposed that the only pornography that he ever had in his home was a video about wife swapping, which had been lent to him and his ex-wife by a friend and was returned within a few weeks. He had ordered one catalogue containing Asian pornography and received a number of them, but he did not show them to the complainant. He said that he had not given the complainant a remote control car – his ex-wife used to purchase the Christmas presents for the family – and he had not sexually assaulted the complainant at the complainant's grandmother's home or at all. He did not recall ever taking the complainant to Red Line. He had only ever permitted the complainant to ride his motor bike from the time that the complainant was 15 years old, and he had never given the complainant permission to ride the bike in return for oral sex. He had not masturbated while the complainant was on the computer, and the computer had been kept in his daughter's bedroom. His slot car track was not set up in Shed 2 until June 1993, by which time the complainant was 14 years old. He had never stood behind the complainant and felt his genitals or performed oral sex on him, and the complainant had never performed oral sex on him. He met Lucy in 1995, which was after the last occasion of alleged sexual abuse, and did not take the complainant to Lucy's unit in South Terrace until then. He never took the complainant to Cherry Gardens and did not supply him with marijuana until years after 28 August 1994.

109 The appellant's testimony was, in some respects, supported by evidence given by his ex-wife, who had been called as a witness for the Crown. In cross-examination, she testified that the computer was kept in their daughter's bedroom, and in re-examination she said that she did not know if the computer had ever been set up anywhere else in the house. She also gave evidence that a 1993 calendar containing handwritten entries that suggested the slot car track in Shed 2 was not operational until June 1993 was familiar to her, and that the handwriting in it was that of the appellant.

The trial judge's reasons for judgment

110 After summarising aspects of the evidence adduced by the Crown, the trial judge stated that he perceived there to be three aspects of the defence case: an

attack on the truthfulness and reliability of the complainant; a submission that the appellant gave evidence and was not shaken in his testimony; and a submission that, having regard to the inconsistencies in and implausibility of the complainant's account and the appellant's unshaken denials, there was insufficient evidence to be satisfied of guilt beyond reasonable doubt.

111 The trial judge acknowledged that it was clear to him that "some of [the complainant's] evidence about when some events occurred is inaccurate" but averred that he "[did] not have to accept everything [the complainant] says to be satisfied of the charge". The judge added that in his judgment, having watched the complainant and heard him give his evidence, the complainant's "presentation was that of a man endeavouring to tell the truth" and the complainant "was describing real events that happened to him and was not led by the suggestions of others". It is to be interpolated that "the suggestions of others" is possibly a reference to evidence that there had been a considerable falling out between the appellant and his ex-wife and that she had been active in persuading the complainant to complain to the police.

112 The trial judge added, apparently epexegetically, that the complainant lacked guile, was not intellectually bright and was a long term drug user. The judge then stated:

> "I also accept [the complainant] as a reliable witness as to the *core allegations*. I have scrutinised his account very carefully. Some of his estimates of his age when events occurred were not reliable (for example, when he rode the motorbike or being 'stoned'), but they were not sufficient to cause me to doubt either his truthfulness or reliability. Any exaggeration was not deliberate. As reflected in cross-examination, he had trouble remembering the process whereby statements were taken from him, who he told beforehand, who he was with and when he made particular allegations. My comments above should not be overlooked and it should not be forgotten that the conduct alleged took place many times over many years". (emphasis added)

113 By contrast, the trial judge stated:

> "I was unimpressed by the [appellant's] presentation. I found his answers to be glib and evasive on some topics, particularly about the number and duration of occasions when [the complainant] and his siblings stayed or the [appellant] was alone with [the complainant] ... In addition to that, the [appellant] was, in my view, understating [the complainant's] interest in slot cars and using the track in Shed 2 because the use of the slot car track provided an opportunity for sexual misconduct … I also thought his answers on the aspect of adult pornography quite evasive".

114 Then, after brief reference en passant to "the difficulty an accused person is in when giving evidence and so long after the time of the alleged events" and the appellant's "personal difficulties" and "significant forensic disadvantage given that these alleged events occurred many decades ago and without any timely complaint", the trial judge concluded:

> "I have considered whether the attributes of [the complainant] as a person and the various criticisms of his evidence caused me to have a reasonable doubt and they do not. I reject the evidence of the [appellant] on substantive issues where he denied the alleged sexual conduct.
>
> I find that the [appellant] sexually assaulted [the complainant] on numerous occasions over a period of some years. The sexual assaults mainly took the form of indecent assaults and mutual oral sexual intercourse."

115 That was it.

The appeal to the Court of Criminal Appeal

116 The appellant's appeal to the Court of Criminal Appeal was made on three grounds. The first, and as it appears principal, ground was that the verdict was unreasonable and not supported by the evidence. Under and in support of that, the appellant advanced two sets of particulars.

117 The first related to an alleged failure by the trial judge to have sufficient regard to matters relevant to the complainant's credibility and reliability. It consisted of extensive, precise particulars of a number of alleged inconsistencies and implausibilities in the complainant's evidence, including inconsistencies as to his age when acts of sexual abuse were alleged to have occurred, inconsistencies and implausibilities in and between identified witnesses' testimony, the implausibility of the complainant's evidence with respect to the supply of cannabis by the appellant to the complainant, the implausibility of the complainant's evidence as to his use of the appellant's motor bike from the age of nine, the appellant's evidence as to the timing of his relationship with Lucy as against the complainant's evidence as to the timing of his visit to the South Terrace unit, the timing of the appellant's commencement of growing cannabis in Shed 2, and the complainant's motive to make false allegations against the appellant (*scil* the appellant's daughter's claim for compensation). It should be understood that those were the same inconsistencies and implausibilities that the judge dismissed peremptorily with the statement: "I have considered whether … the various criticisms of [the complainant's] evidence caused me to have a reasonable doubt and they do not."

