IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A14 of 2017

BETWEEN:



STEPHEN JOHN HAMRA
Appellant

and

THE QUEEN
Respondent

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# APPELLANT'S WRITTEN SUBMISSIONS

## I PUBLICATION

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

## II CONCISE STATEMENT OF ISSUES PRESENTED BY THE APPEAL

2. Having regard to the generalised nature of the complainant's allegations, did the CCA err by overturning the trial judge's decision that there was no case to answer because the evidence was incapable of proving beyond reasonable doubt two or more "sexual offences" separated by the requisite period within the meaning of s 50 of the *Criminal Law Consolidation Act* 1935 (SA) (**CLCA**)?

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3. Did the CCA err by failing to address whether permission to appeal should be granted to the Director of Public Prosecutions having regard, inter alia, to considerations relating to double jeopardy?

## III SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)

4. Notice pursuant to s 78B of the *Judiciary Act* 1903 (Cth) is not required.

## IV CITATION

5. *R v Hamra* (2016) 126 SASR 374 (**CCA**).

## V NARRATIVE STATEMENT OF FACTS FOUND OR ADMITTED

### Overview of decisional history

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6. The applicant was charged with persistent sexual exploitation of the complainant B, contrary to s 50 of the CLCA. He elected for a trial by judge alone. The trial judge found there was no case to answer because of the generalised nature of B's allegations and directed a verdict of acquittal: *R v Hamra (No. 2)* [2016] SADC 8 (**TJ**). The DPP sought permission to appeal pursuant to s 352(1)(ab)(i) of the CLCA.

7. Kourakis CJ (Kelly, Nicholson and Lovell JJ agreeing) considered that despite the generalised nature of the assertions, there was a case to answer. He considered the acquittal should be quashed, and considered that the Court lacked power to remit the matter to the trial judge (CCA [62]). A re-trial was ordered. The question of

Woods & Co Lawyers
11-13 Bentham Street
ADELAIDE SA 5000

Telephone: (08) 8311 3111
Fax: (08) 8231 2360
Email: lawyers@woodslaw.com.au

permission to appeal was not addressed, albeit the formal orders of the Court appear to reflect that permission was granted.

8. By contrast, Peek J considered that there was power to remit the matter to the trial judge. It was on that basis, and recognising that a fresh trial would deprive the applicant of the judgment of the trial judge on the case as a whole and place him in jeopardy a second time, that he was prepared to grant permission to appeal (CCA [131]-[133]).

**The alleged offending**

9. The Information was in these terms.

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Statement of Offence

Persistent Sexual Exploitation of a Child. (Section 50(1) of the [CLCA]).

Particulars of Offence

[The applicant] between the 30th day of October 1977 and the 1st day of November 1982 at Morphett Vale, and another place, committed more than one act of sexual exploitation of B a child under the prescribed age.

It is further alleged that the acts of sexual exploitation performed by [the applicant] upon B were, touching B's genitals, placing his penis between B's bottom, causing B to touch his penis and performing fellatio upon B.

10. The significance of 1 November 1982 was that it was the date B turned 17 (the
20 prescribed age). As to the commencement date, as the trial judge found, because the evidence was that the applicant came to know the complainant and his family in his capacity as a qualified teacher, and because the applicant only completed his Diploma of Teaching in 1978, it was clear that no offending could have taken place as early as was alleged in the Information (TJ [17]).

11. The complainant was unable to give evidence about specific occasions he recalled (CCA [4]). However, the broad circumstances surrounding the alleged conduct were that the applicant commenced tutoring B's sibling S and became a close friend of the family, such that he often dined at the family home in the southern suburbs of Adelaide and on occasions slept in a sleeping bag in the lounge room or bedroom
30 where B slept with his brothers (TJ [7]).

12. The alleged abuse was said to have occurred in B's bedroom (there was reference to two different bedrooms) at night and it was also alleged to have occurred in the applicant's parents' home (TJ [8]). There were inconsistencies between the mother's evidence regarding the bedrooms in which B slept, which the judge said "certainly would be [relevant] if the submission progressed to one of the lack of proof beyond reasonable doubt" (TJ [12]). Neither of B's two brothers was called (TJ [12]).

13. The nature of B's evidence is set out in the trial judge's reasons (TJ [14]-[16]). As the judge observed, B frankly conceded a number of times that his recollection had

varied and that "it's a long time ago and the time frames aren't 100 per cent accurate" (TJ [17]).

14. At the conclusion of the prosecution case, the applicant made a no case submission. The applicant's counsel indicated prior to advancing the no case submission that the applicant would not be giving or calling evidence, that she stood ready to address on the ultimate verdict, and that she was in the hands of the Court as to how to proceed.

15. The trial judge decided to consider and reserve his decision on the no case submission before proceeding further, and because he ruled there was no case to answer, it was not necessary to consider the matter more generally.

16. In his reasons for verdict he noted that in *R v Little*[1], the CCA constituted by five Justices had observed that s 50 raised the same issue as to its constituent elements and the extent of the requirement of unanimity in a jury trial as the provision considered in *KBT v The Queen*[2] (TJ [19]).

