IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY **No. A38 of 2017**

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF THE SUPREME COURT OF SOUTH AUSTRALIA

BETWEEN:

DL
Appellant

and

THE QUEEN
Respondent

APPELLANT'S REDACTED SUBMISSIONS

I PUBLICATION

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

II CONCISE STATEMENT OF ISSUES PRESENTED BY THE APPEAL

2. The essential issue is whether the Court of Criminal Appeal should have quashed the appellant's conviction for "persistent sexual exploitation" (s 50 of the *Criminal Law Consolidation Act* 1935 (SA)) because the trial judge's reasons for verdict:

   (1) did not identify the two or more acts of sexual exploitation found proved beyond reasonable doubt (which constituted the actus reus of the s 50 offence) and the process of reasoning leading to guilt of those acts; and

   (2) were directed instead to whether the judge considered the complainant was truthful and reliable, culminating in a finding that he was, as to "core allegations"?

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

3. The appellant certifies that notice is not required to be given under s 78B of the *Judiciary Act* 1903 (Cth).

IV CITATION

4. The decision of the Court of Criminal Appeal (**CCA**) is not reported. The media neutral citation is: *R v D, L* [2015] SASCFC 24.

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V NARRATIVE STATEMENT OF FACTS FOUND OR ADMITTED

The prosecution case

5. The appellant was charged with persistent exploitation of his nephew, the complainant (**MGF**), between 6 February 1984 and 1 September 1994. The Information alleged as follows:

> Statement of Offence
>
> Persistent Sexual Exploitation of a Child. (Section 50(1) of the Criminal Law Consolidation Act, 1935).
>
> Particulars of Offence
>
> [The appellant] over a period of not less than three days between the 6th day of February ~~1988~~ 1984 and the ~~6th day of February 1993~~ 1st day of September 1994 at Christies Beach and other locations, committed more than one act of sexual exploitation of [MGF], a child under the age of 17 years by, touching [MGF's] genitals over his clothes, showing [MGF] pornography, masturbating in [MGF's] presence, encouraging [MGF] to masturbate in his presence, encouraging [MGF] to masturbate in his presence, causing [MGF] to perform fellatio upon him and performing fellatio upon [MGF].

6. MGF was between the ages of 5 and 15 years over the period of the alleged offending; the appellant was aged between about 32 and 42 years old. Much but not all of the alleged offending was said to have taken place at the appellant's home at Christies Beach, in South Australia. MGF and his older sister, and later, his younger brother, stayed with the appellant and the appellant's wife (who was the sister of their mother) during some school holidays and some weekends.

7. It was MGF's evidence[1] that the offending by the appellant last occurred on a day on which MGF in fact indecently assaulted the appellant's daughter MD, which, according to an agreed fact, was on 28 August 1994[2]. After that, MGF was not allowed to stay with the appellant's family (TJ [29]). MGF's evidence was that on that same day he had given the appellant oral sex and that was the last occasion of sexual contact between them (TJ [13]). When the appellant's daughter MD turned 18 years old, the appellant assisted her in making a claim for compensation under victims of crime legislation (TJ [33]).

8. The first disclosure MGF claimed he made regarding the allegations of abuse by the appellant was to MGF's partner, in around 2003-2004, or perhaps earlier (TJ [35], [38])[3], although according to his partner he stated only that he had had a rough

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1 The allegation of this act of abuse was first disclosed to the prosecutor Mr Norman in proofing only months before the trial: Agreed fact 2 (Tr 250).

2 Agreed fact 1 (Tr 250).

3 Following the assault upon MD, MGF undertook three years of counseling with a psychologist. MGF did not disclose any of the appellant's alleged conduct during these sessions (TJ [30]).

childhood and had been sexually abused as a child (without identifying the details or perpetrator) (TJ [39]).

9. MGF first made statements to the police in late 2011, or early 2012 (TJ [35]). However, MGF said that, before speaking with the police, and in around 2010 or 2011, as a result of a disclosure to a counsellor he was seeing in relation to his relationship with his present partner, MGF was encouraged to stand up for himself and see what the appellant was up to, and he went to the appellant's house. On that occasion, MGF and the appellant smoked cannabis and the appellant gave him a cannabis cutting at MGF's request. MGF did not raise the alleged abuse (TJ [36]). There was a second occasion when MGF went to the appellant's home and sold him some cannabis. Again, nothing was said about the alleged abuse (TJ [37]).

10. The appellant gave sworn evidence denying the charge. His evidence differed from MGF's in various respects including at a general level that the appellant said that MGF stayed with him only from time to time and that he and his siblings would stay two or three times a year at most (TJ [12]). The appellant denied that he engaged in any sexual activity with the complainant. The appellant submitted that the complainant fabricated the allegations against him, motivated by ill-will harboured towards him for having encouraged his daughter (MD) to make a compensation claim, telling people in Mount Compass about MGF's indecent assault of her and thereby causing MGF's bankruptcy. Further, it was submitted that MGF's family, and in particular his mother and aunt W (the appellant's ex-wife) harboured ill-will towards him and actively encouraged MGF to pursue the allegations (CCA [34]).

11. There were no eyewitnesses to the alleged offending. There were a number of factual and evidential contests during the trial that were relevant to an assessment of MGF's truthfulness and reliability with respect to the alleged offending (TJ [4], [6]).

12. For example:

(1) MGF claimed the appellant gave him marijuana to smoke from the age of 9 years and that MGF would be stoned while playing with slot cars (an activity during which abuse was alleged to have occurred). He asserted that, when with the appellant, "*Wouldn't have been an hour when I wouldn't have been stoned*" (Tr 51). The appellant's position at trial was that this was totally implausible[4].

