IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY **No. A9 of 2018**

BETWEEN: **IAN DOUGLAS JOHNSON**
Appellant

and

THE QUEEN
Respondent

APPELLANT'S REPLY

I PUBLICATION

1. This submission is suitable for publication on the internet.

II CONCISE REPLY TO RESPONDENT'S ARGUMENTS

2. There is a fundamental difference between the framework for analysis adopted by the respondent, and that urged by the appellant. It can be illustrated by summarising the respondent's key propositions concerning the evidence in relation to count 1 and then contrasting the appellant's submissions as to "miscarriage of justice" (s 353(1), CLCA).

(1) The evidence led in relation to count 1 would have been admissible in any event

(a) Whilst the CCA did not engage with the terms of s 34P directly, reference to authority in which that section was considered suggests it was alive to the requirements of the section (RS [73]), and although the CCA spoke in terms of "sexual attraction" or "relationship", it should be taken not to have founded upon "sexual attraction", and the shorthand reference to "relationship" should be understood in light of specific uses of the evidence identified by the trial judge (RS [41]-[51], esp fn 68).

(b) The evidence of allegations of conduct committed whilst *doli incapax* still had probative value in relation to the other counts for reasons developed in detail by the respondent in its submissions (RS [56]-[68]). Whilst prejudice may arise in different ways the "real" prejudicial effect here was the risk of misuse for impermissible propensity purposes in respect of which risk the judge gave directions (RS [69]-[73]).

(2) If the evidence would have been admissible anyway, there was no miscarriage

(a) The fact that the appellant was acquitted of count 1 does not mean he should not have been charged (RS [80]).

(b) It would have made no difference had count 1 not been charged because: (i) it is speculative to suggest the appellant would not have given evidence on that hypothesis or that he was prejudiced by giving evidence (RS [82]-[83]); and (ii) had the jury simply considered the evidence relating to count 1 as an uncharged act relevant to the "relationship", it would have made no difference to their consideration of the other counts (RS [87]-[89]).

3. Propositions (2)(a) and 2(b)(i) misapprehend the appellant's submissions, and (2)(b)(ii) is disputed. More importantly, propositions (1) and (2) fail to engage with the identification and consequences of a "miscarriage of justice" where, as here, the CCA has concluded there was an error or irregularity in the trial, namely, a faulty consideration of and conclusion as to whether the appellant was guilty of count 1.

Caldicott Lawyers
53 Wright Street
ADELAIDE SA 5000

Telephone: (08) 8110 7900
Fax: (08) 8110 7901
Email: ccaldicott@caldicottlawyers.com.au

Appellant's submission as to framework for consideration of the issues

4. Whilst a conclusion that the evidence led in relation to and in respect of count 1 was not admissible pursuant to s 34P in respect of the other counts would be sufficient for the appeal to succeed, with respect, an abstract question of admissibility is not the appropriate starting point for analysis of the appellant's appeal.

5. In respect of count 1, the starting point, and the premise for the analysis that follows, is that as the CCA held, the evidence led at the trial by the prosecution was incapable of establishing that the appellant's alleged conduct whilst 10 years old or younger was undertaken understanding that the conduct was seriously wrong in the requisite sense.

6. The point is not that there was something inappropriate about the appellant having been charged. Rather, it is that, by reference to the material actually led at the appellant's trial, there was no sufficient basis for a finding of guilt on that charge, and it was not open to the jury to return the verdict that it did.

7. When considering a contention of a miscarriage of justice based upon the fact that counts were heard together, and indeed whenever one is considering the "miscarriage" ground of appeal, the matter should be judged by considering the trial that the appellant actually had. A conclusion of a miscarriage[1] can be reached without concluding that there was an error of law in refusing severance[2], or, it is submitted, in failing to withdraw a charge from the jury's consideration. This backward-looking approach to miscarriage has been applied to non-severance in cases concerning multiple accused, but has also been thought to be applicable to cases involving multiple charges against a single accused[3].