118 The second set of particulars in support of the first ground related to the appellant's contention that the trial judge placed undue weight on identified

aspects of the appellant's evidence in the assessment of his credibility and reliability. Under and in support of that, the appellant provided particulars of five Crown witnesses' evidence which it was contended supported the appellant's testimony.

119 The second ground of appeal was that the trial judge erred in his application of the burden of proof. The judge stated in his reasons: "Although it is not determinative of the case, having listened to [the complainant] over a number of days, I simply believed him and found him to be reliable." The appellant contended that that statement, taken together with the judge's reasons, demonstrated that the judge had formed a conclusion on the complainant's credibility and reliability at the end of the complainant's evidence, and thus did not retain an open mind as to his credibility and reliability when hearing from other witnesses.

120 The third ground, which was advanced with leave given in the course of the hearing before the Court of Criminal Appeal, was that the trial judge erred as a matter of law in failing to give adequate reasons in that he did not deal with incontrovertible, or arguably incontrovertible, inconsistencies affecting the credibility of the complainant, and thus affecting the judge's conclusion of proof of guilt beyond reasonable doubt. The alleged inconsistencies included:

(1) inconsistency between the complainant's evidence that the first act of oral intercourse occurred when the complainant was playing with slot cars in Shed 2 at the age of "nine going on to 12", and thus at some time between 1988 and 1991, and the appellant's evidence that the slot car track in Shed 2 was not operational until June 1993;

(2) inconsistency between the complainant's evidence that the appellant had sat on the chaise lounge in the master bedroom masturbating in front of the complainant as the complainant played games on the computer set up in the bedroom, and the appellant's evidence that the computer had only ever been located in his daughter's bedroom; and

(3) inconsistency between the complainant's evidence that the appellant had taken him to Lucy's South Terrace unit when the complainant was "close to" 12 years of age, and thus in 1991 or 1992, and the appellant's evidence that he did not meet Lucy until 1995 and consequently did not take the complainant to Lucy's unit until after the last alleged act of sexual abuse on 28 August 1994.

121 The judgment of the Court of Criminal Appeal[57] was delivered by Blue J, with whom Kourakis CJ and Bampton J agreed. As to the first ground of appeal, of unreasonable verdict not supported by the evidence, Blue J reasoned[58] that the mere fact that the trial judge may have made a credibility finding without giving sufficient weight to specific evidence or aspects of the evidence did not establish that the verdict was unreasonable or not supported by the evidence. Blue J stated[59] that, while an appellate court will have regard to a trial judge's reasons, the ultimate question is whether the evidence in itself was sufficient to support the judge's findings and the verdict. Hence, even if the alleged inconsistencies and implausibilities in the complainant's evidence were established, they would not in themselves lead to the conclusion that the verdict was unreasonable or could not be supported having regard to the evidence[60]. Blue J then went in some detail through each of the alleged inconsistencies and implausibilities, noting in each instance either that no inconsistency or implausibility was demonstrated or that any such inconsistency or implausibility was insignificant or insubstantial[61].

122 As to the trial judge's assessment of the appellant's credibility, Blue J referred[62] to each of the identified passages of the transcript on which the appellant relied, noting in each case that the judge had seen and heard the appellant give the evidence and that on the face of the transcript it was open to the judge to form the impression which he did. Blue J then concluded[63] his analysis of the first ground with the observation that the case essentially turned on the direct conflict between the evidence given by the complainant and the evidence given by the appellant and that it was open to the judge to be satisfied beyond reasonable doubt that the complainant was telling the truth about the alleged sexual abuse and that the appellant was not.

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**57** *R v D, L* [2015] SASCFC 24.

**58** *D, L* [2015] SASCFC 24 at [63].

**59** *D, L* [2015] SASCFC 24 at [63].

**60** *D, L* [2015] SASCFC 24 at [65], [69].

**61** *D, L* [2015] SASCFC 24 at [72]-[114].

**62** *D, L* [2015] SASCFC 24 at [119]-[129].

**63** *D, L* [2015] SASCFC 24 at [130]. Cf *Liberato v The Queen* (1985) 159 CLR 507 at 515 per Brennan J, 519 per Deane J; [1985] HCA 66.

123 On the second ground, concerning the burden of proof and whether the trial judge had prejudged the matter of the complainant's credibility and reliability, Blue J found[64] that the judge's statement, when read in context, demonstrated that the judge was "aware of and applied the axiomatic principle that it was his assessment of the complainant's evidence at the end of all of the evidence that was determinative and impressions formed before that point were only tentative and provisional". There was thus no basis to find prejudgment.

124 As to the third ground, of inadequacy of the judge's reasons in failing to deal adequately or at all with the identified inconsistencies, including the three set out above, Blue J relevantly stated[65]:

> "*Timing of construction of slot car track*
>
> The Judge explicitly identified the conflict between the evidence of the complainant and the [appellant] on this issue and then summarised the [appellant's] case that the complainant was wrong about when cannabis was grown and 'when the slot car track was completed, such that, in conjunction with other inconsistencies, he cannot be relied upon about the substantive allegations.' The Judge said that he accepted the complainant's evidence and rejected the [appellant's] evidence and it is evident that this extended to the conflict concerning the slot car track. There is no substance in this complaint.
>
> *Location of computer*
>
> There was no conflict between the evidence of the complainant and [the appellant's ex-wife] … There was a conflict between the evidence of the complainant and the [appellant], but that conflict was subsumed in the larger conflict that the complainant asserted inappropriate touching and the [appellant] denied that allegation outright. The Judge accepted the complainant's evidence that such touching occurred and rejected the [appellant's] evidence denying it. In the circumstances, there was no need for the Judge to address specifically the question identified by the [appellant].
>
> *Relationship with the other woman*
>
> There was no conflict between the evidence of the complainant and the [appellant] for the reasons given ... above. In the circumstances, there

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**64** *D, L* [2015] SASCFC 24 at [50].

