HIGH COURT OF AUSTRALIA

GORDON A-CJ,
EDELMAN, STEWARD, GLEESON AND JAGOT JJ

COOK (A PSEUDONYM) APPELLANT

AND

THE KING RESPONDENT

Cook (a pseudonym) v The King
[2024] HCA 26
Date of Hearing: 15 May 2024
Date of Judgment: 7 August 2024
S158/2023

ORDER

1. *Appeal allowed in part.*

2. *Set aside order 3 made by the New South Wales Court of Criminal Appeal on 15 December 2022 and, in its place, order that the appeal be allowed on the basis of ground 1 and in part on the basis of ground 3.*

On appeal from the Supreme Court of New South Wales

Representation

T A Game SC and J L Roy with R Khalilizadeh for the appellant (instructed by Streeton Lawyers)

S C Dowling SC with M L Millward and N A Wootton for the respondent (instructed by Director of Public Prosecutions (NSW))

CATCHWORDS

Cook (a pseudonym) v The King

Criminal law – Sexual offences – Appeal against conviction – Admissibility of evidence – Where appellant convicted of sexual offences against child complainant – Where complainant previously sexually assaulted by another person – Where complainant allegedly disclosed previous sexual assaults in detail to appellant – Where appellant sought to call evidence and cross-examine complainant regarding previous sexual assaults – Where s 293(3) of *Criminal Procedure Act 1986* (NSW) prohibits admission of evidence of complainant's sexual experience or sexual activity – Whether evidence admissible under exception to s 293(3) contained in s 293(4)(a) or (b) – Whether evidence formed part of connected set of circumstances in which alleged offending by appellant occurred – Whether evidence related to relationship between appellant and complainant – Whether jury misled by description of previous sexual assaults as "physical assaults" – Whether acquittal of appellant required to avoid new trial that would be unfair to appellant because such evidence inadmissible.

Words and phrases – "characterisation of sexual experience", "connected set of circumstances in which the alleged sexual assault occurred", "evidence of sexual activity", "evidence of sexual experience", "forensic disadvantage", "miscarriage of justice", "permanent stay", "power to decide whether to acquit", "probative value", "relates to a relationship", "relationship between the accused person and the complainant", "relationship of trust and confidence", "sexual activity", "sexual experience", "unfair trial".

Criminal Appeal Act 1912 (NSW), ss 6, 8.
Criminal Procedure Act 1986 (NSW), ss 293(3), 293(4)(a), 293(4)(b), 294CB.
Evidence Act 1995 (NSW), ss 55, 56.

GORDON A-CJ, EDELMAN, STEWARD AND GLEESON JJ.

Introduction

1 In 2019, after a trial before a judge and jury in the District Court of New South Wales, the appellant was convicted of 17 sexual offences against the complainant during various periods between 1 January 2011 and 31 December 2014. At the time of the offences, the complainant was aged between 9 and 11 years old and was living in New South Wales with her aunt ("the New South Wales aunt") and the appellant (who was the New South Wales aunt's husband at that time).

2 The offences charged, and the relevant provisions of the *Crimes Act 1900* (NSW), were as follows: (i) sexual intercourse with a child under 10 years contrary to s 66A(1) (count 1 and counts 6-11); (ii) indecent assault of a person under 16 years contrary to s 61M(2) (counts 2-5); and (iii) sexual assault of a person under 16 years contrary to s 61J(1) (counts 12-17).

3 During 2008 and 2009, prior to the alleged offences by the appellant, the complainant had been subject to sexual assaults committed by the de facto partner ("the Queensland offender") of a different aunt ("the Queensland aunt") with whom the complainant was then living in Queensland. The Queensland offender was charged with 12 counts of sexual assault ("the Queensland conduct") and found guilty of 11 of those counts. The convictions were overturned on appeal and the Queensland offender ultimately pleaded guilty to four counts of indecent treatment of a child under the age of 12 ("the Queensland offences").

4 Events in the aftermath of the Queensland offences preceded or coincided with the offending alleged against the appellant. Those events were: alleged disclosure by the complainant to the appellant of the Queensland conduct in late 2009 and a statement by the appellant in support of the complainant's allegations in July 2010; a committal hearing in April 2011 for the trial of the Queensland offender at which the complainant gave evidence; the complainant's giving of pre-recorded evidence in April 2012; the trial of the Queensland offender in November 2012, at which the appellant gave evidence for the prosecution case as a complaint witness; and, following the quashing of the convictions from that trial, the complainant's giving of further recorded evidence in October 2013.

5 After a voir dire, the trial judge held that s 293(3) of the *Criminal Procedure Act 1986* (NSW)—under the heading "Admissibility of evidence relating to sexual experience"—prohibited the appellant from calling evidence or cross-examining the complainant about the Queensland conduct as sexual offences. His Honour held that the exceptions to that prohibition either had not been relied upon

(s 293(4)(a)) or did not apply (s 293(4)(b)).[1] Nevertheless, the trial judge adopted the expedient of permitting the appellant to ask questions in cross-examination that described the Queensland conduct as "physical assaults". The appellant was convicted of all 17 offences. He appealed from those convictions to the New South Wales Court of Criminal Appeal. His appeal was allowed but a majority of the Court of Criminal Appeal dismissed the appellant's ground of appeal which asserted that evidence describing the Queensland conduct as sexual offences was not inadmissible due to the exceptions in either s 293(4)(a) or s 293(4)(b). On further appeal to this Court the appellant sought to vary the orders of the Court of Criminal Appeal in order to recognise that either or both of those exceptions apply. In the alternative, the appellant relied upon submissions, in support of two further grounds of appeal, that the expedient adopted by the trial judge of permitting reference to the Queensland conduct as "physical assaults" had misled the jury and, for that reason or due to the unfairness to the appellant of excluding evidence about the Queensland conduct, the appellant sought an order for his acquittal in place of the order for a retrial.

6 For the reasons below, the appeal should be allowed in part. The exception in s 293(4)(a) does not apply but, subject to a consideration of evidence that is not before this Court, the exception in s 293(4)(b) might apply at a retrial of the appellant. The appellant's alternative grounds of appeal should not be accepted.

Facts and background

The background facts

7 Prior to 2008, the complainant had lived in different homes. At a "[v]ery, very young" age she was moved from living with her father and his girlfriend to be placed into foster care. On 1 January 2008, the complainant moved to live with the Queensland aunt and the Queensland offender, where she lived until 17 June 2009. During that period, while the complainant was six to seven years old, the Queensland offender committed the Queensland offences.

8 In June 2009, the complainant told her stepmother about the sexual offences committed by the Queensland offender. Initially, the complainant's stepmother and the complainant's father did not believe the complainant. The New South Wales aunt and her then husband, the appellant, later assisted to persuade the complainant's father that the complainant was telling the truth.

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1 *R v Cook (a pseudonym)* (2019) 32 DCLR(NSW) 9 at 11 [21]-[22].

9 In July 2009, the complainant's stepmother and the complainant's father arranged for the complainant to move back to New South Wales to live with the New South Wales aunt and the appellant. In September 2009, the New South Wales aunt became the complainant's legal guardian. On 28 February 2010, the complainant disclosed to her father and stepmother further details of the Queensland conduct.

10 On 21 July 2010, the appellant made a police statement in support of the complainant's complaint against the Queensland offender in which he said the following:

> "After she came to live with us, whenever [the complainant] and I would go for a drive to anywhere I would tell her she could sit in the front of the car. [The complainant] would always refuse and would sit in the back while no-one would sit in the front. After about 4 or 5 times of that occurring I pressed [the complainant] that she could sit in the front. [The complainant] said to me, 'You are not going to do what [the Queensland offender] did to me, are you?'"

11 This disclosure to the appellant occurred more than a year before the start of the first period of alleged offending by the appellant.

12 In April 2011, a committal hearing was held for the trial of the Queensland offender. The complainant gave evidence at the committal hearing and the Queensland offender was committed for trial. On 18 April 2012, the complainant gave pre-recorded evidence in Queensland for the trial of the Queensland offender. On 12 November 2012, the Queensland offender was convicted of four counts of rape and seven counts of indecent treatment of a child under the age of 12. Following a successful appeal by the Queensland offender, on 1 October 2013 the complainant gave pre-recorded evidence in Queensland for a second time. No retrial took place because the prosecution accepted a plea of guilty by the Queensland offender to four counts of indecent treatment of a child under 12 years in his care.

13 In March 2015, the appellant and the New South Wales aunt separated but the appellant continued to live in the spare room in their shared house. In December 2016, the appellant and the New South Wales aunt were divorced and from then they lived in separate houses. The New South Wales aunt continued to live with their two children and her niece, the complainant.

14 On 10 December 2017, the complainant told the New South Wales aunt about alleged offences committed against her by the appellant. The complainant was then 15 years old. The New South Wales aunt took the complainant to the

police and the complainant participated in a recorded interview. In that interview, the complainant told the police about the alleged offending that became counts 1 to 10 of the indictment against the appellant. In the interview, the complainant described one sexual assault in early June 2011, six weeks after the committal of the Queensland offender. The following exchange then took place:

> "Q: Did you tell anyone?
>
> A: No. '[C]ause I didn't know how to tell anyone, cause of what happened the first time."