17. He also noted that in *R v Johnson*[3], the CCA allowed an appeal against conviction pursuant to s 50 following a trial before a jury because in the way in which the complainant had given evidence there was nothing to sufficiently differentiate one occasion of abuse from another (TJ [22]).

18. The trial judge also had regard (at TJ [24]-[25]) to the observations of McHugh J in *KRM v The Queen*[4] and the Court of Appeal in *R v SLJ*[5] in respect of s 47A(2)(b) of the *Crimes Act* 1958 (Vic).

19. The trial judge concluded (at TJ [27]):

> The evidence of B quoted or extracted above taken at its highest, demonstrates the highly generalised nature of the allegations and that he was quite non-specific as to times and dates, to the point that he was in no position to be in any certainty as to what age he was, what grade of (or which) school he was in, what bedroom he was in or whether his grandmother remained in the family home at relevant times. Furthermore, he was singularly unable to relate or reference any particular incident to any particular occasion, circumstance or event, beyond 'what typically or routinely or generally occurred', to the point that it is simply impossible to identify two or more of the requisite acts. In those circumstances on the basis of the most favourable case for the prosecution, the evidence was incapable of supporting a conclusion of proof beyond reasonable doubt: *R v Bilick & Starke* (1984) 36 SASR 321 at 327.

20. In these circumstances, the learned trial judge determined there was no case to answer and he directed a verdict of not guilty accordingly (TJ [28]).

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1 (2015) 123 SASR 414; [2015] SASCFC 118 (***Little***).

2 (1997) 191 CLR 417 (***KBT***).

3 [2015] SASCFC 170 (***Johnson***).

4 (2001) 206 CLR 221 (***KRM***).

5 (2010) 24 VR 372 (***SLJ***) at [16]-[17].

**The application for permission to appeal and the appeal**

21. The facility for the DPP to seek permission to appeal against an acquittal by judge alone was introduced in 2000[6], but only in respect of offending allegedly committed subsequently thereto. In 2008[7], the relevant provision was essentially re-enacted, extending its coverage to a directed jury verdict, but without an equivalent transitional provision[8]. The DPP sought permission to appeal against the acquittal, relying on that provision: s 352(1)(ab) of the CLCA.

22. The CCA comprised five members because a challenge to the correctness of *Johnson* was foreshadowed by the Crown.

23. On the question of whether there was a case to answer, the essential conclusion of Kourakis CJ (Kelly, Nicholson and Lovell JJ agreeing) (CCA [43]), was that:

> neither the elements of the offence or its particularisation, nor any implication of the extended unanimity direction require the occasion on which each act of sexual exploitation was committed to be identified in a way which distinguishes it from other acts of sexual exploitation.

24. He concluded that the trial judge erred in law in directing himself that the evidence was not capable of making out the elements of the offence contrary to s 50 (CCA [53]). As noted earlier, the question of permission to appeal was not addressed, other than by Peek J, who granted permission only on the basis, not accepted by the other four members, that the matter could be remitted to the trial judge (CCA [132-]-[133]).

## VI SUCCINCT STATEMENT OF THE APPELLANT'S ARGUMENT

**Overview**

25. The appellant's essential submissions are as follows.

No case to answer (first ground)

(1) The starting point is a consideration of the *actus reus* of s 50. Having regard to the text of the section, relevant authority, and contextual and policy considerations, s 50 comprises a composite offence which requires proof of two or more distinct constituent offences separated by three or more days. This precludes a finding of guilt where the evidence does not permit a finding of distinct constituent offences in respect of which the ingredients of those distinct offences are proved beyond reasonable doubt.

(2) The question (which should be answered in the negative) is therefore whether any aspect of s 50 expressly or by necessary intendment abrogates the fundamental requirements of proof of distinct offences. The CCA erred by

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6 *Criminal Law Consolidation (Appeals) Amendment Act* 2000 (SA).

7 *Criminal Law Consolidation (Double Jeopardy) Amendment Act* 2008 (SA).

8 It was unsuccessfully argued that, properly, construed permission to appeal remained available only in respect of offending allegedly committed after 2000: CCA [29].

proceeding upon an assumption as to the mischief of the section and concluding that there was no sufficient basis to conclude proof of distinct offences was required, thus inverting the required analysis (CCA [42]-[43]).

(3) The trial judge was correct to find that the evidence was too generalised to permit a finding beyond reasonable doubt that sexual offences were committed on distinct occasions, separated by three days or more, whilst B was still under the age of 17.

Permission to appeal (second ground)

(4) Further, and in any event, the failure explicitly to address the question of permission to appeal was an error of law and in the circumstances of this case permission should not have been granted.

**First ground of appeal: no case to answer**

***The actus reus required to prove the composite offence***

26. Textual analysis

(1) Section 50 is titled "persistent sexual exploitation of a child", however, a textual analysis of the provision demonstrates that what is required for proof of the offence is the commission of specific "sexual offences".