8. In light of the CCA's conclusions, it can be said upon reflection that:

   (1) the trial judge ought not to have left count 1 to the jury because the evidence was not capable of sustaining beyond reasonable doubt either that the appellant was 11 or 12 at the relevant time (which was the basis upon which it was left), or that the appellant knew that what he allegedly did was seriously wrong;

   (2) the jury (a constituent element of the Court[4]) erred by returning a verdict of guilty.

9. In other words, in the trial that the appellant faced on all charges, in which count 1 was both a logical starting point (because it was the first numbered and earliest count) and an important focal point (because all other allegations were entirely uncorroborated), the jury were wrongly invited to conclude, and wrongly did conclude, that the appellant as a young child sexually abused his sister knowing it to be seriously wrong. That is an error, irregularity or blemish upon the trial that amounts to a miscarriage of justice. It is not of a class that could be dismissed as innocuous[5] or immaterial in the sense of being **incapable** of affecting the jury's consideration of the other counts.

---

1 In *State of Western Australia v Bowen* [2006] WASCA 133, a number of expressions to the same effect were identified, including "a substantial miscarriage of justice or improper prejudice created against an accused" (*Webb v The Queen* (1994) 181 CLR 41 at 88-89 (Toohey J)), "impermissible prejudice" (*De Jesus v The Queen* (1986) 61 ALJR 1), "prejudice so as to prevent a fair trial" (*R v Annakin* (1988) 17 NSWLR 202).

2 In submissions in chief, reference has been made to *R v Collie* (1991) 56 SASR 302 and *R v Demirok* [1975] VR 244. But see also: *R v Maurangi* (2001) 80 SASR 308 at [10], *R v Alexander and McKenzie* (2002) 6 VR 53 at [26], *R v Tran* (2006) 96 SASR 8 at [17], *DPP v Mwamba* [2015] VSCA 338 at [26].

3 See *R v Liddy* [2001] SASC 116 at [10].

4 *R v NH* [2015] SASCFC 139 at [34] (Kourakis CJ), referred to without disapproval by French CJ, Kiefel and Bell JJ: *NH v DPP* (2016) 90 ALJR 978 at [72].

5 Cf. *Kalbasi v State of Western Australia* [2018] HCA 7 (***Kalbasi***) at [70] (Gageler J).

10. To demonstrate that had the appellant not been charged with count 1, similar evidence might have been led as uncharged relationship evidence, perhaps coupled with a suite of directions[6] guarding against both propensity use and forming any conclusion that the appellant acted with a criminally culpable intent, is not to demonstrate that had the error or irregularity or blemish in the trial not occurred, the jury might not have convicted on the other counts.

11. This is not a case where the negative criterion necessary to sustain the application of the proviso[7] could be satisfied. The CCA did not proceed on that basis, and the respondent makes no submission to that effect. Accordingly, the question is really one of whether the error or irregularity or, to put it neutrally, the circumstance of the jury's wrong consideration and conclusion with respect to count 1 gave rise "on any ground" to a "miscarriage" – an undoubtedly broad concept[8]. In that context, it is not for the appellant to demonstrate that he would have been acquitted had the evidence not been the subject of a count. Rather it is necessary to identify a blemish in the trial that might have[9] affected the jury's deliberations on the other counts.

12. In a case in which the jury were asked to reach a binary conclusion in respect of count 1, did so by wrongly concluding that the appellant was able to appreciate that the alleged conduct was seriously wrong, and in doing so necessarily also rejected his sworn account as reasonably possibly true, how can it be excluded that this might have affected the jury's conclusion on all the other counts which were entirely uncorroborated and involved a contest of "word against word"? In cases turning on issues of contested credibility, a Court must be cautious in concluding an error did not affect a verdict[10].

13. The appellant does not ask the Court to conclude that had he not been faced with count 1 he would not have given evidence. The appellant rather invites attention to the trial that he had in which he **did** give sworn evidence denying a count which, the CCA held, was unsustainable taking the prosecution case at its highest.

