# HIGH COURT OF AUSTRALIA

GORDON A-CJ,
STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

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WHS APPELLANT

AND

THE KING RESPONDENT

*WHS v The King*
[2025] HCA 51
*Date of Hearing: 10 September 2025*
*Date of Judgment: 10 December 2025*
S92/2025

**ORDER**

*The appeal is dismissed.*

On appeal from the Supreme Court of New South Wales

**Representation**

S J Odgers SC with S A Anderson and C Beesley for the appellant (instructed by Legal Aid NSW)

H R Roberts SC with S Palaniappan and K M Jeffreys for the respondent (instructed by Director of Public Prosecutions (NSW))

## CATCHWORDS

## WHS v The King

Criminal practice – Admissibility of evidence – Sexual offences against child – Where evidence said to be available that complainant displayed sexualised behaviour prior to alleged offending – Where application to call evidence and cross-examine complainant about prior sexual history refused – Where s 293(3) of *Criminal Procedure Act 1986* (NSW) rendered inadmissible evidence that discloses or implies complainant had or may have had sexual experience or lack of sexual experience, or had or may have taken part or not taken part in sexual activity – Whether evidence admissible under exception to s 293(3) – Whether "disclosed or implied in the case for the prosecution" that complainant had or may have had sexual experience or lack of sexual experience or had or may have taken part or not taken part in sexual activity – Whether disclosure or implication from prosecution adducing evidence that complainant was nine years old and from not adducing evidence of complainant's alleged prior sexual experience – Whether Crown Prosecutor's final address unfair.

Words and phrases – "assumption or inference a juror might hold or draw", "complainant's age alone", "disclosed or implied in the case for the prosecution", "evidence adduced or the submissions made in the case for the prosecution", "expressly or implicitly relied on by the prosecution", "failure of the prosecution to adduce evidence", "had or may have had sexual experience", "miscarriage of justice", "sexual activity", "sexual experience", "unfair reasoning".

*Criminal Appeal Act 1912* (NSW), s 6(1).
*Criminal Procedure Act 1986* (NSW), s 293.

1 GORDON A-CJ, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ. The appellant was convicted at a retrial of four sexual offences against a child under the age of ten years, MW ("the second trial"). He successfully appealed against two of the convictions to the New South Wales Court of Criminal Appeal but his appeal against the other two convictions was dismissed.

2 Subject to exceptions, s 293(3) of the *Criminal Procedure Act 1986* (NSW) ("the CPA")[1] renders inadmissible any evidence sought to be adduced at the second trial that disclosed or implied that the complainant, MW, had or may have had sexual experience or a lack of sexual experience, or had or may have taken part or not taken part in sexual activity, other than the sexual acts the subject of the alleged offences.[2] At the second trial the appellant sought to adduce such evidence as it was said to be capable of explaining how MW, aged nine years old at the time of making her complaint, could describe in detail to police the alleged sexual abuse by the appellant that she described. This evidence was excluded under s 293(3) and an application to cross-examine MW about that evidence was rejected.

3 Relevantly, the effect of s 293(6) when read with s 293(4) is to permit such evidence to be adduced in cross-examination of the complainant as an exception to the prohibition in s 293(3), where, amongst other matters, it has been "disclosed or implied in the case for the prosecution"[3] that the complainant had or may have had sexual experience or a lack of sexual experience or had or may have taken part in or not taken part in sexual activity.[4] The principal issue raised by this appeal is whether the Court of Criminal Appeal erred in concluding that there was no such disclosure or implication in the case for the prosecution at the second trial. The disclosure or implication was said to arise from the prosecution adducing evidence at the second trial that MW was nine years old when she first described the alleged

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**1** As of 1 June 2022, CPA, s 293 has been renumbered as CPA, s 294CB: see *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW), Sch 2 item 4. The sub-ss of the now s 294CB appear in the identical order and terms as the sub-ss of former s 293.

**2** CPA, s 293(3); *Cook (a pseudonym) v The King* (2024) 98 ALJR 984 at 992-993 [35]; 419 ALR 1 at 10-11.

**3** CPA, s 293(6)(a); see also CPA, s 293(4)(f).

**4** CPA, s 293(6)(a); see also CPA, s 293(4)(f). The provision applies to evidence other than evidence of the sexual acts the subject of the alleged offences: *Cook* (2024) 98 ALJR 984 at 992-993 [35]; 419 ALR 1 at 10-11.

offences to the police and the prosecution failing to adduce evidence of MW's alleged prior "sexual experience" by MW having previously been exposed to sexual activity by a person other than the appellant. This was said to create a risk of the jury assuming or inferring that she lacked or may have lacked prior sexual experience, or had not taken part or may have not taken part in prior sexual activity, even though the prosecution did not invite or rely on such an inference to prove its case.