(2) Section 50(1) requires proof of more than one "act of sexual exploitation" of a particular child separated by 3 days or more, and an "act of sexual exploitation" is defined by s 50(2) as an act which could, if it were able to be properly particularised, be the subject of a charge of a "sexual offence".

(3) That expression ("sexual offence") is in turn defined in s 50(7) by reference to identified offences set out in Division 11 of the CLCA, attempts or assaults with intent to commit those offences, and any "substantially similar offence against a previous enactment".

(4) It follows that, in relation to historical conduct, it would be necessary to identify the elements of any substantially similar previous offence in existence at the time of the alleged conduct. There is therefore a need to relate an offence to the law in operation at the time of the offence.

(5) The elements of s 50 are acts which are themselves sexual offences[9]. Those sexual offences contain their own elements (and may attract distinct offences).

(6) Proof of the commission of an offence against s 50 necessarily involves proving at least two constituent sexual offences.

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9 The definition of an offence determines its elements: *Pickering v The Queen* [2017] HCA 17 at [25] (Kiefel CJ and Nettle J).

(7) Proof of the constituent sexual offences necessarily involves proving the elements of those offences. Proof of the elements of those offences necessarily involves the adducing of evidence which has the capacity to prove beyond reasonable doubt that there was an actual occasion on which each element of the sexual offence in question occurred. In order to identify the elements of the sexual offence, it would be necessary to identify the relevant offence then in force.

(8) Further, in all cases, it is necessary for the evidence to be capable of proving beyond reasonable doubt that the offending occurred before the complainant turned 17 years old[10].

(9) Not only must the elements of constituent offences be proved, it must be proved that the two or more constituent offences were separated from each other by three or more days (s 50(1)). Proof of separation by a period of time necessarily connotes proof of distinct offences because the timing must attach to specific offences.

(10) Additionally, in order for the preclusion in s 50(3) to be sensibly engaged with, it must be apparent whether the alleged offending was committed when the child was over 16 years of age[11]. The availability of any other defences would also turn on the capacity of the evidence to actually identify the occasion of the offending. These considerations reinforce the proposition that proof of the composite offence involves the proof of distinct and discrete occasions on which sexual offences were committed, and not a generalised assertion of inappropriate or unlawful sexual conduct over a period of time.

(11) The way in which an offence under s 50 is particularised is affected by s 50(4). It will be submitted, however, that this does not alter the identification of the elements of the offence, to which proof must be directed.

27. Relevant authority

(1) The foregoing textual analysis is supported by the approach taken to s 229B(1) of the *Criminal Code* (Q) in *KBT* (supra). That provision provided that any adult who maintains an unlawful relationship of a sexual nature with a child under the age of 16 years was guilty of a crime. It provided that no person should be convicted unless it was shown the offender had during the period during which the relationship was maintained done an act defined to constitute an offence of a sexual nature (subject to identified exceptions) in relation to a child on 3 or more occasions.

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10 Section 50(7)(b). It would be otherwise if the accused was in a position of authority: s 50(7)(a).

11 Cf. *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at [14]-[15] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

(2) The plurality held that an analysis of the terms of the offence made it clear that the offence involved the doing of an act which constituted an offence of a sexual nature in relation to the child concerned on three or more occasions. The *actus reus* of the offence was not a "course of conduct". It followed that the trial judge erred by failing to direct the jury they were required to be unanimous as to the same three or more acts[12]. The plurality went on to hold that the proviso could not properly be applied because it could not be said the trial was an "all-or-nothing" contest[13].

(3) In separate reasons, Kirby J noted that because of the novel nature of the charge an accused confronts a number of difficulties including the danger that generalised evidence, tendered to establish a "relationship", will be used by the jury as propensity evidence[14].

(4) Similarly, in *KRM* (supra), s 47A(1) of the *Crimes Act* 1958 (Vic), made it an offence to maintain a sexual relationship with a child under the age of 16 and provided that to prove the offence it was necessary to prove that the accused during a particular period did an act which would constitute an offence under particular provisions on at least three occasions. It was held this required proof by reference to particular acts, matters or things alleged as the foundation for the charge[15]. The offence stopped short of authorising trials conducted as a contest between generalised assertions which could only be met by generalised denials[16].

(5) In decisions delivered prior to the decision in the present case, it has been accepted that proof of an offence against s 50 requires proof of two or more sexual offences. Although the CCA had said in 2010, by reference to s 50(4) that s 50 clearly contemplates a course of conduct as distinct from particular specific acts being proved beyond reasonable doubt[17], in a 2011 decision it was observed that it was within s 50(1) that the *actus reus* of the offence was given[18].

(6) Any controversy appeared to be resolved by the decision of five justices in *Little* (supra) that it was an error of law to fail to direct a jury that it must agree unanimously that a "prescribed pair" of the same two sexual offences had been proved beyond reasonable doubt, and that s 50 was relevantly to be treated in the same way as the provision in *KBT*[19].

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12 (1997) 191 CLR 417 at 422 (Brennan CJ, Toohey, Gaudron and Gummow JJ).