(2) Similarly, MGF said that from the age of 9-10 years up to the age of 15 years the appellant allowed him to ride a Yamaha motorbike around the nearby streets (and this was in exchange for oral sex), whereas the appellant denied that he

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[4] The appellant did not deny growing marijuana and said it was common knowledge in both families that he use it but denied ever giving it to MGF while he was young (TJ [20]).

permitted MGF to ride other than on the backstreets once he was 15 years old (TJ [22]). It was submitted that, in light of the dimensions of the bike and MGF's height at the time, the notion that MGF was riding it from age 9 or 10 was simply implausible and a deliberate concoction.

(3) MGF said the appellant took him to a location in the bush at Cherry Gardens where he grew cannabis and during which the appellant performed oral sex on him. The appellant denied ever taking MGF to the location (TJ [21]).

(4) MGF said that the appellant built a second shed (Shed 2) which housed a slot car set up and that it was from this time that oral sex and things like that occurred numerous times in Shed 2, which on his evidence was when he was aged between 9 and 12 (between about 1988 and 1991)[5]. Importantly, the appellant's evidence, supported by his contemporaneous calendar record, was that he built Shed 2 in 1991 but that the slot car track was not completed until June 1993 (TJ [45]-[50])[6]. The effect of the appellant's evidence as to timing was therefore that the first act of oral sex could not have occurred before MGF was about 14 ½ years old. As noted earlier, the last date any offending could have occurred was on 28 August 1994.

(5) MGF said that the sexual abuse commenced from age 7 (Tr 58.23) while playing computer games in the master bedroom (Tr 54-57), and he denied the computer was set up in MD's room and said there was only one computer in the house (Tr 123-124). The appellant said it was in MD's room (Tr 253.3). This was consistent with the evidence of W, who said that there was a computer set up in MD's room (Tr 227.24).

13. There were other episodes of alleged offending in respect of which details were challenged by the appellant, including with respect to a particular gift of a remote control car (TJ [18]), the showing of pornographic videos and magazines of Asian content (TJ [24]), and a visit to a South Terrace cottage (TJ [26]).

14. There were also other significant issues relating to the credit and reliability of the complainant's account. For example, it was clear that MGF had been a long-term user of drugs (TJ [65]). Further, the evidence suggested MGF had claimed to have been abused by older boys when living at Moana, before they moved to Mt Compass,

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5 MGF's evidence was that the first occasion of oral sex was when he was 9 going on 12 when playing slot cars in Shed 2 (Tr 59-60).

6 The appellant's evidence relied on entries in the family diary calendar (Exhibit D7) to show that the slot car was not built until June 1993 because it contained entries confirming the time of laying of the braid (Tr 263-265). W confirmed the genuineness of the diary (Tr 211) and recognised the handwriting.

and there were inconsistencies between his evidence on this topic and that of his partner[7].

Judge's reasons and verdict: *R v D, L* [redacted] [2014] SADC 96

15. The trial judge directed himself at the outset that (TJ [6]):

> In a practical sense the issue is whether the prosecution has proved the charge beyond reasonable doubt which, in its turn, **depends upon whether it has been proved that MGF is both a truthful and reliable witness.**

16. After describing the various types of acts that were alleged as part of the charge of persistent sexual exploitation, the trial judge said that (TJ [7]):

> **The prosecution does not have to prove each type of sexual conduct alleged, just two or more acts of sexual exploitation.** Each of those acts is said to have happened multiple times, albeit a different number of times.

17. The trial judge noted that the defence case included an attack upon the truthfulness and reliability of MGF on a number of bases including inconsistencies between his evidence as compared with earlier statements made by him, and inconsistent conduct when visiting the appellant, and that he had a motive to lie in the form of financial compensation (TJ [56]-[59])[8] and he said it was clear to him that some of MGF's evidence about when some events occurred was inaccurate (TJ [61]).

18. He also noted that MGF's evidence regarding the fact he claimed went to the appellant's house to confront him but instead simply shared cannabis with him seemed inconsistent with the alleged abuse but said "at the same time, I find it was part of MGF's way of dealing with his past" (TJ [63]).

19. The trial judge considered MGF was forthright and convincing but that was not to say that his evidence was "without its problems in terms of apparent inconsistencies and implausibility". He directed himself that (TJ [64]):

> **I do not have to accept everything he says to be satisfied of the charge.** I am only too well aware that, individually and cumulatively, inconsistencies and implausibility and other matters may reach the stage of denying proof beyond reasonable doubt.

20. The judge said some of MGF's estimates of his age when events occurred were not reliable (eg, when he rode the motorbike or being "stoned"), but they were not

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7 See, eg, the appellant's address at Tr 390-392. The trial judge disposed of this topic, in respect of which he said he found the evidence "confusing", at TJ [34].

8 Further, at trial, MGF conceded in cross-examination that he had provided an inconsistent out-of-court statement to the prosecutor, regarding when he first made a disclosure of alleged offending to his partner. The appellant's case was MGF had deliberately sought to point to a complaint which pre-dated the time when a victims of crime compensation claim was pressed by MGF's cousin MD.

sufficient to cause him to doubt his truthfulness or reliability. Any exaggeration was not deliberate. MGF was reliable as to "core allegations" (TJ [66]).

21. The judge said that having listed to MGF over a number of days he "simply believed him" and found him to be reliable, and that he had the same view at the end of all of the evidence (TJ [67]).

