IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN:

No. A9 of 2017

MARCO CHIRO
Appellant

and

THE QUEEN
Respondent

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APPELLANT'S REPLY

I PUBLICATION

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

II REPLY

Introduction

2. The respondent's submissions engage with the appellant's submissions at two levels.

   (a) At one level, the respondent accepts there was a discretion to ask questions of the jury, but, by reference to the considerations in *Isaacs*, argues there was limited utility in doing so. As part of this submission, the respondent makes a number of subsidiary propositions, including:

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      (i) that there is no particular reason to think the jury would or could have accepted there were two acts of sexual offending and not accepted the entire account (and that the appellant's submission that the jury may well only have been satisfied of a sub-set of the charged offending involves pure speculation);

      (ii) that once satisfied of two offences the jury may never have considered the remaining offences and since there is no power to "force" the jury to continue deliberating, there is no utility in asking questions because the answers would be unrevealing in relation to the balance of the offences.

   30 (It will be submitted there is a tension between these two propositions.)

   (b) At a more fundamental level, the respondent makes submissions respecting the nature of a conviction pursuant to s 50 (the offence provision) and the nature of the sentencing process itself, which it will be necessary to answer. For example:

      (i) in relation to s 50, the respondent submits that the offence the subject of the conviction encapsulates all the conduct particularised (RS [30]);

      (ii) in making findings as to which sexual offences were committed the judge is simply resolving unknown circumstances relevant to an assessment of a defendant's culpability for the offending established by the verdict, in a manner which is analogous to a finding as to whether, in the context of a rape charge, the defendant knew there was no consent or was alternatively reckless as to whether there was consent (RS [33]-[40]).

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   (Again, there is a tension. If proposition (i) is correct the verdict is taken to prove all the particularised sexual offending. There would be no need for further fact-finding by the sentencing judge of the kind contemplated within proposition (ii).)

3. It is convenient to address the fundamental questions of principle first, before turning to questions pertaining to the utility of special questions or the taking of a special verdict in the present case (to aid sentencing and to avoid uncertainty).

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The nature of a conviction pursuant to s 50

4. The appellant's position is summarised at AS [39]-[45]. The respondent's position, however, is opaque.

   (a) At RS [11]-[12] the respondent mentions, without developing, the significance of the decision in *Hamra*, decided after the CCA decision in the present case. No argument has been or is advanced against the proposition that the *actus reus* of the s 50 offence (the composite offence) requires proof of two or more sexual offences (the constituent offences). Such a contention would involve overruling the five-member CCA decision in *Little*, in which s 50 was held to attract the approach required by this Court in *KBT*.

10 (b) That said, at RS [27]-[40], the respondent develops submissions which can only be correct if a conviction against s 50 may be taken to involve a conviction for conduct which is more wide-ranging than the elements of the offence.

5. In other words, the respondent appears to contend that though a verdict may be secured on the basis of the jury accepting only two constituent offences were committed, the verdict is taken to represent a conviction for a broader offence including, or potentially including, many other alleged acts of sexual offending (namely one or more of the sexual offences identified in s 50(7)). As indicated above, at one point in its submissions (RS [30]), the respondent appears to go so far as to suggest that the verdict must be taken to encapsulate all the conduct particularised in the information even if the jury were directed, as they repeatedly were here,
20 that they could return a verdict of guilty if satisfied of two occasions.

6. That is a startling submission. It would permit the framing of an information involving acts of kissing and acts of rape, and though the jury might be expressly directed that they could convict for two acts of kissing, the judge would be bound to sentence for a composite offence reflecting all the particularised allegations. The submission is also inconsistent with what in fact the judge did in this case. Here, the sentencing judge appears to have considered it necessary to make findings as to the constituent offences. She did not treat the verdict as necessarily establishing their proof.

7. Elsewhere, however, the respondent appears to contemplate that a verdict which may have been based on a sub-set of the constituent offences entitles, but does not require, the
30 sentencing judge to make findings as to the other alleged offences, because (RS [27]):

> The appellant's culpability will however be determined by the length, frequency and nature of his conduct. Once the elements of section 50 have been satisfied, other conduct which may have satisfied the elements but did not, because the jury did not have to reach a conclusion as to that conduct, remains relevant to his degree of culpability.

8. The premise for this submission must be closely examined. It is submitted that the submission could only be sustained in one of two ways:

   (1) First, by accepting, contrary to the approach in *KBT*, that the offence involves the maintaining of an unlawful relationship, or the establishment of some discreditable character or propensity. In other words, while only two acts of sexual offending are
40 required to prove the charge, once made out, the verdict signifies an offence which is more abstract (a state of affairs or a relationship involving persistent exploitation), the detail of which is for the sentencing judge to determine[1].

   (2) Alternatively, the respondent's approach can only be supported if it is accepted that in the process of sentencing, it is appropriate to sentence an offender not only for the offence for which they have been convicted, but other conduct which might have been separately charged as offending but was not.