13 (1997) 191 CLR 417 at 422 (Brennan CJ, Toohey, Gaudron and Gummow JJ).

14 (1997) 191 CLR 417 at 431 (Kirby J).

15 (2001) 206 CLR 221 at [14]-[18] (McHugh J), [68] (Gummow and Callinan JJ), [92] (Kirby J).

16 (2001) 206 CLR 221 at [14] (McHugh J).

17 *R v N, SH* [2010] SASCFC 74 at [11] (Sulan, Anderson and David JJ).

18 *R v M, BJ* (2011) 110 SASR 1 at [70] (Vanstone J, Sulan and White JJ agreeing).

19 (2015) 123 SASR 414 at [11]-[19] (Kourakis CJ, Sulan, Kelly, Peek and Lovell JJ).

(7) Then, in *Johnson* (supra), the CCA reiterated the importance of agreement on the same pair of offences by holding that a conviction was unsafe where the evidence was of intercourse on many occasions over a period of two years but did not permit the jury to delineate a pair of offences[20]. Sulan and Stanley JJ observed:

> In order to establish the offence, it is necessary for the prosecution to prove that two or more **identifiable acts** occurred over not less than three days, and the jury must be agreed upon at least the same two or more acts. **If the evidence rises no higher than a general statement such as that given in this case, even though the jury may be satisfied that there occurred numerous acts of sexual exploitation over a number of years**, but it is impossible to identify two or more acts so that the conclusion can be reached that the jury, either unanimously or by majority, agreed on the same two or more acts, **then the defendant is entitled to an acquittal**. [References omitted; emphasis added.]

It was observed that if it was the intention of the legislature to create an offence involving the maintenance of a sexual relationship with a child, consideration should be given to amending the legislation[21]. Accordingly, at least prior to the decision of the CCA in this case, binding authority in South Australia supported the approach as to the identification of the *actus reus* contended for by the appellant.

28. Context and policy

(1) Consideration of s 50 should be undertaken against the background of principles regarding uncertainty and duplicity of the kind addressed in *Johnson v Miller*[22], *S v The Queen*[23] and *Kirk v Industrial Court of New South Wales*[24]. While the relevant principles have at times been stated by reference to the particularity required in an information, they apply with equal force to the more fundamental question of what it is that must be proved to constitute an offence.

(2) There are sound reasons in principle and policy why s 50 should be construed as requiring the proof of particular sexual offences, including the difficulties in defending ill-defined allegations, for example by way of an *alibi* and the difficulties in properly applying propensity evidence principles and considering questions of cross-admissibility where it not clear what it is that is sought to be

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20 [2015] SASCFC 170 at [2]-[12] (Sulan and Stanley JJ).

21 [2015] SASCFC 170 at [2]-[12] (Sulan and Stanley JJ).

22 (1937) 59 CLR 467.

23 (1989) 168 CLR 266. See for example at 284 and 288 (Gaudron and McHugh JJ).

24 (2010) 239 CLR 531 at [14]-[15], [28]-[30] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

proved. Furthermore, the appropriate sentence will need to reflect the nature of the offending in question[25].

***Is the requirement for proof of distinct offences abrogated?***

29. Against the foregoing background, it is submitted that the relevant question is not whether there is some implication from the section, or some implication built upon the necessity of an extended unanimity verdict, which justifies the conclusion that proof of the underlying sexual offences entails proving distinct and identifiable occasions of offending. Rather, the question is whether there is an express or necessarily implied intention to abrogate the requirement for proof by reference to distinct and identifiable occasions of offending.

30. That was the approach taken in *KBT* in respect of the sub-section's dispensation with respect to proof of the dates and circumstances relating to the occasions on which the acts were committed. The plurality construed that dispensation narrowly, observing that it did not detract from the need to prove the actual commission of acts which constitute offences of a sexual nature[26].

31. It was also the approach taken in *KRM* by McHugh J, with whom Kirby J agreed on this point, consistently with the principle of legality[27]. Section 47A(3) provided that it was not necessary to prove the dates or exact circumstances of the alleged occasions. McHugh J said[28]:

> Courts should not lightly infer that a legislature has intended to modify fundamental principles of the common law such as the principle that an accused person must have a fair opportunity to defend a criminal charge.

32. Kirby J said[29]:

> It is true that the Act relieves the complainant of the need, or the prosecution of the requirement, to prove the "dates or exact circumstances of the alleged occasions". **But "occasions" there still must be.** There was no specific evidence of any such "occasions" tendered in support of the relationship offence. There was at most an allusion back to the evidence that had been given in support of the seventeen specific counts, with the assertion by the complainant that the same thing was "always happening" and was "very routine" and "very frequent". Again, I agree with what McHugh J has written about the purpose and extent of the relief from particularity that provisions such as s 47A(3) of the Act provide. **The prosecution does not have to prove the date or exact circumstances of the offence; but that is all.** [Emphasis added.]

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25 It was accepted in relation to the predecessor provision in *R v D* (1997) 69 SASR 413 that despite the maximum penalty for an offence being life imprisonment, this was really to facilitate the imposition of sentences commensurate with the "sexual offences" in question, which could vary greatly in seriousness and number.

