# HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, NETTLE AND GORDON JJ

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IAN DOUGLAS JOHNSON APPELLANT

AND

THE QUEEN RESPONDENT

*Johnson v The Queen*
[2018] HCA 48
*17 October 2018*
A9/2018

**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 Caldicott Lawyers)

I D Press SC with B Lodge for the respondent (instructed by Director of Public Prosecutions (SA))

## CATCHWORDS

### Johnson v The Queen

Criminal law − Appeal against convictions − Where appellant convicted of five counts of sexual offending against single complainant being his sister − Where counts joined − Where s 34P of *Evidence Act* 1929 (SA) provided for admission of discreditable conduct evidence for permissible use − Where applications to have counts one and two tried separately and to prevent Crown from leading evidence of discreditable conduct against complainant dismissed − Where Crown relied upon evidence of appellant's other alleged sexual misconduct to rebut presumption of doli incapax and to show relationship between appellant and complainant − Where verdicts on counts one and three quashed on appeal − Whether evidence of appellant's other alleged sexual misconduct admissible on trial of each remaining count − Whether joinder occasioned miscarriage of justice.

Evidence − Criminal trial − Sexual offences − Propensity evidence − Admissibility − Where Crown relied on uncharged acts as relationship or context evidence − Where evidence of one uncharged act improperly admitted − Whether miscarriage of justice.

Words and phrases – "admissibility", "context evidence", "contextual use", "discreditable conduct evidence", "effluxion of time", "impermissible use", "non-propensity use", "other alleged sexual misconduct", "permissible use", "prejudicial effect", "probative value", "relationship evidence", "uncharged act".

*Evidence Act* 1929 (SA), Pt 3 Div 3, s 34P.

1 KIEFEL CJ, BELL, GAGELER, NETTLE AND GORDON JJ. This appeal is concerned with the admissibility of evidence under Div 3 of Pt 3 of the *Evidence Act* 1929 (SA) ("the Evidence Act") of the accused's sexual misconduct towards the complainant on occasions other than the occasion charged where the use of the evidence is confined to "contextual" purposes. In these reasons, the expression "the other sexual misconduct" is used to refer to evidence of sexual acts charged in counts in the Information other than the count under consideration and sexual acts for which the accused has not been charged.

2 An evident purpose of the introduction of Div 3 of Pt 3 into the Evidence Act[1] was to overcome uncertainty under the common law[2] as to the admissibility of evidence of the accused's discreditable conduct including other sexual misconduct where the use of the evidence is confined to "contextual" purposes[3]. Division 3 of Pt 3 provides for the admission of "discreditable conduct evidence" for permissible uses that rely on proof of the defendant's particular propensity as circumstantial evidence of a fact in issue and for permissible, non-propensity, uses. The test for admission for the latter use is less demanding than the test for admission for a propensity use. Provided the probative value of evidence of the accused's other sexual misconduct outweighs any prejudicial effect the evidence may have on the defendant, the evidence may be received for one or more contextual uses.

Procedural history

3 The appellant was tried in the District Court of South Australia (Judge Beazley and a jury) in March 2015 on an Information that charged him with five counts of sexual offences against his sister, VW. The appellant is two years and ten months older than VW. The first count alleged an indecent assault[4]

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**1** *Evidence (Discreditable Conduct) Amendment Act* 2011 (SA).

**2** *KRM v The Queen* (2001) 206 CLR 221 at 230-233 [24]-[31] per McHugh J; [2001] HCA 11; *HML v The Queen* (2008) 235 CLR 334 at 358 [24]-[25], 361 [35] per Gleeson CJ, 362 [41] per Gummow J, 363 [46], 370 [58]-[60] per Kirby J, 383 [106], 396-397 [163]-[164], 416 [244] per Hayne J, 417 [248], 422 [271], 448-450 [328]-[330] per Heydon J, 478 [425], 485 [455], 486 [460], 487-488 [465]-[466] per Crennan J, 495 [494], 496 [498], 498 [502] per Kiefel J; [2008] HCA 16.

**3** South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 26 July 2011 at 3502.

**4** *Criminal Law Consolidation Act* 1935 (SA), s 56.

which was particularised as occurring when the appellant was aged 11 or 12 years and was, by law, presumed to be doli incapax[5]. The second count, which charged an offence of carnal knowledge[6], was particularised as occurring when the appellant was aged 17 years. The remaining counts charged offences that were alleged to have taken place when the appellant was an adult: the persistent sexual exploitation of VW, a child[7], particularised as occurring over a period when the appellant was aged 18 or 19 years, and two counts of rape[8]. The first of the latter offences was alleged to have occurred when the appellant was aged 28 years and the second around one year later.

4 The prosecution adduced evidence from VW of the appellant's other alleged misconduct against her from when she was three years old until the end of the period of the alleged offending ("the appellant's other alleged sexual misconduct"). Three incidents were alleged to have occurred before the commission of the first offence – the bath incident, the implements shed incident and the bedroom incident. The appellant was aged between six and nine or ten years at the date of these incidents. A purpose of adducing this evidence was to rebut the presumption of doli incapax.