22. The judge was somewhat critical of the appellant's presentation, but tempered this by saying he was aware that the appellant laboured under a significant forensic disadvantage given that the alleged events occurred many decades ago and without any timely complaint to the appellant. Understandable lack of memory, inability to pursue alibis, lost calendars and the like, might all have undermined his ability to challenge and contradict the evidence against him (TJ [72]).

23. He then concluded as follows (TJ [73]-[75]):

> **Conclusion**
>
> I have considered whether the attributes of MGF as a person and the various criticisms of his evidence caused me to have a reasonable doubt and they do not. I reject the evidence of the accused on substantive issues where he denied the alleged sexual conduct.
>
> I find that the accused sexually assaulted MGF on **numerous occasions over a period of some years**. The sexual assaults mainly took the form of indecent assaults and mutual oral sexual intercourse.
>
> I find the accused guilty.

Appeal to CCA: *R v D, L* [2015] SASCFC 24

24. On appeal, the appellant submitted that the judge had erred in the application of the burden of proof, that the verdict was unreasonable, and that the judge failed to give adequate reasons. In this regard, he contended that he trial judge had not adequately grappled with or resolved inconsistencies within MGF's accounts, inconsistencies between MGF's account and other witness' accounts (primarily the appellant's account) and acknowledged implausibilities in the evidence. These demonstrated both an inadequacy of reasons and also that the conviction was unreasonable.

25. The appeal was argued on 21 August 2014. The previous day, on 20 August, a five-member Court of Criminal Appeal held, in *R v Little*[9], that s 50 was to be treated in the same way (at least for the purposes of the extended unanimity direction) as the provision considered by the High Court in *KBT v The Queen*[10], where it was emphasised that the offence was not a "course of conduct" offence, but involved proof of the commission of particular acts.

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9 (2015) 123 SASR 414.

10 (1997) 191 CLR 417.

26. *Little* was not referred to on appeal, however, and the way in which the CCA dealt with the appeal grounds in the present case did not focus upon the reasonableness of the verdict by reference to proof of two or more particular acts of sexual exploitation, nor upon the adequacy of the judge's reasons in identifying the basis upon which he was satisfied beyond reasonable doubt of two or more such acts.

27. Instead, as the trial judge had done (reflecting the approach urged by the prosecution[11]), the CCA proceeded on the basis of whether or not there was some reason in the evidence which precluded acceptance beyond reasonable doubt of the complainant's credibility and/or reliability (as distinct from whether particular alleged acts of sexual exploitation were proved beyond reasonable doubt), and whether the reasons sufficiently explained why the complainant, and not the appellant, had been believed (as distinct from whether the reasons identified the actus reus found proved and the basis upon which the reasonable possibility that the relevant alleged acts did not occur could be excluded).

28. It will be submitted that the same error in approach permeated the trial judge's and the CCA's reasons. Further, and in any event, the trial judge's failure to direct himself by reference to particular offences prevented the appeal Court from undertaking a meaningful inquiry into the safeness of the verdict because the actus reus was never properly identified[12].

Treatment of unreasonable verdict ground

29. In relation to the unreasonable verdict complaint, Blue J referred to twelve matters raised by the appellant as not having been properly considered by the trial judge "in an assessment of the complainant's credibility and reliability" (CCA [68]), commencing with the evidence regarding MGF's age generally when the acts of abuse were alleged to have occurred and specifically when acts of oral intercourse occurred in Shed 2 and the timing of the appellant's commencement of growing

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11 The prosecutor's address commenced with the observation that putting aside the onus and burden of proof "it's obvious in this trial that **the complainant must have come along to this court and deliberately lied or the accused has. Must be one or the other**. ... [I]f [MGF] is lying to your Honour, he's lied to his own mother at the Christies Beach Police Station or his mother is in on it as well" (Tr 366). By contrast, the appellant urged that "your Honour's task does not involve considerations of who has been the more convincing liar. It is not a competition between who has been the more convincing in their evidence to your Honour, or in the telling of their story to their family members. The critical question for your Honour is whether the Crown has proved the charge beyond reasonable doubt ..." (Tr 385).

12 Also, in dealing with the complaint regarding burden, Blue J (with whom Kourakis CJ and Bampton J agreed) concluded that the trial judge's statement that at the conclusion of the complainant's evidence he believed him did not involve an improper prejudgment and then inversion of the burden of proof because read in the whole context of the judgment it was apparent the judge recognised "**that it was his assessment of the complainant's evidence at the end of all of the evidence that was determinative** and impressions formed before that point were only tentative and provisional" (CCA [50]).

cannabis in Shed 2 (CCA [68]). His Honour held, however, that none of the contentions as to inconsistency or implausibility, even if established, would "in themselves" lead to a conclusion that the verdict was unreasonable (CCA [69]).

30. He then went on to examine them sequentially (CCA [72]-[129]). Some aspects should be highlighted to illustrate how the analysis was directed to the reasonableness, in effect, of preferring the complainant to the appellant, rather than to the sufficiency of the evidence to support findings beyond reasonable doubt of particular acts of sexual exploitation as constituting the actus reus of the s 50 charge.

(1) In relation to the dispute regarding the timing of the erection within Shed 2 of a slot car track, an event which, as he noted, was tied to allegations regarding the commencement of oral sex (see, eg, CCA [74], [75]), Blue J said that "the Judge was entitled to reject the [appellant's] evidence for the purpose of assessing the complainant's credibility" (CCA [78])[13].

(2) In relation to the evidence regarding the location of the computer, by reference to which the allegation of masturbation was linked, Blue J said there was "no inconsistency" between the evidence of MGF and the appellant's then-wife W (CCA [81])[14].

(3) In relation to the timing of visits to the Adelaide unit, Blue J said that the judge was not obliged to accept the appellant's evidence for the purpose of assessing the complainant's credibility (CCA [84])[15].