26 (1997) 191 CLR 417 at 422-423, 424 (Brennan CJ, Toohey, Gaudron and Gummow JJ).

27 See also the passages from *South Australia v Totani* (2010) 242 CLR 1, *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 and *R v Thompson* (1996) 90 A Crim R 416, referred to by Peek J at CCA [74] and [84].

28 (2001) 206 CLR 221 at [14].

29 (2001) 206 CLR 221 at [92].

33. Unlike the dispensing provisions considered in *KBT* and *KRM*, s 50(4) does not in terms address itself to the question of proof at all, but rather the level of particularisation required in the information.

34. Furthermore, although s 50(4)(b)(ii) does not require the information to identify particular acts of sexual exploitation or the occasions on which, places at which or order in which acts of sexual exploitation occurred, s 50(4)(a)(ii) requires the alleged conduct comprising the acts of sexual exploitation to be sufficiently particularised.

35. Plainly, s 50(4) has the effect of reducing the degree of specificity required to be particularised. In the appellant's submission, however, that does not involve an abrogation by express words or necessary intendment that distinct occasions which are to be relied on as supporting the conviction for the composite offence are to be proved beyond reasonable doubt and in a manner which permits them to be identified as distinct and, further, separated by three or more days.

36. In short, the evidence must permit of a conclusion beyond reasonable doubt that a particular occasion occurred on which all elements of a relevant offence occurred. Generalised evidence is inherently incapable of supporting such proof. In the appellant's submission, that cannot be overcome by reasoning that if a victim gives evidence that there were numerous occasions over a long period, and that victim's evidence is such that it could be accepted beyond reasonable doubt as true, that it must follow that there were (unidentified) occasions which satisfy the requirements of the composite offence. As McHugh J said in *KRM*[30]:

> [I]t is a mistake to assume that evidence of the kind and the form in this case is sufficient to support a charge under s 47A. Section 47A(3) provided at the relevant time that "it is not necessary to prove the dates or the exact circumstances of the alleged occasions". But that does not mean that the charge could or now can be proved by a blanket assertion that on three or more occasions the complainant and the accused engaged in an act that falls within a category specified in s 47A(2).

(See also the observations in *SLJ* (supra)[31] in relation to s 47A).

37. In the present case, it is respectfully submitted that Kourakis CJ took a different, and erroneous, approach to the construction of the section.

(1) Kourakis CJ considered that s 50, unlike the provision considered in *KRM* and *SLJ*, did **not** incorporate as an element of the offence commission of a prescribed sexual act on particular occasions (CCA [35]). For the reasons set out earlier, the appellant respectfully disagrees. To prove two offences is necessarily to prove two distinct occasions on which the elements of those offences occurred.

(2) Further, it may be noted that in *KRM*, Kirby J appeared to regard the provision there concerned as having similar consequences as the provision considered in

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30 (2001) 206 CLR 221 at [14].

31 (2010) 24 VR 372 at [16]-[19] (Maxwell P, Buchanan and Bongiorno JJA).

*KBT*[32]. Kourakis CJ's reasons refer to *KBT* as involving an analogous provision (CCA [31]) and do not distinguish the provision. Further, as noted above, in *Little* and *Johnson* the CCA had indicated that s 50 required a similar construction to the provision in *KBT*.

(3) The constructional approach of the Chief Justice appears instead to have been influenced by an assumption as to the mischief to which the offence was directed (CCA [42]). It is submitted that an assertion as to the mischief is not a reliable starting point for analysis[33].

(4) Further, Kourakis CJ's reasons drew upon a consideration of s 50(4) notwithstanding the essentially procedural nature of that sub-section (CCA [39]-[42]). However, he had earlier observed (CCA [34]) that it had been held in *M, BJ* (supra) that s 50(4) is concerned with procedure, and the *actus reus* must be found in s 50(1)[34].

(5) Further, the conclusion that s 50(4)(b)(ii) went further than the Victorian provision considered in *KRM* and *SLJ* (CCA [41]-[42]) is unjustified since the Victorian provisions directly addressed proof as distinct from particularisation in the information.

(6) The Chief Justice held that no implication (that the evidence had to identify distinguishable sexual offences) could be drawn from the extended unanimity direction requirement (CCA [43]). However, with respect, that was not the issue. It is the requirement to prove distinct offences separated by three or more days that underpins and explains the need for the unanimity direction in a jury trial. In other words, the construction contended for by the appellant is the premise for the extended unanimity requirement, not an implication from it or consequence of it.

***Trial judge's conclusion should not have been overturned***

38. Although he accepted that B was unable to give evidence about specific occasions he recalled (CCA [4], [16]), Kourakis CJ considered that the evidence of B, if believed, was capable of proving the commission of two or more prescribed sexual offences over a period of three days or more (CCA [52]). However, that conclusion is necessarily affected by the premise that proof of prescribed sexual offences does not require evidence which would distinguish offences one from another (CCA [43]). In other words, evidence of undifferentiated offending, or a pattern of offending in which it might be inferred there were individual occasions, was seen as sufficient.

