IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A9 of 2017

BETWEEN:

MARCO CHIRO
Appellant

and

10

THE QUEEN
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Publication

1. I certify that this submission is in a form suitable for publication on the internet.

Part II: Concise statement of issues presented by the appeal

2. The respondent agrees that the general issues stipulated by the appellant reflect the two grounds of appeal. The respondent submits the more specific matters which arise for determination are:

20 (a) what matters must be considered when considering whether to take a special verdict or to ask questions of the jury as to the basis of the verdict,

(b) if the absence of a special verdict or questions after the verdict to determine the basis for sentence means a conviction for an offence against s50 of the *Criminal Law Consolidation Act 1935*(the CLCA) is uncertain, does it follow that it is mandatory that such questions be asked after every such verdict,

(c) if the jury has not reached a conclusion as to all the alleged conduct at the time the verdict is delivered can the jury be directed to continue deliberating or must the sentencing judge sentence only on the basis of what has been determined at the time the verdict is delivered,

30 (d) what are the specific questions the appellant submits should have been asked at this trial,

(e) what are the fact finding limitations on a sentencing judge and in particular is the judge prohibited from making a finding as to conduct which constitutes or could constitute an element of the offence, and

(f) is it relevant to the exercise of the discretion that the issue of special verdicts was only raised after addresses, after the summing up, after the jury had been deliberating for 9 hours and at a point 10 minutes before the jury delivered their verdict.

Office of the Director of Public Prosecutions
L7, 45 Pirie Street, Adelaide SA 5000

Telephone: (08) 8207 1529
Fax: (08) 8207 1799
Ref: Ian Press SC & Ben Lodge

Part III:

3. It is certified that the respondent does not consider any notice should be given in compliance with section 78B of the *Judiciary Act 1903*.

Part IV: Material Facts and Chronology

4. The facts included in the narrative of facts and the chronology are generally accurate. A more detailed account of the evidence of the sexual conduct is contained at pages 12-17 of the Summing Up. The number of acts and the specificity of some of the acts alleged by the complainant will be relevant to the questions raised by the appeal and therefore the respondent refers specifically to the following evidence of the complainant:

(a) the appellant first kissed her in year 9 (2008) when she was 14 years old. This first kiss was described as a quick peck on the lips. It was not relied upon by the prosecution as an act of sexual exploitation for the purpose of the charge;

(b) the second occasion on which the appellant kissed her[1] in year 9 (2008). It was an open-mouthed kiss. It happened in the language teacher's office where she was going quite often to help the appellant plan the school Italy tour.[2] It was followed by her tripping over a chair.[3] In a later email by the appellant to the complainant in May 2012 he referred to missing the time he spent with her when planning this trip;[4]

(c) an occasion in the year 9 Italian class (2008) when the complainant was kneeling behind the appellant's desk and he rubbed her vagina on top of her skirt and underwear with the back of his hand.[5]

(d) in 2008 in LOTE5 sometimes the appellant "would have his hand on my leg, sometimes it was on my skin, sometimes just on my skirt…sometimes he would…put his hand on my vagina…"[6]

(e) an occasion in the LOTE5 or LOTE6 class in year 10 (2009), during a break when no other students were present, she followed him up the stairs of the building and they stood and kissed inside a classroom, while he rubbed himself against her;[7]

(f) an occasion in year 10 (2009) in the computer room, when the appellant was concerned they might have been seen kissing by another teacher. The complainant later saw the appellant and the teacher talking "about general stuff" and the appellant later told her that he had gone to speak to him

---

[1] TS 124.
[2] TS 127.
[3] TS 124-125.
[4] TS 498- the last email in P5.
[5] TS 131-132.
[6] TS 128-129.
[7] TS 140.

immediately so that everything would seem normal. On that occasion the appellant had a hand up her skirt and, she thought, under her bra;[8]

(g) one occasion when the complainant and appellant were standing up kissing and the appellant put his hand inside her underwear and put a finger inside her vagina for a few seconds. This happened in Year 10, when they were kissing in the computer room;[9]

(h) an occasion of masturbation in the computer room in year 10 (2009). The complainant and appellant were sitting at a computer. He pulled out his penis, took her hand and moved it up and down on his penis, until he ejaculated. She recalled the appellant placing his hand over the tip of his penis to avoid it hitting the metal edge of the desk, and the appellant ejaculating and using paper from a nearby printer to clean it up;[10]