15 The complainant subsequently reported the conduct which became counts 11 to 17.

16 On 18 December 2017, the appellant took part in a recorded interview. During that interview the appellant was asked why the complainant would make an allegation like this. He replied that the New South Wales aunt had "put [the complainant] up to it" and later added:

> "Why do you think we got her out of the situation she was in? I didn't go [to] all that trouble and then do the, do the same sort of shit. Wouldn't touch a kid like that. It's, you're making me sick. I've ---".

The voir dire and the trial

17 It has been common ground throughout these proceedings that the evidence related to the Queensland conduct was inadmissible under s 293(3) of the *Criminal Procedure Act* unless it fell within an exception contained in s 293(4). In the voir dire before the trial judge, the appellant applied for a pre-trial ruling under s 192A of the *Evidence Act 1995* (NSW) that evidence of the complainant's reporting and disclosures of the Queensland conduct and evidence of the fact of the proceedings concerning the Queensland conduct were admissible by operation of the exception in s 293(4)(b) of the *Criminal Procedure Act*.

18 The evidence which the appellant sought to adduce in cross-examination was set out in detail in a written application. As the trial judge observed, the appellant properly did not propose "to descend into any fine detail of the sexual offending itself".[2] The proposed evidence in the application contained 19 numbered paragraphs. Some paragraphs concerned matters that do not disclose or

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2 *R v Cook (a pseudonym)* (2019) 32 DCLR(NSW) 9 at 10 [11]. See also *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [93].

imply any matters concerning sexual experience or sexual activity. For instance, paragraphs 1 and 2 described how the complainant was moved between "various houses and carers from birth until the age of seven" and that in early 2009, at the age of six, the complainant lived with the Queensland aunt and the Queensland offender. Other paragraphs did relate to complaints of sexual offences against the complainant by the Queensland offender. Those paragraphs concerned evidence ("the Queensland evidence") that can be divided into four categories:

1. **The Queensland conduct**. The Queensland conduct was described either in general terms ("[the Queensland offender] sexually assaulted [the complainant]" (paragraph 3)) or in more particular, but still in generalised, terms ("[12] sexual assault offences including 4 rapes" (paragraph 10)).

2. **The disclosures to the father and stepmother**. This evidence concerned disclosures of the Queensland conduct by the complainant to her father and stepmother, who "did nothing" (paragraph 4).

3. **The disclosures to the appellant**. This evidence concerned the disclosure in late 2010 by the complainant to the appellant, "progressively ... over a period of around a week", that she had been sexually assaulted by the Queensland offender (paragraphs 7 and 11).

4. **The investigation, prosecution and conviction of the Queensland offender**. This evidence concerned the interview of the complainant by police and sexual assault counsellors (paragraph 9); the holding of a committal hearing on 20 April 2011 (paragraph 12) and a trial on 5-13 November 2012 (paragraph 14), at both of which the appellant gave evidence (paragraphs 13 and 15); the finding of guilt of the Queensland offender (paragraph 16); the quashing of the conviction on the ground that the complainant had not been properly sworn in (paragraph 17); and the Queensland offender's plea bargain and the lack of a retrial (paragraph 18).

19 The appellant made diverse submissions to the trial judge about the probative value of the Queensland evidence. At one point in the submissions it was said that "[t]he evidence to be admitted is of the reporting of the previous sexual assaults and hearings, not the assaults themselves". But that submission was made in the context of discussing the evidence concerning a relationship between the appellant and the complainant, and the submission concluded by saying that "[t]hose matters relate directly to the relationship that existed between the [appellant] and the complainant and only occurred because of the existence of that relationship". In any event, the appellant's submissions about the probative value

of the evidence were refined in the Court of Criminal Appeal[3] and further refined in this Court.

20 In this Court, the Queensland evidence was said to be relevant in four key ways. First, it was submitted that the evidence supported a defence case of inherent improbability based upon the asserted "brazenness" of sexual abuse of the complainant at a time when she was engaging with authorities concerning sexual assault by the Queensland offender. Secondly, it was submitted that the "clear opportunity" to complain to the police and others, and the complainant's previous experience of having been believed about sexual misconduct, meant she was aware that she had a "powerful weapon" to stop any sexual assaults against her. Thirdly, it was submitted that the evidence revealed the "true nature" of the complainant's relationship with the appellant, "which involved her confiding in him about the [Queensland conduct], and his advocating for police intervention on her behalf, prior to the commencement of the alleged abuse". Fourthly, there was a submission that the evidence supported a defence case of conflation or fabrication. It was submitted that the evidence "could have provided a source for the complainant's detailed description, and evident memory, of sexual acts and offending against a child".

21 The trial judge accepted that the Queensland evidence was "significantly probative" for the forensic purposes of: (i) showing "that the complainant had more than ample opportunity to make complaint about this accused in the ongoing investigation and prosecution of the Queensland offender, but did not"; and (ii) establishing "the improbability of this accused committing the offences with which he has been charged, given that very many of them are said to have occurred in or around the time of the Queensland proceedings". The trial judge accepted that the Queensland evidence "would directly bear on the objective likelihood of the offences having been committed", and that to exclude it "would lead to an unfair distortion of the facts".[4]

22 Nevertheless, the trial judge held that the Queensland evidence, which the appellant sought to use for the purpose of cross-examination, was inadmissible by operation of s 293(3) of the *Criminal Procedure Act*. The trial judge rejected the appellant's submission that the evidence was admissible because it fell within an exception to the prohibition in s 293(3), namely that contained in s 293(4)(b). That exception, which is subject to a proviso that the probative value of the evidence outweighs any distress, humiliation or embarrassment that the complainant might

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3 *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [89].

4 *R v Cook (a pseudonym)* (2019) 32 DCLR(NSW) 9 at 10-11 [12]-[15].

suffer as a result of its admission, permits the admission of "evidence relate[d] to a relationship that was existing or recent at the time of the commission of the alleged prescribed sexual offence, being a relationship between the accused person and the complainant".

23 In rejecting the admission of the Queensland evidence, it is common ground that the trial judge misunderstood the appellant's argument concerning why the proposed evidence fell within the exception in s 293(4)(b) of the *Criminal Procedure Act*, which would allow the evidence to be the subject of examination or cross-examination. The trial judge had mistakenly treated the relationship that was relied upon by the appellant as a relationship between the complainant and the Queensland offender rather than a relationship of confidence between the complainant and the appellant.[5]

24 In rejecting the admission of the Queensland evidence, the trial judge said that although he considered that "Parliament did not intend the result which has occurred in this case" by which the complainant could not "be cross-examined as extensively as ... the interests of justice require", it was open for counsel for the appellant to "modify his proposed cross-examination so as to delete the context in which the Queensland proceedings occurred".[6]

25 As a consequence of the ruling by the trial judge, counsel for the appellant proposed to refer in cross-examination to the Queensland conduct as "physical assaults". The trial judge accepted that this expedient would not be contrary to his ruling on the voir dire.

26 The complainant was cross-examined consistently with that approach. She accepted in cross-examination that she had been "physically assaulted by a person in Queensland" and that the person had eventually pleaded guilty to physically assaulting her. And, as explained later in these reasons in more detail, she was cross-examined in detail about three of the four ways in which it had been said that the Queensland evidence was relevant to these proceedings. The only point of relevance upon which she was not cross-examined concerned the submission that her knowledge of the Queensland conduct supported a case of conflation or fabrication.

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5 *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [100].

6 *R v Cook (a pseudonym)* (2019) 32 DCLR(NSW) 9 at 11 [23].

The Court of Criminal Appeal

27 Before the Court of Criminal Appeal, the appellant had three grounds of appeal. The appellant's first ground of appeal was unanimously upheld. This ground was that the trial judge had erred by giving the jury a "Jury Question Trail" document without reading or explaining it to the jury. The appellant submitted that the trial judge and the parties were deprived of the opportunity to observe whether any members of the jury had any concern about the document or its terms and that the appellant was prevented from assessing the extent to which individual jurors were reading the document and appreciating its gravamen and purpose. The Crown conceded this ground of appeal. The Court of Criminal Appeal unanimously accepted that concession and held that a new trial should be ordered pursuant to s 8 of the *Criminal Appeal Act 1912* (NSW).

28 The second ground of appeal would have been upheld by the two judges who addressed it, Beech-Jones CJ at CL and Adamson J.[7] This ground of appeal concerned an error by the trial judge in a potentially prejudicial comment made to the jury. In light of the acceptance of the first ground by the Court of Criminal Appeal it was not necessary for the Court of Criminal Appeal to consider any orders that would be made independently as a consequence of upholding the second ground.

29 The ground of appeal upon which the Court of Criminal Appeal was divided was the third ground. The third ground was that the trial judge erred in excluding the evidence relating to the Queensland conduct being sexual offences or, in the alternative, that the trial miscarried due to the exclusion of the Queensland evidence. Although the appellant had only relied upon the exception in s 293(4)(b) of the *Criminal Procedure Act* at the voir dire, in the Court of Criminal Appeal the appellant also relied upon the exception in s 293(4)(a) in support of the admissibility of the evidence.

30 A majority of the Court of Criminal Appeal (Adamson J, with whom Bellew J agreed) would have refused this ground of appeal, concluding that neither the exception in s 293(4)(a) nor the exception in s 293(4)(b) was applicable.[8] Beech-Jones CJ at CL would have allowed the ground of appeal, concluding that both exceptions were potentially applicable but that the matter should be remitted to another trial judge to determine: (i) whether there was a relationship between

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7 *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [1], [65]-[66].

