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

BETWEEN: **IAN DOUGLAS JOHNSON**
Appellant

and

10 **THE QUEEN**
Respondent

RESPONDENT'S SUBMISSIONS

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Office of the Director of Public Prosecutions
Level 7, 45 Pirie Street,
Adelaide SA 5000

Telephone: 08 8207 1529
Fax: 08 8207 1799
Ref: Ian Press SC
ian.press@sa.gov.au

Part I: INTERNET PUBLICATION

1. This submission is in a form suitable for publication on the internet.

Part II: ISSUES ON APPEAL

2. The respondent agrees with the issues identified by the appellant however the respondent submits the two issues identified by the appellant may be stated more specifically as:

   a) in circumstances in which the offending continued regularly over a 20 year period and the appellant's sister complained after some acts (charged and uncharged) but not after the majority of those acts, are the acts committed by the appellant against his sister when under 10 years and when doli incapax admissible at his trial for subsequent offending as a youth and an adult?

   b) assuming the admissibility of the evidence of the appellant's conduct when doli incapax as regards count 1- in light of the fact the jury were satisfied that conduct the subject of count 1 occurred, is there a risk the jury were impermissibly influenced in their deliberations on counts 2, 4 and 5 by their erroneous finding that the appellant knew that conduct was "seriously wrong"[1]?

   c) when an accused is charged with persistent sexual exploitation of a child, contrary to s 50(1) of the *CLCA* (as in force at the time of this appellant's trial[2]) and the complainant gives generalised evidence of sexual abuse which the CCA determine is unable to satisfy the elements of the offence, does the generality of that evidence mean it is inadmissible?

   d) assuming the admissibility of the evidence of the appellant's conduct as regards count 3 - did the subsequent quashing of the conviction for reasons unrelated to the credibility or reliability of the complainant nonetheless mean there was a risk that the jury used their finding that such acts occurred to reason in an impermissible manner when considering their verdicts on counts 2, 4 and 5?

Part III: SECTION 78B NOTICE

3. The respondent certifies that notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) need not be given.

Part IV: SUMMARY OF CONTESTED FACTS

The relevance of a detailed factual summary

4. The facts contained in the appellant's written submissions are not contested. However, the appellant's summary provides insufficient detail to evaluate the

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[1] *R v Johnson* [2015] SASCFC 170 [91] (CAB 185); *RP v The Queen* (2016) 259 CLR 641.

[2] Section 50 has since been substituted: see s 6, *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA). References in these submissions to s 50 CLCA are references to the provision as it existed before its substitution by that amending Act on 23 October 2017.

relevance of the impugned evidence or the trial judge's directions.[3] To simply refer to the fact some complaints were made by the complainant is, with respect, apt to mislead.[4] To consider the relevance of the evidence it is therefore necessary to detail when and to whom the complainant did and did not complain, whether complaints were made after each charged act, her lack of complaint to police when she was an adult notwithstanding some initial attempts to inform police when a child, the continuity of the conduct, the length of time over which it occurred and how the complainant reacted both at the time of the sexual abuse and immediately thereafter.

5. On the evidence of the complainant, her family was dysfunctional in many respects. That dysfunction, in the absence of a full account of her relationship with the appellant and other members of her family, would give rise to a number of questions in the minds of the jury that may otherwise have cast a doubt over her credibility or reliability.

6. It is also only when this Court has regard to her complete account that it can assess the impact that excluding her evidence as to counts 1 and 3 would have on the ability of the jury to assess her credibility and reliability as to the charged offences.

7. The respondent therefore supplements the appellant's factual summary with a more detailed overview of the evidence.

Evidence of uncharged acts that occurred prior to any charged act

8. The complainant's earliest memory was of an incident in the bath when she was "*about 3, probably.*"[5] The appellant "*pushed his foot in between [her] legs to [her] vagina. Not inside [her] vagina.*"[6] The complainant kicked the appellant to try to get him to stop and "*must have connected with him*" because he was "*screaming and yelling out*" for their mother. When their mother arrived, the appellant told her that the complainant had kicked him. The complainant was then "*belted on the backside.*"[7]

9. In light of the young age of the appellant this act was the subject of two directions by the trial judge as regards its potential relevance to whether the appellant knew that the act the subject of count 1 was seriously wrong and whether this was an uncharged "sexual act". On both occasions the learned trial judge asked the jury to consider whether it could seriously be regarded as evidence of sexual misconduct. [8]

10. The respondent further notes that not only was there no application to exclude this evidence prior to the trial[9] (as distinct from an application to sever count 1), this act

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[3] At SU 54-55 (CAB 85-86) the judge directed the jury that the acts may be relevant to explain that a particular offence did not come "out of the blue" or that it may explain the "confidence the accused might have had" to engage in the charged acts because she had not complained about them or to explain why his sister did not complain about the sexual misconduct "until much later".
[4] AS at [18]
[5] T81 (AFM 155).
[6] T82 (AFM 156), T27 (AFM 101).
[7] T27 (AFM 101).
[8] SU 41 (CAB 71) and SU 54 (CAB 54).
[9] AFM 11

was also relied upon by the CCA as evidence consistent with the appellant not knowing that his conduct, the subject of count 1, was seriously wrong.[10]

11. The first overtly sexual incident recalled by the complainant occurred at the family property in an implement shed when the complainant was "*probably about four or five years old*".[11] The complainant was taken into the implement shed by her brothers on the pretext of showing her how she can have a baby sister or brother. Neil Johnson, the appellant's older brother, took the complainant's pants off. She recalled feeling scared and nervous, not knowing why they were doing this. The appellant sat behind her and held her shoulders. Neil spat into his hand and rubbed his fingers and then his penis against the complainant's vagina. She yelled and tried to get away. The appellant was holding her and holding his hand over her mouth to try to stop her from screaming. The complainant was told by Neil not to "*say anything*" otherwise she would get "*into trouble.*" [12] Immediately after this incident, the complainant approached her mother and told her that the appellant and Neil were trying to give her "*a little baby brother or sister*" and that it "*hurt down there.*"[13] The complainant's mother slapped her in the face and told her "*[d]on't you ever say that again.*" The complainant recalled crying and being confused as to why she had been smacked.