(4) In relation to the proposition that the complainant smoked marijuana each time he visited the appellant's house from age nine, Blue J said that the judge's conclusion that his estimates of his age were not reliable was not sufficient to

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13 The difficulty with this is that, without knowing which one or more of the occasions of oral sex the judge found occurred, it is **not apparent whether he did in fact reject** the appellant's evidence as to the timing of the construction of Shed 2 and the completion of the slot car track.

14 As noted earlier, MGF said that sexual abuse commenced from age 7 (Tr 58.23) while playing computer games in the master bedroom (Tr 54-57). The evidence of the appellant (Tr 253.3) and W (Tr 123-124) was that the computer was in MD's room. W had, however, accepted, when asked if it was ever set up anywhere else in the house, and responded that she really didn't know; all she could remember was in MD's room (Tr 227.24). Contrary to Blue J's approach, whether or not W's evidence strictly gave rise to an inconsistency with MGF's evidence was not the issue; it was whether it provided some support for the complainant and in all the circumstances gave rise to an ineradicable doubt about MGF's account of **the particular act or acts which were alleged to have occurred in the master bedroom**.

15 The appellant submits that while that proposition is correct, (1) he did not need to accept the appellant's account for it to be relevant to an assessment of the complainant's credibility **and reliability**, and (2) the critical issue was not the complainant's credibility and reliability in preference to that of the appellant, but whether the act alleged to have occurred at the Adelaide unit was proved beyond reasonable doubt.

cause doubt as to his truthfulness or reliability so as to preclude acceptance of the complainant's evidence beyond reasonable doubt (CCA [88])[16].

(5) In relation to the fact that MGF claimed he rode the appellant's Yamaha motorbike from age 9, whereas the appellant said this did not occur until he was at least 15, Blue J took the same approach, namely, that this did not preclude an acceptance (in general terms) of the complainant (CCA [91]).

(6) In relation to the fact that when attending the appellant's house twice in 2010, allegedly to confront him, the complainant did not in fact raise the allegations, and instead shared or dealt in drugs, Blue J said that this did not make the complaints of abuse (generally) glaringly improbable or inconsistent with compelling inferences arising from the visits (CCA [94]).

(7) Likewise, in respect of the evidence regarding the initial disclosure to MGF's partner, the evidence regarding the abuse by the Moana children, the disclosure to MGF's mother and W and the complaint to police, the issue of whether MGF had abused his own brother, and MGF's possible motive to make false allegations (CCA [96]-[114]), Blue J's analysis was invariably in terms of whether the issues raised by the appellant required a rejection of the complainant's credibility or his evidence in general terms, rather than whether in light of the issues regarding credibility and the appellant's sworn evidence regarding matters including the timing of events, the particular acts as alleged by MGF could be established beyond reasonable doubt.

31. So too, when he made a holistic assessment, Blue J spoke in general terms, by concluding (CCA [130]):

> [I]t cannot be said that the complainant's evidence was glaringly improbable, contrary to compelling inferences or otherwise such that it was not open to the Judge to accept it. Nor can it be said that it was not open to the Judge to reject the [appellant's] evidence. The case essentially turned on the direct conflict between the evidence given by the complainant and the [appellant]. It was open to the Judge on the evidence to be satisfied beyond reasonable doubt that the complainant was telling the truth about the sexual abuse alleged and that the defendant was not.

Treatment of inadequate reasons ground

32. As part of the inadequate reasons ground, the appellant complained that the judge's reasons did not explain how (1) the issues regarding the timing of the construction of Shed 2, (2) the location of the computer, and (3) the timing of the visit to the Adelaide unit, had been dealt with (CCA [136]). Each of these went to whether the

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16 The conclusion that part of MGF's evidence was not reliable means his evidence cannot have been accepted beyond reasonable doubt in all respects. Accordingly, Blue J's observation appears to frame the issue as being whether MGF's credibility and reliability could generally be accepted.

particular acts of sexual exploitation alleged to have occurred at those locations could have occurred as alleged.

33. Blue J dealt with the first by saying that (CCA [138]):

> The Judge said that he accepted the complainant's evidence and rejected the defendant's evidence and it is evident that this extended to the conflict concerning the slot car track. There is no substance in this complaint.

34. The appellant submits that it is **not** apparent that the judge rejected the appellant's evidence regarding the timing of construction (see TJ [64], [66], [73]).

35. Moreover, the appellant submits that Blue J's approach treats the ultimate issue as being a preference between witnesses, with the requirement of reasons being seen as only necessary to explain why that preference was made. The approach then treats a rejection of the appellant's evidence regarding the construction of the slot car track as necessarily implied, with the reasons for the rejection simply being the reasons for preferring the complainant. But if the acts of oral intercourse tied to the use of the slot car in Shed 2 were part of the actus reus, the reasons needed to address and explain how one could exclude the reasonable possibility - raised by the appellant's sworn evidence regarding when the slot track was set up in Shed 2 - that the acts did not occur as alleged.

36. Blue J dealt with the second matter by saying (CCA [139]):

> There was a conflict between the evidence of the complainant and the [appellant], but that conflict was subsumed in the larger conflict that the complainant asserted inappropriate touching and the [appellant] denied that allegation outright. The Judge accepted the complainant's evidence that such touching occurred and rejected the [appellant's] evidence denying it. In the circumstances, there was no need for the Judge to address specifically the question identified by the [appellant].

37. For similar reasons, it is submitted this (and the approach taken to the third matter at CCA [140]) reflected that neither the trial judge nor the CCA approached the adequacy of reasons by reference to the proof of actual sexual offences comprising the actus reus[17].