5 The appellant gave evidence denying that he had engaged in any sexual conduct with VW. The jury returned verdicts of guilty on each count.

6 The appellant appealed against his convictions to the Court of Criminal Appeal of the Supreme Court of South Australia (Sulan, Peek and Stanley JJ). The Court of Criminal Appeal allowed the appeal in relation to the first and third counts. Their Honours held that the evidence adduced in support of the first count was incapable of rebutting the presumption that the appellant was doli incapax. Their Honours held that the evidence adduced in support of the third count was "simply too sparse" for the jury to agree upon any two occasions on which a particularised act of sexual exploitation (penile vaginal intercourse)

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**5** See *RP v The Queen* (2016) 259 CLR 641; [2016] HCA 53.

**6** *Criminal Law Consolidation Act*, s 55(1)(a).

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

**8** *Criminal Law Consolidation Act*, s 48(1).

occurred[9]. The verdicts on counts one and three were quashed and verdicts of acquittal were substituted on those counts.

7 The Court of Criminal Appeal rejected the contention that the joinder of counts one and three had occasioned a miscarriage of justice in the trial of the remaining counts. Their Honours concluded that the evidence adduced in relation to counts one and three was admissible on the trial of each other count as "relationship evidence"[10]. This was a shorthand reference to evidence of other sexual misconduct adduced for one or more of the contextual purposes explained in *R v Nieterink* and by this Court in *Roach v The Queen*[11]. The appeal against the convictions on counts two, four and five ("the remaining counts") was dismissed.

8 On 16 February 2018, Kiefel CJ and Bell J granted the appellant special leave to appeal. The appeal is brought on two grounds. The first ground asserts that the joinder of count one occasioned a miscarriage of justice because the evidence led in relation to it was not admissible on the trial of the remaining counts. In the alternative, if the evidence might have been received as evidence of "uncharged acts", it is contended that the trial miscarried nonetheless for one or more of the following reasons: (i) the evidence was not led, and the jury was not instructed, on the basis that the act charged in count one was an uncharged act; (ii) having returned a verdict of guilty on count one, the jury "necessarily treated the evidence in relation to it as having a status or effect which … it could not properly bear"; and (iii) the verdict on count one involved the rejection of the appellant's sworn account.

9 The second ground mirrors the first with respect to the joinder of count three, save that there is no pleading of particular (ii) in the alternative way the trial is said to have miscarried. On the hearing of the appeal, the focus was on the challenge articulated in the first ground.

10 For the reasons to be given, with the exception of the earliest act, the bath incident, the Court of Criminal Appeal was right to hold that the whole of the

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**9** *R v Johnson* [2015] SASCFC 170 at [110] per Peek J (Sulan and Stanley JJ agreeing at [2]).

**10** *R v Johnson* [2015] SASCFC 170 at [121].

**11** *R v Johnson* [2015] SASCFC 170 at [20] citing (1999) 76 SASR 56 and (2011) 242 CLR 610; [2011] HCA 12.

evidence of the other sexual misconduct was admissible on the trial of each of the remaining counts. Given the course of the trial, the wrongful admission of the evidence of the bath incident did not occasion a miscarriage of justice. The Court of Criminal Appeal was also right to reject the contention that the joinder of count one or three occasioned a miscarriage of justice. It follows that the appeal must be dismissed.

Discreditable conduct evidence

11 Division 3 of Pt 3 of the Evidence Act governs the admission and use of evidence adduced on the trial of an offence that tends to suggest that the defendant has engaged in discreditable conduct, whether or not constituting an offence, other than the conduct constituting the offence charged ("discreditable conduct evidence")[12]. Division 3 of Pt 3 prevails over any relevant common law rule of admissibility to the extent of any inconsistency[13].

12 Section 34P(1) provides that discreditable conduct evidence cannot be used to suggest that the defendant is more likely to have committed the offence because he or she has engaged in discreditable conduct and is inadmissible for that purpose ("impermissible use"). Subject to sub-s (2), discreditable conduct evidence is inadmissible for any other purpose.

13 Sub-section (2) provides:

> "Discreditable conduct evidence may be admitted for a use (the ***permissible use***) other than the impermissible use if, and only if –
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> (a) the judge is satisfied that the probative value of the evidence admitted for a permissible use substantially outweighs any prejudicial effect it may have on the defendant; and
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> (b) in the case of evidence admitted for a permissible use that relies on a particular propensity or disposition of the defendant as circumstantial evidence of a fact in issue – the evidence has strong probative value having regard to the particular issue or issues arising at trial."

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**12** Evidence Act, s 34P(1).