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[1] For reasons already developed, the appellant disputes this submission. Further, the respondent's reliance upon the double-jeopardy protections in s 50(5) (RS [39]) is misplaced. A provision designed to ensure a defendant cannot be repeatedly taxed with prosecutions involving allegations said to have occurred during a period in respect of which there has already been a forensic contest cannot justify the interpretation contended for by the respondent.

9. In relation to the second proposition, it is respectfully submitted that the respondent's submissions overlook an important first step in the sentencing process, which is fundamental to the resolution of this appeal. To explain further:

(1) The respondent refers to the "primary constraints" on a sentencing judge being that the findings must not be inconsistent with the verdict of the jury (and the need to make findings of fact against the offender beyond reasonable doubt) (eg, RS [22], [67]).

(2) The respondent then acknowledges but seeks to distinguish the principles acknowledged in *De Simoni*, as being concerned with a case where the sentencing judge is invited to punish the defendant for uncharged offences (RS [30]-[31]), and to bring the present case within the proposition in *Cheung*, to the effect that the sentencing judge may make findings necessary to assess the offender's culpability for the offending of which they have been found guilty, though the jury's verdict may be unrevealing as to the fact in issue (eg, RS [28]).

(3) The respondent develops its argument by seeking to draw analogies with three examples given at RS [35]: (i) manslaughter where the verdict does not reveal whether the jury based themselves on different approaches (provocation, excessive self-defence, no intent to kill or cause grievous bodily harm), (ii) rape where the verdict does not reveal whether there was no consent or recklessness, and (iii) trafficking controlled drugs where the verdict does not articulate the precise nature of the conduct.

(4) But in each of the examples, and in the motive example given in *Cheung* at [36], there is no doubt as to the offence for which the offender is to be sentenced. The fact-finding in question relates to circumstances which may bear upon the culpability or gravity of that offence. The proposition or constraint that the judge must not act inconsistently with the verdict operates to that process of sentencing, but the anterior question, and the more fundamental inquiry is: for what offence is the offender being sentenced? This reflects a most basic tenet of criminal law and punishment that is reflected in *De Simoni* but in numerous other authorities (AS [55], fn 29), that an offender is sentenced and punished for the offence of which he has been convicted.

(5) Fact finding as to the circumstances of **that** offence do not contravene that principle. Nor, in some cases, does a finding by reference to surrounding conduct which may indicate, because the offending the subject of the conviction was not isolated, there may be no mitigating circumstances. But that is very different from punishing the offender for **other criminal acts** which are not shown to be established by the verdict, which is how the sentencing judge proceeded in the present case.

(6) Accordingly, while it is clear from *R v Olbrich*[2] and *Filippou v The Queen*[3] that there is no obligation upon a sentencing judge to take a view of the facts most favourable to the defendant, the problem in the present cases arises at an anterior stage: what is the offending for which the defendant is to be sentenced?

10. In the present case, because the judge expressly directed the jury that they might convict on the basis of two acts of indecent kissing, one cannot treat the verdict of guilty as signifying a conviction of an offence encapsulating all the particularised offending. The position might be different had the respondent sought directions to the effect that the jury had to be unanimously satisfied of all the alleged acts, but that was not how the respondent conducted the case.

The utility of asking questions in this case

The "all or nothing" issue

11. The respondent contends that the appellant's submission to the effect that the verdict may well have reflected satisfaction of two occasions only is speculative (eg, RS [20]). The respondent

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2 (1999) 199 CLR 270.

3 (2015) 256 CLR 47.

appears to place great reliance upon email correspondence (RS [6], [63]) and it puts that the appellant and V were "in fact seen by people at the school" (RS [8]). Indeed, the respondent submits that (RS [9]):

> The appellant does not state how or why a jury could have been satisfied of her credibility and reliability in relation to only two acts of kissing in circumstances of indecency and yet not also been satisfied of any other aspects of her evidence.

12. That submission commits the fallacy deprecated in *KBT* at 424. This case can no more be described as an "all-or-nothing" contest than could *KBT*. The inconsistencies and improbabilities referred to in the appellant's submissions bear this out (AS [15]-[24]) and are not answered by references to emails which, if anything, tend to reinforce that although there was, as was conceded, an inappropriate and unacceptable relationship (AS [23]), the appellant did not commit the acts alleged by V.

    (a) Those emails, which were exchanged in 2011 (when V was in year 12), are revealing in that they demonstrate that the appellant and V were very conscious of V's age and that things might change when she turned 18 (which occurred around the time V finished school)[4], and that, in the subsequent months, their contact appears to have been primarily limited to email, V had a new boyfriend, and indeed a comment was made by V in an email that "it looks as though, for now, we've missed the window of opportunity"[5]. It was well open to the jury to find that there had been an inappropriate relationship and perhaps that there had been acts of kissing, for example, but to reject what might be thought to be brazen and improbable accounts of masturbation and an occasion involving oral sex in a classroom. Contrary to the respondent's submission (RS [8]), the emails hardly reflect "brazen" conduct of that kind.

    (b) Further, the submission that they "were in fact seen by people" needs to carefully scrutinised. The appellant's submissions[6] show that this evidence was most equivocal.