8 *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [117]-[118], [122], [137]-[139].

the appellant and the complainant to which evidence of disclosures by the complainant to the appellant related; and (ii) whether the proviso to the exceptions was applicable.[9] Order 3 of the orders made by the Court of Criminal Appeal, by majority, was to "[a]llow the appeal on the basis of ground 1". That order provided for an appeal to this Court by effectively including a declaration that the appeal had been allowed only on ground 1.

The grounds of appeal in this Court

31 In this Court the appellant had three grounds of appeal. The first ground of appeal was that the Court of Criminal Appeal erred in its construction of s 293(4) of the *Criminal Procedure Act*. The appellant submitted that all of the Queensland evidence fell within the exception in s 293(4)(a) and some of it fell within s 293(4)(b), and that the matter should be remitted to a trial judge to determine whether the proviso to s 293(4) applied to any of that evidence.

32 The second and third grounds of appeal were in the alternative to the first, on the basis that some or all of the Queensland evidence was inadmissible. The second ground was that the Court of Criminal Appeal "erred in holding it permissible to mislead a jury in order to attempt to counteract unfairness occasioned by the exclusion of the s 293 evidence". The appellant submitted that the jury had been misled by the contrivance of the trial judge to permit the appellant to cross-examine the complainant on the basis that the Queensland conduct involved a "physical assault".

33 The third ground of appeal asserted that the Court of Criminal Appeal erred in ordering a retrial. The appellant submitted that an acquittal should have been entered if the Queensland evidence was inadmissible because the institutional integrity of the District Court would be compromised if the appellant could only cross-examine the complainant without mentioning the Queensland conduct (which would be the effect of the appellant succeeding on ground 2) or if the appellant's cross-examination were to be confined to treating the Queensland conduct as physical assaults only (which would be the effect of the appellant failing on ground 2).

Section 293(3) of the *Criminal Procedure Act*

34 Section 293 of the *Criminal Procedure Act*, which is now renumbered as s 294CB, relevantly provides as follows:

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9 *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [16], [25].

"(3) Evidence that discloses or implies:

(a) that the complainant has or may have had sexual experience or a lack of sexual experience, or

(b) has or may have taken part or not taken part in any sexual activity,

is inadmissible.

(4) Subsection (3) does not apply:

(a) if the evidence:

(i) is of the complainant's sexual experience or lack of sexual experience, or of sexual activity or lack of sexual activity taken part in by the complainant, at or about the time of the commission of the alleged prescribed sexual offence, and

(ii) is of events that are alleged to form part of a connected set of circumstances in which the alleged prescribed sexual offence was committed,

(b) if the evidence relates to a relationship that was existing or recent at the time of the commission of the alleged prescribed sexual offence, being a relationship between the accused person and the complainant,

...

and if the probative value of the evidence outweighs any distress, humiliation or embarrassment that the complainant might suffer as a result of its admission."

The prohibition in s 293(3)

35 As Leeming JA observed in *Jackmain (a pseudonym) v The Queen*,[10] s 293 "is not a well-drafted law ... It also differs from its counterparts in every other Australian state, because it does not contain a residual discretion, even in an

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10 (2020) 102 NSWLR 847 at 858 [27].

exceptional case". The predecessor provision to s 293 was enacted in 1981[11] to "ease, so far as is possible, the humiliation experienced by sexual assault victims, to remove the stigma attached to the rape victim, to encourage victims to report the offences, and to bring the offenders to justice as justice demands".[12] But the terms of the prohibition in s 293(3) are so broad that, if read without full context, the evidence of "sexual experience" or "sexual activity" to which s 293(3) refers could extend even to evidence of the sexual acts which comprise the offence itself.[13] The prohibition must be taken to concern evidence that discloses or implies relevant sexual experience or sexual activity which occurred prior to or at the time of the alleged offending.

36 In other respects, however, the prohibition in s 293(3) has not been confined. In *HG v The Queen*,[14] this Court rejected the submission that the predecessor provision to s 293 applied only to "prior consensual sexual episodes". On this appeal there were very limited submissions made about the scope of s 293(3). It is neither necessary nor appropriate to address the scope of s 293(3) or the legal effects of the successive re-enactments of the terms of s 293, which made no substantial changes.[15] It suffices to say that it was common ground that the evidence that was proposed to be adduced by the appellant was one of the "problem cases" described by the New South Wales Law Reform Commission in 1998 which fell within the prohibition in s 293(3), namely, a case where the complainant was

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11 See *Crimes (Sexual Assault) Amendment Act 1981* (NSW), Sch 1 item 15, inserting s 409B into the *Crimes Act 1900* (NSW).

12 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 1981 at 4759-4760. See *HG v The Queen* (1999) 197 CLR 414 at 424 [24].

13 *HG v The Queen* (1999) 197 CLR 414 at 434 [69].

14 (1999) 197 CLR 414 at 424-425 [28]-[29], 435 [70], 441 [92], 449-450 [124], 456 [147].

15 *R v Morgan* (1993) 30 NSWLR 543 at 544. See also *Crimes Legislation Amendment (Sentencing) Act 1999* (NSW), Sch 2 item 31; *Criminal Procedure Amendment (Justices and Local Courts) Act 2001* (NSW), Sch 1 item 123; *Criminal Procedure Further Amendment (Evidence) Act 2005* (NSW), Sch 1 item 10; *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW), Sch 4 item 9; *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW), Sch 2 item 4. See, further, *Director of Public Prosecutions Reference No 1 of 2019* (2021) 274 CLR 177 at 184-187 [10]-[17], 198-199 [51]-[52], 215 [92].

a child, the accused denied that the alleged abuse occurred and the relevant evidence was about sexual experience or activity (or lack of it) rather than evidence of sexual reputation.[16]

Ground 1: The exceptions to inadmissibility

37 In assessing whether one of the exceptions to inadmissibility applies, it has been said that "no narrow approach should be taken to that part of the statutory provision which permits [the evidence's] reception".[17] As will be seen below, that caution applies particularly to an assessment of whether the evidence which is sought to be adduced is "of" sexual experience in the first exception, contained in s 293(4)(a), or whether the evidence "relates to a relationship" of the relevant kind in the second exception, contained in s 293(4)(b).

The operation of the first exception to inadmissibility: s 293(4)(a)

(i) The first limb of the first exception: s 293(4)(a)(i)

38 The starting point for any application of the first limb of s 293(4)(a) is a clear identification of the evidence that purportedly discloses or implies the complainant's "sexual experience" or "sexual activity" (or lack thereof) and which is said to fall within the exception. There is an important difference in this respect between whether the evidence is relied upon as evidence of sexual experience or as evidence of sexual activity. In *GEH v The Queen*,[18] Harrison J (with whom Beech-Jones J agreed) distinguished between "sexual experience" and "sexual activity":[19]

> "The former rather encompasses a state acquired over time, whether long or short, but which refers to the condition of having had experience in sexual matters, as opposed to a single or isolated sexual experience, or a number of them, at some particular time ...

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16 New South Wales Law Reform Commission, *Review of Section 409B of the Crimes Act 1900 (NSW)*, Report No 87 (1998) at 44-45.

17 *R v Morgan* (1993) 30 NSWLR 543 at 544.

18 (2012) 228 A Crim R 32.

19 (2012) 228 A Crim R 32 at 50 [63]-[64]. Affirmed in *R v Edwards* [2015] NSWCCA 24 at [30].

> The distinction may be critical, because any complainant's sexual experience, in the historical sense, will necessarily be his or her sexual experience 'at or about' the relevant time. In other words, a complainant's sexual experience will be his or her state of being at or about the time of the commission of any alleged prescribed sexual offence because that state of sexual experience or lack of sexual experience will in an ambulatory fashion always exist at the relevant time."

39 In other words, sexual experience is a characterisation that can persist separately from a particular sexual act. As the respondent submitted on this appeal, common examples given in the case law are characterisations of "virgin" or "sex worker".[20] These instances involve a continuing "experience" or lack of experience. Another characterisation, and one applicable to the circumstances of this appeal, is the continuing experience of a survivor of sexual assault.

40 The preposition, "of", requires a link between the characterisation of the sexual experience (or lack thereof) and the evidence upon which a person relies to establish that sexual experience (or lack thereof). Evidence that discloses or implies a characterisation of sexual experience will usually be evidence "of" or about that characterisation. And, provided that the characterisation continues at the time of the alleged sexual offence, the evidence will also usually be evidence of sexual experience "at or about the time of the commission of the alleged prescribed sexual offence". Hence, as Harrison J said in *GEH v The Queen*,[21] "evidence that relates to a complainant's general state of sexual experience may more readily satisfy the temporal test in subs (4)(a)(i) than evidence relating to singular acts of sexual activity".

41 The Queensland evidence was evidence about the complainant's sexual experience as a survivor of sexual assault.

(ii) The second limb of the first exception: s 293(4)(a)(ii)

42 The obstacle for the appellant's reliance upon the first exception is the second limb, contained in s 293(4)(a)(ii), requiring that the evidence "is of events

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20 *R v Rahme* [2004] NSWCCA 233 at [64]; *Spratt v Director of Public Prosecutions* [2010] NSWSC 355 at [10]; *JWM v The Queen* (2014) 245 A Crim R 538 at 551 [46]; *SC v The King* [2023] NSWCCA 60 at [168]. See also Woods, *Sexual Assault Law Reforms in New South Wales: A Commentary on the Crimes (Sexual Assault) Amendment Act, 1981, and Cognate Act* (1981) at 34.