**13** Evidence Act, s 34O(1).

14 Evidence that under Div 3 of Pt 3 is not admissible for one use must not be used in that way even if the evidence is relevant and admissible for another use[14]. In determining whether discreditable conduct evidence is admissible under sub-s (2)(a), the judge must have regard to whether the permissible use of the evidence is, and can be kept, separate and distinct from the impermissible use so as to remove any appreciable risk of the evidence being used for that purpose[15]. The judge is required to identify and explain to the jury the purpose for which any discreditable conduct evidence may, and may not, be used[16]. Subject to a general dispensing power[17], a party seeking to adduce discreditable conduct evidence for a sub-s (2)(b) use must give reasonable notice in writing to each other party in the proceedings in accordance with the rules of court[18].

Pre-trial applications

15 Before the trial, the prosecution notified the appellant in writing of its intention to adduce evidence under s 34P(2)(b) of his particular propensity or disposition. The evidence was particularised as evidence of charged and uncharged acts of sexual misconduct as circumstantial evidence of the appellant's sexual attraction to VW and his tendency to act on that attraction.

16 On 17 October 2014, the appellant filed an application for directions by which he sought orders for the separate trial of counts one and two[19], and a ruling that the prosecution not be permitted to lead the evidence identified in its discreditable conduct notice. In a further application, the appellant sought a permanent stay of proceedings on counts one and three. The applications were heard together before Judge Soulio. On the hearing of the applications, the prosecutor argued that the discreditable conduct evidence was admissible for "non-propensity and propensity uses". As to the non-propensity use of the

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**14** Evidence Act, s 34Q.

**15** Evidence Act, s 34P(3).

**16** Evidence Act, s 34R(1).

**17** Evidence Act, s 34P(5).

**18** Evidence Act, s 34P(4).

**19** The prosecution had earlier succeeded in an application to have the appellant tried as an adult in relation to the offences charged in counts one and two.

evidence of acts of sexual misconduct when the appellant was himself a child, the prosecutor submitted that "[t]o suddenly allege that when you are in your late teens or an adult your brother rapes you would seem to be just utterly unbelievable without knowing the history of the relationship". Judge Soulio's ex tempore reasons do not deal with the application to reject the discreditable conduct evidence. It is unclear whether this part of the application filed on 17 October 2014 was pressed. Both applications were dismissed.

17 For the reasons given in *R v Bauer (a pseudonym)*[20], on the trial of multiple sexual offences against a single complainant the latter's evidence of the accused's other sexual misconduct will commonly have very high probative value as circumstantial evidence of the accused's propensity to act on his or her sexual attraction to the complainant. Here, notwithstanding service of the s 34P(2)(b) notice and the stance adopted before Judge Soulio, that the other sexual misconduct evidence was admissible for propensity and non-propensity purposes, at the trial the prosecution confined its reliance on the evidence to the latter purpose.

The probative value of the evidence adduced for a contextual use

18 The correctness of the Court of Criminal Appeal's conclusion, that the evidence of other sexual misconduct was admissible on the trial of the remaining counts, requires assessment of whether the probative value of the evidence for a permitted use substantially outweighed any prejudicial effect to the appellant. The expression "probative value" is not defined in the Evidence Act. It was not in issue that the expression is to be understood in the way it is defined in the Uniform Evidence Acts as the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue. The fact in issue on the trial of each of the remaining counts was the occurrence of the offence.

19 On the trial of a sexual offence, where there is a familial or other relationship between complainant and accused, the complainant's evidence of the accused's other sexual misconduct may serve to place the offence in context in circumstances in which evidence of the offence might otherwise present as inexplicable[21]. Other recognised contextual uses of evidence of this kind are to

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**20** [2018] HCA 40 at [51]-[52].

**21** *Roach v The Queen* (2011) 242 CLR 610 at 624 [42] per French CJ, Hayne, Crennan and Kiefel JJ.

explain the failure to complain or to rebuff the accused[22]; or the accused's confidence to act as he or she did[23]. The probative value of the complainant's evidence of the accused's other sexual misconduct for these uses lies in its capacity to assist in evaluating the evidence of the offence[24]. The prejudice with which s 34P(2)(a) is concerned is the risk that the jury will make some improper use of the evidence[25]. On the trial of sexual offences alleged to have been committed against a single complainant, the complainant's evidence of the accused's other sexual misconduct towards him or her will commonly not give rise to a risk that the evidence will be used otherwise than for its legitimate, contextual use[26].

20 As was explained in *HML v The Queen*[27] in relation to uncharged act evidence adduced as propensity evidence, that is so because such evidence is seldom of a kind or quality radically different from charged act evidence, albeit sometimes lacking its specificity and particularity. The same is true of uncharged act evidence adduced as context evidence[28]. There is seldom as much risk of a jury reasoning improperly from uncharged act context evidence than reasoning improperly from charged act evidence; especially where, as here, the jury is carefully directed as to the limited purpose for which the uncharged act evidence is adduced and that the jury must not find the accused guilty of a charged act unless satisfied beyond reasonable doubt, on the evidence relating to that charge, that the accused is guilty of that charge.

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**22** *KRM v The Queen* (2001) 206 CLR 221 at 230 [24] per McHugh J; *HML v The Queen* (2008) 235 CLR 334 at 352 [6] per Gleeson CJ, 495 [494], 496-497 [497]-[499] per Kiefel J.