**65** *D, L* [2015] SASCFC 24 at [138]-[140].

was no need for the Judge to address specifically the question identified by the [appellant]."

125 Earlier in his reasons, Blue J had said in relation to the evidence about the alleged visit to Lucy's South Terrace unit[66]:

> "The complainant gave evidence that he and the [appellant] visited the Adelaide unit and the [appellant] performed oral sex on him. He said that he was 'close to 12' on that occasion and in cross-examination denied that this occurred after the incident with [the appellant's daughter] (when he was 15).
>
> The [appellant] gave evidence that there were separations from [his ex-wife] when she left in 1995, 1996 and then in 1998 for good. He said that all of the times that [his ex-wife] left were because of the other woman and that he was going with her at those times, but did not say when he commenced a friendship or relationship with her. The [appellant] gave evidence that he and the complainant visited her unit but said that, as far as he remembered, this occurred after the incident with [the appellant's daughter]. He said that he was 'not quite clear about it' and then that he was 'almost hundred-per-cent sure about it'.
>
> Given the vagueness of the [appellant's] evidence, there was no clear inconsistency between the evidence given by the complainant and the [appellant] concerning their visit to the unit. In any event, the Judge was not obliged to accept the [appellant's] evidence as to the timing of that visit for the purpose of assessing the complainant's credibility."

Grounds of appeal to this Court

126 The grounds of appeal to this Court are, in substance, that the Court of Criminal Appeal erred in not holding that: (1) the verdict was vitiated by the trial judge's failure to give adequate reasons; (2) the verdict was uncertain, unreasonable or unsafe; and (3) there was a miscarriage of justice.

127 The first ground was put on the basis of the same inconsistencies and implausibilities relied on in support of the inadequacy of reasons ground of appeal before the Court of Criminal Appeal, but with the added element, not advanced below, that it was necessary for the trial judge to be satisfied beyond reasonable doubt of each of the two or more acts of sexual abuse which he found to be proved; and, therefore, that the reasons for judgment were deficient in that they failed to identify which two or more acts of sexual abuse the judge found to be proved beyond reasonable doubt and explain how, despite the identified

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**66** *D, L* [2015] SASCFC 24 at [82]-[84].

inconsistencies and implausibilities, the judge was able to reason to satisfaction beyond reasonable doubt of the proof of those acts.

128 The second and third grounds of appeal were based on the first. In effect, the second was that the verdict was uncertain, unreasonable or unsafe because of the inadequacy of the trial judge's reasons, and the third was that there was a miscarriage of justice because of the inadequacy of the reasons. It was not contended that it would not have been open to the judge to be satisfied on the evidence beyond reasonable doubt of at least two of the alleged acts of sexual exploitation separated by a period of not less than three days.

129 For reasons which will be explained, the first ground of appeal is determinative. But it is necessary to say something first of the law that governs the standard of reasons for judgment in a criminal case and also of the change in the state of authority in relation to the offence of persistent sexual exploitation of a child since the appeal to the Court of Criminal Appeal was determined. It was because of that change that special leave to appeal was granted in this case.

The need for adequate reasons

130 There was a time past when trial judges sitting in civil causes involving substantial conflicts of evidence sometimes delivered reasons for judgment that consisted of no more than a recitation of the evidence, an assertion of preference for the credibility of one witness over another – usually justified by incantation of the mantra of having seen and heard the witnesses in the witness box – and an asseveration of conclusion according to the preferred witness's version of events. As recently as 1983, the Privy Council gave its apparent approval to the practice[67]. But, if the law of this country ever countenanced the practice, it does so no longer. As early as 1947, the Supreme Court of New South Wales, in a judgment delivered by Jordan CJ, stated in *Carlson v King*[68] that a court of first instance from which an appeal lies to a higher court had a duty "to make, or cause to be made, a note of everything necessary to enable the case to be laid properly and sufficiently before the appellate Court if there should be an appeal. This includes not only the evidence, and the decision arrived at, but also the reasons for arriving at the decision." A plethora of cases since then has established that, although the extent of reasons may depend on the circumstances of the case, reasons must identify the relevant principles of law, refer to relevant evidence, state the judge's findings upon material questions of fact and provide

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**67** See *Selvanayagam v University of the West Indies* [1983] 1 WLR 585 at 587-588; [1983] 1 All ER 824 at 825-826.

**68** (1947) 64 WN (NSW) 65 at 66 per Jordan CJ, Davidson and Street JJ.

an explanation for those findings and the ultimate conclusions reached by the judge[69].

131 Since parties must be able to see the extent to which their cases have been understood and accepted, a trial judge will ordinarily be expected to expose his or her reasoning on points critical to the contest between the parties[70]. This applies both to evidence and to argument. If a party relies on relevant and cogent evidence which the judge rejects, the judge should provide a reasoned explanation for the rejection of that evidence[71]. If the parties advance conflicting evidence on a matter significant to the outcome, both sets of evidence should be referred to and reasons provided for why the judge prefers one set of evidence to the other[72]. Similarly, while a judge is not required to deal with every argument and issue that might arise in the course of a trial[73], if a party raises a substantial argument which the judge rejects, the judge should refer to it and assign reasons for its rejection. And in providing reasons, the judge is required to make apparent the steps he or she has taken in reaching the conclusion expressed, for reasons are not intelligible if they leave the reader to speculate as to which of a number of possible paths of reasoning the judge may have taken to that

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**69** See for example *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 382 per Asprey JA; *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 443-444 per Meagher JA; *Hunter v Transport Accident Commission* (2005) 43 MVR 130 at 136-137 [21] per Nettle JA (Batt JA and Vincent JA agreeing at 131 [1]-[2], [4]); *Drew v Makita (Australia) Pty Ltd* [2009] 2 Qd R 219 at 237-238 [58]-[64] per Muir JA (Holmes JA and Daubney J agreeing at 224 [1], 240 [72]).