(i) an occasion of fellatio. This happened when they were alone in the computer room, in year 10. The appellant asked her to perform this act. The appellant told her to stop after a short time, or he would "come". She recalled a later conversation, possibly via email, in which this incident was discussed. She gave detail of the conversation;[11]

(j) they would kiss a lot in Year 10 and he would pull her close to him and rub himself against her, touch her breast and put his hands up her skirt and touch her "butt" and her vagina;[12]

(k) an occasion in a portable classroom in year 11 (2010), when the appellant kissed the complainant's neck and had one hand inside her underwear and one hand inside her top, touching her breast.[13]

5. The installation of cameras commenced in October 2009 and was completed during Term 4 in November 2009, which was the end of the complainant's year 10. In evidence-in-chief the complainant said she had seen the accused in these years in portable room 34, the gold sub school and the withdrawal room.[14] The only occasion of offending she could specifically recall from this time was in portable room 34, and she also said touching continued on the gold sub school.[15] It was put to the complainant that she had omitted to mention kissing and touching in the computer room in year 11 and 12 in the second trial because she now knew about the CCTV. The complainant responded that she never said offending didn't happen in the computer room, she just hadn't remembered it when she gave her evidence-in-chief. She also recalled being worried about getting caught on CCTV.[16]

---

[8] TS 144-5.
[9] TS 142.
[10] TS 136-7.
[11] TS 138-40.
[12] TS 140 and 142.
[13] TS 152.
[14] TS 152.
[15] TS 152-5.
[16] TS275- 8.

6. Copies of emails between the complainant and the appellant which showed he had a sexual interest in her while she was at the school were tendered. [17] An email as early as July 2010, when the complainant was 16 years old, had the appellant telling the complainant: "*missing you heaps, hope to catch up soon*".[18] Later emails in 2011 contained messages of a sexual nature including one from which it could be inferred he was looking forward to seeing her naked[19] and another in which he stated "I want you".[20]

7. To the extent the appellant's narrative refers to the appellant's closing address and the nature of the criticisms of the complainant's evidence the respondent makes two submissions.

8. Firstly, these criticisms appear to be relied upon to submit the jury are likely to have not accepted some aspects of her evidence. It is said some of her evidence was inherently unlikely because of the risk of detection and because more people did not see them engaged in inappropriate behavior. This it appears is one of the factors relied upon to support the use of questions to determine the basis of the verdict. The respondent notes the appellant and the complainant were in fact seen by people at the school.[21] And further, such brazen behavior is not, in any event, so unusual as to cast doubt on the veracity of the evidence, particularly in light of the fact he was corresponding with her in Year 11 by email and expressing his sexual interest in her. An act which itself may be thought to brazen and inherently risky.

9. Secondly, the appellant contends that the criticisms mean the jury might have convicted on the basis of only two acts of kissing separated by the requisite period. 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.

Part V: Relevant Legislation

10. The respondent agrees with the list of legislation identified by the appellant. In light of the court hearing the matter of *R v Hamra* and *R v Chiro* together, the dispute between the parties as to the elements of s50 of the CLCA will be of greater significance in the appeal in *R v Hamra* and relevant interstate legislation will be referred to therein.

---

[17] Exhibit P6 and P5.
[18] TS 526 XXN of appellant as to P6.
[19] TS 529.
[20] TS 537.
[21] As acknowledged at footnote 8 of the appellant's submissions.

Part VI: Respondent's Argument

The elements of section 50 of the CLCA

11. The respondent does not agree with the appellant's submissions as to the evidence required to prove the elements of section 50 of the CLCA. The appellant only mentions in passing[22] the recent Full Court decision of *R v Hamra*[23] in which a five member bench of the Full Court considered the elements of section 50 and the nature of the evidence required to prove those elements. The respondent adopts the statement of Kourakis J, with whom Kelly, Nicholson and Lovell JJ agreed:[24]

> ...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.

12. Whilst the elements of s50 and the evidence which may prove those elements are relevant to the nature of the jury's deliberations, there is however no dispute that the jury were considering and deliberating on more than two acts in the circumstances of this case. It is that fact which raises the issue of special verdicts and questions to determine the basis of the verdict. The respondent will not therefore deal with the dispute between the parties as to the evidence which may prove s50 in this outline.

Ground 2 - Was it mandatory that either a special verdict be taken or questions be asked after the verdict to determine the basis of the verdict ?

13. The appellant's submissions relate to special verdicts and questions after the verdict.[25] It will not therefore be necessary to consider a third category: special questions before the verdict.[26] Insofar as the appellant relies on authorities which deal with special questions prior to verdict it is submitted such authorities do however provide some guidance.