**23** *HML v The Queen* (2008) 235 CLR 334 at 497 [499] per Kiefel J.

**24** *HML v The Queen* (2008) 235 CLR 334 at 352 [6] per Gleeson CJ.

**25** *HML v The Queen* (2008) 235 CLR 334 at 354 [12] per Gleeson CJ; and see *Papakosmas v The Queen* (1999) 196 CLR 297 at 325 [91]-[92] per McHugh J; [1999] HCA 37.

**26** *HML v The Queen* (2008) 235 CLR 334 at 388 [126] per Hayne J.

**27** (2008) 235 CLR 334 at 388 [126] per Hayne J.

**28** *Wilson v The Queen* (1970) 123 CLR 334 at 344 per Menzies J; [1970] HCA 17; *Roach v The Queen* (2011) 242 CLR 610 at 624-625 [44]-[46].

21 The appellant contends that, in this case, there was a special risk of prejudice because of the effluxion of time since the alleged offending. But that cannot be so unless the effluxion of time somehow made it more likely that the jury would reason *improperly* from the uncharged act evidence to a conclusion of guilt. And logically there is no reason to suppose that the jury would do so. There is nothing about the effluxion of time or the forensic difficulties which it imposed on the appellant that conceivably could cause a jury to reason *improperly* to guilt.

22 Ultimately, however, the focus of the appellant's submissions was on the admission of the evidence of his sexualised behaviour towards his younger sister when he was himself a young child lacking the capacity to understand the serious wrongness of his conduct. He argues that this evidence did not have probative value for any of the contextual uses described above. Assessment of the strength of the argument requires reference to VW's evidence in some detail.

The evidence

23 VW grew up with her two brothers, Neil and the appellant, on a farm in south-east South Australia. Neil was the eldest sibling. He was four years older than the appellant and around seven years older than VW. VW was 52 years of age when she reported her allegations to the police. At the date of the trial VW was aged 58 years.

*Acts of the appellant's other alleged sexual misconduct*

(i) The bath incident

24 VW's earliest memory was of an incident in the bath when she was "[a]bout three, probably". The appellant and she were being bathed together. The appellant "pushed his foot in between [her] legs to [her] vagina. Not inside [her] vagina." She kicked the appellant to try to get him to stop and "must have connected with him" because he was "screaming and yelling out" for their mother. When their mother arrived, the appellant complained that VW had kicked him. Their mother "belted [VW] on the backside" ("the bath incident").

(ii) The implements shed incident

25 The next incident occurred in the implements shed when VW was "[p]robably about four or five". VW was taken to the shed by Neil and the appellant on the pretext of being shown how she could have a baby sister or brother. Neil took VW's pants off as the appellant sat behind her holding her shoulders. Neil spat into his hand and rubbed his fingers and then his penis

against VW's vagina. VW yelled and tried to get away. The appellant had his hand over her mouth to stop her screaming. Neil told her not to say anything or she would get into trouble ("the implements shed incident").

26 Immediately after the implements shed incident, VW complained to her mother that Neil and the appellant were trying to give her "a little baby brother or sister" and that it "hurt down here". The mother slapped VW's face and said "[d]on't you ever say that again". VW recalled crying and being confused about why she was the one to be punished.

(iii) The bedroom incident

27 The next incident occurred when VW was "probably five or six". Neil and the appellant came into VW's bedroom and Neil said "[g]ive us a root". This was a "regular thing that they would say". She tried to get away from them but she was held down and Neil took her pants off. He spat on his hand and rubbed it and then his penis against her vagina. The appellant also rubbed his penis against her vagina. This was the first time the appellant had assaulted her in this way ("the bedroom incident"). VW did not complain about the bedroom incident because she had "got a belting" when she told her mother about the implements shed incident.

(iv) Later acts of the appellant's other alleged sexual misconduct

28 VW said that from when she was five until she was around ten the appellant and Neil would rub their penises against her vagina on "[p]retty much a weekly basis". She told her mother about this behaviour "a couple of times" when she was about five, and over the "next few years", but that "in the end … nothing changed". VW also said that when she was around eight or ten she had called the police on several occasions. She had told the police that her brothers were hurting her but she had not been able to explain in greater detail how they were hurting her. She had been told by the police to tell her parents when they got home. When her parents returned home after one of these calls the appellant reported that VW had telephoned the police. VW explained that she had wanted the boys to stop. Her father yelled at her, he was "really, really wild" and VW did not ring the police again.

*Count one – the shearing shed incident*

29 VW and her friend, FC, were called to the shearing shed where Neil told her "[w]e're going to have a root". He told her that if she tried to fight she would "cop it". Neil took her pants off. He spat onto his hand and rubbed his penis

against her vagina until he ejaculated. VW saw faces looking down from the wool bales. She felt embarrassed. Neil asked two friends, Des and Peter Flavel, to "come and have a go" but they refused. The appellant then spat on his hand, rubbed the spit against VW's vagina and rubbed his penis against her vagina until he ejaculated. After this VW ran out of the shed ("the shearing shed incident"). VW told FC that "[i]t happens to me all the time and I can't stop them". VW did not complain to anyone else about the shearing shed incident until many years later.