14. Because count 1 was submitted for verdict, the jury was not only required to consider whether to reject the appellant's version of what he remembered of the shed incident as a reasonable possibility, but invited to conclude, in light of the cross-examination about his state of mind at that age[11], that he acted as VW alleged and knowing that it was seriously wrong. Consideration of **that** additional issue (a matter which, on the CCA's reasoning, ought to have been a non-issue):

    (1) of its nature, tended to encourage an assessment of the appellant's conduct and character before and after count 1, which was plainly potentially prejudicial;

    (2) was not in truth probative of guilt of counts 2, 4 and 5, other than by propensity reasoning which the respondent disavows.

---

6 Even where appropriate warnings are in fact given regarding use, the conclusion may be reached that counts should be severed due to a lack of complete cross-admissibility: see, eg, *Baini v The Queen* (2012) 246 CLR 469 (***Baini***) at [37]-[38] (plurality).

7 *Weiss v The Queen* (2005) 224 CLR 300 (***Weiss***) at [44] (the Court), *Kalbasi* at [13] (plurality), *Collins v The Queen* [2018] HCA [18] (***Collins***) at [36] (plurality).

8 *Weiss* at [18] (the Court), *Baini* at [51] (Gageler J). In *Davies v The King* (1937) 57 CLR 170 at 180 (quoted in *Nudd v The Queen* (2006) 80 ALJR 614 at 617 [4]), it was said that this ground of the common form criminal appeal provision extended to a case where there was some feature of the case "raising a substantial possibility that, either in the conclusion itself, or in the manner in which it has been reached, the jury may have been mistaken or misled".

9 *TKWJ v The Queen* (2002) 212 CLR 124 at [72]-[73], *Dhanhoa v The Queen* (2003) 217 CLR 1 at [38], [49], [60], both referred to in *Baini* at [54] (Gageler J).

10 *Collins* at [36] (plurality); *Kalbasi* at [15] (plurality), referring to *Castle v The Queen* (2016) 259 CLR 449.

11 See, eg, Tr 309-311 AFM.383-385. There was cross-examination regarding the earlier incidents and childhood events generally: eg, AFM.340-364,378-382.

15. Accordingly, even if the fact of the incidents the subject of count 1 or the earlier incidents might have been admissible as to "relationship" so as to bolster the credibility of VW's account in respect of counts 2, 4 and 5, that was not the trial that the appellant had.

Reply on the question of admissibility

16. Further, contrary to the respondent's submissions, the evidence led in respect of counts 1 and 3 was not admissible in respect of the other counts. The respondent's submissions overstate the probative value of the evidence, understate the relevant prejudice, and overlook the significance of the need to be able to distinguish permissible and impermissible lines of reasoning, a matter to which s 34P(3) directs attention.

17. First, the appellant's submissions with respect to why evidence led in respect of count 1 was cross-admissible are not reflected in the approach taken in the CCA, where the weighing exercise required by s 34P was not undertaken[12]. The CCA's analysis did not extend beyond identifying two concepts (sexual attraction and relationship), one of which the respondent disavows, and did not address the question of prejudice.

18. The respondent relies upon a lengthy and detailed (RS [4]) justification for why, notwithstanding that on VW's accounts she did make contemporaneous complaints and did not in fact submit to the appellant's abuse, the evidence of offending whilst the appellant was a child was still "highly relevant" (RS [51]).

(1) The respondent contends that whilst VW said she made numerous complaints, she did not claim to have complained about count 2, and this would have been difficult for the jury to understand (RS [62]). But nor did VW make any immediate or ineffective complaint in respect of the shed incident (count 1), so as to render later complaints futile, and so giving evidence about that incident (or the earlier allegations[13]) did not have any substantial probative value in respect of her credibility respecting count 2. Nor did VW say that her non-complaint about count 2 was for that reason. Indeed, she said she complained about later offending.

(2) In fact, the burden of the respondent's submission is that it was the later uncharged offending allegedly undertaken between counts 1 and 2 (RS [22]-[25]) that would have assisted in explaining VW's conduct following count 2. The possibility that evidence of those events might have had some probative value in relation to the credibility of VW's account of count 2 does not render the evidence of and preceding count 1 strongly probative in respect of each of counts 2, 4 and 5.