**70** See *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 279 per McHugh JA; *Assad v Eliana Construction & Developing Group Pty Ltd* [2015] VSCA 53 at [34].

**71** See *Sun Alliance Insurance Ltd v Massoud* [1989] VR 8 at 18 per Gray J (Fullagar J and Tadgell J agreeing at 20).

**72** See *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 at 382; [2000] 1 All ER 373 at 378; *Jones v Bradley* [2003] NSWCA 81 at [131] per Santow JA (Meagher JA and Beazley JA agreeing at [1], [2]); *Mount Lawley Pty Ltd v Western Australian Planning Commission* (2004) 29 WAR 273 at 283 [28]; *Waterways Authority v Fitzgibbon* (2005) 79 ALJR 1816 at 1835-1836 [131] per Hayne J; 221 ALR 402 at 428-429; [2005] HCA 57; *Pollard v RRR Corporation Pty Ltd* [2009] NSWCA 110 at [66] per McColl JA (Ipp JA and Bryson AJA agreeing at [1], [85]); *Assad* [2015] VSCA 53 at [36].

**73** See *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598 at 1610 [62] per Gleeson CJ, McHugh and Gummow JJ; 200 ALR 447 at 464; [2003] HCA 48.

conclusion[74]. Failure sufficiently to expose the path of reasoning is therefore an error of law[75].

132 The trial of an indictable offence (or, as it is called in South Australia, an offence charged on information) by judge alone is an extraordinary procedure fundamentally at odds with the deep seated conviction of Anglo-Australian criminal justice that a man or woman accused of a serious offence should be tried by a jury of peers[76]. Due as much, therefore, to the extraordinary nature of the procedure as, in some States, to specific legislative requirements[77], a judge who tries an indictable offence without a jury is bound to produce reasons for judgment of at least the quality expected of his or her civil brethren[78]. It is, however, even more important in criminal proceedings than in civil that a trial judge's reasons meet the standard required. It follows that a judge's failure to deliver adequate reasons is an error of law productive of a miscarriage of justice which, subject to application of the proviso, will necessitate that a conviction be set aside[79].

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**74** See *Wright v Australian Broadcasting Commission* [1977] 1 NSWLR 697 at 701 per Moffitt P (Glass JA agreeing at 713); *Soulemezis* (1987) 10 NSWLR 247 at 280 per McHugh JA; *Houlahan v Pitchen* [2009] WASCA 104 at [94] per Newnes JA (Pullin JA and Miller JA agreeing at [1], [2]).

**75** *Pettitt* [1971] 1 NSWLR 376 at 382 per Asprey JA.

**76** See generally Blackstone, *Commentaries on the Laws of England*, (1769), bk 4, c 27 at 342-344; *Kingswell v The Queen* (1985) 159 CLR 264 at 300 per Deane J; [1985] HCA 72; *Brown v The Queen* (1986) 160 CLR 171 at 179 per Gibbs CJ, 188 per Wilson J, 196-197 per Brennan J, 201-202 per Deane J, 214-215 per Dawson J; [1986] HCA 11; *R v Baden-Clay* (2016) 258 CLR 308 at 329 [65]; [2016] HCA 35.

**77** See for example *Supreme Court Act* 1933 (ACT), s 68C; *Criminal Procedure Act* 1986 (NSW), s 133; *Criminal Code* (Q), s 615C; *Criminal Procedure Act* 2004 (WA), s 120.

**78** See *Fleming v The Queen* (1998) 197 CLR 250 at 261-264 [23]-[33]; [1998] HCA 68; *R v Keyte* (2000) 78 SASR 68 at 75-80 [30]-[54] per Doyle CJ (Wicks J agreeing at 84 [80]), 82 [64]-[65] per Williams J; *AK v Western Australia* (2008) 232 CLR 438 at 445-446 [16] per Gleeson CJ and Kiefel J, 453-454 [44]-[48] per Gummow and Hayne JJ, 467-469 [85] per Heydon J; [2008] HCA 8; *Douglass* (2012) 86 ALJR 1086 at 1088-1089 [8]; 290 ALR 699 at 701-702.

**79** See *Douglass* (2012) 86 ALJR 1086 at 1090 [14]; 290 ALR 699 at 703.

The change in the state of authority

133 The appeal to the Court of Criminal Appeal was heard on 21 August 2014. Previously, in 2011, a differently constituted Court of Criminal Appeal in *R v M, BJ*[80] had held that the reasoning in *KBT v The Queen*[81] (as to the need for a jury to be unanimous in relation to the underlying sexual acts found to constitute an offence of maintaining a sexual relationship contrary to s 229B(1) of the *Criminal Code* (Q)) applied, mutatis mutandis, to an offence of persistent sexual exploitation of a child contrary to s 50 of the CLCA. In *M, BJ*, however, it was also held that despite the trial judge's failure to direct the jury as to the need to be unanimous as to each of the acts found to constitute the offence of persistent sexual exploitation, there had not been a miscarriage of justice. It was observed[82] that, in the particular circumstances of that case, the possibility that different jurors based their findings of guilt on different underlying acts could be "entirely discounted", and, therefore, the conviction was not uncertain or unsafe.