12. The next uncharged sexual incident recalled by the complainant occurred when she was "*probably five or six*".[14] She was in her bedroom when the appellant and Neil entered. Neil said "*give us a root*".[15] This became a "*regular thing that they would say*". The complainant knew what was going to happen and tried to get away. She was held down, Neil took her pants off, spat on his hand and rubbed his hand against her vagina. This was also the first time the complainant could recall that the appellant rubbed his penis against her vagina.[16] The complainant did not believe she complained about this incident. She explained that she did not tell anyone about it because when she told her mother about the incident in the implement shed she "*got a belting.*"[17]

13. Between the ages of five and ten, the complainant stated the appellant and Neil would put their penises on her "*vagina area*" on "*[p]retty much a weekly basis*".[18] The complainant told her mother about what happened "*a couple of times*" when she was about 5, and in the "*next few years*" but said that "*in the end...nothing changed.*"[19]

14. The complainant also gave evidence that she called the police four or five times during her childhood to report the abuse by her brothers. She was probably 8 or 10 years old.[20] When she called the police, the high point of her complaint was that her

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[10] *R v Johnson* [2015] SASCFC 170 [97] (CAB 186)
[11] T27 (AFM 101), T85 (AFM 159).
[12] T29 (AFM 103).
[13] T30 (AFM 104), T92 (AFM 166).
[14] T30-31 (AFM 104-105).
[15] T30 (AFM 30).
[16] T31 (AFM 31).
[17] T32 (AFM 32).
[18] T32 (AFM 32).
[19] T32 (AFM 106).
[20] T33 (AFM 107).

brothers were hurting her. She was unable to articulate in any greater detail how they were hurting her. She "*couldn't explain what was happening*"[21] and she was "*scared of any repercussions*".[22] The police told her to "*tell mum and dad when they get home.*" She thought she may have given the police her name but she was not sure. Notwithstanding the appellant's submission at AS [19], in light of her age and the nature of the complaints the lack of any police record was hardly surprising.

15. The last occasion on which she attempted to complain to police her mother and father arrived home so she hung up. The appellant then informed their parents she had called the police. Notwithstanding she explained to her parents she just wanted the boys to stop, her father yelled at her. It was the first time she had seen him "*really, really wild*" and she did not try to ring police again.[23]

Count 1 (indecent assault) - no complaint at that time

16. The CCA detail the relevant evidence at [83]-[86] of the judgment.[24] Whilst it was possible the appellant was as old as 12 years of age it was also reasonably possible he was as young as 10. The CCA therefore proceeded on that latter basis.[25]

17. After calling the complainant and her friend, FC, into the shearing shed, the complainant was told by Neil that "*we're going to have a root*" and that if she tried to fight, she would "*cop it*".[26] At this stage, only the appellant and Neil were in close proximity to the complainant. She described being dragged to the floor by her brothers. The acts of sexual abuse by her brothers then occurred until both ejaculated.[27] The complainant did not state she fought back and there was no evidence she yelled or otherwise resisted. She did not know what happened to FC.

18. There were two other people present in the shed when this occurred: Des and Peter Flavel. The complainant's evidence was that Neil told her that the Flavel brothers were "*going to have a go too*". The brothers however declined to do so.

19. Peter and Des Flavel gave evidence at the trial. Both recalled an incident in the shed. Des recalled climbing some wool bales and looking down to see the appellant laying across the top of the complainant, having intercourse. He said he "*looked straight down in her eyes and that's something I've never forgotten*".[28] He also saw Neil having intercourse with the complainant's friend, FC. Peter did not recall seeing any sexual activity but recalls his brother climbing some wool bales and then jumping down and saying '*let's get out of here*'.[29]

20. After the incident the complainant said to her friend FC '*it happens to me all the time and I can't stop them.*'[30] The complainant did not inform anyone else of this incident

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[21] T33 (AFM 107).
[22] T33 (AFM 107).
[23] T34 (AFM 108).
[24] *R v Johnson* [2015] SASCFC 170 (CAB 183)
[25] *R v Johnson* [2015][SASCFC 170 [75-82] (CAB 182-183)
[26] T36-37 (AFM 110-111), 43 (AFM 117).
[27] T43-44 (AFM 117-118).
[28] T165 (AFM 239).
[29] T187 (AFM 261).
[30] T118 (AFM 192).

immediately after it occurred although in 1987 she informed her then partner, Rodney Angel, about this incident.[31]

21. Apart from agreeing he was asked to lay on the complainant in the shearing shed by Des or Neil, the appellant's account bore little resemblance to the evidence of the complainant or Peter or Des. He denied he and Neil invited the complainant into the shed and he denied Neil sexually abused her. He further stated FC was not present[32] and he did not recall Peter being present either.[33] He stated Neil and Des wanted him to take off his clothes and lay on top of her but he refused and the complainant then started unbuttoning his shirt.[34] His evidence was to the effect he "*didn't want a bar*" of "*their game*", "*whatever it was*",[35] he was crying and eventually they lost interest in him.

Uncharged conduct between counts 1 and 2 and complaints

22. The shearing shed incident was the last time the complainant recalled Neil and the appellant abusing her at the same time.[36] After the shearing shed incident, the appellant would do things of a sexual nature to the complainant "*every week, sometimes every two weeks, but pretty regularly.*"[37] There was no greater specificity of this offending.