4 For the reasons that follow the Court of Criminal Appeal did not err and the appeal should be dismissed. The "case for the prosecution" as referred to in s 293(6) is not confined to what the prosecution expressly invites the jury to find or reason during the prosecutor's opening or final addresses. The "case for the prosecution" embraces the entirety of how a prosecution case is presented, including such steps in the reasoning process suggested by the prosecution towards guilt that may be implicit. The Court of Criminal Appeal did not hold to the contrary. However, there is a difference between a "case for the prosecution" that discloses or implies that a complainant has or may have a lack of sexual experience and the prosecution merely adducing evidence from a complainant of such an age that the complainant's age alone involves a risk of the jury assuming or inferring that the complainant lacked or may have lacked sexual experience. The latter is not sufficient to engage s 293(6) and that provision was not engaged in this case.

## Section 293 of the CPA

5 Section 293 of the CPA applies to proceedings in respect of a "prescribed sexual offence", which includes the sexual offences charged at the second trial.[5] Section 293(3) provides that "[e]vidence 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" is inadmissible. This prohibition extends to asking witnesses to give evidence that is rendered inadmissible under s 293(3).[6] However in *Cook (a pseudonym) v The King*[7] Gordon A-CJ, Edelman, Steward and Gleeson JJ confirmed that the prohibition does not preclude the adducing of evidence of the sexual acts that

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**5** CPA, s 293(1); see also CPA, s 3(1) (definition of "prescribed sexual offence").

**6** CPA, s 293(5)(a).

**7** (2024) 98 ALJR 984; 419 ALR 1.

comprise the charged offences.[8] No issue arises in this Court as to the meaning of the term "sexual experience". In this Court, the appellant accepted that the evidence he sought to adduce fell within s 293(3).

6 Section 293(4)(a) to (f) specify six categories of evidence that are exceptions to the prohibition in s 293(3) although for any such evidence to be admissible the probative effect of the evidence must "outweigh[] any distress, humiliation or embarrassment that the complainant might suffer as a result of" the admission of the evidence. One category of exception is that specified in s 293(4)(f), namely evidence given by the complainant in cross-examination by or on behalf of the accused given in answer to a question that may be asked pursuant to s 293(6).

7 Section 293(6) provides:

"If the court is satisfied—

(a) that it has been *disclosed or implied in the case for the prosecution* against the accused person that the complainant has or may have, during a specified period or without reference to any period—

(i) had sexual experience, or a lack of sexual experience, of a general or specified nature, or

(ii) had taken part in, or not taken part in, sexual activity of a general or specified nature, and

(b) the accused person might be unfairly prejudiced if the complainant could not be cross-examined by or on behalf of the accused person in relation to the disclosure or implication,

the complainant may be so cross-examined, but only in relation to the experience or activity of the nature (if any) so specified during the period (if any) so specified." (emphasis added)

8 Thus, s 293(6) permits cross-examination of the complainant about particular sexual experience or particular sexual activity if it has been disclosed or implied in the case for the prosecution that the complainant has or may have sexual experience or a lack of sexual experience or had or may have taken part in or not

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**8** *Cook* (2024) 98 ALJR 984 at 992-993 [35]; 419 ALR 1 at 10-11.

taken part in sexual activity (other than the sexual acts the subject of the alleged offences) and the accused might be unfairly prejudiced if the complainant could not be cross-examined in relation to that disclosure or implication. The effect of s 293(4)(f) is that evidence adduced in cross-examination of the complainant about their sexual experience or lack of sexual experience, or their sexual activity or lack of sexual activity, is exempt from the prohibition in s 293(3) but only if the probative value of the evidence outweighs any distress, humiliation or embarrassment the complainant might suffer from its admission.

9 Questions arising in a jury trial as to the admissibility of evidence under s 293(2) or (3) or whether the right to cross-examine under s 293(6) has arisen are decided in the absence of the jury.[9] If evidence is found to be admissible by the operation of s 293(4) then the Court must record or cause to be recorded in writing the nature and scope of the evidence that is so admissible and the reasons for that decision.[10]

## Background and facts

10 MW was born in 2003. From November 2005 to May 2008 she and her younger brother, JW, were in the foster care of a female carer, DB, before they were removed from her care by officers of what became known as the Department of Family and Community Services ("FACS"). DB and the appellant were married on 10 October 2009. On 14 November 2009, MW and JW returned to the foster care of DB and the appellant saw DB, MW and JW from at least that date.[11]

11 The offences with which the appellant was charged at the second trial were alleged to have been committed between 27 January 2010 and 10 November 2012. On about 10 November 2012, MW described to DB sexualised behaviour by the appellant towards her. She was interviewed by police on 13 and 14 November 2012. MW was then nine years old. During those interviews she described in detail the sexual acts alleged to have been committed by the appellant, including the conduct which was the subject of two counts on the indictment presented at the second trial.