21 (2012) 228 A Crim R 32 at 51 [64].

that are alleged to form part of a connected set of circumstances in which the alleged prescribed sexual offence was committed". The appellant's submissions treated this as a requirement that the evidence be of circumstances that were connected to the alleged sexual offences. For instance, the appellant submitted that the "earlier assaults and allegations were the reason the complainant was ultimately moved and placed into the appellant's care".

43 It can be accepted that there was a connection between the alleged sexual assaults by the appellant and the evidence of each of the key events prior to the alleged sexual assaults: the Queensland conduct, the investigation and prosecution of the Queensland conduct, and the disclosures of the Queensland conduct to the complainant's father and stepmother. The connection arose because, as the appellant submitted, those events were the reason that the complainant was moved into the appellant's care, in which the alleged offences occurred. There was also a possible connection between the sexual offences alleged against the appellant and the prior disclosures to the appellant by the complainant of the Queensland conduct, which may have been part of the relationship between the appellant and the complainant at the time of the alleged offending.

44 But connected events, even those which the appellant described as "critically" connected, are not sufficient. Section 293(4)(a)(ii) contains the additional requirement that the events must "form part of" the connected set of circumstances "in which" the alleged sexual offence was committed. The effect of this additional requirement in s 293(4)(a)(ii) is to narrow the operation of para (a) to near-contemporaneous events that were sufficiently integrated with the alleged offending so that it can be said that the events are part of the circumstances of the alleged occurrence of the sexual offence itself.[22] In the second reading speech of the predecessor legislation to s 293, the Attorney-General and Minister for Justice said:[23]

> "From the accused's viewpoint, this section is particularly important in so-called pack assault situations. The accused may cross-examine the complainant about whether or not [the complainant] had had intercourse with another person or persons immediately before the intercourse with [the accused]."

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22 Compare *Gregory v The Queen* (1983) 151 CLR 566 at 571 with *R v White* (1989) 18 NSWLR 332 at 339.

23 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 1981 at 4764.

45 Another example, given by the respondent, of evidence of events that are sufficiently integrated with the alleged sexual assault so as to form part of the connected set of circumstances in which the alleged sexual assault occurred is the decision in *Chia v The Queen*.[24] In that case, it was held that s 293(4)(a) was satisfied by evidence of statements made by the complainant about her sexual experience "in the hours or minutes preceding the allegations giving rise to the two counts of sexual intercourse without consent".[25]

46 By contrast, none of the Queensland evidence was, in this sense, "part" of a set of circumstances "in which" the alleged sexual offences were committed. None of the events in the Queensland evidence was contemporaneous or near-contemporaneous with the circumstances of the alleged offending or sufficiently integrated with the offending such that it could be said that the events were "part" of the set of circumstances in which the alleged offending occurred.

47 The first exception to inadmissibility does not apply.

The operation of the second exception to inadmissibility: s 293(4)(b)

48 The second exception to inadmissibility upon which the appellant relied is concerned with different circumstances and, as the appellant accepted, applies to a narrower range of evidence than the four categories of evidence comprising the Queensland evidence, upon which the appellant relied in relation to the first exception.[26] The second exception applies only to that part of the Queensland evidence that relates to a relationship between the appellant and the complainant "that was existing or recent at the time of the commission of the alleged ... sexual offence[s]". For instance, even with the breadth of the expression "relates to",[27] the evidence of disclosures by the complainant to her father and stepmother could not, by itself, relate to a relationship between the appellant and the complainant.

49 The evidence that relates to a relationship cannot be identified without first identifying the nature and scope of the relationship. The relationship described by the second exception encompasses a wide range of possibilities, permitting

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24 [2021] NSWCCA 51.

25 *Chia v The Queen* [2021] NSWCCA 51 at [58], [60].

26 See [18] above.

27 See *Tooheys Ltd v Commissioner of Stamp Duties (NSW)* (1961) 105 CLR 602 at 620.

evidence to be adduced by both the prosecution and the defence which would otherwise be prohibited by s 293(3).

50 The relationship could be one of abuse.[28] As the appellant submitted in oral submissions, it would extend to evidence of uncharged acts by an accused person against a complainant. Those uncharged acts might have significant probative value because they strongly support proof of a tendency of the accused person, which in turn may strongly support proof of a fact making up the offence charged.[29] The evidence of those uncharged acts would be inadmissible pursuant to s 293(3) but the tendency would almost invariably fall within s 293(4)(b) because it would relate to a relationship between the accused person and the complainant that was existing or recent at the time of the commission of the alleged sexual offence.

51 The relationship could also be one of trust and confidence or mutual emotional connection between the complainant and the accused person.[30] But the relationship contemplated by s 293(4)(b) must be more than a casual acquaintance.[31] It is a question of degree, dependent upon the facts of a particular case, whether interactions between two persons are sufficient for it to be said that they have formed a relationship.

52 If the trial judge had not erred in his Honour's identification of the parties to the relationship with which s 293(4)(b) is concerned, it is possible that his Honour might have found that the appellant and the complainant had a relevant relationship and that some of the Queensland evidence may have related to that relationship. Equally, and unsurprisingly in the absence of any findings by the trial judge concerning any relationship, no member of the Court of Criminal Appeal considered the nature and content of the relevant relationship. Their Honours were all correct to abstain from an attempt to do so. Without the context and evidence that was before the trial judge such consideration would have been a difficult, perhaps impossible, task.

53 Adamson J, writing for the majority, nevertheless, and with respect erroneously, concluded that she was "not persuaded that the disclosure by [the

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28 *Taylor v The Queen* (2009) 78 NSWLR 198 at 209 [33].

29 *Hughes v The Queen* (2017) 263 CLR 338 at 356-357 [41].

30 See *R v Henning* (unreported, New South Wales Court of Criminal Appeal, 11 May 1990) at 76.

31 *R v White* (1989) 18 NSWLR 332 at 341.

complainant] to [the appellant] of offences perpetrated on [the complainant] by [the Queensland offender] can be said to 'relate to' the relationship between [the complainant] and [the appellant]".[32] Her Honour reached this conclusion based on three substantive paragraphs of reasoning under the heading "Whether s 293(4)(b) applies".[33] In the first paragraph, her Honour recorded the submission by senior counsel for the appellant that "[t]he disclosure of the Queensland offences to the appellant and the context surrounding the ensuing proceedings were a significant aspect of the relationship between the complainant and the appellant, particularly at the time of the first 12 counts on the indictment given the overlap with the Queensland proceedings". In the second paragraph, her Honour explained that "what is required for evidence to 'relate to a relationship'" existing at the time of the offences was considered by this Court in *HG v The Queen*,[34] quoting from the judgment of Gleeson CJ in that case. In the final paragraph, her Honour described, and rejected, the submission of senior counsel for the appellant that the present case could be distinguished from *HG v The Queen*. With respect, the present case is quite distinguishable from *HG v The Queen*. In *HG v The Queen* there was scant evidence of any relationship between the appellant and the complainant and Gleeson CJ said that even if the evidence were assumed to establish a relevant relationship, that relationship did not relate to the evidence the appellant sought to admit. As senior counsel for the appellant submitted in this Court: "[in] *HG* ... there was no question about a relationship of the kind that is here".

54 It was common ground on this appeal that if error in the application of s 293(4)(b) were established then, as Beech-Jones CJ at CL had held in the Court of Criminal Appeal,[35] the evidence before this Court was not sufficient to determine whether there was a relevant relationship between the appellant and the complainant. Whether the present evidence, and any further evidence admitted on remitter, relates to a relevant relationship will depend upon an assessment of the nature and extent of the relationship alleged in submissions. In the absence of such submissions it is not possible to determine whether the evidence sought to be adduced "relates to" a relevant relationship in the absence of any identification of the nature and extent of any relationship. That identification must be a matter for the trial judge in the light of an assessment of all of the evidence before the court.

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32 *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [121].

33 *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [119]-[121].

34 (1999) 197 CLR 414 at 426 [33].

35 *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [16].

55 For these reasons, the third ground of appeal before the Court of Criminal Appeal should have succeeded in part. The second exception to inadmissibility is potentially applicable. For the reasons above, and in the absence of any submissions in this Court concerning the relationship between the appellant and the complainant and its nature and extent, that exception cannot, and should not, be determined in this Court. At the retrial of the appellant, the trial judge should consider any evidence of a relationship between the appellant and the complainant to determine whether the exception applies, the scope of the evidence to which it applies, and whether the admission of that evidence falls within the proviso to s 293(4) that its probative value outweighs any distress, humiliation or embarrassment that the complainant might suffer as a result of its admission.

Ground 2: Misleading the jury?

56 The premise of the appellant's second ground of appeal is not correct. The jury were not misled by the decision of the trial judge to permit cross-examination of the complainant on the premise that the Queensland offender had physically assaulted her. The starting point is the common concept in criminal trials that a witness is questioned on a particular topic so that the witness does not give evidence to the extent that the evidence would be prohibited by rules concerning hearsay, tendency, or character, or by the operation of a privilege or immunity.