23. The complainant gave evidence that on one occasion when she was "*probably about 13*" she was late for her period. She went to her mother about it, her mother asked her whether she had ever "*been with anyone.*" The complainant replied "*No, only Ian.*" Her mother asked "*how far did he penetrate*" and she indicated to her mother about an inch.[38] Although not clear it appears on the same occasion the complainant also asked her mother whether it was possible for "*brothers and sisters to get pregnant[sic]*" and her mother told her she didn't know and she would have to ask her father. Her mother later returned with a hot water bottle and the complainant lay on her mother's bed for a while.[39]

24. The complainant also stated that while she was a teenager, she complained to her mother about the sexual abuse that the appellant perpetrated on her, on several occasions.[40]

25. She further gave evidence of an occasion which she thinks occurred when she was about 14 in which Neil demanded sex from her on the way home from a football match and when she refused he told her to leave the car. The complainant was therefore left to walk home after midnight and when confronted by her parents she informed them of what had occurred. Her mother told her father: "*..this has got to*

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[31] T117 (AFM, 191).
[32] T253 (AFM 327).
[33] T252 (AFM 326).
[34] T251 (AFM 325)
[35] T250 (AFM 324)
[36] T45 (AFM 119)
[37] T45 (AFM 119).
[38] T48 (AFM 122).
[39] T48 (AFM 122).
[40] T47-48 (AFM 121-122).

stop". She did not however know whether he spoke to her brothers and in any event "*nothing changed*".[41]

Count 2 (rape) -no complaint at that time

26. This offence occurred in late 1970 when the complainant was approximately 14 and a half years old and the appellant was 17. After attending a football match with the appellant, the complainant accompanied the appellant to the Lucindale Hotel, but the complainant was required to wait in the car. The appellant eventually returned to the car and drove away from the hotel. He pulled over to the side of the road and said "*give us a root*". The complainant tried to leave the car and was fighting with him. The appellant punched her to the head and slammed her head against a window. The appellant then removed the complainant's pants and "*completely*" inserted his penis into her vagina.[42] The appellant was particularly violent during the assault. She stopped struggling. This was the occasion the complainant considered she lost her virginity. Afterwards, the appellant drove back to the Lucindale Hotel and continued drinking with his friends. Notwithstanding she stated she was "*horrified*" at what had just happened, she waited in the car so that she could get a lift home with him and Neil.[43]

27. The complainant did not tell anyone about this incident.[44]

Count 3 (persistent sexual exploitation of a child) – no specific complaints at that time

28. This offence related to conduct between June 1971 and April 1973 when the complainant was aged 15 and 16 years old. During that period, the appellant would have penile vaginal sexual intercourse with the complainant "*every week or so*", "*generally*" in her bedroom.[45] The conduct was charged as one offence of persistent sexual exploitation, which was constituted of *"underlying acts of sexual exploitation"*.[46] The charge only related to acts committed over that 2 year period.

29. Whilst the complainant stated she complained to her mother when a teenager on several occasions, she stated she did not complain to anyone about these specific incidents at the time they occurred although she believed her father knew what was happening as he put locks on her door.[47]

Uncharged conduct between counts 3 and 4 and complaints

30. After April 1973, when the complainant was 17 years old the complainant moved out of the family home to live in a flat in Naracoorte.[48] The sexual assaults committed by the appellant against her only occurred a "*few times*" when she returned to the family

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[41] T58-59 (AFM 132-133).
[42] T49-53 (AFM 123-127).
[43] T54 (AFM 128)
[44] T57 (AFM 131).
[45] T57-60 (AFM 131-134).
[46] *Chiro v The Queen* (2017) 91 ALJR 974 at [19], [39]-[40], [42], [44], [51]-[52] (Kiefel CJ, Keane and Nettle JJ).
[47] T58 (AFM 132).
[48] T60 (AFM 134).

farm on the weekends.[49] When she was aged 18, she moved back onto the family farm. When she did, the sexual abuse "*continued to happen*", albeit "*not very often*".[50]

31. The complainant married when she was 20. She was with her husband until Christmas day 1980. The appellant continued to sexually assault her while she was married but not very regularly.[51]

32. When she was still married and after an occasion when the appellant had been violent to her, the complainant told her mother that she was going to make a complaint to the police. Her mother made her promise not to do that while she was still alive.[52] The complainant's mother died on 23 June 2010.[53]

33. Once the complainant's marriage ended, the appellant's sexual abuse of her became more frequent. She tried to have someone staying with her but the appellant would often turn up unannounced. It occurred '*probably every two or three months*'.[54] The abuse continued for "*probably another 3 years*" after her marriage ended.[55]

Count 4 (rape) - no complaint at that time

34. This offence occurred when the complainant was living at a house on Hynam Road in 1981-1982 with her two sons about 12 months after her husband left. The appellant entered the house and shut the door while the children were outside. The complainant screamed at him to get out. There was little said between them except for the appellant saying "*just give us a root*". The appellant forced her into the lounge room and raped her while her children were banging on the door calling for the complainant.[56]

35. There was no evidence that the complainant complained to anyone about this incident.

Count 5 (rape) - complaint made

36. This offence occurred around September or October of 1983. The appellant arrived at her house unannounced and let himself in through the back door. He dragged her just inside the lounge room and when she fought back he choked her and hit her to the head. Again very little was said between them.[57] He raped her and as he left said: "*I'm moving out to the farm. Any stock you've got out there, you better get rid of it because I'm going to sell them all.*"[58]

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[49] T60-61 (AFM 134-135).
[50] T63 (AFM 137).
[51] T64-65 (AFM 138-139).
[52] T65 (AFM 139).
[53] T23 (AFM 97).
[54] T66-67 (AFM 140-141).
[55] T67 (AFM 141).
[56] T67-68 (AFM 141-142).
[57] T71 (AFM 145).
[58] T71 (AFM 145).

37. The complainant did inform her father of this incident soon thereafter in the context of also complaining about the appellant's threats to sell all the stock.[59]

38. In 1987, Mr Angel, her then partner, recalled her telling him that the appellant had raped her at a time when the appellant was going to sell all the livestock.[60] This would therefore appear to be a reference to the incident in count 5. This statement by the complainant to Mr Angel predated many of the subsequent familial issues referred to by the appellant in the chronology.