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**9** CPA, s 293(7).

**10** CPA, s 293(8).

**11** *WHS v The King* ("*WHS No 2*") [2024] NSWCCA 242 at [4].

12 In August 2014, the appellant was tried and convicted of seven sexual offences alleged to have been committed against MW and acquitted on another count ("the first trial").[12] The appellant was sentenced to a substantial term of imprisonment.[13] MW's interviews with the police in November 2012 were played during MW's evidence-in-chief at the first trial.

13 In 2020, the Court of Criminal Appeal set aside the appellant's convictions and ordered a retrial because, prior to the first trial, material concerning MW was not produced in response to a subpoena that the prosecution accepted was "potentially exculpatory" and which should have been disclosed.[14] This material included FACS records indicating the possibility of prior sexual experience on the part of MW that the Court of Criminal Appeal found could potentially explain MW's ability to describe sexual acts of the kind she alleged against the appellant.[15] In so finding, the Court expressly stated that it did not address whether s 293 of the CPA rendered the material inadmissible.[16]

14 The appellant was tried again in 2023 (ie, the second trial) on seven counts. The jury returned verdicts of guilty on four counts, being one charge of attempted sexual intercourse with a child under the age of ten years[17] (Count 1) and three counts of aggravated sexual intercourse with a child under the age of ten years (Counts 2, 4 and 5).[18] He was acquitted on two other counts[19] and the jury could

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**12** *WHS No 2* [2024] NSWCCA 242 at [8]-[9].

**13** *WHS No 2* [2024] NSWCCA 242 at [1].

**14** *WHS v The Queen* ("*WHS No 1*") [2020] NSWCCA 31 at [6].

**15** *WHS No 1* [2020] NSWCCA 31 at [47].

**16** *WHS No 1* [2020] NSWCCA 31 at [52].

**17** *Crimes Act 1900* (NSW), s 66B; see also *Crimes Act*, s 344A.

**18** *Crimes Act*, s 66A(2).

**19** Count 3 (indecent assault on a person under the age of 16 years: *Crimes Act*, s 61M(2)) and Count 6 (aggravated sexual intercourse with a child under the age of ten years: *Crimes Act*, s 66A(2)).

not reach a verdict on the remaining count.[20] The appellant was given an aggregate sentence backdated to reflect the period in custody he served following the first trial. The non-parole period of that aggregate sentence has since expired.

15 Prior to the second trial, the appellant applied for an advance ruling[21] as to, relevantly, the admissibility of FACS records said to be capable of proving that MW displayed sexualised behaviour prior to the alleged offending, and a police interview with MW on 16 August 2017 in which she described being touched indecently by a young male, AT, while she lived at DB's house when aged between six and eight years. Both categories of evidence were ruled to be inadmissible under s 293(3) of the CPA. An application by the appellant to cross-examine MW as to whether, just prior to her interview with police in November 2012, she viewed pornographic movies with her cousins and to adduce evidence that in her interview with police in 2017 she stated that AT had referred to sexually explicit matters was also refused, as was an application to permanently stay the proceedings.

16 The appellant appealed from his convictions at the second trial. The Court of Criminal Appeal set aside his convictions on Counts 1 and 4 on the ground that they were unreasonable, or could not be supported, having regard to the evidence.[22] The aggregate sentence was set aside and the proceedings remitted to the District Court of New South Wales for resentencing on the remaining counts, being Counts 2 and 5.

17 Of relevance to this appeal, the Court of Criminal Appeal rejected a ground of appeal contending that the evidence of MW's prior "sexual experience" or "sexual activity", specifically the evidence sought to have been adduced by way of cross-examination under s 293(4)(f) and (6), was wrongly excluded.[23] The Court of Criminal Appeal also rejected a ground of appeal contending that a miscarriage of justice was occasioned by part of the Crown Prosecutor's final

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**20** Count 7 (indecent assault on a person under the age of 16 years: *Crimes Act*, s 61M(2)).

**21** *Evidence Act 1995* (NSW), s 192A.

**22** *Criminal Appeal Act 1912* (NSW), s 6(1); *WHS No 2* [2024] NSWCCA 242 at [76], [78], [82].

**23** *WHS No 2* [2024] NSWCCA 242 at [24]-[44], [77].

address to the jury that sought to explain MW's alleged failure to complain about sexual abuse by the appellant earlier than November 2012.[24]

18 The appellant was granted special leave to appeal to challenge both of those conclusions.

**Ground 1: "disclosed or implied in the case for the prosecution"**

19 Ground 1 of the appeal contended that the Court of Criminal Appeal erred in holding that the evidence of the complainant's sexual experience was inadmissible.