30 At the date of the trial Neil was deceased. Peter and Des Flavel each gave evidence. Des Flavel remembered climbing some wool bales and looking down to see the appellant lying across the top of VW "having intercourse". He said that he "looked straight down in her eyes, and that's something I've never forgotten". Des also saw Neil having intercourse with VW's friend, FC. Peter Flavel did not remember seeing any sexual activity but he recalled Des climbing some wool bales and jumping down saying "[l]et's get out of here". FC refused to make a statement about the incident and was not called to give evidence.

31 The trial was conducted, consistently with the way count one was particularised, on the basis that the appellant was aged 11 or 12 years at the time of the shearing shed incident. The Court of Criminal Appeal noted that the evidence of Des and Peter Flavel suggested that the incident probably occurred before December 1964. The appellant dated an incident in the shearing shed as taking place when he was "probably close to 10". The Court of Criminal Appeal concluded that it was not open to find that the shearing shed incident occurred when the appellant was older than 10 years.

*The pattern of abuse and VW's complaints to her parents*

32 VW said that Neil and the appellant hated each other and that her last recollection of "them doing it together to me" was probably the shearing shed incident. After this, the abuse occurred "[e]very week, sometimes every two weeks, but pretty regularly" but was carried out separately. Generally, the appellant sexually abused VW in her bedroom. She tried to avoid him by pulling her wardrobe across the door. She said that "I told mum on several occasions, many occasions. And dad knew, even though we had – dad and I hadn't specifically spoken about it until I was about 14".

33 VW had been frightened of getting pregnant and on one occasion when her period was late she raised her fears with her mother. Her mother asked "[h]ave you been with anybody?" and VW replied "[n]o, only [the appellant]. He won't leave me alone." Her mother asked "[h]ow far did he penetrate?" and VW

indicated about one inch. VW asked "if it was possible for brothers and sisters to get pregnant and she said she didn't know, she would have to ask dad". Her mother left her for a little while after this conversation and when she returned she gave VW a hot water bottle. VW lay down for a couple of hours. VW thought that she was about 13 years old at the time of this discussion.

34 VW gave evidence of an occasion when she was about 14 years when Neil demanded sex from her on their way home from a football match. She refused and Neil told her to get out of the car. VW walked home. It was after midnight when she arrived. Her parents confronted her about her late return and she told them what had happened. Her mother said to her father that "this has got to stop". VW did not know whether her father had spoken to her brothers. Nothing changed after this complaint.

*Count two – carnal knowledge*

35 The offence of carnal knowledge charged in count two occurred in late 1970 when VW was around 14 years and the appellant was around 17 years. It was the first occasion on which the appellant had full penile vaginal intercourse with VW. It was the occasion that VW recalled as when she lost her virginity. VW and the appellant had gone to a football match. After the match the appellant went to the local hotel. VW waited in the car for him. He was angry when he returned. On the drive home he stopped the car and said "[g]ive us a root". VW tried to get out of the car and she sought to fight off the appellant's advances. He punched her and slammed her head against the window. He took off her pants and inserted his penis into her vagina. Afterwards, he drove the car back to the hotel. He left VW in the car while he went back inside the hotel. Notwithstanding that she was "horrified" by what had happened, VW waited in the car so that she could get a lift home. She did not tell anyone about the incident.

*Count three – persistent sexual exploitation*

36 The acts relied on as evidencing the persistent sexual exploitation of VW, a child, were particularised as acts of penile vaginal intercourse in the period June 1971 to April 1973. VW was aged either 15 or 16 years at the time. VW said that the appellant had penile vaginal intercourse with her every week or so over this period. Generally, the offences occurred in her bedroom. VW said she had not complained to anyone about these incidents at the time although she said that "Dad knew. He repeatedly put locks on my door."

*The changed pattern of abuse after VW leaves home*

37 VW moved out of the family home around April 1973. She was 17 years old and she moved into a flat in Naracoorte. After this the appellant's sexual assaults became less frequent. They occurred a few times on occasions when VW returned to the family home on the weekend. VW moved back to the family home when she was 18 years old. The sexual assaults continued but not very often.

38 VW married in November 1975 when she was 19 years old. The marriage lasted for five years. On infrequent occasions during the marriage the appellant raped VW. These episodes followed a pattern; the appellant would take hold of VW's forearms and hook one of his legs around hers pushing her backwards onto the floor. After one violent assault VW told her mother that she was going to make a complaint to the police. Her mother made her promise not to do so while she lived.

39 After VW's marriage ended, the appellant's sexual abuse became more frequent. For the following three years, VW said, the sexual assaults took place every two or three months.

*Counts four and five – rape*

40 The offence charged in count four occurred in 1981-1982. The appellant came into VW's house and shut the front door leaving her two young sons outside. He said "[j]ust give us a root", forcing VW onto the floor and raping her while her children banged on the door and called out for her. VW did not complain to anyone about the assault.