(3) Furthermore, the respondent's lengthy articulation on appeal as to why count 1 may have assisted the jury in explaining VW's conduct relating to counts 2, 4 and 5 is not reflected in the prosecutor's address to the jury where in fact, if anything, backward light was sought to be thrown on count 1 by reference to the continuous nature of the allegations[14].

---

12 *Sokolowskyj v R* (2014) 239 A Crim R 528 (***Sokolowskyj***) at [53] (Hoeben CJ at CL, Adams & Hall JJ agreeing).

13 The respondent accepts that if count 1 was not admissible, the earlier acts were inadmissible: RS [58].

14 "We all know that kids play and get up to no good sometimes, but what we have here, I submit, is a persistent course of physical and sexual assault by the accused against [VW] from childhood through to adulthood. I contend to you that the persistence of the conduct makes it apparent that the accused must have known it was wrong from a very early age and that's the case even if that conduct had been learned from his older brother, Neil. What we have here is not innocent conduct. What we have is a quite horrific combination of abuse of a young girl from the age of about three right through to her 20s. It's a domination borne out of violence, fear, and a lack of being brought to account" (Tr 335 AFM.409). Whilst the very last component of that submission might identify a relevant matter in assessing the credibility of VW's account, the way in which the issue was presented serves to highlight the danger to which s 34P(3) is concerned.

(4) The respondent seeks to found at RS [67] upon questions that were put and submissions that were made at trial, and then invites speculation as to a more extreme approach that would have been taken to an attack on the credibility of VW's account had the prosecution not led evidence of the allegations relating to and perhaps surrounding count 1. This is misconceived, in that:

(a) the questions and submissions instanced in fact challenged that complaints had been made to VW's parents and that they had done nothing. A challenge of that kind does not suggest there was some need, out of fairness to VW, or in the interests of completeness, to lead evidence of earlier allegations (whether or not it was suggested they produced complaints);

(b) it is illegitimate to reason, from the approach defence counsel in fact took to the prosecution case where a severance application had been rejected, to the conclusion that had evidence of the earlier allegations not been led, defence counsel would have attacked VW's credibility based on the absence of a contemporaneous complaint following count 2. This also ignores s 34M(2)[15].

(5) What the respondent's submissions tend to highlight is that, with the exception of a suggestion that allegations of multiple uncharged acts might explain a confidence the appellant may have had in re-offending, the only potential legitimate probative value of the evidence was in bolstering VW's credibility. But the question remained whether evidence of acts allegedly committed when the appellant was a young child had probative value on that score which **substantially** outweighed any prejudicial effect.

19. There were numerous aspects to the prejudicial effect.

(1) The allegations were shocking and whilst a juror might bear in mind the appellant's young age, VW's even younger age might excite an overwhelming reaction.

(2) There was the risk of engaging in propensity reasoning notwithstanding any "separate consideration" direction[16].

(3) There was the forensic prejudice of answering allegations about one's conduct when aged about 10 many decades later, and the risk of overestimation of the weight of evidence of a now adult witness, such as Des Flavel, who claimed he "looked straight down in her eyes and that's something I've never forgotten" (RS [19])[17].

(4) Further, because the appellant was practically compelled to respond to the evidence to give his recollection of an incident in the shed, in doing so, he contributed to proof of the prosecution case, permitting the prosecutor to submit, as he did, that "it should not be in dispute that something did happen in the shearing shed"[18].

Date: 25 May 2018

M E Shaw QC
P: 0412 076 482
E: mshaw@senet.com.au
Counsel for the appellant

B J Doyle
P: (08) 8212 6022
E: bdoyle@hansonchambers.com.au

---

15 Section 34M(2) provides: "In a trial of a charge of a sexual offence, no suggestion or statement may be made to the jury that a failure to make, or a delay in making, a complaint of a sexual offence is of itself of probative value in relation to the alleged victim's credibility or consistency of conduct".

16 Cautionary directions do not eliminate the risk of prejudice in an analysis of this kind: see, eg, *Sokolowskyj* at [53]-[57].

17 Such a statement had the potential to swamp the fact that his account was actually inconsistent with that of VW's, on which he and his brother appeared to be more than fortuitous or accidental observers.

18 Tr 335.21 AFM.409.