20 The substance of this ground concerned whether, under s 293(6)(a) of the CPA, at the second trial it had "been disclosed or implied in the case for the prosecution" that MW had or may have had a lack of sexual experience. That disclosure or implication was said to arise from the prosecution adducing evidence at the second trial that MW was nine years old when she first described the alleged offences to the police and the prosecution failing to adduce evidence of MW's alleged prior sexual experience. In the Court of Criminal Appeal, Fagan J (with whom Chen and Sweeney JJ agreed on this point)[25] accepted that it "would likely be the common experience amongst jurors that, up to the age of nine ... a girl would [not] have gained sexual experience or engaged in sexual activity ... unless in circumstances of abuse".[26] However, his Honour held that s 293(6) was not engaged by a risk of how jurors might reason, including a risk that the jury would infer a lack of prior sexual experience or activity on the part of the complainant from the complainant's age alone. His Honour concluded that there was "nothing in the presentation of the Crown case that effectively invited the jury to draw an inference about [MW's] lack of prior sexual experience or activity".[27]

21 In this Court, the appellant submitted that, in only referring to an inference the prosecution "effectively invited" the jury to draw,[28] Fagan J adopted too narrow a view of what constitutes the "case for the prosecution" in s 293(6)(a). The

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**24** *WHS No 2* [2024] NSWCCA 242 at [52]-[55], [77], [78], [81].

**25** *WHS No 2* [2024] NSWCCA 242 at [78] per Chen J, [80] per Sweeney J.

**26** *WHS No 2* [2024] NSWCCA 242 at [37].

**27** *WHS No 2* [2024] NSWCCA 242 at [38].

**28** *WHS No 2* [2024] NSWCCA 242 at [38].

appellant contended that there was (at least) a "real risk" of the jury concluding that MW had or may have had a lack of sexual experience, or that MW had not or may not have taken part in sexual activity (prior to the sexual acts the subject of the alleged offences)[29] and thus the jury would or might have inferred from the detail of MW's allegations that she must be telling the truth because she could not have fabricated her account. The appellant contended that, in adducing evidence of MW's age and MW's descriptions of the alleged offending to the police in November 2012, and by *not adducing evidence* that she had any prior sexual experience or taken part in prior sexual activity, the case for the prosecution at least implied that MW had or may have had a lack of prior[30] sexual experience or that MW had not or may not have taken part in prior sexual activity.

22 The respondent submitted that to engage s 293(6)(a) the relevant disclosure or implication must derive from the evidence adduced or the submissions made in the case for the prosecution but not from an assumption or inference a juror might hold or draw based upon a complainant's age or from evidence that was not adduced by the prosecution.

23 Although both parties (correctly) treated the "case for the prosecution" as not confined to what the prosecution expressly invited the jury to find or reason during the opening or final addresses, the appellant's argument seeks to expand what is meant by the phrase "disclosed or implied in the case for the prosecution" to include assumptions that the jury might hold or inferences the jury might draw from the evidence adduced even if they are not expressly or implicitly relied on by the prosecution. When the text of s 293(6) is understood in its context and in light of its statutory purpose,[31] the phrase should not be so construed.

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**29** In this case there is no material difference between whether the risk concerned the lack of sexual experience prior to the alleged offending or prior to MW first describing the offending to the police in November 2012.

**30** See above at fn 29.

**31** *Palmanova Pty Ltd v The Commonwealth* (2025) 99 ALJR 1362 at 1364-1365 [4]; 424 ALR 768 at 769-770, citing *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 at 157 [40]; *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 12 [16]; 419 ALR 457 at 468.

*Section 293: statutory purpose*

24 The original form of s 293 of the CPA was enacted in 1981.[32] Although the provision has moved between statutes[33] and been renumbered,[34] its text as originally enacted is in substantially the same form as s 293.[35]

25 In *Cook*, Gordon A-CJ, Edelman, Steward and Gleeson JJ noted that the purpose of the original predecessor to s 293 was 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".[36] That rationale applies as much to a nine year old victim of sexual assault as it does to any other victim of sexual assault.

26 This statutory purpose warrants not giving any narrower meaning to the prohibition in s 293(3) than is apparent from its words unless necessity dictates it, such as with the conclusion in *Cook* that s 293(3) does not apply to evidence of the

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**32** *Cook* (2025) 98 ALJR 984 at 992 [35]; 419 ALR 1 at 10, citing *Crimes (Sexual Assault) Amendment Act 1981* (NSW), Sch 1 item 15, inserting s 409B into the *Crimes Act*.