41 The offence charged in count five occurred in September or October 1983. The appellant arrived at VW's house unannounced and let himself in through the back door. He forced VW onto the lounge room floor. She attempted to resist him and he choked her and hit her about the head. He raped her and then said "I'm moving out to the farm". "Any stock you've got out there, you better get rid of it because I'm going to sell them all". VW telephoned her father after this assault and told him "[the appellant's] been here again. He's just raped me and now he is threatening to sell all my cattle." Her father replied "[d]on't worry about it, it won't happen".

*The appellant's evidence*

42 The appellant agreed that there had been an incident in the shearing shed. He said it occurred when he was close to 10 years old. Des Flavel and Neil had

wanted him to take his clothes off and lie on top of VW and he had refused to. VW started unbuttoning his shirt and he "didn't want to have a bar of their game. Whatever it was". He was crying and eventually Neil and Des lost interest in him. He denied that FC had been in the shearing shed on this occasion.

43 The appellant denied that he had engaged in any sexual misconduct with VW. It was the defence case that VW had made false accusations against him in the context of a bitter familial property dispute.

The course of the trial

44 The prosecution relied on the bath incident, the implements shed incident and the bedroom incident to show that notwithstanding his young age the appellant must have known his conduct in the shearing shed incident was wrong. More generally the evidence of the other sexual misconduct was relied upon to show that the relationship between the appellant and VW was one of "domination borne out of violence, fear, and a lack of being brought to account".

45 The jury was given repeated instructions that the appellant was to be tried on the evidence relating to the count under consideration and not on evidence concerning things done on other occasions. The trial judge identified the limited purpose for which the evidence of the other sexual misconduct had been adduced, explaining that the evidence "may be used ... to understand the context in which the charged offences are alleged to have taken place". His Honour went on to illustrate the possible contextual use of the evidence, observing that it may "explain the confidence the [appellant] might have had in performing the charged offences, a confidence gained from [VW's] failure to complain" and why VW had not complained until much later. These directions were accompanied by a warning not to reason that the appellant was a person who is likely to have committed the charged offences simply because he committed one or more uncharged acts. The sufficiency of the directions as to the permissible and impermissible uses of the evidence of other sexual misconduct was not the subject of complaint at the trial. It should be accepted that the directions sufficed to remove any appreciable risk of the evidence being used for the impermissible use[29].

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**29** Evidence Act, s 34P(3).

The submissions

46 The appellant contests that the evidence adduced in support of count one possessed probative value for any permissible contextual use that substantially outweighed any prejudicial effect its admission may have occasioned to his case. He argues that the occurrence of the offences charged in the remaining counts can hardly be suggested to be incomprehensible absent evidence of the early childhood incidents. The evidence of those incidents was not needed to explain the lack of complaint given that it was VW's evidence that she made contemporaneous complaints. Nor was the evidence needed to explain VW's submission given that it was VW's evidence that she resisted the assaults.

47 Peek J, giving the leading judgment in the Court of Criminal Appeal, considered that a notable feature of the first three incidents was the mother's response to VW's complaints, which was to remonstrate with VW and not with her brothers. Peek J reasoned that this parental response was unlikely to have impressed on a young child that his conduct was seriously wrong[30]. The appellant's description of the shearing shed incident as a "game", while self-serving, was, in his Honour's analysis, a reasonable hypothesis with respect to his then mental state[31].

48 The appellant embraces this aspect of Peek J's analysis in the alternative way in which he puts his first ground. He submits that the vice in the joinder of count one was that the jury was wrongly invited to conclude, and wrongly did conclude, that as a young child he sexually abused his sister knowing his conduct was seriously wrong. The conclusion is suggested to have infected consideration of the remaining counts. Added to this, he submits that the shearing shed incident was likely to assume undue significance in the jury's consideration of the offences charged in the remaining counts because it was the only incident of sexual misconduct for which there was independent evidence to support VW's account.

49 The prosecution correctly submits that the critical issue is whether the evidence adduced in support of counts one and three was admissible on the trial of the remaining counts; if it was, the Court of Criminal Appeal was right to reject that the trial of the remaining counts miscarried. As to the admissibility of

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**30** *R v Johnson* [2015] SASCFC 170 at [97].

**31** *R v Johnson* [2015] SASCFC 170 at [99].

the childhood incidents, the prosecution relies on the reasoning in *R v M (D)*[32], submitting that the fact that the appellant may not have understood the wrongness of his childhood sexual abuse of VW does not deprive evidence of the abuse of its probative value on the trial of the remaining counts. The prosecution submits that the pattern of early childhood abuse and the mother's failure to act on VW's complaints are important to understanding the appellant's confidence to act as he did and VW's failure to complain about the offences charged in counts two and four.