134 Two years later, in *R v C, G*[83], a further differently constituted Court of Criminal Appeal in effect rejected the idea that this Court's reasoning in *KBT* applied to an offence of persistent sexual exploitation contrary to s 50 of the CLCA. Basing themselves on an earlier decision of the Court of Criminal Appeal in *R v Warsap*[84], they held that it was not necessary for a trial judge sitting alone to identify particular acts of sexual exploitation. It sufficed to sustain a conviction, it was said[85], "if a pattern of offending behaviour during the relevant period is established beyond reasonable doubt".

135 Thus stood the state of relevant Full Court authority in South Australia at the time of the appeal to the Court of Criminal Appeal in this case. It was not until some 12 months after the hearing and determination of that appeal that a

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**80** (2011) 110 SASR 1 at 28-29 [70] per Vanstone J (Sulan J and White J agreeing at 6 [1], 41 [138]).

**81** (1997) 191 CLR 417 at 422-423 per Brennan CJ, Toohey, Gaudron and Gummow JJ, 431-433 per Kirby J; [1997] HCA 54.

**82** (2011) 110 SASR 1 at 32 [80] per Vanstone J (Sulan J and White J agreeing at 6 [1], 41 [138]).

**83** (2013) 117 SASR 162 at 186-187 [85]-[88].

**84** (2010) 106 SASR 264 at 267 [7] per Bleby J (Duggan J and White J agreeing at 265 [1], 278 [72]).

**85** *C, G* (2013) 117 SASR 162 at 187 [88], quoting *Warsap* (2010) 106 SASR 264 at 267 [7] per Bleby J (Duggan J and White J agreeing at 265 [1], 278 [72]).

five member Court of Criminal Appeal, convened by Kourakis CJ to resolve the point, held in *R v Little*[86], correctly, that it is necessary for the Crown to prove beyond reasonable doubt the two or more underlying acts of sexual exploitation which constitute the offence of persistent sexual exploitation which it alleges and that a trial judge should direct a jury accordingly that they must be unanimous as to each of the underlying acts of sexual exploitation found to be proved beyond reasonable doubt. A failure to give the extended unanimity direction is an error of law productive of a miscarriage of justice which will necessitate a conviction being quashed unless the proviso can be applied[87].

136 It is to be observed in passing that it was also held[88] in *Little* that, despite the trial judge's failure in *M, BJ* to give the jury an extended unanimity direction, the appeal was rightly dismissed because the failure to give that direction had not occasioned a miscarriage of justice. With respect, that is debatable. Possibly some of the reasoning in *M, BJ* suggested that the proviso was applicable and that, in holding that there was no miscarriage of justice, the Court of Criminal Appeal intended to convey that there had been no substantial miscarriage of justice. But, at least in terms, that was not the way in which the case was decided. It was decided[89] on the expressed basis of there having been no miscarriage of justice, when plainly there was.

137 Be that as it may, it was only after and as a consequence of *Little* that it appears to have been appreciated that, just as it is necessary in the case of a trial by judge and jury for an offence of persistent sexual exploitation for the trial judge to give the jury an extended unanimity direction, in the case of trial by judge alone it is necessary for the judge to identify in his or her reasons for judgment the underlying acts of sexual exploitation found to be proved and identify the evidence and explain the reasoning which has led the judge to be satisfied of proof beyond reasonable doubt of each such act[90]. It was only then that an application for special leave to appeal was made in this case – at the same time as applications for special leave to appeal were made in *Chiro*[91] and *Hamra*

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**86** (2015) 123 SASR 414 at 417-420 [11]-[19].

**87** (2015) 123 SASR 414 at 420 [20].

**88** (2015) 123 SASR 414 at 420 [19].

**89** (2011) 110 SASR 1 at 31-32 [78]-[80] per Vanstone J (Sulan J and White J agreeing at 6 [1], 41 [138]).

**90** *Hamra v The Queen* (2017) 91 ALJR 1007 at 1017 [45]; 347 ALR 586 at 598; [2017] HCA 38.

**91** (2017) 91 ALJR 974; 347 ALR 546.

*v The Queen*[92] – and it was for that reason that special leave to appeal was then granted, out of time, in each case.

The trial judge's reasons were inadequate

138 Given the state of authority in South Australia at the time of the trial in this matter and at the time of the appeal to the Court of Criminal Appeal, it is hardly surprising that the trial judge did not identify and that the Court of Criminal Appeal did not consider it necessary for the judge to identify the acts of sexual exploitation which the judge found to be proved beyond reasonable doubt and properly to explain the reasoning which led him to those conclusions. Nonetheless, the reasons are deficient in both of those respects.

139 The Crown contended to the contrary that, when the reasons are read as a whole, as it appeared the Court of Criminal Appeal had done, it was not open to doubt that the trial judge was entitled to be and was satisfied beyond reasonable doubt of each and every one of the acts of sexual exploitation which the complainant alleged. More specifically, it was submitted that, despite the judge's recognition of inconsistencies and implausibilities regarding the complainant's testimony as to times and dates, the fact that the judge stated that he accepted the complainant as a witness of truth and "as a reliable witness as to the *core allegations*" (emphasis added), coupled with his statements that he "simply believed" the complainant and that the complainant was "describing real events", signified the judge's acceptance of the allegations that lay at the *core* of the charge; meaning thereby that he was satisfied beyond reasonable doubt that each and every one of the alleged acts of sexual exploitation was proved beyond reasonable doubt.

140 That contention cannot be accepted for two reasons. First, it is not what the trial judge wrote. He did not state that, despite his concerns about the inconsistencies and implausibilities in the complainant's recall of times and dates, he was nevertheless satisfied that each and every one of the acts of sexual exploitation alleged by the complainant had been proved beyond reasonable doubt. What the judge wrote was: "I find that the [appellant] sexually assaulted [the complainant] on numerous occasions over a period of some years." He had earlier remarked: "I do not have to accept everything [the complainant] says to be satisfied of the charge." One is left to wonder what was meant by the "core allegations" and, since this is a criminal matter, one should not be left to wonder.