57 The complainant was asked two questions which referred to physical assaults. It was not suggested that the complainant's answers were false. The complainant was also asked about assaults that involved cable ties and accepted that the Queensland offender had pleaded guilty to physical assaults. The particular description of the assaults by the Queensland offender as "physical" was not misleading. The description of these assaults as "physical" neither implied that they were sexual assaults nor implied that they were not sexual assaults. Contrary to the submission of the appellant on this appeal, the context of the complainant's claims against the appellant being claims of sexual assault does not invite an inference that a description of the earlier assaults as "physical" excluded the possibility that they were also sexual. Even if there were such a possibility, albeit falling short of an implication prohibited by s 293(3), such a possibility could be avoided by a direction from the trial judge that the jury should not speculate about the content of any of the Queensland conduct.[36]

58 Whether or not the same decision is made at a retrial of the appellant to allow the appellant to cross-examine the complainant only on the basis that the Queensland conduct involved physical assaults, without mention of any sexual

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36 Compare *Dyers v The Queen* (2002) 210 CLR 285 at 294 [15].

aspect to the assaults, might depend upon the conclusion reached by the trial judge concerning the exception in s 293(4)(b). It suffices to say that in the context of the appellant's first trial the decision by the trial judge to allow cross-examination in this way did not mislead the jury and, as in *Jackmain (a pseudonym) v The Queen*,[37] went "a considerable way" to addressing the prejudice to the appellant that was occasioned by s 293.

Ground 3: An otherwise unfair trial?

59 The appellant's final ground of appeal asserted that the Court of Criminal Appeal erred by ordering a new trial under s 8(1) of the *Criminal Appeal Act 1912* (NSW). Since s 8(1) of the *Criminal Appeal Act* does not permit a conviction to be quashed without further order,[38] the appellant submitted that the Court of Criminal Appeal should have ordered an acquittal of the appellant to avoid an order for a new trial that would be unfair.[39] It was submitted that since an inevitable "unacceptable prejudice to a fair trial" by the application of s 293(3) would lead an appellate court to set aside the verdict,[40] a new trial should not be ordered and an acquittal should be entered.

60 This ground of appeal relied heavily upon success by the appellant on ground 2, with the appellant submitting that if "an adequate way of dealing with [the issue of admissibility] is not identified in describing [the Queensland conduct] as 'assaults'—the appropriate order is not for a retrial but for acquittal". Since ground 2 should be rejected, this submission cannot succeed. Nevertheless, at one point in the appellant's written submissions the appellant submitted that even if ground 2 were rejected there would still be manifest unfairness at any retrial which would require this Court to direct that an acquittal be entered. The appellant is correct in his basic premise that the power to decide whether to acquit under s 6(2) of the *Criminal Appeal Act* or to order a new trial under s 8(1) can look forward to events following conviction and the circumstances of a new trial as well as looking backwards to any error of law or miscarriage of justice that occurred at the previous

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37 (2020) 102 NSWLR 847 at 896 [225].

38 *R v A2* (2019) 269 CLR 507 at 533-534 [83], 554 [148], 569-572 [186]-[192].

39 See *Criminal Appeal Act 1912* (NSW), s 6(2).

40 *R v Morgan* (1993) 30 NSWLR 543 at 554.

trial.[41] The circumstances to which regard may be had do not comprise a closed list. Nor is an assessment of all those circumstances as relevant to the case to be controlled by a comparison with the test for ordering a permanent stay of proceedings. But the circumstances of any new trial in this case fall far short of justifying an entry of an acquittal by this Court.

61 The appellant relied upon an assertion that the forensic disadvantage from exclusion of the Queensland evidence by s 293(3) at any retrial was such that he could not receive a fair trial. That submission should not be accepted. The forensic disadvantage to the appellant does not reach such a level even if the appellant's submission were to be taken at its highest, and it were to be assumed that at a retrial s 293(3) would operate to exclude all of the Queensland evidence other than to the extent that the appellant could refer to the Queensland conduct as "physical assaults".

62 The extent of forensic disadvantage to the appellant, and whether that could be so great as to render a potential trial so unfair that no retrial could be ordered, must be assessed by reference to the key ways, described above,[42] in which the Queensland evidence was said to be relevant. When each of those matters of relevance is considered, it can be seen that the expedient of permitting the appellant to cross-examine the complainant by describing the Queensland conduct as "physical assaults" removed much of the forensic disadvantage suffered as a result of s 293 being treated at trial as preventing any reference to the Queensland conduct as sexual.

63 First, as to the "inherent improbability" submission based upon the "brazenness" of the alleged offending, the complainant was cross-examined on the fact that some of the alleged assaults by the appellant had occurred during the Queensland proceedings. In closing submissions to the jury, counsel for the appellant said that there was "[n]ot a word said, not a word, despite the fact that [the complainant] was with the police, she was with [the New South Wales aunt], not a word".

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41 *R v Taufahema* (2007) 228 CLR 232 at 256-257 [55], citing *Jiminez v The Queen* (1992) 173 CLR 572 at 590, *Reid v The Queen* [1980] AC 343 at 350, *Parker v The Queen* (1997) 186 CLR 494 at 520, *Anderson* (1991) 53 A Crim R 421 at 453, *Everett v The Queen* (1994) 181 CLR 295 at 302, and *R v Wilton* (1981) 28 SASR 362 at 367-368. See also *Dyers v The Queen* (2002) 210 CLR 285 at 314-315 [82]-[83].

42 At [20].

64 Secondly, as to the submission that the complainant possessed a "powerful weapon" to stop any sexual assaults by the appellant, the exclusion by operation of s 293(3) of the exchange between the complainant and police in the complainant's record of interview did prevent her from being cross-examined on the assertion of inconsistency by her failure to complain to the authorities about the appellant.[43] But, on the other hand, there were at least eight separate occasions during the cross-examination of the complainant in which her ability to make a complaint or her contact with authorities was raised. For instance, the complainant was specifically asked whether the Queensland offender "pleaded guilty to doing things, to physically assaulting you in Queensland" and whether, after the first alleged sexual assault by the appellant, she knew that "if [she] complained, something was likely to happen in terms of police and/or courts". The complainant accepted both propositions.

65 Thirdly, as to the disclosures to the appellant and the "true nature" of the complainant's relationship with the appellant as one in which she confided in the appellant and he advocated for her on her behalf, although the appellant was prevented from cross-examining the complainant on the particular content of the alleged disclosure described in the appellant's supporting statement to the police,[44] it was put to the complainant that she had complained to the appellant about "what had happened to you in Queensland" and that when she was in a Repco store she had said to the appellant that "that was the sort of thing [the Queensland offender] tied me up with". The complainant accepted in cross-examination that she had gone to the police at the suggestion of the New South Wales aunt and the appellant and that "it wasn't until [she] spoke to [the appellant], personally, alone, about Queensland that even [the New South Wales aunt] was prepared to help [her]".

66 The only one of the four key areas of relevance relied upon by the appellant which placed the appellant at a forensic disadvantage was his ability to cross-examine the complainant about whether the Queensland conduct provided a source for her memory of sexual acts and offending by the appellant. In other words, the appellant was precluded from running a defence based upon unintentional conflation or deliberate fabrication based on the detail of the Queensland conduct. But the extent of the forensic disadvantage from being unable to run such a defence can be assessed in light of the fact that no allegation of unintentional conflation was made at trial.

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43 Above at [14].

44 Above at [10].

67 As to the allegation of deliberate fabrication, the complainant was cross-examined on this point carefully, in detail, and on express instructions. The complainant accepted in cross-examination that the appellant and the New South Wales aunt broke up because the New South Wales aunt discovered that the appellant was cheating on her. The complainant said that the appellant had cheated multiple times and that the New South Wales aunt had tried to kill herself because the appellant was cheating on her. The complainant also accepted in cross-examination that the complainant and the New South Wales aunt went to the police less than a month after the appellant's new partner, with whom he had returned to Australia from overseas, had given birth to a son. The closing address to the jury by counsel for the appellant relied upon these matters.

68 It is unsurprising that at the voir dire before the trial judge the appellant disclaimed any intention of relying upon any of the "fine detail of the sexual offending" in Queensland.[45] Any forensic disadvantage to the appellant in his inability to descend into any detail of the Queensland conduct could not amount to such a degree of unfairness in any retrial as to require an order that the appellant be acquitted rather than an order for a retrial.

Conclusion

69 The appeal should be allowed in part. Orders should be made to allow the appeal in part, quash order 3 of the orders of the Court of Criminal Appeal and, in its place, order and declare that the appeal to that Court be allowed on the basis of ground 1 and, in part, ground 3.

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45 *R v Cook (a pseudonym)* (2019) 32 DCLR(NSW) 9 at 10 [11]. See also *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [93].

70 JAGOT J. The relevant circumstances in which this appeal is to be determined are set out in the joint reasons of Gordon A-CJ, Edelman, Steward and Gleeson JJ ("the majority"). In contrast to the conclusion of the majority, in which grounds 2 and 3 of the appeal are dismissed but ground 1 is allowed in part, I would dismiss all grounds of the appeal for the following reasons.

Ground 1 – s 293 of the *Criminal Procedure Act*

71 By ground 1 it is contended for the appellant ("the accused") that the Court of Criminal Appeal of New South Wales misconstrued s 293(4) of the *Criminal Procedure Act 1986* (NSW).[46] As explained below, no such misconstruction is apparent.