14. Special verdicts and questions after the verdict as to the basis of the verdict for the purpose of sentencing involve very different considerations.[27]

---

[22] Footnote 18 of the appellant's submission.
[23] *R v Hamra* (2016) 126 SASR 374.
[24] *R v Hamra* (2016) 126 SASR 374 [43].
[25] The decisions in *R v Isaacs* (1997) 41 NSWLR 374 and *R v Cheung* (2001) 209 CLR 1 both involved questions after the verdict.
[26] *Jackson v The Queen* (1976) 134 CLR 42, 53 per Murphy J; "*Special findings by the jury in answer to questions propounded by the judge do not amount to a special verdict at common law...a 'special verdict' as defined by Barry J in R v Brown and Brian is: "A finding by the jury of particular facts which raise the question of law, accompanied by a statement by the jury of their verdict in the light of the determination by the court of the question of law."* The distinction was acknowledged in *R v Spanos* (2007) 99 SASR 487 [34] by Leyton J, (Nyland J agreeing): "*These proposed questions were neither directed to the verdict, nor were they directed to the means by which the jury could reach a verdict. They were neither special questions prior to verdict, nor a special verdict. Instead they were questions concerned with a later sentencing process, which at common law has traditionally been the province of a trial judge.*"
[27] *The Queen v Dudley and Stephens* (1884) 14 QBD 273, 275, 288; *R v Brown and Brian* [1949] VLR 177, 179; *R v Graham* (1984) VR 649; *R v Jackson* (1976) 134 CLR 42, 45; *Thompson* v *The Queen v* (1989) 169 CLR 1.

15. A special verdict:

> properly so called, found the facts, and stated that the jury were in doubt as to some question of law, which they submitted for the consideration of the court, whose assistance they prayed, and it concluded that, if on the whole matter the Court should be of the opinion that the prisoner was guilty, then the jury found the prisoner guilty.[28]

16. At common law, it was thought that a verdict given by a jury involved the work of humans (as distinct from trial by ordeal, wager or battle which was determined by the supernatural) and was therefore liable to error.[29] If a verdict concealed error, the verdict was "*undone and the jurors were severely punished for rendering it*".[30] The special verdict had its origins in the desire of the jury to avoid the responsibility of determining questions of law.[31] That is probably why it is the right[32] of the jury to return a special verdict.

17. In this case, the jury did not have a doubt as to any question of law. They returned a verdict. The jury accepted that the appellant committed at least two acts of sexual exploitation separated by the requisite period and understood, in line with the directions they were given, that the appellant was therefore guilty of the offence charged. There is no basis upon which a special verdict would have been appropriate in this case.

18. The respondent therefore proceeds on the basis that the true question for this court is whether questions after the verdict should have been asked of the jury.

Was it mandatory to ask questions after the verdict in this case?

19. The appellant submits there are two aspects which tell in favour of questions being asked of the jury. First, the limitations on a trial judge when fact finding for the purpose of sentence. Second, the need to ensure certainty as to the basis of the verdict so that the factual basis of any sentencing only reflects that verdict.

20. The respondent does not accept that the directions, the jury questions, the length of the deliberations or the fact a majority verdict was returned mean "there is every reason to think that the verdict may reflect satisfaction of two occasions only".[33] The appellant's reasoning in this regard is speculative. However whether it is possible or not that the jury based the conviction on satisfaction of two acts of kissing in circumstances of indecency, the respondent's submission remains the same; there was no impediment to the judge making findings of fact as to other conduct and there was no requirement to ask questions.

---

[28] *R v Brown and Brian* [1949] VLR 177, 179; see also *The Queen v Dudley and Stephens* (1884) 14 QBD 273.
[29] Morgan, "A Brief History of Special Verdicts and Special Interrogatories" (1923) 32 *Yale Law Review* 575.
[30] Morgan, "A Brief History of Special Verdicts and Special Interrogatories" (1923) 32 *Yale Law Review* 575, 576.
[31] Morgan, "A Brief History of Special Verdicts and Special Interrogatories" (1923) 32 *Yale Law Review* 575, 588.
[32] *Russell v The Victorian Railways Commission* [1948] VLR 118, 132.
[33] See paragraph 45(b) of the Appellant's submissions.

21. The respondent submits three questions should be asked:

    (a) is there an impediment to a sentencing judge making findings of fact in relation to conduct which could have satisfied an element of the offence but did not necessarily do so,

    (b) bearing in mind the function of the jury is it appropriate in the circumstances of this matter to ask questions of the jury, and

    (c) can questions be formulated which will have an identified utility?