Admissibility of the evidence of counts one and three

50 Accepting VW's evidence at its highest, her recollection of the bath incident was not probative of the appellant's capacity to bear criminal responsibility for the offence charged in count one, nor was it probative of any relevant feature of the relationship between the appellant and VW. The appellant and VW were infants being bathed together. His foot touched her vagina and she kicked him. He screamed and their mother came in and smacked her. It cannot rationally be concluded that the incident was illustrative of the appellant's asserted domination of VW. Nor was it illustrative of their mother's failure to act on VW's complaints of sexual abuse; when the mother arrived on the scene it was the appellant who was apparently distressed. It is not suggested that VW said or did anything to convey that the appellant had been mistreating her sexually or otherwise. Evidence of the bath incident should not have been adduced. In this Court, the prosecution only faintly contended to the contrary.

51 The prosecution conceded that if evidence of the implements shed, bedroom and shearing shed incidents was not admissible, the reception of the evidence would have occasioned a miscarriage of justice and required that the appeal be allowed. The concession did not extend to the wrongful admission of evidence of the bath incident taking into account the treatment of that evidence in the summing-up. The submission refers to the following passages in the trial judge's instructions to the jury:

> "[Y]ou will recall that the prosecution case includes evidence on what I have called 'uncharged acts'. [The prosecutor] directed your attention of one alleged incident in the bath. *It is a matter for you, but you might think a six-year-old and three-year-old in the bath have no idea about sexual matters.* That is a matter for you." (emphasis added)

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**32** [2016] 4 WLR 146.

And:

> "[VW] gave evidence of the alleged indecent conduct by the [appellant] in the bath at age three. I have already discussed that with you, *you will decide whether that could seriously be regarded as being sexual misconduct or not. Just think about that. He was aged about 6 – she was aged about 3*." (emphasis added)

52 While unsuccessful objection was taken to the joinder of count one, at the trial objection was not taken to the evidence of the bath incident. Admission of the evidence was not a wrong decision on a question of law[33]. Nor did admission of the evidence occasion a miscarriage of justice in circumstances in which the trial judge's comments were apt to neutralise any suggestion that the bath incident cast light on the relationship between the appellant and VW, and in which the evidence of the incident was almost certainly subsumed by evidence of the appellant's explicitly sexualised childhood misconduct.

53 In *R v M (D)*[34] the Court of Appeal of England and Wales affirmed its earlier analysis in *R v Hodson*[35]. In each case evidence of the defendant's sexual misconduct at a time when he was presumed to be doli incapax was held to have been rightly admitted on his trial for sexual offences against the same complainant[36]. Admissibility was governed in each case by s 101(1) of the *Criminal Justice Act* 2003 (UK), which allows evidence of the accused's bad character to be received if, among other things, it is "important explanatory evidence". Evidence is important explanatory evidence if without it the court or jury would find it impossible or difficult to properly understand other evidence in the case and its value for understanding the case as a whole is substantial[37]. In each case the Court of Appeal considered that evidence of the accused's sexual misconduct as a child was important explanatory evidence in that it would have

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**33** *Criminal Law Consolidation Act*, s 353(1).

**34** [2016] 4 WLR 146.

**35** [2010] EWCA Crim 312.

**36** *R v M (D)* [2016] 4 WLR 146 at 4 [20] quoting *R v Hodson* [2010] EWCA Crim 312 at [45]; see also *Director of Public Prosecutions (Vic) v Martin* (2016) 261 A Crim R 538.

**37** *Criminal Justice Act* 2003 (UK), s 102.

been artificial to confine the complainant's evidence to events occurring after the defendant turned 14 years[38]. While the statutory regimes differ, the same reasoning informs the assessment of probative value for the purposes of s 34P(2)(a) of a child's acts of sexual misconduct regardless of whether the child bears criminal responsibility for them.

54 The evidence of the implements shed, bedroom and shearing shed incidents was eloquent of the appellant being schooled by his older brother in sexually inappropriate behaviour at a time when the appellant was too young to have any appreciation that the behaviour was seriously wrong. If accepted, the relevance of these early incidents was to understanding the highly dysfunctional family in which VW and the appellant were raised; on VW's account, both of her parents were aware that she was being preyed upon sexually by each of her brothers and yet neither parent was disposed to taking effective action to protect her or to discipline them. Without an understanding of this background, VW's evidence of the offences charged in the remaining counts was likely to have presented as implausible.

55 Implausible features of the offence charged in count two include that "out of the blue" the appellant should demand that his 14-year-old sister "give us a root"; that after forced sexual intercourse VW would sit in the car and wait for the appellant to drive her home; and that after losing her virginity to her brother in circumstances amounting to rape, VW made no complaint to her parents. So, too, it might be thought implausible that VW, an adult woman, would make no complaint following the rape charged in count four. This is to say nothing of the assessment the jury might make of VW's account of her conversation with her father following the last rape if the history of sexual abuse and her parents' phlegmatic response to her reports of that abuse was not known.

56 The appellant did not contest that some evidence of other sexual misconduct was admissible to place the evidence of the offences charged in the remaining counts in context. His argument is that there was no need to adduce evidence of the shearing shed incident and the earlier incidents, and that the evidence of these early incidents risked provoking a response of moral outrage on the part of at least some jurors.