VI SUCCINCT STATEMENT OF ARGUMENT

38. The appellant makes the following essential submissions.

(1) Proof of contravention of s 50 required the proof of two or more acts (separated by the requisite period) which amounted to relevant sexual offences.

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[17] A similar approach was taken in relation to the evidence regarding the Moana children (CCA [145]) and other topics (CCA [147]-[148]).

(2) The requirement to give reasons for verdict entailed identifying the two or more acts which the judge found proved beyond reasonable doubt and explaining of the process of reasoning which negatived the possibility that MGF's account of the act(s) in question was wrong.

(3) To reason that there might be reasons why the specific allegations made by the complainant were doubtful, but that overall the complainant should be accepted as to the "core", is effectively to reason to guilt without dealing with whether the evidence led by the prosecution proved the actus reus which the appellant was called upon to meet.

10 (4) The CCA erred by failing to recognise that the trial judge had erred in his approach to proof of the s 50 offence and that the reasons were inadequate.

(5) A conviction was not inevitable on the evidence. The consequence was and is a substantial miscarriage of justice. The conviction should be quashed, with an order for a retrial.

Proof of contravention of s 50

39. Section 50 of the *Criminal Law Consolidation Act* 1935 (SA) was considered in *Chiro v The Queen*[18] and *Hamra v The Queen*[19].

40. The plurality accepted in *Chiro* that s 50 is not a true "course of conduct" offence, but one comprised of discrete underlying offences, in the sense that the actus reus of the
20 offence is comprised of discrete underlying acts of sexual exploitation that are defined by reference to sexual offences found in the CLCA[20].

41. The joint judgment in *Hamra* rejects the proposition that it is impossible to convict an accused person 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 circumstances[21].

42. For example, it would be sufficient if the jury (or judge in a trial by judge alone) were to accept that acts which could be the subject of a charge of a sexual offence occurred every night, or every weekend, over a period of two months without any further differentiation of the particular occasions of the offending[22].

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18 *Chiro v The Queen* (2017) 347 ALR 546; [2017] HCA 37 (***Chiro***).

19 *Hamra v The Queen* (2017) 347 ALR 586; [2017] HCA 38 (***Hamra***).

20 *Chiro* at [22], [37] (Kiefel CJ, Keane and Nettle JJ).

21 *Hamra* at [46] (the Court).

22 *Hamra* at [46] (the Court).

43. That is to say, if a **complainant's evidence** was that an act of sexual exploitation was committed every day over a two week period, acceptance of that evidence beyond reasonable doubt **could** justify a verdict of guilt[23].

44. Whilst *Hamra* decides that a lack of differentiation between incidents in a complainant's evidence does not preclude there being a case to answer (because the trier of fact might unqualifiedly accept all of the complainant's evidence, from which it might logically follow that two or more offences over the requisite period were committed), it does not follow that the issue to be resolved in a case in which the complainant and the accused both give evidence is to be identified at the level of generality of accepting one and rejecting the other.

45. Since each "act of sexual exploitation" which may ultimately comprise part of the actus reus is itself an offence, the determination of guilt involves a consideration of the evidence which supports particular alleged acts of sexual exploitation, and whether, in light of all the evidence, reasonable doubt is negatived. This requires[24], but involves more than, a rejection beyond reasonable doubt of the appellant's sworn evidence. The resolution of a criminal trial depends upon whether the evidence taken as a whole proves the **elements of the offence** beyond reasonable doubt[25].

Requirement to give reasons for verdict

46. Whilst s 7 of the *Juries Act* 1927 (SA), which provided for the trial of an accused on an information presented in the District Court by judge alone did not specify the requirements for the contents of the reasons for judgment, it has been accepted that a judge returning a verdict following a trial without a jury is obliged to give reasons sufficient to identify the principles of law and the main factual findings upon which the judge relied[26].

47. In *Douglass v The Queen*[27], the Court observed:

> In *R v Keyte*, Doyle CJ explained why a judge is required to give reasons for the judge's verdict following a trial under s 7 of the *Juries Act* 1927 (SA)[28]. These included that in the

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23 *Hamra* at [28] (the Court).

24 *Liberato v The Queen* (1985) 159 CLR 507 at 515 (Brennan J).

25 *Douglass v The Queen* (2012) 86 ALJR 1086; [2012] HCA 34 at [12] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), referring to *Murray v The Queen* (2002) 211 CLR 193 at [57] (Gummow and Hayne JJ).

26 *Douglass v The Queen* (2012) 86 ALJR 1086; [2012] HCA 34 at [8] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), referring to *AK v Western Australia* (2008) 232 CLR 438 at [107] (Heydon J). See also *R v Becirovic* [2017] SASCFC 156 at [267] (Lovell and Hinton JJ), referring to *R v Ricciardi* [2017] SASCFC 128 and *R v Cotton* [2015] SASCFC 17.

27 (2012) 86 ALJR 1086; [2012] HCA 34 at [14] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

28 (2000) 78 SASR 68 at 76.

> absence of reasons, the appellate court is unable to determine whether the judge has correctly applied the relevant rules of law. In this case, the failure to record any finding respecting the appellant's evidence left as one possibility that the judge simply preferred CD's evidence and proceeded to convict upon it applying a standard less than proof beyond reasonable doubt. **The absence of reasons sufficient to exclude that possibility constituted legal error.**

48. In *Douglass*, there had been a complete acceptance by the trial judge of the complainant's credibility, but the status of the accused's sworn evidence had been left unclear by the reasons. The reasons were insufficient to exclude legal error.

