**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 ANNOTATED REPLY

## I PUBLICATION

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

## II REPLY

2. The respondent accepts that the obligation to give reasons for verdict in a trial of an offence against s 50(1) requires that the acts of sexual exploitation of which the trial judge was satisfied beyond reasonable doubt must be "apparent" (RS [14], [23]).

3. However, the respondent makes the following essential submissions[1], to which the appellant will reply.

   (1) It should be inferred on a "fair and holistic reading" that, in accepting the "core allegations", the trial judge must have accepted beyond reasonable doubt **all** of the acts of sexual exploitation alleged by the complainant in his evidence "**less** the particular circumstances of those allegations which the trial judge has identified as problematic" (RS [15], [27]-[30]).

   (2) This was not gainsaid by the trial judge having rejected the appellant's evidence apparently only "on substantive issues" – "the appellant's denials were expressly rejected as being a reasonable possibility on the basis that the evidence of the complainant that the alleged acts of sexual exploitation occurred had been accepted beyond reasonable doubt" (RS [32]-[33]).

   (3) The appellant's submissions to the effect that the failure to identify the acts found proved involved a failure to give adequate reasons because the process of reasoning to guilt was not properly exposed is beyond the scope of the grounds

[1] The respondent also makes submissions directed to answering a submission the appellant did not advance (indeed expressly disavowed – AS [54]), viz, that the verdict was uncertain (RS [18]-[19]).

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of appeal or inconsistent with the basis upon which special leave was sought (RS [2], [16]). It is convenient to deal with this point immediately.

**Scope of the ground of appeal**

4. With respect, the respondent seeks artificially to narrow the ground of appeal. In effect, the respondent seeks to confine the appellant's appeal to a contention that the reasons are inadequate, or the verdict is unsafe, solely because of, and **without considering the implications which flowed from**, a failure to identify the actus reus (the particular acts of sexual exploitation found proved).

5. That is an unnatural and narrow reading of the ground of appeal, and it is not consistent with how the matter was argued on the application for special leave.

6. The appellant's essential submission is that the trial judge's error was not merely in failing to **record**, as the final step in the process of giving reasons, the actus reus found proved[2]. Rather, the trial judge's failure to identify the actus reus found proved reflected a more fundamental failure to **identify the true issue**. (It is for this reason that the ground of appeal articulates, as possible consequences of the failure to address the acts found proved, not only that the reasons were inadequate, but that the verdict is unsafe and/or that there has been a miscarriage of justice.)

7. The judge treated the issue as being whether he generally preferred and accepted the complainant MGF, notwithstanding the apparent difficulties with his account, instead of considering whether, in light of the appellant's sworn denials, the difficulties with the complainant's reliability and credibility and the objective evidence bearing on and inconsistent with each allegation, two or more of the relevant allegations were proved beyond reasonable doubt (and separated by the requisite period).

8. In complaining that the reasons do not in terms identify (and resolve) the real issue, the appellant is necessarily complaining that the reasons did not properly expose the path of reasoning to guilt. That contention does not involve an expansion of the grounds of appeal.

9. Submissions to essentially the same effect as made on appeal were made in the appellant's application for special leave to appeal[3], in the reply submissions[4], in the

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2 Although such a failure would itself, in the appellant's respectful submission, constitute a material error of law having regard to the various purposes served by reasons.

3 Application for Special Leave to Appeal filed 28 October 2016 (No. A45 of 2016), paras [25], [26], [43]-[49].

4 Applicant's Reply filed 19 December 2016 (No. A45 of 2016), paras [20]-[24], and in particular, para [24] ("Where the trial is by judge alone, in the absence of reasons on this issue, a defendant is left in a state of uncertainty as to the **path to guilt taken by the trial judge**. That is unsatisfactory because, without knowing that path, an appellate challenge to the reasonableness of the verdict is hampered, and the possibility remains that no identifiable acts of sexual offending were ever actually found beyond reasonable doubt and that there was instead a finding in some general way of an unlawful sexual relationship".

further submissions on the application for leave made at the invitation of the Court following its decisions in *Chiro* and *Hamra*[5], and orally[6].

10. The contention that the judge focussed wrongly on a preference at a general level for the complainant is simply the other side of the coin of the complaint that the judge did not focus on or address explicitly in his reasons whether the evidence proved one or more (and if so which) of the particular acts of sexual exploitation alleged by the complainant.

**Fair and holistic reasoning reveals all offences found proved**

11. Contrary to the respondent's submissions (eg, RS [27]), the appellant submits that it is not appropriate for this Court to rationalise the trial judge's reasons as disclosing findings that **all** of the allegations of acts of sexual exploitation **less** the particular circumstances of those allegations identified as problematic.

12. First, the trial judge directed himself that he did not have to accept everything that MGF said to be satisfied of the charge (TJ [64] AB355). Whilst he specifically singled out timing as an aspect of MGF's evidence that was inaccurate (TJ [61] AB354), he later referred more generally to the "implausibility" of aspects of MGF's evidence (TJ [64] AB354), suggesting the problems with its reliability extended beyond legally irrelevant details of each allegation. Indeed, that language reflected criticisms advanced as part of the **appellant's case** (see TJ [59] AB353), which involved a general attack on the consistency and plausibility of MGF's account and was not limited to a criticism of "non-core" details with respect to each allegation. The judge's comment that he did not have to accept everything that MGF said followed after noting that MGF's evidence was affected by both inconsistency and implausibility. In that context, the later finding with respect to "core allegations" cannot fairly be taken to be a finding beyond reasonable doubt that all the alleged acts occurred. Indeed, at the outset, the judge had directed himself the prosecution **did not** have to prove each type of sexual conduct alleged (TJ [7] AB345).