13. Moreover, the respondent's submissions overlook the fact that the trial judge specifically and repeatedly directed the jury that they could act on two sexual offences alone, and in the particular circumstances of this case, there is no reason to think they were unanimous about the first two offences they considered because after approximately 6 ½ hours of deliberation, the jury said they had reached an impasse and were given a *Black* direction (AS [27]). Later again, they asked whether they were to be asked for a verdict by reference to different species of offending (AS [28]).

No power to force the jury to keep deliberating

14. Next, the respondent contends that unless there were power to require the jury to deliberate beyond satisfaction of the elements of the offence, there would be little utility in asking questions of the jury because the answers may not provide a complete answer in respect of each of the alleged sexual offences (RS [55]). The answer to this submission is that if the prosecution elects to seek directions from the judge which would entitle a jury to accept some but not all the offending alleged in the information then it follows that the prosecution is content to seek a conviction for a sub-set of the alleged offending, and it is for that sub-set which the sentencing judge must impose punishment.

15. In a case such as the present, where the judge has directed the jury that they are entitled to return a verdict of guilty if they unanimously agree that two or more sexual offences were committed beyond reasonable doubt, the question for the jury is essentially, and simply, this: "What were the two or more sexual offences as to which you were unanimously agreed?"

16. The fact that in a particular case, the jury may have agreed as to two offences, and not considered others, is simply a function of the way the prosecution have elected to seek a conviction. If it is desired that the defendant be convicted and punished for each act of

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4 Exhibit P5, emails dated 17.06. 11, 24.07.11, 30.07.11, 23.08.11, 30.09.11, 14.10, 1.

5 Exhibit P5, email dated 08.12.11.

6 See AS [19](c) (Keisha Kimber) RS [22] and fn 6 (the respondent's submissions wrongly refer to fn 8).

alleged sexual offending, the prosecution should seek that the jury be directed in terms that the composite offence alleged comprises **all** of the constituent offences particularised in the information and alleged by the victim. Alternatively, separate acts can be charged as separate offences.

17. This is not to contend that there is an **obligation** on the prosecution, which is superintended by the Court, to frame indictments in particular ways (cf. RS [75] and *Cheung* at [44]). It is to contend that the **consequence** of framing an indictment so as to include multiple discrete sexual offences but then to seek a conviction on some lesser basis gives rise to (i) a problem of uncertainty (because the verdict will not correlate with the information)[7], and (ii) restrictions upon the approach to sentencing, unless questions are asked of the jury which resolve those matters.

***The considerations in* Isaacs**

18. The respondent submits that four of the seven considerations identified in *Isaacs* tell against the asking of questions in this case (RS [49]). The first argument (RS [49](a)) relates to the question of matters not considered by the jury, which has been addressed above. The second argument (RS [49](b)) does not tell against asking questions; it is an attempt to neutralise a possible additional benefit of asking questions (namely, to ensure the jury in fact unanimously agreed on particular offences)[8]. The third argument (RS [49](c)) seeks to criticise defence counsel for raising these matters after the jury had been deliberating for some 9 hours (and see also RS [78]-[79]). This criticism is misconceived because:

    (a) this was not a case where, if questions were to be asked, the fundamental directions needed to be revisited, or the jury would become confused. The judge had directed the jury in terms which necessitated their unanimous agreement of specific offences. There could be no difficulty in identifying which offences they unanimously agreed upon;

    (b) the necessity to ascertain the basis for any verdict became increasingly apparent during the course of the jury's deliberations. Not only did they reach an impasse, but they then raised a question as to whether they would be asked for separate verdicts. Defence counsel immediately raised an issue. This was a perfectly appropriate time at which to raise an issue. The judge indicated categorically she would ask for a single verdict;

    (c) finally, if the appropriate course is to ask questions, it is not the sole province of defence counsel to raise the matter. Given how the judge responded to the issue when it was raised, there is no reason to think raising it earlier would have altered matters.

19. The respondent does not meet the appellant's submissions that, unlike in the case of manslaughter, where unanimity is generally not required, and where it is accepted that none of the forms of manslaughter is intrinsically more serious than the others, here, the jury **must** be unanimous, and the number and nature of constituent offences found proved will, on accepted principles (AS [34], [55]), be fundamental to the punishment.

20. If questions were not appropriate in the present case, it is difficult to see when they would ever be. Questions not having been asked, the sentencing process should have been constrained by an assumption necessary to avoid punishing the appellant for underlying offences in respect of which, conceivably, the jury positively acquitted him.

21 April 2017

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7 See AS [82]. The jury's task and function is critically linked to the indictment in respect of which the jury is sworn and empanelled. See the discussion in *Maher v The Queen* (1987) 163 CLR 221.

8 The appellant does not accept the submission that this would not be a factor militating in favour of asking questions, particularly given the facility, identified in the respondent's submissions (RS [13], including by reference to *Jackson v The Queen* (1976) 134 CLR 42), to ask questions in advance of seeking a general verdict. Such questions may assist in ensuring there has been no error in approach.