Other evidence of violence by the appellant toward the complainant

39. The complainant's evidence was that over the course of her life the appellant had, from a young age, exerted a physical dominance over her. These acts of violence, occurred both in the course of the sexual offending and at other times.[61]

Part V: LEGISLATIVE PROVISIONS

40. S34P *Evidence Act 1929*

Part VI: RESPONDENT'S ARGUMENT

41. Whilst it is agreed simply directing the jury that such evidence is relevant to explain "the relationship" or to "put matters into context" without further explanation, may in some circumstances be insufficient, no such criticism can be levelled at the CCA for using this shorthand terminology. Insofar as it appears the appellant does so at AS [61 and 65], it is submitted the criticism is unwarranted.[62] The CCA also used that shorthand expression against a background of the specific uses of the evidence having been identified by the trial judge.[63]

42. The respondent will deal with the issues raised by the appellant as they appear to relate to the appeal grounds.

GROUND 2(a): Evidence led in relation to count 1 including the acts preceding count 1 was not properly admissible with respect to counts 2, 4 and 5

43. The respondent submits this ground appears to invite attention to 3 issues:

a) does the fact the appellant was doli incapax at the time of and before count 1, mean of itself or in combination with other factors, that there has been a miscarriage of justice because the jury heard that evidence;

b) is the evidence as to count 1 relevant to counts 2, 4 and 5 and the issues at the trial;

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[59] T72 (AFM 146).
[60] T176-177 (AFM 250-251)
[61] Eg T26 (AFM 100), T45 (AFM 119), T50 (AFM 124), T53 (AFM 127).
[62] See for example the use of this shorthand phrase in *BBH v The Queen* (2012) 245 CLR 499; Crennan and Kiefel JJ at [138]
[63] *R v Johnson* [2015] SASCFC 170 [31] (CAB 161)

c) if the evidence is relevant, does its probative value substantially outweigh its prejudicial effect such that the test prescribed by section 34P(2)(a) of the *Evidence Act 1929* is satisfied.

Re (a) the consequence of the appellant being doli incapax

44. That the appellant was acquitted of count 1 by the Court below says nothing about the admissibility of the evidence led in support of that count. Any attack on the admissibility of the evidence as a result of the acquittals must be considered in light of the reasons for that acquittal and the relevance of that evidence to the remaining issues in the trial.

45. As to count 1, the appellant was acquitted on the basis that the jury should have entertained a reasonable doubt that the appellant, possibly 10 years old at the time, understood that what he did was seriously wrong in the sense that it attracted criminal responsibility.[64] Peek J subsequently confirmed :

> The verdict on count 1 is set aside not, because the evidence of VW as to the facts occurring in the shed is suspect, but rather on the basis that the whole of the evidence could not rebut the presumption of *doli incapax*.[65]

46. The fact a defendant may not be criminally responsible for an act does not, of itself, rob evidence of that act of its relevance to subsequent acts. It will depend on the specific facts, the age of the defendant, the proximity in time to the subsequent acts and the manner in which it is said the evidence may be used by the jury.

47. In circumstances in which a defendant's sexual abuse of another began when he was under 14 and then continued after that age, the English Court of Appeal (Criminal Division) has determined the earlier acts when he was doli incapax are admissible to explain why the complainant behaved as she did at a later time and because to do otherwise would have left the jury to assess a wholly artificial account. [66] Whilst the court in both cases quashed the convictions as to the earlier counts because the direction as to doli incapax was insufficient, the court nonetheless determined no miscarriage of justice occurred as regards the remaining counts.

48. The Victorian Court of Appeal in *DPP v Peter Martin* (a pseudonym)[67]cited the aforementioned authorities with approval and accepted such evidence may be relevant and admissible.

49. To the extent the appellant asks at AS [60], whether the acts of the appellant prior to and at the time of count 1, could "seriously be considered" relevant to sexual interest given he was not found to know the acts were seriously wrong, the respondent notes such a use was not left to the jury and nor was this the basis upon which the evidence

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[64] *R v Johnson* [2015] SASCFC 170 [98], [99] (CAB 186).
[65] *R v Johnson* [2015] SASCFC 170 [121] (CAB 195).
[66] See *R v DM* [2016] EWCA Crim 674; *R v H* [2010] EWCA Crim 312; *DPP v Peter Martin* (a pseudonym) [2016] VSCA 219 [70]-[74] wherein the Victorian Court of Appeal cited the aforementioned authorities with approval.
[67] [2016] VSCA 219 [70]-[74]

was found to be admissible by the CCA.[68] The answer to the question posed by the appellant is therefore irrelevant.

50. Similarly when the appellant then asks whether evidence of conduct when doli incapax may assist in the proof of acts committed "decades later", the appellant ignores the fact the appellant continued to act in the same manner continuously over those decades and most significantly ignores that the same behavior continued unabated in the period between count 1 and count 2. The nexus between those two acts was important.

51. Whilst the relevance of the conduct must be assessed in light of the fact the appellant was doli incapax, that finding does not preclude the evidence being relevant or admissible. For the reasons that follow it is submitted the impugned evidence was highly relevant.

Re (b) and (c) is the evidence relevant and does it satisfy the test of admissibility in s34P

52. *Wigmore on Evidence* (3rd edition) states the two axioms of admissibility as:

    a) none but facts having rational probative value are admissible; and

    b) all facts having rational probative value are admissible, unless some specific rule forbids it.

53. As to the first, the text continues:

> *".....It prescribes merely that whatever is presented as evidence shall be presented on the hypothesis that it is calculated, according to the prevailing standards of reasoning, to effect rational persuasion".*

54. Evidence will have "*rational probative value*" when, if accepted, it "*could rationally affect the assessment by the jury of the probability of the existence of a fact in issue*".[69] Therefore if it assists in the evaluation of other evidence it is relevant.

55. In South Australia, the admissibility of such evidence falls to be determined by satisfaction of the conditions prescribed in section 34P of the *Evidence Act 1929* (SA). The evidence could only be admitted pursuant to s34P(2)(a) if the court was satisfied that the "*probative value of the evidence admitted for a permissible use substantially outweighs any prejudicial effect it may have on the defendant*".