**33** Upon the coming into force of the *Crimes Legislation Amendment (Sentencing) Act 1999* (NSW), Sch 2 item 31, Sch 3 item 14 introduced into the CPA s 105 (the former s 409B of the *Crimes Act*), a provision similar to the original form of s 293 of the CPA.

**34** See *Criminal Procedure Amendment (Justices and Local Courts) Act 2001* (NSW), Sch 1 item 123. See above at fn 2.

**35** Since renumbered as CPA, s 294CB. See also *Crimes (Personal and Family Violence) Amendment 1987* (NSW), Sch 3 item 8; *Crimes (Amendment) Act 1989* (NSW), Sch 1 item 9; *Crimes Legislation Amendment (Sentencing) Act*, Sch 2 item 31, Sch 3 item 14; *Criminal Procedure Further Amendment (Evidence) Act 2005* (NSW), Sch 1 items 10-11; *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW), Sch 4 item 9. See further *Jackmain (a pseudonym) v The Queen* (2020) 102 NSWLR 847 at 872 [96].

**36** *Cook* (2025) 98 ALJR 984 at 992 [35]; 419 ALR 1 at 10-11, quoting New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 1981 at 4759-4760.

sexual acts that comprise the charged offences.[37] Similarly, in *HG v The Queen*[38] Gleeson CJ rejected the contention that a predecessor to s 293(3)[39] was limited to evidence concerning prior consensual sexual experience. His Honour approved statements describing that construction as leading to a "most invidious distinction in the case of child sexual assault victims" because proof of a lack of consent is not an element of offences involving such victims and an inquiry into whether they consented would be "grotesque".[40]

27 While the purpose of s 293 is not a basis for giving either s 293(4) or s 293(6) a construction that the words of either section do not bear, those provisions should not be construed expansively if such a construction would destroy or significantly undermine the protection conferred by s 293(3) on a particular class of victim, such as children, as the appellant's argument seeks to do. In this Court, the appellant accepted that his argument would have the effect that s 293(6) would be engaged in all cases where a complainant was nine years old or younger and had prior "sexual experience" or taken part in prior "sexual activity". This would be so because in all such cases a jury might assume or infer that the child has or may have a lack of prior sexual experience or has not or may not have taken part in prior sexual activity. The appellant also accepted that his posited construction of s 293 would have the same effect with respect to some older children, presumably being those children who, at the time they first described the offending, were of an age which might cause the jury to assume or infer a lack of prior sexual experience.

28 Thus the result of adopting the appellant's approach would be that, subject to satisfaction of ss 293(6)(b) and 293(4), all child complainants aged nine years or younger (and potentially older) could be cross-examined about their prior "sexual experience" (if any) or their having taken part in prior "sexual activity",

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**37** *Cook* (2025) 98 ALJR 984 at 992-993 [35]; 419 ALR 1 at 10-11. As to evidence of uncharged acts committed by an accused against a complainant, see: *R v Beserick* (1993) 30 NSWLR 510 at 516-519; *BRS v The Queen* (1997) 191 CLR 275 at 331; *Gipp v The Queen* (1998) 194 CLR 106 at 156-157 [141]; *HG v The Queen* (1999) 197 CLR 414 at 426 [33]; *HML v The Queen* (2008) 235 CLR 334 at 426-427 [279].

**38** (1999) 197 CLR 414 at 424-425 [28]-[31].

**39** *Crimes Act*, s 409B(3).

**40** *HG* (1999) 197 CLR 414 at 425 [30], quoting *R v G* (1997) 42 NSWLR 451 at 458. See also *HG* (1999) 197 CLR 414 at 456 [147].

which may extend to any such prior experience or prior activity. Such an outcome is inconsistent with the factual predicate of *HG*, which involved a child complainant of similar age in similar circumstances to the present case.[41] Such an outcome would substantially undermine the protection afforded by s 293(3) to an entire class of vulnerable complainants and mean that a significant target of the intended operation of s 293 would have been missed.[42] It would create an equally invidious distinction to that adverted to in *HG*, namely a distinction between, on the one hand, complainants who are of an age which might cause the jury to assume or infer that they might not have had prior sexual experience or have engaged in prior sexual activity and, on the other, those of an age which would not cause the jury to make that assumption or draw that inference.

*Section 293: text and context*

29 Two related textual and contextual matters should be noted about s 293(6). First, contrary to the appellant's submissions, s 293(6) is clearly not directed to addressing any general risk of the jury "having a misconception regarding some aspect of the complainant's prior sexual experience which might unfairly prejudice the accused". If that were so, s 293(6)(a) would be otiose and much of the operation of the exceptions to s 293(3) provided for in s 293(4) would be subsumed into s 293(4)(f).