72 The relevant provision, s 293, includes the following parts:

> "(1) This section applies to proceedings in respect of a prescribed sexual offence.
>
> (2) Evidence relating to the sexual reputation of the complainant is inadmissible.
>
> (3) Evidence that discloses or implies:
>
> (a) that the complainant has or may have had sexual experience or a lack of sexual experience, or
>
> (b) has or may have taken part or not taken part in any sexual activity,
>
> is inadmissible.
>
> (4) Subsection (3) does not apply:
>
> (a) if the evidence:
>
> (i) is of the complainant's sexual experience or lack of sexual experience, or of sexual activity or lack of sexual activity taken part in by the complainant, at or about the time of the commission of the alleged prescribed sexual offence, and

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46 Now renumbered as s 294CB.

(ii) is of events that are alleged to form part of a connected set of circumstances in which the alleged prescribed sexual offence was committed,

(b) if the evidence relates to a relationship that was existing or recent at the time of the commission of the alleged prescribed sexual offence, being a relationship between the accused person and the complainant,

...

and if the probative value of the evidence outweighs any distress, humiliation or embarrassment that the complainant might suffer as a result of its admission."

General observations

73 Section 293 applies to proceedings in respect of a prescribed sexual offence (s 293(1)) and provides that evidence relating to the sexual reputation of the complainant (s 293(2)) or evidence that discloses or implies that the complainant has or may have had sexual experience or a lack of sexual experience or has or may have taken part or not taken part in any sexual activity (s 293(3)(a) and (b)) is inadmissible. Accordingly, the important premise on which s 293 operates is that such evidence would otherwise be admissible.[47] To be admissible, the evidence must be relevant in the proceeding.[48] It is not to be assumed that, merely because evidence is of the kind referred to in s 293(3), it is thereby "evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding".[49]

74 I reject the submission for the accused that this case is an example of "categories of frequently excluded evidence that were not anticipated by the legislature". It is not to be assumed that the legislature did not anticipate the exclusion of the type of evidence in issue in these proceedings. The Queensland evidence ruled to be inadmissible in this case under s 293(3) was evidence proposed to be adduced from the complainant in cross-examination about the sexual offending to which she was subjected when she was between five and seven years old, while in the care of her Queensland aunt. As the respondent submitted, this is "the very type of distressing cross-examination which the legislature sought

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47 eg, *R v Morgan* (1993) 30 NSWLR 543 at 551.

48 *Evidence Act 1995* (NSW), s 56.

49 *Evidence Act 1995* (NSW), s 55(1).

to preclude", because such questioning "has been a potent cause of reluctance [of victims] to report sexual assault".[50]

75 I also do not accept that the operation of s 293(3), in excluding such evidence, is to be understood as precluding an accused from adducing evidence necessary to be adduced in the interests of justice.[51] The interests of justice extend beyond the interest of an accused. Further, the right to a fair trial is a right of both the accused and the Crown (as a representative of the people) and is not to be conflated with an accused's interest in obtaining an acquittal at any cost. In enacting s 293, the legislature struck the balance that it considered appropriate between all competing rights and interests, including those both of the accused and of the public in facilitating the reporting and prosecution of sexual assaults.[52] As Adamson J rightly said in this case, it "is not uncommon that incomplete evidence is adduced in a jury trial to take account of the rules of evidence".[53]

Section 293(4)(a)(i)

76 A point made in the reasons of the majority in this appeal should be emphasised. The point relates to the meaning of "sexual experience" in ss 293(3)(a) and 293(4)(a)(i) as explained in *GEH v The Queen*.[54] In that case, Harrison J (with whom Beech-Jones J agreed) said that the provision distinguishes between "sexual experience" and "sexual activity", the former encompassing "a state acquired over time, whether long or short, but which refers to the condition of having had experience in sexual matters, as opposed to a single or isolated sexual experience, or a number of them, at some particular time".[55] Harrison J also said that "any complainant's sexual experience, in the historical sense, will necessarily be his or her sexual experience 'at or about' the relevant time. In other words, a complainant's sexual experience will be his or her state of being at or about the time of the commission of any alleged prescribed sexual offence because that state of sexual experience or lack of sexual experience will in an ambulatory

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50 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 1981 at 4763.

51 cf the observation of the trial judge in this case: *R v Cook (a pseudonym)* (2019) 32 DCLR(NSW) 9 at 11 [23].

52 See, eg, *Jackmain (a pseudonym) v The Queen* (2020) 102 NSWLR 847 at 898 [244].

53 *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [131].

54 (2012) 228 A Crim R 32.

55 *GEH v The Queen* (2012) 228 A Crim R 32 at 50 [63]. See also *R v Edwards* [2015] NSWCCA 24 at [30].

fashion always exist at the relevant time".[56] It is this latter statement that I consider needs to be put in a clear context.

77 The reasons of the majority note that "sexual experience is a characterisation that *can* persist separately from a particular sexual act"[57] and that "*provided that the characterisation continues at the time of the alleged sexual offence*, the evidence will also usually be evidence of sexual experience 'at or about the time of the commission of the alleged prescribed sexual offence'".[58] I consider that this statement represents the proper understanding of the reasoning in, or a necessary qualification to the relevant parts of, *GEH v The Queen*.

78 The assumption on which s 293 operates, that the evidence will otherwise be relevant in order to be admissible, means that irrelevant "sexual experience" and irrelevant "sexual activity" – that is, evidence of a kind which, if it were accepted, could not rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding – ought not to arise for consideration under s 293. As irrelevant evidence, such evidence is inadmissible under s 56(2) of the *Evidence Act 1995* (NSW).

79 Given that the predicate of s 293 is that the evidence would otherwise be admissible as relevant evidence, it is not the case that a complainant's "sexual experience" should be understood to encompass the entirety of the complainant's "sexual experience, in the historical sense" or that such experience, or any aspect of it, "will necessarily be [the complainant's] sexual experience 'at or about' the relevant time", being the time of the alleged commission of the prescribed sexual offence. The above-mentioned statements in *GEH v The Queen* should not be understood to mean this, because those statements themselves assume that the evidence is otherwise relevant and admissible. This also underlies the importance of the qualification in the majority's reasons that the characterisation of a complainant's "sexual experience" needs to be continuing at the time of the alleged commission of the prescribed sexual offence. If the characterisation is not continuing at that time, it is difficult to see how it could be relevant or, if relevant, how it could satisfy the temporal requirement of "at or about the time of the commission of the alleged prescribed sexual offence" in s 293(4)(a)(i).

80 I also agree with the majority that the Queensland evidence was evidence about the complainant's sexual experience, albeit that I would characterise that experience of the complainant, at or about the time of the alleged prescribed sexual offences, as being (in the sense of relevantly remaining) a child survivor of child

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56 *GEH v The Queen* (2012) 228 A Crim R 32 at 50 [64].

57 At [39] (emphasis added).

58 At [40] (emphasis added).

sexual abuse.[59] This characterisation of the complainant's sexual experience relevantly continued to the time of the alleged prescribed sexual offences by the accused because at the time of the alleged prescribed sexual offences: (a) the complainant remained a child and a "survivor" of child sexual abuse; and (b) although the complainant was between five and seven years old at the time of the Queensland offences, she remained a young child of only eight to twelve years of age at the time of the alleged prescribed sexual offences by the accused. Accordingly, the "sexual experience" of the complainant by reason of the Queensland offences, meaning her status as a child survivor of child sexual abuse, relevantly continued to the time of the commission of the alleged prescribed sexual offences as provided for in s 293(4)(a)(i).

Section 293(4)(a)(ii)

81 In respect of the application of s 293(4)(a)(ii) to the facts of the present case, the accused rightly did not suggest that his mere allegation that the Queensland evidence is of events that formed "part of a connected set of circumstances in which the alleged prescribed sexual offence was committed" satisfied the terms of s 293(4)(a)(ii), despite that section referring to "... events that are *alleged* to form ...".[60] Nor can the first "alleged" in s 293(4)(a)(ii) ("... if the evidence ... is of events that are *alleged* to form ...") mean only a formal allegation by a prosecutor, in contrast to the second "alleged" in that section ("*alleged* prescribed sexual offence"), which relates to the formal allegation of a prosecutor against an accused of the commission of the prescribed sexual offence. Consistent with the approach in the cases summarised in *GEH v The Queen*,[61] the condition in s 293(4)(a)(ii) is to be construed as requiring the court to be satisfied that there is a rational and objective evidentiary foundation that the evidence is of events that "form part of a connected set of circumstances in which the alleged prescribed sexual offence was committed".[62] As the majority concludes,[63] none of the Queensland evidence was, in the required sense, part of a set of circumstances in which the alleged sexual offences were committed.

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59 cf [39], [41].

60 Emphasis added.

61 (2012) 228 A Crim R 32 at 42-47 [36]-[49].

62 See, eg, *Jackmain (a pseudonym) v The Queen* (2020) 102 NSWLR 847 at 891 [192].

63 At [46].

Section 293(4)(b)

82 Turning now to s 293(4)(b), I have reached a different conclusion from that of the majority.[64] The accused's case in the Court of Criminal Appeal was that the complainant's alleged disclosure of the Queensland offences to the accused (specifically, the sexual nature of those offences) was evidence that related to a close personal relationship of confidence between the complainant and the accused within the meaning of s 293(4)(b).[65] Adamson and Bellew JJ rejected that contention on the basis that, irrespective of the trial judge's error in misunderstanding the relevant relationship for the operation of s 293(4)(b),[66] the evidence could not be said to relate to such a relationship between the complainant and the accused.[67] Adamson J said (and Bellew J agreed) that she was "not persuaded that the disclosure by [the complainant] to [the accused] of offences perpetrated on [the complainant] by [the Queensland offender] can be said to 'relate to' the relationship between [the complainant] and [the accused]".[68]

83 Beech-Jones CJ at CL considered, however, that the evidence of the alleged disclosure by the complainant to the accused of the Queensland offences (including their sexual nature) *could* relate to a relationship of trust and confidence between the complainant and the accused that was existing or recent at the time of the commission of the alleged prescribed sexual offences, and, because the trial judge misunderstood the relevant relationship,[69] insufficient facts had been found to determine that question.[70] Accordingly, and in light of s 130A(2) of the *Criminal Procedure Act*, Beech-Jones CJ at CL concluded that this ground of the accused's appeal to the Court of Criminal Appeal should be upheld.[71]

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64 See [48]-[55].