56. The uncharged acts prior to count 1 were left to the jury as relevant to the question of doli incapax and as evidence to assist the jury to understand and explain her behavior

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[68] The respondent notes the appellant may rely on comments of Peek J at [20] of the judgement (CAB 156) wherein his Honour states cross-admissibility may be found on the basis of relationship or sexual attraction. It is however necessary to note that firstly his Honour was dealing with grounds 1 and 2 of that appeal which compendiously alleged that none of the counts were cross-admissible.(ie there should have been separate trials for each of the 5 counts. This comment was therefore relevant to issues beyond those raised by count 1. And further, read in context, his Honour's comments are clearly general in nature in that his Honour is indicating the two bases upon which the evidence may be cross-admissible, in a case involving one complainant and a continuous course of conduct.

[69] *Roach v The Queen* (2011) 242 CLR 610 at [12] per French CJ, Hayne, Crennan and Kiefel JJ; *Phillips v The Queen* (2006) 225 CLR 303 at [50] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ.

and the appellant's behaviour and to enable the jury to understand that count 1 did not occur "out of the blue". (the "relationship evidence")

57. As previously stated, the learned trial judge directed the jury to consider whether the earliest of those incidents (the bath incident) could seriously be regarded as evidence of sexual misconduct.[70] That it remained part of the complaint's memory of her treatment by the appellant and her mother's treatment of her, meant however that it continued to be relevant to her account of the dynamics of her relationship with the appellant and her mother, why she behaved as she did at other times and as part of the narrative leading to count 1 and beyond. The length of time over which a person's will is subjugated may well provide an explanation for their subsequent behavior.

58. It is therefore necessary to consider first whether the evidence as to count 1 was admissible. If it is not, the evidence of the acts preceding would also be inadmissible.

59. The individual charged acts did not occur in a vacuum. The surrounding circumstances were important to make the evidence complete.[71] If the appellant's argument is accepted, the evidence of the violence, the sexual abuse and her attempts to engage her parents in her protection since a young child should not have been before the jury. That evidence was however vital to the jury's assessment of the complainant's evidence as it related to count 2 (and indeed counts 3, 4 and 5).

60. It would have been unfair to the complainant,[72] misleading to the jury[73] and completely artificial[74] if evidence of the conduct giving rise to count 2 was given as though it were the first occasion of misconduct of a violent and sexual nature. If the evidence was given in that way, the jury would have had difficulties in understanding, assessing and accepting what she said for a number of reasons.

61. First, that such an act was committed by a brother against his sister. That behavior does not conform with societal norms. This Court has recognised that "*jurors are likely to assess competing versions of events or conduct by reference to their ideas of normal or predictable behavior.*"[75] That is particularly so, when, as in this case, the jury are directed that they should use their life experiences and act as "*commonsense responsible people*" when assessing the evidence.[76] In the absence of the evidence of the prior relationship — including that his behavior had been learnt from his older brother — the jury might have concluded that her evidence was implausible.[77]

62. Second, the jury would have found it difficult to understand why count 2 occurred "out of the blue" and that she did not complain to anyone about it. However, the fact that she did not complain made perfect sense in the circumstances of this case

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[70] SU 41 (CAB 71) and SU 54 (CAB 54).There was also no application prior to the trial starting to exclude the prior uncharged acts if the court rejected the application to order a separate trial for count 1.
[71] *Martin v Osbourne* (1936) 55 CLR 367 at 375, 385.
[72] *HML v The Queen* (2008) 235 CLR 334 [6] per Gleeson CJ.
[73] *HML v The Queen* (2008) 235 CLR 334 [6] per Gleeson CJ.
[74] *BBH v The Queen* (2012) 245 CLR 499 [74] (Hayne J,Gummow J agreeing)
[75] *HML v The Queen* (2008) 235 CLR 334 [6] per Gleeson CJ.
[76] SU29 (CAB 29).
[77] See eg *HML v The Queen* (2008) 235 CLR 334 [9] per Gleeson CJ.

because, firstly, this did not occur out of the blue and secondly, when she had previously complained, she either got into trouble, or no action was taken.

63. The appellant asserts that this was not a case where the evidence was important to explain why the complainant did not make contemporaneous complaints, because the complainant made multiple complaints (AS[66]). However, the overwhelming majority of those complaints were made prior to count 2 and the overwhelming majority of the complaints related to acts not the subject of a charge. On the appellant's argument, such complaints would not have been in evidence. The evidence of offending would have begun with count 2, about which the complainant positively stated she did not complain to anyone.[78]

64. Third, the jury would have naturally thought it was very odd that after the commission of count 2, the complainant returned to the hotel with the appellant and waited for him to give her a lift home. The jury might have expected that she would have run away if this conduct in fact had occurred "out of the blue". The evidence of the prior relationship was important to explain this oddity and in particular why she was not overly surprised when this conduct happened or that she was willing to wait for him to finish drinking at the hotel so she could get a lift home with him. The appellant's suggestion at AS [70] that the "out of the blue" consideration only arises when there is a single charge is, with respect, wrong. It arises whenever the circumstances of a charged offence may be explained by previous acts.

65. Fourth, the jury might have doubted that the appellant would just leave her in the car outside the hotel or that he would have returned to the hotel and continued drinking with his friends after he had just violently raped the complainant for the first time. The history of their relationship however explains why he would not have considered this a risk and why he had the confidence to act in this way.

66. If the appellant's response to this submission is that the complainant could still have given the evidence that she was sexually abused in the years between count 1 and count 2 referred to at RS [22], the respondent notes this evidence was very general in nature. In light of the appellant's submission that evidence which is too general should also not be admitted (appellant's submissions as to count 3), such a submission would be inconsistent with the argument on that ground. But even if this general evidence was admitted, would the evidence be limited to only acts committed after he turned 15? And in any event, the jury would fairly ask themselves why the complainant purported not to recall any individual incident prior to the act in count 2 and why did she not complain after the first time she was molested by her brother in the time leading up to count 2. And if some evidence of her complaints to her mother in this period was permitted what would the jury have made of her evidence that her mother simply did nothing or gave her a hot water bottle? The appellant's position creates a wholly artificial account of the events.