30 Second, as noted, there is no reason to construe the phrase "case for the prosecution" as being restricted to the prosecutor's opening or final address. Similarly, there is no reason to limit the phrase "disclosed or implied" to what the prosecution expressly invites the jury to conclude. The case for the prosecution extends to all aspects of how a prosecution is presented, including such steps in the prosecution's suggested reasoning process towards guilt that may be implicit rather than expressly stated. An analysis of what was disclosed or implied in the case for the prosecution may involve considering what evidence was adduced by the prosecution, why it was admissible and the forensic purpose for which it was led. Section 293(6)(a) will not be engaged merely because there is a risk that the

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**41** *HG* (1999) 197 CLR 414 at 422 [13].

**42** See *Bropho v Western Australia* (1990) 171 CLR 1 at 20, citing *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421-424; cf *Forestry Corporation of New South Wales v South East Forest Rescue Inc* (2025) 99 ALJR 794 at 804 [39]; 422 ALR 358 at 370-371.

jury might or even would make an assumption or draw an inference about those matters in respect of the complainant.

31 Implicit in the observation in *Cook*[43] that s 293(3) does not preclude evidence of the sexual acts that comprise the offences charged being adduced is that s 293 otherwise binds the prosecution. That is, the prosecution does not have a free-standing capacity to adduce evidence of a complainant's sexual experience or sexual activity or lack of such experience or activity to enhance its case. Instead, to adduce such evidence the prosecution must demonstrate that one of the exceptions to s 293(4) is made out. To do so the prosecution must obtain a ruling from the court,[44] and will need to identify the relevance of the evidence and the basis for establishing an exception to s 293(4). In the ordinary course it will necessarily follow from that process, and through the prosecution then adducing the evidence, that the relevant disclosure or implication will have been made "in the case for the prosecution".

32 As noted, s 293(6) does not address the risk of a jury reasoning in a manner that assumes or infers the existence or non-existence of evidence about the complainant's sexual experience or sexual activity. Instead, the text and context of s 293(6) confirm that, at least insofar as the "case for the prosecution" includes the adducing of evidence, s 293(6) is primarily directed to ensuring that the accused is not unfairly precluded from being able to challenge evidence adduced by the prosecution that falls within one or more of the exceptions to s 293(3) provided for in s 293(4).

33 This structured approach to s 293 can be illustrated by reference to an example of the operation of a predecessor to s 293(6) that the Attorney-General gave in the Second Reading Speech for the original predecessor to s 293,[45] namely where "it is *somehow suggested* during the prosecution case—for example through the evidence of the police surgeon—that the complainant was a virgin prior to the

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**43** (2025) 98 ALJR 984 at 992-993 [35]; 419 ALR 1 at 10-11. See [26] above.

**44** CPA, s 293(7)-(8).

**45** The provision was then contained in *Crimes Act*, s 409B.

[relevant] events, then the accused may explore that matter by cross-examination, if he sees any benefit in it".[46]

34 The appellant relied on this example as an implication arising from the evidence adduced as part of the "case for the prosecution" sufficient to engage s 293(6) and contended that this example is analogous to the circumstances of this appeal. However, this example does not assist him because he is forced to go further and contend that the relevant implication arises from the mere admission of evidence of the complainant's age and the *failure* of the prosecution to adduce evidence of MW's prior sexual experience; a proposition that wrongly assumes that the prosecution had a free-standing capacity to do so.

35 In any event, the appellant's reliance on the example given by the Attorney-General is misplaced as it overlooks *why* the prosecution might have been permitted to adduce such evidence through the "police surgeon". On its face such evidence would have been precluded by the original equivalent to s 293(3)[47] as it would imply the complainant had a lack of prior sexual experience or had not taken part in (a form of) prior sexual activity. However, such evidence might have fallen within one or more of the predecessor exceptions to s 293(4) such as (what would become) s 293(4)(c) in that, for example, evidence that, prior to the alleged sexual intercourse the subject of the charge, the complainant had not had any relevant sexual experience or taken part in any relevant sexual activity may be relevant to ascertaining whether the complainant's pregnancy is attributable to sexual intercourse with the accused (where that intercourse is denied).[48] If that was the basis upon which the prosecution sought to adduce evidence from the "police surgeon", then to obtain a ruling permitting that evidence to be adduced the prosecution's proposed reasoning would have to be identified in the absence of the jury.[49] In articulating that reasoning and then adducing the evidence from the

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**46** New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 1981 at 4766 (emphasis added).