10 **Trial judge's reasons inadequate**

49. In the present case, the trial judge's reasons reveal a less than complete acceptance of the complainant's evidence (see, eg, at TJ [61], [64], [66]). MGF was accepted as a reliable witness as to the "core allegations" (TJ [66]) but not reliable as to what might be thought to be important details by reference to which the appellant met the prosecution case.

50. Further, in relation to the appellant, the judge stated, in a conclusory paragraph, that he rejected the evidence of the accused "on substantive issues where he denied the alleged sexual conduct" (TJ [73]). Not only is it unclear whether this rejection went as far as a rejection of the **reasonable possibility** of the truth of the appellant's
20 evidence, but critically, the rejection was expressed generally and ambiguously, by reference to "substantive issues where he denied the alleged sexual conduct" (TJ [75]).

51. The reasons do not exclude the possibility that the judge in fact misconceived his task as deciding, at a general level, whether to believe the complainant that there had been an unlawful relationship, as distinct from whether particular acts (or, if differentiation was not possible because the acts were repetitive and similar, classes of acts) about which evidence had been given were proved beyond reasonable doubt.

52. Having regard to the significant forensic issues joined on questions of timing and location, the failure ever to identify the particular acts (or, if necessary, classes of
30 acts) of sexual exploitation found proved, left open a number of possibilities, including:

(1) that the trial judge did not find that the acts occurred in the manner alleged by the complainant, but considered that there must have been an unlawful sexual relationship;

(2) that the trial judge did accept the appellant's evidence (or did not reject it as reasonably possibly true) regarding, for example, the timing of the construction of the slot car track in Shed 2, the location of the computer, and the timing of

the visits to the Adelaide unit, but considered that similar acts as described by the appellant must have occurred at different times or different locations;

(3) that the trial judge rejected beyond reasonable doubt the appellant's evidence on all matters, but on a basis which is not articulated.

53. It is submitted that the latter is the least likely in view of the reasons, but it would also involve error. The first two possibilities would involve either a conviction based on a misconception of the actus reus of s 50, or a conviction based on a finding as to the actus reus which was in effect a variation upon the prosecution case.

54. The appellant accepts, in light of *Chiro*, that the absence of an identification of the actus reus found proved does not of itself render the conviction uncertain[29].

55. However, the appellant submits that the reasons were fundamentally inadequate to exclude that a misdirection as to the correct approach to guilt had been taken. In fact, if anything they suggest an incorrect approach was taken. The reasons do not show that proper directions were given[30], let alone heeded[31], with respect to the making of findings of sexual offences.

56. Further, as a matter of basic fairness, it was appropriate that the actus reus be properly identified, so that justice could be seen to be done, with the appellant having a chance to understand why the parts of his evidence which seemingly were not rejected (at all, let alone beyond reasonable doubt) did not give rise to a reasonable doubt about the complainant's evidence as to the alleged acts.

57. The reasons simply indicate that the complainant was regarded as reliable as to "core allegations", but it is unclear whether that means a sub-set of the actual allegations, or the essence (but not detail) of all of the allegations. That is, the judge may have found, in effect, that the acts of sexual exploitation did not happen where or when or as described by the complainant but that acts of sexual exploitation must have occurred otherwise. Whilst s 50(4) modifies the requirements of particularity to be stated in the information[32], nevertheless, in the appellant's respectful submission, to proceed other than in reliance upon the evidence actually led would be to depart from the fundamentally accusatorial (and adversarial) nature of a criminal proceeding[33].

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29 *Chiro v The Queen* [2017] HCA 37 at [46] (Kiefel CJ, Keane and Nettle JJ), [60] (Bell J).

30 Particular alleged offending might attract different directions, particularly in relation to delay, having regard, inter alia, to s 34CB of the *Evidence Act* 1929 (SA).

31 As to the importance of heeding directions, see *Crampton v The Queen* (2000) 206 CLR 161 at [212]-[213] (Hayne J).

32 *Hamra* at [27] (the Court).

33 *X7 v Australian Crime Commission* (2013) 248 CLR 92.

58. Finally, the failure to identify the relevant acts of sexual exploitation the subject of the offence meant that the appellant's appeal rights were curtailed and frustrated. The CCA could only deal with the unreasonable verdict and inadequate reasons grounds by reference to the reasonableness or otherwise of a preference for the complainant's evidence, and whether reasons for that high level conclusion had been given[34]. The verdict was opaque because the actus reus was not identified, meaning the sufficiency of the evidence to establish the actus reus beyond reasonable doubt could not properly be examined.

59. The discipline of providing written reasons in a trial by judge alone, which is in substitution for the requirement of unanimity amongst a high number of jurors, acts as a safeguard of the interest of the accused and the public interest generally[35].

Error by the CCA

60. In these circumstances, the CCA erred by failing to uphold the appellant's appeal on the basis, at least, that the trial judge's reasons were inadequate and that this involved an error of law. In fact, in so far as the reasons tended to show a misdirection (or non-direction) as to the elements of the offence, there were further independent grounds for appellate intervention.

61. The CCA erred both in its consideration of the unreasonable verdict ground and the inadequate reasons ground in that the conflicts, inconsistencies and forensic issues raised by the appellant were not properly addressed and resolved. Instead, they were avoided as being subsumed within a single overarching conflict between the credibility of the complainant in preference to the appellant. Complaints regarding the safeness of the verdict were put to one side unless they necessarily required, at this high level, the conclusion that the complainant could not be preferred.

62. The correct approach would have involved a consideration, in relation to the different acts of sexual exploitation alleged, of whether the alleged offending occurred, bringing to bear any inconsistencies in the evidence and any matters relevant to credibility in so far as they bore on the different accounts.