65 See *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [5], [15], [119].

66 The trial judge mistakenly proceeded on the basis that the relevant relationship was between the complainant and the Queensland offender, instead of the complainant and the accused. See *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [100].

67 *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [121], [139].

68 *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [121].

69 *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [100].

70 *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [16].

71 *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [3], [16].

84 Section 130A(2) of the *Criminal Procedure Act* provides that if, on an appeal against a conviction for an offence in proceedings on indictment, a new trial is ordered, a pre-trial order made by a judge, or an order made by the trial judge, in relation to the proceedings from which the conviction arose is binding on the trial judge hearing the fresh trial proceedings unless, (a) in the opinion of the trial judge hearing the fresh trial proceedings, it would not be in the interests of justice for that order to be binding, or (b) that order is inconsistent with an order made on appeal. That is, the appeal to the Court of Criminal Appeal having been allowed on other grounds, Beech-Jones CJ at CL considered that the trial judge's misunderstanding and inadequate factual findings as a consequence, together with the incomplete record of evidence before the Court of Criminal Appeal,[72] meant that the ground relating to the exclusion of the sexual nature of the Queensland evidence should be upheld, partly so that, in the fresh trial, the trial judge would not be bound[73] to apply the ruling excluding that evidence.[74]

85 As the reasons for Adamson J (Bellew J agreeing) disclose, however: (a) the trial judge conducted a pre-trial *voir dire* to determine the admissibility of the Queensland evidence;[75] (b) in the appeal to the Court of Criminal Appeal, counsel for the accused identified the options open to that Court in respect of the argument concerning s 293(4)(a) and (b) and submitted that the options included the Court of Criminal Appeal "determin[ing] for itself that the evidence did not fall within the exceptions in s 293(4)(a) and (b)";[76] (c) Adamson J recorded that the parties had "joined issue in this Court about the applicability of" s 293(4)(a) and (b) and that there had been "full argument on the question";[77] (d) it was in this context that Adamson J was "persuaded that it would be preferable for this Court to decide whether either of s 293(4)(a) or (b) applies in the present case";[78] and (e) in considering the arguments put for the accused that s 293(4)(b) applied, Adamson J recorded that counsel "submitted that the complainant's evidence of the Queensland offences *related to* her relationship with the [accused], which existed at the time of the subject offences because she chose to confide in him about the

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72 *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [16].

73 Subject to a determination that the interests of justice warranted it being reconsidered: *Criminal Procedure Act*, s 130A(2). See also *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [3].

74 *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [3], [24]-[26].

75 *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [67].

76 *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [98(2)].

77 *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [102].

78 *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [102].

Queensland offences ... Thus, [counsel] argued, the complainant's evidence *related* to their relationship of confidence, which was existing at the time of the commission of the subject offences."[79]

86 Accordingly, the substantive application of s 293(4)(b) to the evidence of the complainant about her alleged disclosure to the accused of the Queensland offences (including their sexual nature) was in issue before the Court of Criminal Appeal, and the accused's counsel sought that this issue be determined for or against the accused.[80] The Court of Criminal Appeal had before it the complainant's evidence of her alleged disclosure of the Queensland offences to the accused. Adamson J (Bellew J agreeing) therefore did not err in determining the issue as put before the Court on behalf of the accused. Further, Adamson J did not reach her conclusion relying on *HG v The Queen*.[81] It is apparent that her Honour discussed that case principally because the accused made submissions about it, not to support her conclusion about the inadmissibility of the evidence in this case.[82]

87 The respondent also did not agree that the evidence before this Court (and the Court of Criminal Appeal) which the accused sought to adduce (of the complainant's disclosure of the Queensland offences, as sexual offences, to the accused), or the balance of the evidence, was insufficient to enable this Court to determine if a relationship of trust and confidence existed at the relevant time between the complainant and the accused. To the contrary, the respondent's principal submission in this respect was that the Court of Criminal Appeal was correct to conclude that the complainant's alleged disclosure to the accused could not be said to relate to the asserted relationship of trust and confidence between them. It was only if this principal submission were to be rejected that the respondent submitted that it would be necessary to remit the matter for determination on the retrial of the accused. Moreover, the parties again joined issue on the substance of this aspect of the matter before this Court. For example, it was submitted for the accused in this Court that the evidence of the complainant's alleged disclosure of the Queensland offences to the accused brought the evidence of that disclosure within s 293(4)(b). It was submitted for the respondent that it did not. As the respondent also submitted, the accused left "unexplained how the

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79 *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [119] (emphasis in original).

80 And, if determined against the accused, had a fallback position of seeking an order for an acquittal, based on the same principles applicable to the question of whether a permanent stay should be granted: *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [3], [38], [99]-[102], [123].

81 (1999) 197 CLR 414 at 426 [33].

82 *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [120]-[121].

balance of the evidence (outside the disclosure *to him*) ... supported a conclusion as to" a relevant relationship existing between the accused and the complainant.[83]

88 Otherwise, as counsel for the accused accepted during oral argument, the type of relationship alleged to have existed must be identified before an assessment can be made of how the evidence sought to be adduced relates to that relationship. In this case, the evidence sought to be adduced is also the evidence of the alleged relationship of trust and confidence. This means it is necessary to consider whether the evidence sought to be adduced is capable of being characterised as evidence of the existence of the alleged relationship.

89 The evidence in fact adduced in this case about the complainant's disclosure to the accused is inconsistent with the existence of the alleged relationship of trust and confidence. The accused's counsel was permitted to cross-examine the complainant about the alleged disclosure, albeit that the Queensland offences (on two occasions) were referred to by the accused's counsel as a "physical assault", the accused's counsel saying that he would not "go into the detail" (that is, the sexual nature) of those offences. The complainant was asked if she had told her New South Wales aunt (who was married to the accused) and the accused "about what had happened to [the complainant] in Queensland". The complainant answered: "I do remember that I told them". It was then put to the complainant that she had complained to the accused about what had happened to her in Queensland. The complainant answered: "[n]ot really". She was then asked if she remembered being at a Repco store and looking at certain items and saying to the accused, "that was the sort of thing he tied me up with". The complainant answered: "[n]o I don't remember it". She was asked next if she knew what cable ties were, to which the complainant answered, "[y]es". It was then put to the complainant that "[she] disclosed to [the accused] in detail" what had happened to her in Queensland, and she answered: "[n]ot in detail, I didn't tell him a lot of stuff, I told [the New South Wales aunt] a lot of it".

90 The complainant also gave evidence in cross-examination that she did not tell her New South Wales aunt about the accused's sexual offences against her because of her experience in Queensland and because she "didn't want it all to start again", saying that it had taken her years to speak about what happened to her in Queensland. In a similar context, the complainant gave evidence that "[t]hings aren't easy to speak up about, especially when it's going to ruin a family [and] when I'm so young and I'm going through another court case about a similar issue".

91 The evidence that the accused's counsel adduced in cross-examination from the complainant does not establish the complainant disclosing the Queensland offences, in detail or otherwise, to the accused. If anything, the evidence establishes the lack of any relationship of trust and confidence between the

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83 Emphasis in original.

complainant and the accused. For example, given the complainant said that she did not tell the accused "a lot of stuff", and instead told her New South Wales aunt, it was immaterial that the cross-examination of the complainant could not focus on the sexual nature of the Queensland offences. Nothing more could have been obtained from cross-examining the complainant about the sexual nature of the Queensland offences than was in fact obtained. And as the accused did not give evidence, the point can go no further.

92 In these circumstances, although I would not endorse a general principle that "disclosure by C to A of offences perpetrated on C by B"[84] can *never* be said to "'relate to' the relationship between C and A", I am unable to apprehend any error on the part of Adamson and Bellew JJ in rejecting the accused's contentions in this regard.

93 To the extent it was put for the accused in this Court that the evidence of the complainant's disclosure of the Queensland offences to the accused was "a subset of the wider evidence" required to establish the asserted relationship of trust and confidence for the purposes of s 293(4)(b), two responses are apt. First, while this submission was put in the written submissions in reply for the accused, it was inconsistent with the other submissions for the accused, which focused on the complainant's disclosure of the Queensland offences to the accused as the basis for the asserted relationship. Second, if that was part of the argument for the accused, it was for the accused to ensure that this Court (and, for that matter, the Court of Criminal Appeal) had before it such "wider evidence" and to explain how such evidence supported the existence of the asserted relationship of trust and confidence to which the evidence sought to be adduced might possibly relate. The accused did not do so.