**47** Being the then *Crimes Act*, s 409B.

**48** See *Crimes Act*, s 409B(3)(c)(ii) as introduced by the *Crimes (Sexual Assault) Amendment Act 1981* (NSW), Sch 1 item 15. See also *Munn v The Queen* [2006] NSWCCA 61 at [28].

**49** CPA, s 293(7).

"police surgeon" the requisite disclosure or implication "in the case for the prosecution" will be apparent.

36 As the respondent submitted, the conclusion that s 293(6) ensures that the accused is not unfairly precluded from being able to challenge evidence adduced by the prosecution that falls within one of the exceptions in s 293(4) does not exhaust all of the circumstances in which s 293(6) might be engaged. Section 293(3) only applies to preclude evidence being adduced. That provision does not preclude the prosecution in its opening or final addresses from referring to a complainant's lack of sexual experience, assuming that submission fairly reflects the evidence and is not otherwise unfair.[50] If there is such a reference, there may have been a disclosure or implication such as to engage s 293(6)(a).[51]

37 In the end result, what the "case for the prosecution" discloses or implies depends on a consideration of the entirety of the conduct of the prosecution. However, just because the prosecution adduced evidence that the complainant was of such an age that a risk arose of the jury assuming or inferring that the complainant has or may have had a lack of prior sexual experience, or has not or may not have taken part in prior sexual activity, is not sufficient to engage s 293(6)(a).

*Unfair reasoning and s 293*

38 As an aspect of their duty to ensure a fair trial, trial judges are often requested and are sometimes obliged to give directions to the jury that they should not engage in impermissible forms of reasoning.[52] The same applies in relation to modes of reasoning that, in the context of a particular trial, may be unfair and where the warning is necessary to avoid a perceptible risk of a miscarriage of justice.[53]

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**50** See *Munn* [2006] NSWCCA 61 at [36]-[37].

**51** See *Y v The Queen* [2009] NSWCCA 287 at [77]-[80].

**52** See *BRS* (1997) 191 CLR 275 at 306; *RPS v The Queen* (2000) 199 CLR 620 at 637 [41]; *KRM v The Queen* (2001) 206 CLR 221 at 234-235 [38], 263 [131]; *Hamilton v The Queen* (2021) 274 CLR 531 at 553-554 [43].

**53** See *Longman v The Queen* (1989) 168 CLR 79 at 86, citing *Bromley v The Queen* (1986) 161 CLR 315 at 319, 323-325; *Carr v The Queen* (1988) 165 CLR 314 at

39 In some cases, there may be an appreciable risk that a jury might adopt a chain of reasoning that assumes or infers a complainant did not have or may not have had any particular form of sexual experience, even though such reasoning is not expressly or implicitly relied on or is even disclaimed by the prosecution. The adoption by the jury of such reasoning may be unfair to the accused if there is a substantial body of probative evidence to the contrary the admission of which was excluded by the operation of s 293(3). A trial judge may be able to address the potential unfairness that such an appreciable risk presents by directing the jury in a manner that precludes the adoption of that unfair reasoning, although the trial judge's scope to do so is subject to the significant constraint that any such direction should not subvert the purpose or efficacy of s 293(3) (now s 294CB(3)) by itself disclosing or implying that the complainant has or may have had such prior sexual experience (or had or may have taken part in prior sexual activity). The appellant did not contend that the trial judge erred in not giving any such direction in this case, and therefore the issue does not arise for determination.

*Conclusion on ground 1*

40 The Court of Criminal Appeal did not err in concluding that the evidence sought to be adduced and the proposed cross-examination of MW on her alleged prior sexual experience was correctly rejected. This conclusion renders it unnecessary to consider whether the appellant was unfairly prejudiced because the complainant could not be cross-examined in relation to that sexual experience,[54] and whether the probative value of such evidence would have outweighed any distress, humiliation or embarrassment that MW might have suffered from its admission.[55]

41 Ground 1 of the appeal should be rejected.

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330. See also *Crofts v The Queen* (1996) 186 CLR 427 at 446; *R v GW* (2016) 258 CLR 108 at 130-131 [50].

**54** CPA, s 293(6)(b).

**55** CPA, s 293(4).

**Ground 2: the Crown Prosecutor's final address**

42 Ground 2 of the appeal contended that the Court of Criminal Appeal erred in holding that a miscarriage of justice did not result from the final address by the Crown Prosecutor.