63. In the present case, the allegations of oral sex appeared on the complainant's account to have commenced with an incident in Shed 2 in connection with the slot car track. The evidence strongly suggested this could not have occurred as alleged, because

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34 Cf. *AK v Western Australia* (2008) 232 CLR 438 at [112] (Heydon J). As Lovell J, with whom Parker J agreed, recently observed in the context of the reasons required in a trial by judge alone: "It is always important to bear in mind that the resolution of a criminal case does not depend on whether the evidence of one witness is preferred to that of another. The resolution of a criminal trial depends upon whether the evidence taken as a whole proves the elements of the offence beyond reasonable doubt": *R v Ricciardi* [2017] SASCFC 128 at [110].

35 *AK v Western Australia* (2008) 232 CLR 438 at [103]-[108] (Heydon J).

whereas the complainant's evidence was this occurred when he was between 9 and 12, the appellant's evidence showed (or strongly suggested) the track was not complete until the complainant was nearly 14½ years old.

64. This in turn would require that the other acts of oral sex as alleged by the complainant occurred in a relatively short window, given that the prosecution case was that the last act occurred on the day that the complainant himself sexually assaulted the appellant's daughter (at which time the complainant was about 15 ½). The allegation that the appellant abused the complainant on that date (28 August 1994) was itself the subject of a significant forensic challenge because the allegation was first mentioned in a proofing session with the prosecutor shortly before trial, on 25 July 2013[36].

65. This reinforces the importance of focussing upon the allegations said to comprise the actus reus. Otherwise the appellant faced the risk that no single allegation made by the complainant was in terms proved beyond reasonable doubt but that the verdict reflected a generalised conclusion that, because the complainant's credibility was preferred to the appellant, offending of some kind must have occurred.

Disposition of appeal

66. If the reasons for verdict were inadequate on the basis contended for by the appellant, the error of law was one which of its nature involved a substantial miscarriage of justice[37].

67. Further and in any event, the satisfaction on the part of the Court of the appellant's guilt beyond reasonable doubt would have been a necessary but not sufficient condition for the application of the proviso[38]. The CCA did not conclude, nor was there a basis to conclude[39], having regard to the significant forensic contests and the natural limitations of proceeding on the record where oral evidence was so critical to the prosecution case[40], that a finding of guilt with respect to two or more sexual offences was inevitable, and no alternative contention is made to the effect that the appeal should have been dismissed by the invocation of the proviso. It cannot be said that no substantial miscarriage of justice actually occurred.

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36 Agreed fact 2, Tr 250.

37 *AK v Western Australia* (2008) 232 CLR 438 at [55]-[56] (Gummow and Hayne JJ), *R v Ricciardi* [2017] SASCFC 128 at [117]-[123] (Lovell J, Parker J agreeing), *R v Becirovic* [2017] SASCFC 156 at [125] (Blue J), at [303] (Lovell and Hinton JJ).

38 *Weiss v The Queen* (2005) 224 CLR 300 at [44]-[45] (The Court).

39 Indeed, to take the example of the alleged act of showing pornography, it is unclear what if any offence this would or could have involved by reference to relevant statutory provisions in force at the time. The definition of "sexual offence" in s 50(12) directs attention to the laws in force from time to time.

40 See, eg, *Castle v The Queen* (2016) 227 CLR 57 at [68] (Kiefel, Bell, Keane and Nettle JJ).

68. Accordingly, if the Court is satisfied that the trial judge's reasons were inadequate or revealed a misdirection as to the relevant issues, and that the CCA was wrong not to so hold, the appeal should be allowed, the conviction quashed and a re-trial ordered.

VII LEGISLATIVE PROVISIONS

69. The provisions relevant to the disposition of the appeal are ss 50 and 353 of the *Criminal Law Consolidation Act*. The former provision is no longer in force[41].

70. Those provisions together with s 7 of the *Juries Act* 1927 (SA) are set out in the annexure.

VIII ORDERS SOUGHT

10 71. That the appeal be allowed.

72. That the orders of CCA be set aside and in lieu thereof it be ordered that:

(1) the appeal to the Court is allowed;

(2) the appellant's conviction be quashed;

(3) there be an order for retrial.

IX ESTIMATE OF ORAL ARGUMENT

73. The appellant estimates that his oral submissions will require 1 – 1½ hours.

4 December 2017 ~~28 November 2017~~

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41 Section 50 was repealed and replaced by a different offence involving the maintenance of an unlawful sexual relationship with a child by the *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act* 2017 (SA), which was assented to and effective from 24 October 2017. Whilst s 9 of that Act appears to be intended to have a partially retrospective operation in respect of appeals against sentence based on the ruling in *Chiro*, it does not affect the position of an appeal against conviction. See also *R v Chiro* [2017] SASCFC 144 at [10].

ANNEXURE (PART VII – STATUTORY PROVISIONS)

***Criminal Law Consolidation Act* 1935 (SA) (as then in force)**

50—Persistent sexual abuse of child

(1) An adult who maintains an unlawful sexual relationship with a child is guilty of an offence.

Maximum penalty: Imprisonment for life.

(2) An ***unlawful sexual relationship*** is a relationship in which an adult engages in 2 or more unlawful sexual acts with or towards a child over any period.

(3) For an adult to be convicted of an unlawful sexual relationship offence, the trier of fact must be satisfied beyond reasonable doubt that the evidence establishes that an unlawful sexual relationship existed.