67. The ability of the evidence to meet the questions which may have arisen in the minds of the jury about the incidents charged had she not been permitted to recount the history of the relationship and events occurring within it, is therefore important.[79] To complete this part of the respondent's argument it is submitted this Court may

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[78] T57 (AFM 131)

[79] *BBH v The Queen* (2012) 245 CLR 499; per Crennan and Kiefel JJ at [149].

consider it useful to have regard to the cross-examination of the complainant and the matters put to the jury by the appellant which were said to undermine her credibility and reliability. The appellant's preparedness to make the following submissions when all of the evidence was before the Court provides an insight into what could have been put to the jury if the evidence of acts preceding count 1, the evidence relating to count 1 and the evidence relating to count 3 was not before the jury;

a) the complainant agreed in relation to count 2 that there were lots of people in town and near the pub at the time of the football match in 1970. [80] In his address the appellant asked the jury to consider why he would rape the complainant and leave her in the car when there was a risk of "*one of her friends coming out*" and a risk of "*seeing her there all emotional and getting out of her what had just happened*".[81] By the time of count 2 however the appellant had been sexually abusing the complainant for a number of years and although she had complained to her mother and father the appellant had every reason to believe she would not complain to any of her friends given she had not done so in the previous 5-8 years;

b) in cross-examination it was put to the complainant that it was "*patently ridiculous*" that her brothers would sexually abuse her in front of her friend and the Flavels.[82] In his address the same proposition was put to the jury as to the incident occurring at all.[83] Whilst their young age would be relevant to a willingness to take risks, the fact the jury were aware this incident had not "come out of the blue" and that the appellant and his brother knew that there had been no consequences for their previous acts, the evidence of what preceded count 1 explained why both may have had the confidence to act in this way in front of other people;

c) in relation to count 3 the appellant was critical of the complainant for the fact that she was not able to give any specifics in relation to that 2 year period. The complete account of his behavior up to that point in time however explained why the length of the period over which she had been subjected to abuse and the number of occasions on which it had occurred meant she may be unable to be more specific as to individual acts of abuse;[84]and

d) it was further suggested to the jury in the appellant's address that the complainant's evidence that both her mother and father knew about the offending and did nothing was "*the most ridiculous of all*".[85] If the complainant's evidence had been restricted in the manner now suggested by the appellant such a suggestion may have found favour with the jury. The completeness of her account however and the number of times on which she brought matters to the attention of another, the responses recounted by the

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[80] T152 (AFM 226).
[81] T364 (AFM 438).
[82] T110 (AFM 184)
[83] T366 (AFM 440).
[84] T365 (AFM 439) in relation to the appellant's address and T344 (AFM 418) in relation to the prosecution address.
[85] T367 (AFM 441).

complainant and the details of their specific conversations allowed the jury the opportunity to properly consider and assess that criticism.

68. So, contrary to the submissions made by the appellant at AS [65]-[70], the evidence was of significant probative value. But that is not the end of the enquiry as to the admissibility of the evidence. Section 34P(2)(a) of the *Evidence Act* requires that the probative value must substantially outweigh any prejudicial effect it has on the defendant.

69. The respondent accepts that prejudice to an appellant may arise in different ways. If one act is likely to engender strong feelings of disapprobation such that it would be given undue weight when considering other more benign offending then the probative value of that evidence may need to be higher to "substantially outweigh" the prejudice. If some acts are simply more serious than other acts, the nature of the prejudice may require the appropriate value to be greater. However the submission of the appellant at AS [71] that the younger age of the complainant may have evoked sympathy from the jury is, with respect, difficult to rationalise. In any event the nature of the offending against the complainant in this matter was of a very similar nature throughout. It could not be said that one offence in particular would have resulted in the jury being unwilling or unable to follow the directions they were given.

70. In this case, the real prejudicial effect that had to be guarded against was the risk the jury might misuse the evidence for an impermissible propensity purpose. That is to say, the jury would have reasoned that because the appellant engaged in violent or sexual misconduct on one occasion, he was more likely to have engaged in similar conduct on another occasion. That risk was identified at the trial, and the judge repeatedly warned the jury not to reason in such a manner.[86]

71. The jury were also directed, on a number of occasions, that they must consider each count separately and only by reference to the evidence relating to that count.[87] This Court has recognised that separate consideration directions may safeguard against the risk that a jury will engage in propensity reasoning.[88]

72. For the reasons previously given, the appellant's submission at AS [71] that this evidence only had "marginal (if any) probative value" is wrong. This evidence had significant probative value, the directions were sufficient to guard against the prejudice and the value of the evidence substantially outweighed the prejudice. The evidence was therefore admissible pursuant to s 34P of the *EA*.

73. Lastly, insofar as the appellant alleges that the question of admissibility was determined by reference to something other than section 34P, that is not the case. In the course of discussing how such evidence may be cross-admissible, Peek J refers to a number of authorities. The principles that are enunciated in those cases apply to the statutory regime under section 34P.In particular, Peek J referred to *Maiolo (No 2)*,[89]

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[86] SU 8(CAB 38),SU36 (CAB 66), SU54-55 (CAB 84-85) SU57 (CAB 87)
[87] SU 8 (CAB 38) SU 36 (CAB 66) SU 37 (CAB 67)
[88] *KRM v The Queen* (2001) 206 CLR 221 [36] per McHugh J and [133] per Hayne J. Also see SU 36 (CAB 66) at which point the trial judge also links the two concepts.
[89] (2013) 117 SASR 1 [50].

itself a case about section 34P. No error on the part of the reasoning of the Court below has been established.

GROUND 2(b)(i): If, alternatively, the evidence is admissible as "evidence of uncharged acts" this was not the basis on which the evidence was left to the jury.

74. The appellant's argument is that, even if the evidence of count 1 was admissible the fact it was led as a charged act and not an uncharged act has resulted in a miscarriage of justice because of the directions. That submission is misconceived. The appellant was properly charged with count 1, convicted by the jury, and subsequently acquitted by the Court of Criminal Appeal. It is not the case that if a person is acquitted of a charge, that they should have never been charged with it. For this reason alone the ground should be dismissed.

75. Whilst the respondent submits it is therefore neither helpful nor necessary to re-characterise the evidence as "uncharged", insofar as this ground invites attention to the directions to the jury it is submitted the sole question for this court is whether there is a risk that the jury reasoned improperly as to this evidence or misused it in some way as a result of the directions.