141 Secondly, if the trial judge meant to convey that, despite his concerns about the inconsistencies and implausibilities in the complainant's recall of times and dates, he was nevertheless satisfied that each and every one of the acts of

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**92** (2017) 91 ALJR 1007; 347 ALR 586.

sexual exploitation alleged by the complainant had been proved beyond reasonable doubt, the judge's reasons do not explain how, given the extent of the inconsistencies and implausibilities as to times and dates, he could legitimately have reached that standard of satisfaction. As already observed, the furthest the judge went in the identification of the acts of sexual abuse which he found to be proved was to say that he was satisfied beyond reasonable doubt that "the [appellant] sexually assaulted [the complainant] on numerous occasions over a period of some years", and the furthest the judge went in the provision of reasons as to why, despite the extent of inconsistencies and implausibilities, he was satisfied of that beyond reasonable doubt was to say, in effect, that he had seen and heard the complainant in the witness box and considered him to be an honest and reliable witness as to the "core allegations". That is the kind of reasoning that the cases[93] decry.

142 This is not to overlook that there are cases of a type posited in *Hamra*[94] where a trial judge may encounter numerous underlying acts of sexual exploitation of a particular kind or kinds that are alleged to have taken place within a discrete, designated period of time, and, therefore, where, without being able precisely to identify the time or circumstances of commission of any one of those alleged acts, the judge is able to conclude on the basis of the evidence that he or she is satisfied beyond reasonable doubt that, within that discrete, designated period of time, at least two acts of the particular identified kind or kinds alleged took place, separated by not less than the required period of three days.

143 By contrast, however, where, as here, there are distinct groups of underlying acts of sexual exploitation which are alleged to have occurred at different times and in different circumstances, and the evidence as to the likelihood of each group of acts having occurred as alleged is distinct, different and attended by disparate inconsistencies and implausibilities, each group requires separate analysis. Contrary to the Crown's contentions, in such cases it does not suffice for a trial judge to say that, having seen and heard the witnesses give their evidence in the witness box, the judge is satisfied beyond reasonable doubt that the complainant is telling the truth. Rather, just as when an offence of persistent sexual exploitation is tried before a jury the judge must direct the jury that they must be unanimous as to each underlying act of sexual abuse which they find to be proved beyond reasonable doubt, so, too, when such an offence is tried before judge alone it is mandatory for the judge to direct himself or herself of the need to be satisfied beyond reasonable doubt of the commission of two or more of the acts of sexual offending alleged and to explain in reasons for

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**93** See above at [130]-[131].

**94** (2017) 91 ALJR 1007 at 1014 [27]; 347 ALR 586 at 594.

judgment how he or she has reasoned to the conclusion of guilt beyond reasonable doubt in respect of each such act.

144 The importance of the distinction may be demonstrated by reference to three of the inconsistencies which the appellant urged in support of his third ground of appeal before the Court of Criminal Appeal. It will be recalled that one of those inconsistencies was as between the complainant's evidence that the first act of oral sex occurred when he was the age of "nine going on to 12" and playing with slot cars in Shed 2, and thus at some time between 1988 and 1991, and the appellant's evidence that the slot car track was not set up in Shed 2 until June 1993. It is impossible to say from the judge's reasons what he made of that inconsistency, or, therefore, whether he ever truly turned his mind to its ramifications. All one has is his inscrutable declaration that, despite all of the identified inconsistencies, he considered the complainant to be a truthful and reliable witness as to the "core allegations". As has been seen, the Court of Criminal Appeal dismissed the matter as one of no moment[95]. But plainly it was a matter of considerable forensic moment.

145 As mentioned, the appellant's evidence that the slot car track in Shed 2 was not operational until June 1993 appeared to be corroborated by contemporaneous calendar entries identified by his ex-wife. In June 1993, the complainant would have been 14 years and four months of age, not "nine going on to 12", and it would have been only 14 months before the last act of sexual abuse was alleged to have been committed on 28 August 1994. Assuming the appellant's evidence coupled with the calendar entries and his ex-wife's testimony were accepted, or at least in aggregate created a reasonable doubt as to whether the slot car track was operational before June 1993, it would have to follow that there was a reasonable doubt as to whether the alleged act of sexual abuse ever occurred at all, or, at least, if it did occur, whether it occurred before June 1993. Since the complainant's evidence was that the first instance of oral sex occurred in Shed 2, it must equally follow that there was thereby created a reasonable doubt as to whether the occasion when the appellant was alleged to have taken the complainant to Lucy's South Terrace unit and fellated him when the complainant was "close to 12" ever occurred at all or, if it did, whether it occurred before June 1993, within 18 months of the last alleged act of sexual abuse on 28 August 1994. So, too, must it follow that there was thereby created a reasonable doubt as to whether the occasion when the appellant was alleged to have taken the complainant to Cherry Gardens when the complainant was "over 12, 12 nearly" ever occurred at all or, if it did, whether it occurred before June 1993. And, to the extent that the complainant's evidence suggested that instances of oral sex occurred when he was aged between "nine going on to 12"

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**95** *D, L* [2015] SASCFC 24 at [138].

and 14 years and four months, it must also follow that those instances were not proved beyond reasonable doubt.

146 Conceivably, it may be that the trial judge was satisfied that, despite the appellant's corroborated and, save for the complainant's testimony, effectively uncontested evidence that the slot car track was not operational in Shed 2 until June 1993, the judge considered it was proved beyond reasonable doubt that the slot car track was in fact set up and operational in Shed 2 at an earlier date, and, therefore, that the alleged first act of oral sex did occur as and when alleged. But if so, the judge did not say so, still less disclose how, despite the inconsistency in the evidence, he was able to reason to that conclusion beyond reasonable doubt.