13. Secondly, the trial judge did not identify the elements of the sexual offences in question. (As noted in the primary submissions, it is not apparent that each of the allegations would have amounted to a "sexual offence" according to the law at the time of the alleged act: see, AS fn 39.)

14. Thirdly, for reasons advanced in the appellant's primary submissions (see, eg, AS [63]-[64]), forensically, timing could not in this case be waved away as mere detail, even if the precise time of a particular act was not an essential particular of an underlying sexual offence under s 50.

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5 Further Submissions of the Applicant filed 22 September 2017 (No. A45 of 2016), paras [5], [6], [15]-[18], [20]-[22].

6 *DL v The Queen* [2017] HCA 215 at 324-349, 384-478.

15. There was a major issue at trial about the frequency of MGF's visits to the appellant's house. However, even allowing that the visits were as frequent as MGF suggested, if, as MGF's evidence appeared to suggest, oral sex commenced from the time of the slot car track being established in Shed 2, the appellant's evidence regarding when the track when was set up (corroborated by an entry in a contemporaneous calendar (Exhibit D7 AB324), the genuineness of which was testified to by his ex-wife (Tr 211-214 AB189-192)) meant that the available period during which many of the allegations were said to have occurred is necessarily reduced to the point that it strains credulity to think that each of the acts alleged by MGF occurred. If, as seems likely, the judge did not reject as reasonably possibly true the appellant's evidence on this issue, it is not likely that the judge could have accepted beyond reasonable doubt that each and every allegation of oral sex alleged by MGF occurred.

16. This was not a case where it was possible or appropriate to put aside the detail of the allegations (on the respondent's case, the "non-core" aspects of the allegations) and accept the essential parts because the proper approach to a finding of guilt of particular sexual offences required a consideration of how MGF's reliability bore on proof of the particular offence.

17. The more likely construction of the judge's reasons is that the judge did not approach proof of the charge by reference to proof of the actus reus (two or more particular acts of sexual exploitation separated by the requisite period) but rather by reference to a single general issue, namely, whether MGF was truthful and reliable in saying that he had been sexually abused. That is more consistent with how the judge expressed himself at TJ [6] AB345 when identifying the issue, and later in TJ [66], [67] and [73] AB355-356. It is respectfully submitted that ultimately, the judge's reasons reflect a recognition that the actual allegations made by MGF (or at least not all of them) were not proved beyond reasonable doubt, but that the judge believed MGF (or preferred MGF as a witness over the appellant) and accordingly concluded that acts of a kind which would disclose an unlawful sexual relationship did happen. In the appellant's respectful submission, that would not be a legitimate path of reasoning to guilt having regard to the nature of the s 50 offence.

18. At the least, the reasons do not exclude the possibility of such reasoning. The reasons do not positively identify that a correct approach was taken, and where the possibility of error is left open, a generous approach to the reasons should not be taken. Unless the judgment shows expressly or by implication that the principle was applied, it should be taken that the principle was not applied, rather than applied but not recorded[7]. The same is true of findings of fact[8]. The reasons here do not show that the

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

8 *AK v Western Australia* (2008) 223 CLR 438 at [111] (Heydon J).

judge considered whether the evidence taken as a whole proves the elements of the offence beyond reasonable doubt[9].

19. Indeed, at RS [32]-[33], the respondent appears to attribute to the judge a mode of reasoning which is positively indicative of error. The respondent contends, in answer to a submission that the judge's treatment of the appellant's sworn evidence was unsatisfactory, that this was not a case where the status of the appellant's evidence was left unclear because they were rejected **on the basis that the evidence of the complainant** that the alleged acts of sexual exploitation occurred **had been accepted beyond reasonable doubt** (RS [33]). If that approach was taken by the trial judge, it is inconsistent with authority in this Court[10].

20. Finally, and in any event, if contrary to the foregoing, the reasons are to be treated as revealing a finding of guilt in respect of each and every allegation made by the applicant, the reasons are totally inadequate to demonstrate how, in light of the specific issues of credibility and reliability relating to various of those allegations, the trial judge could reject as a reasonable possibility the appellant's sworn denials of each of them and accept each and every allegation beyond reasonable doubt.

21. As Ipp JA said in *Goodrich v Aerospace Pty Ltd v Arsic*[11]:

> It is not appropriate for a trial judge merely to set out the evidence adduced by one side, then the evidence adduced by another, and then assert that having seen and heard the witnesses he or she prefers or believes the evidence of the one and not the other. If that were to be the law, many cases could be resolved at the end of the evidence simply by the judge saying: 'I believe Mr X but not Mr Y and judgment follows accordingly'. That is not the way in which our legal system operates.

22. It has been said that the mere recitation of evidence followed by a statement of findings, without any commentary as to why the evidence is said to lead to the findings, is about as good as useless[12]. The deficiency in the reasons in the present case is *a fortiori* in that, first, one is left to deduce the nature of the findings, and secondly, the trial judge has failed to deal with the specific inconsistencies and difficulties with the Crown case relied upon by the appellant.

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9 *Douglass v The Queen* (2012) 86 ALJR 1086; [2012] HCA 34 at [12] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

10 *Murray v The Queen* (2002) 211 CLR 193 at [57] (Gummow and Hayne JJ).

11 (2006) 66 NSWLR 186; [2006] NSWCA 187 at [28].

12 *Hunter v Transport Accident Commission* [2005] VSCA 1 at [28] (Nettle JA).