76. The directions to the jury in relation to uncharged acts are to be found at [30]-[31] of the judgment of the Court below.[90] The jury were told to consider the counts separately on numerous occasions.[91] The directions as to both the permissible and impermissible uses were clear. The judge did not direct simply in terms of "relationship" or "context". The specific uses were identified; to show the first incident charged did not come out of the blue, to explain why the appellant may have had the confidence to perform the offences charged, and as a result of the ongoing nature of the offending to explain why the complainant did not complain about the alleged sexual misconduct until much later. It was also stressed that the jury could only use such evidence to explain charged acts which were subsequent in time.[92]

77. The jury were also directed in relation to both charged and uncharged acts that the jury had to be satisfied beyond reasonable doubt that the act occurred before it could be used against the accused.[93] And similarly, the judge directed the jury in relation to both charged and uncharged acts that if they did not accept the truth of the complainant's evidence as to one act then they may take that into account when assessing her credibility and reliability as a witness in respect of the charged acts.[94]

78. For reasons already expressed, the evidence of count 1 and the acts preceding it were admissible for the purposes identified by the judge.

79. It is therefore, with respect, difficult to identify the miscarriage relied upon by the appellant pursuant to this ground.

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[90] CAB 160-161
[91] SU 8 (CAB 38) SU 36 (CAB 66) SU 37 (CAB 67)
[92] SU 56 and 57 (CAB 86 and 87).
[93] SU 57-58 (CAB 87-88).
[94] SU 36 (CAB 66), SU 58 (CAB 88)

GROUND 2(b)(ii) and (iii): If the evidence was admissible a miscarriage of justice has occurred as a result of the evidence being given "a status or effect" it did not deserve and because the jury's verdict involved a rejection of the appellant's sworn account.

80. The first assumption of the appellant is that some unfairness has been occasioned to the appellant because the appellant determined to give evidence when faced with 5 counts when ultimately the CCA determined that he should have been acquitted of counts 1 and 3. The reasoning of the appellant also appears to assume the acquittal means the defendant should never have been charged with it.

81. These assumptions are misplaced for a number of reasons. Firstly, it is not the case that if a person is acquitted of a charge, that they should have never been charged with it.[95]

82. Secondly, the CCA relied on the evidence of the appellant when considering whether the 'whole of the evidence" rebutted the presumption.[96] The assumption that the appellant should never have been charged with the offence of which he was convicted fails to have regard to that fact.

83. Thirdly, there is no reason to assume the appellant's decision to give evidence would have been different if count 1 was not a charged offence. The evidence of the complainant on count 1 was corroborated by independent witnesses. Its relevance to the complainant's reliability and credibility remained an issue for the appellant and was therefore a significant aspect of the case against him.

84. Fourthly, it is correct that the jury must have rejected his evidence on those counts but no unfairness arises from that fact. Insofar as it is implied that the appellant may not have given evidence if he faced 3 charges instead of 5, this would simply have resulted in the jury not having his evidence to consider when determining whether the charges were proved beyond reasonable doubt. The appellant in effect invites this Court to find there has been a miscarriage of justice because the jury may have reasoned differently if he did not give evidence.

85. In any even the rejection of his evidence was not a basis upon which he could be convicted. The jury still had to consider whether they accepted the complainant's evidence as credible and reliable beyond reasonable doubt. The trial judge directed the jury to this effect.[97] In circumstances in which the main issue was whether the acts occurred as described by the complainant, the rejection of his evidence left the appellant in the same position as if he had given no evidence. No miscarriage of justice has been occasioned.

86. The appellant further submits at AS [51] that he was "entitled to a trial at which the jury did not proceed on [the] wrong basis" that the appellant knew his actions were

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[95] *Chiro v The Queen* (2017) 92 ALJR 974 [100] per Edelman J.

[96] *R v Johnson* [2015] SASCFC 170 , [99] CAB 186

[97] SU 32-33 (CAB 62-63): "*As Mr Phillips said to you yesterday if you decided not to accept his evidence in some respects or even at all it does not follow that you must find him guilty of the charge you are then considering. He does not have to prove anything. It is for the prosecution to prove a charge beyond a reasonable doubt. But again, when you come to consider whether the prosecution has proved a charge against him beyond reasonable doubt, you must take into account and weigh up his evidence as you would with any other witness.*"

seriously wrong. The respondent however submits that the appellant must in fact show that there is a risk that such a finding has impermissibly impacted upon or "contaminated' their deliberations on counts 2, 4 and 5.

87. The respondent submits this ground of appeal in effect only raises the following matter for this Court's consideration; in light of the fact the jury were satisfied that conduct the subject of count 1 occurred, is there a risk the jury were impermissibly influenced in their deliberations on counts 2, 4 and 5 by their additional but erroneous finding, that the appellant knew that conduct was "seriously wrong"[98]?

88. It is submitted the answer to the above question must be "no". Whether the appellant knew it was wrong or not, did not undermine the jury finding that the acts occurred. This is consistent with the reasoning of the CCA at [120][99]. Whether the appellant knew it was wrong or not, the commission of the acts the subject of count 1 showed that the subsequent offending did not come "out of the blue" and did not change the fact such conduct may have affected the complainant's subsequent behaviour. Its ability to explain her behavior was not undermined by a finding he did not know it was seriously wrong. Similarly, given the proximity in time between count 1 and the subsequent sexual abuse and the similar nature of the ongoing acts – the commission of those acts assisted to explain why the appellant may have acted as he did. The jury were therefore able to continue to use the evidence for the purposes described by the trial judge. The reasoning of the CCA at [121][100] was therefore correct

89. There is no risk the jury were improperly influenced in their deliberations as to counts 2, 4 and 5 by their finding that the appellant did know his actions as to count 1 were seriously wrong.