147 Granted, as the Crown submitted, the trial judge stated that he was "unimpressed by the [appellant's] presentation", "found [the appellant's] answers to be glib and evasive on some topics, particularly about the number and duration of occasions when [the complainant] and his siblings stayed or the [appellant] was alone with [the complainant]" and that "the [appellant] was … understating [the complainant's] interest in slot cars and using the track in Shed 2". But in both terms and substance, that falls far short of rejecting beyond reasonable doubt the appellant's evidence that the slot car track was not operational in Shed 2 until June 1993 or, for that matter, that the appellant did not meet Lucy until 1995 and so could not have taken the complainant to the South Terrace unit until after 28 August 1994, and that he never took the complainant to Cherry Gardens. To repeat, the requirement to refer to the evidence is not limited to the evidence which a judge accepts. Where, as here, an accused has relied upon substantial and cogent evidence which the judge rejects, the judge must refer to it and explain why it has been rejected.

148 More likely perhaps, although recognising the existence of reasonable doubt as to when the slot car track was first operational in Shed 2, the trial judge was satisfied beyond reasonable doubt that the track was operational by June 1993, by which time the complainant would have been 14 years and four months old, and that there then occurred the first occasion of oral sex. In point of principle, there would have been nothing wrong with reasoning to that conclusion. But if that were the case, the difficulty remains that it is not what the judge said he did. And as should now be understood, it is no answer that an appellate court may be able to reverse engineer a logical path of reasoning capable of sustaining a trial judge's conclusion. An appeal against conviction to the Court of Criminal Appeal is not a rehearing[96]. Unless it is clear from a

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**96** See *R v ADW* (2002) 84 SASR 178 at 181-182 [24] per Doyle CJ (Debelle J agreeing at 185 [44]), 188-189 [62]-[63] per Williams J (Debelle J agreeing at 185 [44]). See also *Kurtic* (1996) 85 A Crim R 57 at 59-60 per Hunt CJ at CL (Grove J and Barr J agreeing at 66, 67). Cf *Fleming* (1998) 197 CLR 250 at 260 [21].

judge's reasons that he or she has so reasoned, the reasons are inadequate and as such productive of a miscarriage of justice. And where, as here, the inadequacy of reasons relates to the central issue to be tried, the proviso can be applied only if it is apparent that the judge must have reasoned by that route and no other[97]. Otherwise the appellate court cannot be satisfied that the error at trial did not affect the verdict[98].

149 It will be remembered that a second inconsistency relied upon in the Court of Criminal Appeal related to the appellant's alleged acts of masturbation in front of the complainant while the complainant played on the computer. The complainant's evidence was that there were "numerous times" when he was "growing up" when the appellant would be sitting on the chaise lounge masturbating while the complainant played games on the computer. According to the complainant, the computer was in the master bedroom, where the chaise lounge was situated. The appellant's evidence, however, was that the computer was always kept in his daughter's bedroom (where there was no chaise lounge), and it was not put to him in cross-examination that it was ever located anywhere else. Similarly, as will be recalled, the appellant's ex-wife's evidence in cross-examination was that the computer was in the daughter's bedroom and, when asked in re-examination whether it had ever been set up anywhere else, she said that she did not know but that all she could remember was that it was set up in the daughter's bedroom.

150 The Court of Criminal Appeal dismissed the matter as one of no moment[99]. But it, too, was a matter of moment. If the trial judge accepted that the computer was always kept in the daughter's bedroom, or at least that there was a reasonable doubt as to whether it had ever been elsewhere than in the daughter's bedroom, that meant that there was a reasonable doubt as to whether there was ever an occasion of the type alleged when the appellant sat on the chaise lounge in the master bedroom masturbating in front of the complainant while the complainant played games on the computer. Conceivably, the judge may have been satisfied beyond reasonable doubt that there were occasions when the appellant sat on the chaise lounge masturbating while the complainant was present in the master bedroom doing something other than playing games on the computer. If so, however, the judge did not say so or explain why,

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**97** See *AK* (2008) 232 CLR 438 at 457 [58]-[59] per Gummow and Hayne JJ; *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 104 [29] per French CJ, Gummow, Hayne and Crennan JJ; [2012] HCA 14.

**98** See *Baiada* (2012) 246 CLR 92 at 104 [28] per French CJ, Gummow, Hayne and Crennan JJ; *Reeves v The Queen* (2013) 88 ALJR 215 at 223-224 [50] per French CJ, Crennan, Bell and Keane JJ; 304 ALR 251 at 261; [2013] HCA 57.

**99** *D, L* [2015] SASCFC 24 at [81], [139].

notwithstanding the doubt about reliability that the discrepancy was bound to engender, he was able to exclude the reasonable possibility that the alleged acts of masturbation did not occur. And it is to be remembered that inconsistencies are cumulative. For the complainant to be wrong as to the date when the slot car track was first set up in Shed 2, and thus as to when occurred the first alleged act of oral sex, is one thing. For the complainant to be wrong about both that and the circumstances in which the appellant is alleged to have masturbated in front of him is another thing, and one which is of potentially greater forensic significance in the assessment of which of the allegations are established beyond reasonable doubt.

151 So then to a third inconsistency relied upon, which was as between the complainant's evidence that the appellant had taken him to Lucy's South Terrace unit when the complainant was "close to 12" years old, and there fellated him, and the appellant's evidence that he did not meet Lucy until 1995 and, therefore, did not take the complainant to Lucy's unit until after 28 August 1994, being the date of the last alleged act of sexual abuse. The Court of Criminal Appeal held that there was no need for the trial judge to deal with that issue because the appellant did not say when he commenced a friendship or relationship with Lucy, and although he said that he did not take the complainant to Lucy's unit until after the complainant indecently assaulted the appellant's daughter, he said that he was "not quite clear about it" and then that he was "almost hundred-per-cent sure about it"[100]. That is incorrect.