39. It is true that Peek J appears to have considered there was a case to answer despite taking a less expansive view of the effect of s 50(4) (CCA [70]) and despite adhering firmly to the correctness of *Johnson* and to the proposition that there had to be a

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32 (2001) 206 CLR 221 at [80]-[81].

33 Cf. *Little* (supra) at [11]-[12] (Sulan and Stanley JJ).

34 See also Peek J's reasons on this matter at CCA [70].

necessary minimum degree of specificity to permit a sufficient delineation in the evidence between different offences (CCA [99], [111]).

40. However, and with respect, the analysis of the evidence was brief and proceeded upon an acceptance of a synopsis by Kourakis CJ (CCA [111]) notwithstanding that the Chief Justice's reasons were to the effect the complainant was unable to give evidence about specific occasions he recalled (CCA [4]).

41. The trial judge's conclusion on the evidence was correct.

(1) None of the incidents related by B at B's home could be differentiated one from the other because they did not contain any concrete reference in point of time, detail or circumstances, and none was referable to any external event or circumstance (TJ [17]).

(2) The evidence relating to incidents at Anzac Highway, Kurralta Park was not dated at all and the evidence was incapable of proving beyond reasonable doubt it occurred whilst B was a child.

(3) Although there was evidence relating to a period of around 10 days or 2 weeks when B's parents were in Fiji and it was said that on two occasions the appellant put B's penis in his mouth, this was said to be in 1981 or 1982, and since B turned 17 on 1 November 1982, it was therefore unclear whether the events described could qualify as acts of sexual exploitation. Even accepting that evidence as true it could not be excluded that the timing of the events rendered them incapable as qualifying as constituent offences (TJ [16]). Particularly was that so where the complainant said his time frames weren't 100% accurate (TJ [17]).

42. In the appellant's submission, to say that "it would happen frequently over a period which was longer than three days" is not to give evidence which proves any distinct offence[35], nor two offences separated by three days.

43. It is only by a process of inference from the generalised evidence that one could even notionally distinguish offences. In such a case, logically, there must be a "first" and a "last" occasion, and so it is that in a very general sense one can notionally distinguish offences. However, in the appellant's submission, that process of reasoning does not involve relating any particular evidence of the complainant to any particular occasion[36].

44. The CCA was wrong to interfere with the trial judge's conclusion that the generalised assertions did not permit of a finding beyond reasonable doubt with respect to any two particular occasions on which sexual offending had occurred, those occasions being separated by three or more days.

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35 Cf. *R v SLJ* (2010) 24 VR 372 at [16]-[19] (Maxwell P, Buchanan and Bongiorno JJA).

36 *DPP v Lewis* [1997] 1 VR 391, *R v Baker, ex parte Attorney-General* [2002] 1 Qd R 274, *The Queen v DWB* (2008) 20 VR 112; [2008] VSCA 223.

**Permission to appeal (second ground of appeal)**

45. A failure to address the question of permission would constitute an injustice (and an error of law) in and of itself, as illustrated by *Malvaso v The Queen*[37]. There, a successful Crown appeal against sentence was reversed in circumstances where distinct consideration had not been given to the question of leave. The Court emphasised that the question whether leave should be granted was distinct from the inadequacy of the sentence, and was informed by considerations of double jeopardy.

46. In the present case, while the reasons of Kourakis CJ narrated that an application for permission was made (CCA [2]), the matter was not thereafter addressed by him.

47. The requirement to give reasons reflects important considerations including that not only should justice be done, it should be seen to be done. Accordingly, unless a judgment shows expressly or by implication that a principle required to be considered was applied, it should be taken that the principle was not applied, rather than applied but not recorded[38]. In the circumstances, there is an absence of reasons on the question of permission by a majority of the Court, constituting an error of law.

48. Unlike the other members of the Court, Peek J did address the question of permission to appeal, and considered that double jeopardy considerations were pertinent (CCA [113]-[121]). He said (CCA [119], [121]):

> [A] Court considering a prosecution appeal may not infrequently conclude that while there was technically a case to answer (the Judge having erred in finding no case), it remains the position that, had the case proceeded, the Judge would very likely have acquitted on the basis that the charge had not been proven beyond reasonable doubt. In such cases, permission to appeal may well be refused, or the residual discretion exercised, so as not to disturb the verdict of acquittal.
>
> ... I would be prepared to grant permission to appeal (and to allow the appeal and set aside the acquittal), **but only on the basis that there is power available to remit the case to the trial Judge to further hear and determine according to law rather than to order that there be a trial *de novo* before a different Judge**. I consider that there is such power and that the present is an appropriate case in which to make such an order. [Emphasis added.]

49. Peek J gave prominence to the consideration that it was quite possible the trial judge may have acceded to a verdict of not guilty even had he rejected the no case submission and that the acceptance of the no case submission should not deprive the applicant of a judgment of the trial judge on the case as a whole (CCA [132]).