94 In any event, the accused having asked the Court of Criminal Appeal to decide the substance of the application of s 293(4)(b), it cannot be the case that this Court is unable to do so. Accordingly, it is insufficient in this appeal for it to be merely asserted for the accused that Beech-Jones CJ at CL was correct. It was for the accused to establish in this appeal that Adamson and Bellew JJ erred on some evident basis. No such error has been established.

95 For these reasons, I would dismiss ground 1 of the appeal.

Ground 2 – misleading of the jury

96 The evidence given by the complainant in cross-examination, summarised above, also reinforces the conclusion of the majority that the trial judge's ruling, permitting the cross-examination of the complainant on the basis that the Queensland offences involved physical assaults or assaults, did not mislead the

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84 *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [121].

jury.[85] There were more references in the cross-examination to "what had happened" to the complainant in the Queensland offences than there were to those offences involving the complainant being "physically" assaulted. In closing address, the accused's counsel also referred to "the things that had happened to" the complainant in Queensland. The accused's counsel submitted that reasonable doubt existed because, at the very time the prosecution of the Queensland offender was occurring (facilitated by the accused's encouragement to the complainant and his giving of evidence in that prosecution), the case against the accused depended on the jury accepting that he reasoned, "[o]h well that's all right, I'll do it myself, I'll sexually assault this child". This further context confirms the majority's conclusion that the references by the accused's counsel to the Queensland offences involving "physical assaults" did not implicitly exclude them also being sexual assaults.

97 It was also submitted for the accused that the prosecutor's closing address closed off a possible basis for the jury to hold a reasonable doubt about the accused's guilt. According to counsel for the accused, describing the Queensland offences to the jury as "physical assaults", rather than as sexual assaults, enabled the prosecutor to suggest that the only two possible explanations for the complainant's allegations against the accused were either that the complainant made the allegations up (by herself or encouraged by her New South Wales aunt, whose relationship with the accused had ended) or that the complainant was telling the truth. According to the accused in this appeal, however, a third possibility was that the complainant had deliberately or unintentionally conflated her memories of the sexual assaults in Queensland and the Queensland offender with the accused.

98 There are several problems with this submission. It assumes that the jury had been misled into believing that the Queensland offences did not involve the sexual assault of the complainant when, as discussed above, this is not so. It also overlooks that the accused's case at trial was that the complainant was knowingly making false allegations at the instigation of her New South Wales aunt, which would have been inconsistent with a case that the complainant had unintentionally conflated in her mind the Queensland offences and the Queensland offender with the accused. Further, while the application of s 293(3) precluded the admission of evidence of the complainant's sexual experience or taking part in sexual activity as part of the Queensland offences (so the accused's counsel could not put to her the sexual character or details of those offences), if the accused's counsel had wished to put to the complainant that, by reason of the trauma of the Queensland offences, she was giving genuine evidence of false memories, the accused's counsel could have done so within the scope of the trial judge's ruling. It must be inferred that the accused's counsel did not do so for some forensic reason.

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85 At [56]-[58].

99 In fact, the only way in which the accused's case at trial could have been consistent with the newly proposed possibility is if that possibility is confined to the complainant having fabricated the allegations and knowingly using the sexual details of the Queensland offences as source material to support the fabricated allegations. There is no hint in the material that the accused's counsel wished to put such a case below but was precluded from doing so by the trial judge's ruling. And as Adamson J also noted, the evidence about the Queensland offences was by no means only exculpatory of the accused.[86] The evidence of the Queensland offences cuts both ways for the accused and the accused's counsel must have made forensic decisions on that basis.

100 For these reasons, I would dismiss ground 2 of the appeal.

Ground 3 – new trial unfair

101 It is to be recalled that the Court of Criminal Appeal allowed the appeal on a ground not raised in this appeal and ordered a new trial.[87] The power to do so is in s 8(1) of the *Criminal Appeal Act 1912* (NSW). Section 8(1) is in these terms:

> "On an appeal against a conviction on indictment, the court may, either of its own motion, or on the application of the appellant, order a new trial in such manner as it thinks fit, if the court considers that a miscarriage of justice has occurred, and, that having regard to all the circumstances, such miscarriage of justice can be more adequately remedied by an order for a new trial than by any other order which the court is empowered to make."

102 One contention for the accused is that, if ground 2 is allowed but ground 1 dismissed, the proper order would be acquittal because a new trial (on this hypothesis, excluding the Queensland evidence because of s 293(3)) would involve a miscarriage of justice within s 8(1). As such, the miscarriage of justice as found by the Court of Criminal Appeal cannot be "more adequately remedied by an order for a new trial than by any other order which the court is empowered to make". Rather, the remedy is an order for acquittal. This argument fails, however, because ground 2 has been rejected.

103 The alternative contention for the accused is new and more inventive. It is that if grounds 1 and 2 are both rejected, the Court of Criminal Appeal nevertheless erred in ordering a new trial. This is said to be so because, in a new trial, the accused would be prevented by s 293(3) from "providing the jury with the 'third alternative'" explanation for the complainant's evidence, being that the complainant does have knowledge and memories of sexual abuse, but they are

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86 See [106].

87 See [27].

sourced from the Queensland offences and not from any conduct of the accused. On this basis, the argument is that the Court of Criminal Appeal erred in ordering a new trial under s 8(1) by reference to the principles of the permanent stay of proceedings rather than by reference to the power in s 8(1) to order an acquittal (being any other order which the court is empowered to make to remedy "such miscarriage of justice") as referred to in s 8(1). The power in s 8(1), according to this argument, is to be exercised to order an acquittal because in a new trial, without the evidence excluded by s 293(3), the accused necessarily will be "denied a chance of acquittal which [is] fairly open to him".[88]

104 These arguments must be firmly rejected.

105 First, before the Court of Criminal Appeal, "it was common ground that the question whether to order a new trial in the present case was governed by the same principles which would apply to the question whether it was appropriate to permanently stay the trial".[89] The relevant principle is that "a permanent stay will only be ordered in an extreme case and there must be a fundamental defect 'of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences'".[90] The Court of Criminal Appeal did not err in not considering an argument about s 8(1) never put to it and in resolving the issue of whether a new trial should be ordered, or not, on the agreed basis that the relevant test to be applied was whether the circumstances were such that a permanent stay of the prosecution should be granted.

106 Second, the Court of Criminal Appeal did not err in refusing to acquit the accused by reference to the principles applicable to the grant of a permanent stay of the prosecution. As Adamson J's reasons expose, the evidence of the Queensland offences cuts both ways for the accused. As Adamson J said, based on the Queensland offences: (a) a "jury might reason that the [accused], when the complainant told him of what the Queensland offender had done to her, [thought the complainant] was vulnerable, having already been sexually assaulted as a child and would not complain again, particularly if there was a risk (as well there might have been) that she would again lose her home";[91] and (b) a "jury might have assessed the complainant's credit as having been fortified by the circumstance that she had previously made a *true* complaint about the Queensland offences (the truth

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88 *Filippou v The Queen* (2015) 256 CLR 47 at 55 [15].

89 *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [38], [126].

90 *R v Glennon* (1992) 173 CLR 592 at 605 (footnotes omitted), quoting *Barton v The Queen* (1980) 147 CLR 75 at 111. See also *Dupas v The Queen* (2010) 241 CLR 237 at 245 [18].

91 *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [128].

of which was amply borne out by [the Queensland offender's] pleas of guilty)".[92] On this basis, Adamson J rightly said that all that the accused had lost by reason of the operation of s 293(3) was "the opportunity to *fully* exploit evidence that may or may not have been forensically beneficial to him in the conduct of this defence".[93] This very limited form of *possible* forensic disadvantage in any new trial does not approach the high threshold that applies to the grant of a permanent stay.

107 Third, the new submissions for the accused that s 8(1) prescribes a lower threshold for the order of an acquittal than the conventional test for a permanent stay de-contextualise and therefore misapprehend this provision. Part of the context of s 8(1) is s 6, which relevantly provides that:

> "(1) The court on any appeal under section 5(1) against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.
>
> (2) Subject to the special provisions of this Act, the court shall, if it allows an appeal under section 5(1) against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered."

108 Several provisions of the *Criminal Appeal Act* permit orders to be made other than the quashing of the conviction and entry of a verdict of acquittal. These provisions include: (a) s 6A ("Powers of court in relation to certain convictions and sentences concerning mentally ill persons"); (b) s 7 ("Powers of court in special cases"); and (c) s 8 ("Power of court to grant new trial"). In this context, it is apparent that the arguments for the accused misconceive s 8(1) altogether. Section 8(1) does not enable an accused to be granted an acquittal in mere anticipation that a new trial might be unfair by reason that, depending on forensic decisions yet to be made in the new trial, the accused might be denied a possibility

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92 *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [129] (emphasis in original).

93 *Cook (a pseudonym) v The King* [2022] NSWCCA 282 at [130] (emphasis in original).

of acquittal. As the respondent submitted, this conception of s 8(1) is not supported by its text and would introduce radical incoherence into the law by enabling s 8(1) to circumvent the high threshold that must be met to obtain a permanent stay. Such incoherence would arise because, while an accused person seeking a permanent stay before trial would need to satisfy the high threshold required to justify a permanent stay (for instance, by establishing that the exclusion of evidence pursuant to s 293 necessarily rendered any trial unfair), a convicted offender who established some other error on appeal amounting to a miscarriage could obtain an equivalent remedy by meeting some lower threshold under s 8(1).

109 For these reasons, I would dismiss ground 3 of the appeal.