43 As the trial took place in New South Wales, the Crown Prosecutor's final address to the jury preceded the final address by counsel for the accused.[56] One part of the Crown Prosecutor's final address anticipated an attack on MW's credibility for failing to complain about the appellant's conduct prior to November 2012. The Crown Prosecutor accepted that MW did not take up various opportunities to complain "straight away" to "authority figures" or family members about "what was happening to her" but sought to place that "failure" in the context of MW's circumstances, namely: that MW was aged between seven and nine years old when the alleged offending occurred; that she had been living with foster families since she was two years old; that she was shocked by the appellant's behaviour; that she "didn't want to tell her" family members what had occurred or "didn't know how to say it"; that she had said that the appellant had told her he would "literally kill" her if she told anyone; and that she was scared after the "first incident" with the appellant.

44 Ultimately, the Crown Prosecutor submitted that "[u]nderstandably, you might think it would be difficult for a young girl to tell anybody about what a man with [the appellant's] relationship to her does with his rude part ... [u]nderstandably, you might think that'd be hard for any child, let alone a child in the situation of [MW], a foster child".

45 At trial, the appellant's counsel did not complain or seek any direction about this aspect of the Crown Prosecutor's address. In their final address to the jury, counsel for the appellant repeatedly referred to MW not raising an "immediate complaint" about the appellant, including to her grandmother and in her weekly therapy sessions with a psychologist that took place over two years.

46 In the Court of Criminal Appeal and in this Court, the appellant contended that so much of the Crown Prosecutor's final address that sought to explain MW's delay in complaining about the appellant's conduct was unfair because the exclusion of evidence under s 293 denied the appellant the opportunity to adduce FACS records that would have contradicted or undermined the Crown Prosecutor's submission. The essence of the unfairness was said to be the Crown Prosecutor's

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**56** CPA, s 160(1).

assertion to the jury that MW was inhibited in complaining about sexual matters while the appellant was precluded from adducing evidence that MW was not so inhibited in complaining or speaking about other sexually related matters, including alleged sexual abuse by DB.

47 In the Court of Criminal Appeal, Fagan J, with whom Chen J agreed, did not accept that the documents that were made inadmissible by s 293(3) would have materially weakened the Crown Prosecutor's submission.[57] Sweeney J found that the Crown Prosecutor's submission was unfair in that the "Crown knew there were records of [MW] having complained earlier about inappropriate sexual conduct" by DB but did not accept that the ground of appeal was made out given the lack of complaint made by the appellant's trial counsel about the Crown Prosecutor's submission and that counsel's submissions to the jury about the complainant's lack of immediate complaint.[58] It is not necessary to consider this aspect of Sweeney J's reasons.

48 In the Court of Criminal Appeal, the appellant relied upon four documents the admission of which was precluded by s 293 and which were said by the appellant to demonstrate that the Crown Prosecutor's submission was unfair. Two of the documents recorded interviews between MW and FACS caseworkers. In one of the interviews, conducted on 24 September 2009, MW said she liked going to DB's because "[s]he takes me to [McDonalds]. [DB] had sex at [McDonalds]. She took her clothes off and everyone ran outside". Whatever be the credibility of that assertion, that description of DB's behaviour has no bearing on the Crown Prosecutor's submission. In the other interview, conducted on 30 October 2009, MW stated that DB "always touches me when she puts a nappy on me ... [o]n [the] private part". That statement is not remotely comparable to the serious instances of sexual abuse that MW alleged the appellant perpetrated against her.

49 The third document was an email from DB to FACS on 31 May 2010 in which DB reported MW stating that JW "kept trying to put his hands in [MW's] pants". Again, that complaint is not remotely comparable to MW's allegations against the appellant.

50 The fourth document is a FACS document entitled "Finalisation Submission", which recounts various bare allegations concerning MW and the "finding" made by FACS about those allegations. Those allegations included that

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**57** *WHS No 2* [2024] NSWCCA 242 at [55] per Fagan J, [78] per Chen J.

**58** *WHS No 2* [2024] NSWCCA 242 at [81].

DB "touched [MW] between her legs and on her private parts", that DB "touched [MW] on the bottom" when putting a pull-up nappy on her and "had sex with [MW] and [JW]". Otherwise, the document records that, for these alleged incidents, the "allegation type" was "sexual" and was "[n]ot sustained". No further details of any kind are provided, including the source of the allegation. In the absence of such detail, including confirmation that MW made the allegations that are recited, there is nothing in the document capable of undermining the Crown Prosecutor's submission.

51 Fagan J's assessment of the effect of the inadmissible documentary evidence said to render the Crown Prosecutor's submission unfair was correct. These documents did not contradict, weaken or otherwise bear upon the submission. The evidentiary basis for the contention that the Crown Prosecutor's submission was unfair was not established.

52 Ground 2 of the appeal should be dismissed.

**Disposition**

53 The appeal should be dismissed.