(4) However—

(a) the prosecution is not required to allege the particulars of any unlawful sexual act that would be necessary if the act were charged as a separate offence; and

(b) the trier of fact is not required to be satisfied of the particulars of any unlawful sexual act that it would have to be satisfied of if the act were charged as a separate offence, but must be satisfied as to the general nature or character of those acts; and

(c) if the trier of fact is a jury, the members of the jury are not required to agree on which unlawful sexual acts constitute the unlawful sexual relationship.

(5) The prosecution is required to allege the particulars of the period of time over which the unlawful sexual relationship existed.

(6) This section extends to a relationship that existed wholly or partly before the commencement of this section and to unlawful sexual acts that occurred before the commencement of this section.

(7) A person may be charged on a single indictment with, and convicted of and punished for, both—

(a) an offence of maintaining an unlawful sexual relationship with a child; and

(b) 1 or more sexual offences committed by the person against the same child during the alleged period of the unlawful sexual relationship.

(8) Except as provided by subsection (7)—

(a) a person who has been convicted or acquitted of an unlawful sexual relationship offence in relation to a child cannot be convicted of a sexual offence in relation to the same child if the occasion on which the sexual offence is alleged to have occurred is during the period over which the person was alleged to have committed the unlawful sexual relationship offence; and

(b) a person who has been convicted or acquitted of a sexual offence in relation to a child cannot be convicted of an unlawful sexual relationship offence in relation to the same child if the sexual offence of which the person has been convicted or acquitted is one of the unlawful sexual acts that are alleged to constitute the unlawful sexual relationship.

(9) A person who has been convicted or acquitted of a predecessor offence in relation to a child cannot be convicted of an unlawful sexual relationship offence in relation to the same child if the period of the alleged unlawful sexual relationship includes any part of the period during which the person was alleged to have committed the predecessor offence.

(10) For the purposes of this section, a person ceases to be regarded as having been convicted for an offence if the conviction is quashed or set aside.

(11) A court sentencing a person for an offence against this section is to sentence the person consistently with the verdict of the trier of fact but having regard to the general nature or character of the unlawful sexual acts determined by the sentencing court to have been proved beyond a reasonable doubt (and, for the avoidance of doubt, the sentencing court need not ask any question of the trier of fact directed to ascertaining the general nature or character of the unlawful sexual acts determined by the trier of fact found to be proved beyond a reasonable doubt).

(12) In this section—

adult means a person of or over the age of 18 years;

child means—

(a) a person who is under 17 years of age; or

(b) a person who is under 18 years of age if, during the period of the relationship that is the subject of the alleged unlawful sexual relationship offence, the adult in the relationship is in a position of authority in relation to the person who is under 18 years of age;

predecessor offence means an offence of persistent sexual exploitation of a child, or of persistent sexual abuse of a child, as in force under a previous enactment;

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;

unlawful sexual act means any act that constitutes, or would constitute (if particulars of the time and place at which the act took place were sufficiently particularised), a sexual offence;

unlawful sexual relationship offence means an offence against subsection (1).

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

(a) the person is a teacher and the child is a pupil of the teacher or of a school at which the teacher works; or

(b) the person is a parent, step-parent, guardian or foster parent of the child or the de facto partner or domestic partner of a parent, step-parent, guardian or foster parent of the child; or

(c) the person provides religious, sporting, musical or other instruction to the child; or

(d) the person is a religious official or spiritual leader (however described and including lay members and whether paid or unpaid) in a religious or spiritual group attended by the child; or

(e) the person is a health professional or social worker providing professional services to the child; or

(f) the person is responsible for the care of the child and the child has a cognitive impairment; or

(g) the person is employed or providing services in a correctional institution (within the meaning of the *Correctional Services Act 1982*) or a training centre (within the meaning of the *Young Offenders Act 1993*), or is a person engaged in the administration of those Acts, acting in the course of the person's duties in relation to the child; or

(h) the person is an employer of the child or other person who has the authority to determine significant aspects of the child's terms and conditions of employment or to terminate the child's employment (whether the child is being paid in respect of that employment or is working in a voluntary capacity).

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. …

***Juries Act* 1927 (SA)**

7—Trial without jury

(1) Subject to this section, where, in a criminal trial before the Supreme Court or the District Court—

(a) the accused elects, in accordance with the rules of court, to be tried by the judge alone; and

(b) the presiding judge is satisfied that the accused, before making the election, sought and received advice in relation to the election from a legal practitioner,

the trial will proceed without a jury.

(2) No election may be made under subsection (1) where the accused is charged with a minor indictable offence and has elected to be tried in the District Court.

(3) Where two or more persons are jointly charged, no election may be made under subsection (1) unless all of those persons concur in the election.

(3a) Where an information is presented to the District Court or the Supreme Court under section 275 of the *Criminal Law Consolidation Act 1935* and the information includes a charge of a serious and organised crime offence (within the meaning of that Act), the Director of Public Prosecutions may apply to the court for an order that the accused be tried by judge alone.

(3b) The court may make an order on an application under subsection (3a) if it considers it is in the interests of justice to do so (and may do so at any time before commencement of the trial of the matter, regardless of whether a jury has been constituted in accordance with this Act to try the issues on the trial).

(3c) Without limiting subsection (3b), the court may make an order on an application under subsection (3a) if it considers that there is a real possibility that acts that may constitute an offence under section 245 or 248 of the *Criminal Law Consolidation Act 1935* would be committed in relation to a member of a jury.

(3d) An order of a court on an application under subsection (3a) may be appealed against in the same manner as a decision on an issue antecedent to trial.

(4) If a criminal trial proceeds without a jury under this section, the judge may make any decision that could have been made by a jury and such a decision will, for all purposes, have the same effect as a verdict of a jury.