50. Furthermore, it was relevant in the present case to consider the conduct of the matter by the DPP. During the course of the trial, the applicant requested the Crown to consider the referral of questions of law[39] regarding the applicability of *Johnson* in a trial by judge alone. The Crown declined to agree, and ultimately made submissions

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37 (1989) 168 CLR 227.

38 *Fleming v The Queen* (1998) 197 CLR 250 at [30], [37] (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ).

39 Pursuant to s 350 of the CLCA.

on the basis that *Johnson* was binding but distinguishable. The Crown submitted that because evidence had been given of offending at different locations this was sufficient to satisfy the concerns expreessed in *Johnson*. A referral of a question of law would have permitted an answer to that question to inform the forensic decisions to be made at trial, without the appellant being put in jeopardy twice. The DPP was not supportive of such a referral. Further, if a question of law had been reserved subsequent to the acquittal, pursuant to s 351A(2)(c), the determination would not invalidate or otherwise affect the acquittal.

51. As noted, after the acquittal, the DPP elected to seek permission to appeal, and in doing so foreshadowed a challenge to *Johnson*, as indeed it does by notice of contention in this Court.

52. In these circumstances, it is submitted that:

(1) if the appeal to the CCA was allowed due to an implicit departure from *Johnson*, and/or if the appeal to this Court is sought to be defeated by inviting a departure from *Johnson*, there is a question whether it is fair to invoke permission to appeal to secure a result which differs from the basis upon which the trial was conducted; and

(2) if the appeal to the CCA is considered to have turned simply on a different evaluation of the evidence (without the benefit of having observed the evidence as it was given), there was also a real question whether that justified permission to appeal in favour of the DPP.

53. On either analysis, permission to appeal was not justified when regard is had to the double jeopardy considerations addressed by Peek J.

**PART IV SPECIAL ORDERS WITH RESPECT TO COSTS [n/a]**

**PART V ESTIMATE OF TIME**

54. The appellant estimates that 1.5 hours will be required to present his submissions.

**PART VI STATUTORY PROVISIONS [see annexure]**

Dated: 11 May 2017

**M E Shaw**
Frank Moran Chambers
P: 0412 076 482

**B J Doyle**
Hanson Chambers
P: (08) 8212 6022

**Counsel for the appellant**

## ANNEXURE (PART VI – STATUTORY PROVISIONS)

Sections 50, 350, 351A, 353 and 353 of the *Criminal Law Consolidation Act* 1935 (SA)

**50 Persistent sexual exploitation of a child**

(1) An adult person who, over a period of not less than 3 days, commits more than 1 act of sexual exploitation of a particular child under the prescribed age is guilty of an offence.

Maximum penalty: Imprisonment for life.

(2) For the purposes of this section, a person commits an act of sexual exploitation of a child if the person commits an act in relation to the child of a kind that could, if it were able to be properly particularised, be the subject of a charge of a sexual offence.

(3) If –

(a) at any time when an act of sexual exploitation of a child was allegedly committed the child was at least 16 years of age; and

(b) the defendant proves that he or she believed on reasonable grounds that the child was of or over the prescribed age at that time,

the act of sexual exploitation is not to be regarded for the purposes of an offence against this section.

(4) Despite any other Act or rule of law, the following provisions apply in relation to the charging of a person on an information for an offence against this section:

(a) subject to this subsection, the information must allege with sufficient particularity—

(i) the period during which the acts of sexual exploitation allegedly occurred; and

(ii) the alleged conduct comprising the acts of sexual exploitation;

(b) the information must allege a course of conduct consisting of acts of sexual exploitation but need not—

(i) allege particulars of each act with the degree of particularity that would be required if the act were charged as an offence under a different section of this Act; or

(ii) identify particular acts of sexual exploitation or the occasions on which, places at which or order in which acts of sexual exploitation occurred; …

(5) A person who has been tried and convicted or acquitted on a charge of persistent sexual exploitation of a child may not be convicted of a sexual offence against the same child alleged to have been committed during the period during which the person was alleged to have committed the offence of persistent sexual exploitation of the child.

(6) ...

(7) In this section—

***prescribed age***, in relation to a child, means—

(a) in the case of a person who is in a position of authority in relation to the child—18 years;

(b) in any other case—17 years;

***sexual offence*** means—

(a) an offence against Division 11 (other than sections 59 and 61) or sections 63B, 66, 69 or 72; or

(b) an attempt to commit, or assault with intent to commit, any of those offences; or

(c) a substantially similar offence against a previous enactment.

(8) For the purposes of this section, a person is in ***a position of authority*** in relation to a child if the person is—

(a) a teacher (within the meaning of the *Education and Early Childhood Services (Registration and Standards) Act 2011*) engaged in the education of the child; ...

**350 – Reservation of relevant questions**

(1) In this section—

***relevant question*** means a question of law and includes a question about how a judicial discretion should be exercised or whether a judicial discretion has been properly exercised.