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**38** *R v M (D)* [2016] 4 WLR 146 at 4 [20] quoting *R v Hodson* [2010] EWCA Crim 312 at [45].

57 As the prosecution submits, the unusual dynamics of this family would have made it difficult to confine VW's evidence of the other sexual misconduct while permitting her evidence of the offences to be evaluated in their proper context. Without her account of the early incidents of abuse, where was her evidence of the sexualised relationship with the appellant to start? The pattern established by Neil, and followed by the appellant, of demanding that VW "[g]ive us a root", dating back to their early childhood, was important to understanding VW's account of the incidents of abuse leading up to and including the offence charged in count two.

58 On occasions, on VW's account, she complained to her mother of the appellant's sexual misconduct. Notably, however, VW did not complain about the offences charged in counts two and four. Her evidence of her mother's inappropriate response to her complaint about the implements shed incident, and the mother's subsequent inadequate response to her daughter's complaints of abuse, is important to the evaluation of VW's evidence of the offences. It is no answer to point to the preclusion on the making of a suggestion or statement to the jury that a failure to make, or a delay in making, a complaint of a sexual offence is probative of the complainant's credibility or consistency of conduct[39]. Jurors are not limited to considering the submissions of counsel in evaluating the evidence of the complainant[40].

59 The evidence of the incidents of sexual intercourse adduced in support of count three was important to the evaluation of VW's evidence of the offences charged in counts four and five. In the absence of evidence that the abuse of VW as a child had continued with periodic incidents of forced sexual intercourse, her account of those offences might be thought also to strain credulity.

60 It is not apparent that evidence of the appellant's childhood sexual misconduct carried out at the instigation of his older brother gave rise to a risk that jurors would be inflamed against him such that they might ignore the direction to act on the evidence and not to permit prejudice or moral judgments to influence their deliberations. The probative value of VW's evidence of the implements shed, bedroom and shearing shed incidents and the later incidents of sexual intercourse adduced in support of count three substantially outweighed any prejudicial effect on the appellant.

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**39** Evidence Act, s 34M(2).

**40** *HML v The Queen* (2008) 235 CLR 334 at 353 [9] per Gleeson CJ.

A miscarriage of justice nonetheless?

61 The contention must be rejected that, even if the evidence adduced in support of count one was admissible, there was a miscarriage of justice because count one should not have been left to the jury. The fact that the appellate court determined that the evidence was incapable of supporting the conviction on count one does not mean that its joinder was wrong. There was evidence of each of the elements of the offence and, contrary to this aspect of the appellant's argument, in those circumstances it was not open to the trial judge to direct an acquittal upon an assessment that the evidence fell short of rebutting the presumption of doli incapax[41]. There is no reason to consider that the jury's finding, that the appellant understood the wrongness of his conduct in the shearing shed incident, infected its consideration of the remaining counts, which charged offences when he was aged 17 years and older. The limited permitted use of the evidence of the other sexual misconduct to the consideration of each of the remaining counts was correctly explained to the jury and the injunction to consider each count separately was given on a number of occasions. There is no basis for inferring that the jury did not act on those directions.

62 The contention that the appellant was prejudiced by the reception of the evidence of the shearing shed incident because it was the sole occasion for which there was independent support for VW's evidence misapprehends the nature of the prejudice with which s 34P(2)(a) is concerned. In assessing the credibility of VW's evidence of the offences charged in the remaining counts, the jury may have taken into account that her account of the shearing shed incident was generally supported by Des Flavel's evidence. This, however, would not be to use the evidence for other than its permitted use.

63 The final contention, that the trial of the remaining counts miscarried because the verdicts on counts one and three involved the jury's rejection of the appellant's sworn account, was not developed in oral argument. In written submissions, the high point of the argument is the assertion that "ordinary experience" suggests that if a jury finds an accused guilty of count one, which the accused has denied on oath, the jury will find it difficult to accept the accused's denial of guilt of count two. The jury was correctly directed to consider each count separately; that it was not incumbent on the appellant to prove anything;

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**41** *Doney v The Queen* (1990) 171 CLR 207 at 212 per Deane, Dawson, Toohey, Gaudron and McHugh JJ; [1990] HCA 51; *MFA v The Queen* (2002) 213 CLR 606 at 615 [26] per Gleeson CJ, Hayne and Callinan JJ; [2002] HCA 53.

and that if it did not accept his evidence in some respects, or at all, it did not follow that he should be found guilty of the charge under consideration. Consistently with those directions, the jury must have been satisfied of the truthfulness and reliability of VW's account of each of the offences. Necessarily, that satisfaction required the jury to exclude the reasonable possibility that the appellant's evidence in respect of each offence was true. The trial of the remaining counts did not miscarry because the jury rejected the appellant's evidence on counts which were properly joined and on which verdicts of guilty were returned which were later set aside.

Order

64 For these reasons there should be the following order:

Appeal dismissed.