152 The appellant stated clearly that the visit to Lucy's South Terrace unit was not until after the incident in which the complainant indecently assaulted the appellant's daughter, which occurred on 28 August 1994. When it was put to him whether the complainant would then have been 15 or 16 years old, the appellant replied "15, 15 and a half or something like that, I'm not sure". On the next day of the trial, in the second day of the appellant's cross-examination, he was asked when he first saw Lucy and he said it was after his daughter was indecently assaulted by the complainant. He was then asked when he had his first massage with Lucy (she was a masseuse), and whether it was towards the end of 1994, and he answered 1995. Asked then whether it was a few months after his daughter was indecently assaulted by the complainant, he said: "I'm not really sure about the date when I went to get my first massage from Lucy" but agreed it was "[a] number of months after August 1994". Asked then again whether the complainant was 15 or 15 and a half years old when the appellant took the complainant to Lucy's unit he answered: "I'm not quite sure of exactly how old he was ... He was 15, something about that, yeah. I mean – when was he born again?" When it was then put to him that he could have taken the complainant to Lucy's unit before February 1995, he answered that he did not meet Lucy until

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**100** *D, L* [2015] SASCFC 24 at [83]-[84].

1995. Put to him then that he took the complainant to Lucy's unit before his daughter was indecently assaulted, he denied it. Later, when the appellant was being questioned about how often the complainant and his siblings would stay at the appellant's and his ex-wife's home, the appellant was asked whether on occasions when the complainant stayed at the appellant's home the appellant had taken the complainant out on "boys' trips". He answered, emphatically, "I don't think so". That it was emphatic is apparent from the terms of the exchange:

> "Q. Do you agree that you would take [the complainant] on outings.
>
> A. By himself; just me and him?
>
> Q. Boys' trips.
>
> A. I don't think so.
>
> Q. What do you mean 'I don't think so'; are you sure.
>
> A. Of course I'm sure, absolutely 100%.
>
> Q. Never happened.
>
> A. Never ever. I'm emphatic about that."

153 The appellant's evidence about the trip to Lucy's unit being after 28 August 1994 was clear and emphatic, just as was his evidence that he did not ever take the complainant on any "boys' trips" when the complainant and his siblings came to stay at his home. Whether or not the appellant's evidence on the point was accepted was a matter for the trial judge. But it could not properly be sloughed off on the basis that it was vague. For the reasons already stated, it needed to be dealt with specifically and in the detail which has been explained.

154 Similar considerations apply to the act of oral sex which was alleged to have occurred at Cherry Gardens when the complainant was 12 years old (ex hypothesi, some two years before the first alleged act of oral sex in Shed 2), especially given the appellant's categorical and, save for the complainant's testimony, uncontradicted denial of ever having taken the complainant to Cherry Gardens. In that connection, too, it is to be noted that, although the Crown called the appellant's ex-wife, who deposed that she had been to Cherry Gardens with the appellant many times, she was not asked whether and did not suggest that the appellant had ever taken the complainant to Cherry Gardens.

155 Finally, it may be observed that the same considerations also apply to the inconsistencies between the complainant's evidence and the appellant's evidence as to the occasions when the appellant allowed the complainant to ride the appellant's motor bike and whether it was in return for acts of oral sex. On the appellant's evidence, the complainant did not ride the motor bike until he was at

least 15 years of age, after the incident involving the appellant's daughter – a version of events consistent with evidence of the size and capacity of the motor bike and the unlikelihood of a child of much less than 15 years of age being able to ride it. Presumably, it was for that reason that the trial judge stated that the complainant's estimates of his age when allowed to ride the appellant's motor bike were not reliable. But, as has been seen, having just made that observation, the judge then went on to observe that such lack of reliability was not sufficient to cause him to doubt the complainant's "truthfulness *or reliability*" (emphasis added). What that meant is impossible to say. One possibility perhaps is that, despite the judge's expressed doubt as to the reliability of the complainant's evidence of his age when he was permitted to ride the motor bike, the judge was satisfied beyond reasonable doubt that the complainant was allowed to ride the motor bike from the age of 15 and, too, that there were then instances of oral sex in return for motor bike rides. If so, however, that is not what the judge said. Nor does it explain how the judge managed to reason to that conclusion beyond reasonable doubt given that, if there were no motor bike rides until the age of 15, or at least if there was reasonable doubt as to whether there were any rides before then, there was reasonable doubt that there were instances of oral sex in exchange for motor bike rides before the age of 15, and the last date of alleged oral sex was said to have occurred when the complainant was 15 and a half years old. Another possibility is that, despite the judge's expressed doubt as to the complainant's reliability regarding his age when permitted to ride the motor bike, other evidence persuaded the judge that there were instances of motor bike rides for oral sex before the age of 15 and therefore before the date of the last alleged instance of oral sex. But again, that is not what the judge said and, in the absence of further explanation, it taxes credulity that the judge could have reasoned to that conclusion beyond reasonable doubt consistently with his misgivings about the complainant's reliability.

Conclusion and orders

156 The trial judge's reasons did not meet the standard required in the case of a trial by judge alone of a serious indictable offence. The failure to do so constituted an error of law productive of a miscarriage of justice. It is not suggested that the proviso can be applied, and, for reasons already explained, it cannot be applied. It follows that the appeal should be allowed. The conviction should be quashed, the sentence passed below should be set aside, and it should be ordered that a new trial be had.