(2) A court by which a person has been, is being or is to be tried or sentenced for an indictable offence may reserve for consideration and determination by the Full Court a relevant question on an issue—

(a) antecedent to trial; or

(b) relevant to the trial or sentencing of the defendant,

and the court may (if necessary) stay the proceedings until the question has been determined by the Full Court.

(3) Unless required to do so by the Full Court, a court must not reserve a question for consideration and determination by the Full Court if reservation of the question would unduly delay the trial or sentencing of the defendant.

(4) A court before which a person has been tried and acquitted of an offence must, on application by the Attorney-General or the Director of Public Prosecutions, reserve a question antecedent to the trial, or arising in the course of the trial, for consideration and determination by the Full Court.

(5) The Full Court may, on application under subsection (6), require a court to refer a relevant question to it for consideration and determination.

(6) An application for an order under subsection (5) may be made by—

(a) the Attorney-General or the Director of Public Prosecutions; or

(b) a person who—

(i) has applied unsuccessfully to the primary court to have the question referred for consideration and determination by the Full Court; and

(ii) has obtained the permission of the primary court or the Supreme Court to make the application.

(7) If a person is convicted, and a question relevant to the trial or sentencing is reserved for consideration and determination by the Full Court, the primary court or the Supreme Court may release the person on bail on conditions the court considers appropriate.

**351—Powers of Full Court on reservation of question**

(1) The Full Court may determine a question reserved under this Part and make consequential orders and directions.

(2) However – …

(c) if the defendant has been acquitted by the court of trial, no determination or order of the Full Court can invalidate or otherwise affect the acquittal.

**352—Right of appeal in criminal cases**

(1) Appeals lie to the Full Court as follows:

(a) if a person is convicted on information—

(i) the convicted person may appeal against the conviction as of right on any ground that involves a question of law alone;

(ii) the convicted person may appeal against the conviction on any other ground with the permission of the Full Court or on the certificate of the court of trial that it is a fit case for appeal;

(iii) subject to subsection (2), the convicted person or the Director of Public Prosecutions may appeal against sentence passed on the conviction (other than a sentence fixed by law), or a decision of the court to defer sentencing the convicted person, on any ground with the permission of the Full Court;

(ab) if a person is tried on information and acquitted, the Director of Public Prosecutions may, with the permission of the Full Court, appeal against the acquittal on any ground—

(i) if the trial was by judge alone; or

(ii) if the trial was by jury and the judge directed the jury to acquit the person;

(b) if a court makes a decision on an issue antecedent to trial that is adverse to the prosecution, the Director of Public Prosecutions may appeal against the decision—

(i) as of right, on any ground that involves a question of law alone; or

(ii) on any other ground with the permission of the Full Court;

(c) if a court makes a decision on an issue antecedent to trial that is adverse to the defendant—

(i) the defendant may appeal against the decision before the commencement or completion of the trial with the permission of the court of trial (but permission will only be granted if it appears to the court that there are special reasons why it would be in the interests of the administration of justice to have the appeal determined before commencement or completion of the trial);

(ii) the defendant may, if convicted, appeal against the conviction under paragraph (a) asserting as a ground of appeal that the decision was wrong.

(2) If a convicted person is granted permission to appeal under subsection (1)(a)(iii), the Director of Public Prosecutions may appeal under that subparagraph without the need to obtain the permission of the Full Court.

**353—Determination of appeals in ordinary cases**

(1) The Full Court on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal; but the Full Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(2) Subject to the special provisions of this Act, the Full Court shall, if it allows an appeal against conviction, quash the conviction and either direct a judgment and verdict of acquittal to be entered or direct a new trial.

(2a) On an appeal against acquittal brought by the Director of Public Prosecutions, the Full Court may exercise any one or more of the following powers:

(a) it may dismiss the appeal;

(b) it may allow the appeal, quash the acquittal and order a new trial;

(c) it may make any consequential or ancillary orders that may be necessary or desirable in the circumstances.

(3) If the Full Court orders a new trial under subsection (2a)(b), the Court—

(a) may make such other orders as the Court thinks fit for the safe custody of the person who is to be retried or for admitting the person to bail; but

(b) may not make any order directing the court that is to retry the person on the charge to convict or sentence the person.

(3a) If an appeal is brought against a decision on an issue antecedent to trial, the Full Court may exercise any one or more of the following powers:

(aa) it may revoke any permission to appeal granted by the court of trial;

(a) it may confirm, vary or reverse the decision subject to the appeal;

(b) it may make any consequential or ancillary orders that may be necessary or desirable in the circumstances.

(4) Subject to subsection (5), on an appeal against sentence, the Full Court must—

(a) if it thinks that the sentence is affected by error such that the defendant should be re-sentenced—

(i) quash the sentence passed at the trial and substitute such other sentence as the Court thinks ought to have been passed (whether more or less severe); or

(ii) quash the sentence passed at the trial and remit the matter to the court of trial for resentencing; or

(b) in any other case—dismiss the appeal.

(5) The Full Court must not increase the severity of a sentence on an appeal by the convicted person except to extend the non-parole period where the Court passes a shorter sentence.