GROUND 3(a): The evidence led in relation to count 3 being so generalised as to be incapable of permitting a finding of guilt, was inadmissible with respect to counts 2, 4 and 5

90. The Court below acquitted the appellant of count 3 because the verdict on that count was perceived to be "*unreasonable*" because it was "*impossible*" for the jury to have agreed that "*the same pair of offences had been proved*". That impossibility was said to result from the fact that, on the evidence, the jury could not "*delineate any such pair of offences*".[101]

91. Whilst not determinative of this ground the respondent notes that in *R v Hamra*[102] this Court unanimously held that the statements made by the Court of Criminal Appeal in this case to the effect an accused person could not be convicted if the "*evidence did not identify two particular acts of sexual exploitation which could be delineated from many other acts of sexual exploitation by reference to particular*

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[98] *R v Johnson* [2015] SASCFC 170 [91] (CAB 185); *RP v The Queen* (2016) 259 CLR 641.
[99] CAB 195- In dismissing the appeal as it related to counts 2, 4 and 4, Peek J took into account that acquittals were being entered in respect of counts 1 and 3. At [120] His Honour said: *I also have regard to the fact that the verdicts on counts 1 and 3 are being set aside with judgment of acquittal being entered. However, as appears above, those acquittals are in no way inconsistent with the appeal being dismissed on counts 2, 4 and 5.*
[100] CAB 195
[101] *R v Johnson* [2015] SASCFC 170 [114-115] (CAB 193-194).
[102] *Hamra v The Queen* (2017) 34 ALR 586

circumstances",[103] are incorrect. This Court determined that s50 of the *CLCA* requires a jury to find the same two or more acts committed over three or more days, *"it does not require the occasions of those acts to be particularised other than as to the period of the acts and the conduct constituting the acts"*.[104] Importantly, the evidence relied upon on a charge under s50 need not allow acts of sexual exploitation *"to be delineated by reference to differentiating circumstances"*.[105]

92. Whether the Court below was correct to quash the conviction on count 3 is not however a matter which arises on this appeal. The respondent agrees the evidence was of a general character. It is outlined at RS [28]. The point remains however that "generalised' evidence may in some circumstances be sufficient to prove the offence. The fact it lacks specificity may reduce its probative value but that cannot simply be assumed. It will depend on the circumstances. It cannot be, for instance, that evidence of sustained and continued offending to the point a victim cannot differentiate offences must result in the evidence being excluded.

93. The test for admissibility has already been outlined under the previous ground of appeal. The respondent notes that the evidence of the complainant as to the offending of the appellant during the 2 year period covered by count 3 and the subsequent period of offending between count 3 and 4 was all of a general nature. If evidence of count 3 is inadmissible it must follow that the evidence of the uncharged acts between count 3 and count 4 is also inadmissible. If all this evidence was inadmissible the complainant's evidence would have been to the effect she was raped in 1970 (count 2) when she was 14 years old and then the next offence occurred without warning in 1981-82, (count 4) some 11 years later and she again did not complain to anyone. It is submitted this evidence was therefore admissible for the same reasons articulated under that ground and it was significantly probative in light of the issues at the trial.

94. The generality of the evidence as to count 3 and the acts which occurred afterwards does not reduce the ability of that evidence to explain why the appellant was confident that he could commit the offences particularised in count 4 or 5. More importantly however the generality also did not reduce the ability of that evidence to explain why the complainant was not surprised when he arrived, why she immediately knew what was about to occur, why she screamed at him to get out before he had attacked her and why she did not complain to anyone after the offence. Its probative value therefore significantly outweighed it prejudicial effect.[106]

95. To the extent the appellant appears to suggest the fact the evidence was uncorroborated is a relevant consideration as to admissibility in this case, the

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[103] *Hamra v The Queen* (2017) 34 ALR 586 at [46]
[104] *Hamra v The Queen* (2017) 34 ALR 586 at [27] (the Court)
[105] *Hamra v The Queen* (2017) 34 ALR 586 at [45-46] (the Court).
[106] Although the respondent acknowledges the issues in *Castle v R*; *Bucca v R* (2016) 259 CLR 449 ,[76-78] as regards the evidence of the appellant's previous possession of handguns is very different to the present case, the respondent notes the decision provides a helpful insight into the nature of the balancing exercise and an implicit acceptance of the jury's ability to not reason impermissibyl. Evidence from a witness that the defendant was in possession of three handguns some 7 to 8 months before the shooting, 2 of which "might" have been used to commit the offence had a probative value which substantially outweighed any prejudicial effect. It is submitted this decision and the line of authority which supported it, acknowledges that a jury will use the evidence in the manner in which they are directed.

respondent respectfully disagrees. The quote of the plurality relied upon by the appellant at AS [72] was directed at the capacity of evidence of a complainant as to an uncharged act to be significantly probative of whether the appellant had a sexual interest in her (a tendency use). In the present case, the evidence was not said to be relevant for such a purpose. The decision of this Court in *IMM v The Queen* does not assist the appellant. The evidence was admissible.

GROUND 3(b)(i): If, alternatively, the evidence is admissible as "evidence of uncharged acts" this was not the basis on which the evidence was left to the jury

96. The respondent relies on the submissions made at [74-79] of these submissions. The same reasoning applies.

GROUND 3(b)(ii): If the evidence was admissible a miscarriage of justice has occurred because the jury's verdict on Count 3 involved a rejection of the appellant's sworn account

97. The respondent relies on the submissions made at [80-85] of these submissions.

98. As previously submitted the respondent submits the question posed by this ground is effectively: did the subsequent quashing of the conviction on count 3 for reasons unrelated to the credibility or reliability of the complainant nonetheless mean there was a risk that the jury used their finding that such acts occurred to reason in an impermissible manner when considering their verdicts on the other counts?

99. The respondent submits there was no such risk. The separate counts direction and the warning against impermissible reasoning told against the existence of such a risk.

Conclusion and orders sought

100. The appellant's grounds of appeal are not made out. The appeal should be dismissed.

Part VII: TIME ESTIMATE

101. The respondent estimates that 1 hour will be required for its oral argument.

Dated: 4 May 2018

I D Press SC
Telephone: 08 8207 1529
Facsimile: 08 8207 1799
Email: ian.press@sa.gov.au

B Lodge
Telephone: 08 8207 1529
Facsimile: 08 8207 1799
Email: ben.lodge2@sa.gov.au