22. As to the first question, it is well settled that the primary constraints on a sentencing judge determining the factual basis for sentence after trial are that such findings must not be inconsistent with the verdict of the jury and any findings of fact against the offender must be proved beyond reasonable doubt.[34]

23. In the context of acknowledging the inscrutability of a jury verdict and that in some circumstances a judge "might take the view" that the jury has convicted the offender on the basis of the most favourable version of events and thus sentence on that basis, the plurality in *Filippou v The Queen* stated; "*So to say, however, does not mean that the judge would necessarily be bound to sentence on that basis.*"[35]

24. In *Cheung v The Queen*, Gleeson CJ, Gummow and Hayne JJ held that a sentencing judge reviews:

> ...the evidence for himself for the purpose of making findings of matters of fact which were necessary for sentencing, and which were not resolved by the jury's verdict. Such a procedure does not involve any infringement of a right to a trial by jury. It involves the application of well-established principles as to the division of functions which are ... an aspect of trial by jury.[36]

25. The appellant appears to contend at [46] that the following statement in *Cheung* purports to limit the role of a sentencing judge:

> The decision as to guilt of an offence is for the jury. The decision as to the degree of culpability of the offender's conduct, **save to the extent to which it constitutes an element of the offence charged**, is for the sentencing judge (the appellant's emphasis).

26. This statement of principle simply acknowledges that some conduct will have been the subject of a determination by the jury in reaching its verdict. In those circumstances the judge will be bound by that finding insofar as it reflects the defendant's culpability, and may not make a determination inconsistent with that finding insofar as it is implicit in the verdict. The statement does not purport to prevent a sentencing judge from making a finding of fact on any issue which a jury may have considered when finding an element proved.

---

[34] *Filippou v The Queen* (2015) 256 CLR 47 [71]; *Cheung v The Queen* (2001) 209 CLR 1, [13]; *R v Isaacs* (1997) 41 NSWLR 374, 378.

[35] *Filippou v The Queen* (2015) 256 CLR 47 [68] per French CJ, Bell, Keane and Nettle JJ, (Gageler J agreeing).

[36] *Cheung v The Queen* (2001) 209 CLR 1 [55].

27. Section 50 requires proof of the commission of conduct involving at least two sexual acts which would amount to an offence. 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. That this involves sometimes difficult questions is not to the point.

28. This is consistent with the plurality in *Cheung*:

> On occasion, this may mean that a jury's verdict 'on the black and white issue of guilt may leave a sentencing judge a difficult task of deciding questions of degree involved in assessing an offender's culpability, and the proper measure of punishment. There are many cases involving...a conviction following a plea of not guilty, where the task of assessing an offender's culpability is more difficult than that of determining his or her guilt.[37]

29. The appellant submits it would have been appropriate to ask questions because to do otherwise permits or requires the sentencing judge to sentence the defendant on the basis of offences not proved. The appellant relies on the decision in *The Queen v Di Simoni.*[38]

30. *Di Simoni* is a very different case and is not relevant to these factual circumstances. *Di Simoni* stands for the proposition that *"[n]o one should be punished for an offence for which he has not been convicted*".[39] However the offence the subject of this conviction encapsulates all the conduct particularised- not as the appellant describes it "other offences".

31. The appellant's argument conflates punishment for conduct which was charged as part of a single offence (an offence against s50) for which he was found guilty with punishment for uncharged offences. The learned sentencing judge made findings as to conduct encapsulated within the count of Persistent Sexual Exploitation. The sentencing judge's role must be considered in light of the elements of the offence proved.

32. When a defendant pleads guilty to an offence contrary to s50 of the CLCA, but disputes that he committed all of the conduct particularised in the information, there is no issue with a sentencing judge making findings as to conduct which could constitute an element of the charge. Clearly there cannot be a jury trial at that point to determine those aspects in dispute. That the sentencing judge is able to determine those matters left unresolved by the plea of guilty- including conduct alleged in the count as particulars is uncontroversial. This applies even when such matters are pleaded as matters of aggravation.[40]

---

[37] *Cheung v The Queen* (2001) 209 CLR 1 [8] per Gleeson CJ, Gummow and Hayne JJ.
[38] *The Queen v Di Simoni* (1981) 147 CLR 383.
[39] *The Queen v Di Simoni* (1981) 147 CLR 383, 389.
[40] *R v Meaton* (1986) 160 CLR 359, 364; In *R v W* (2015) 123 SASR 70, the court dealt with s5AA of the Criminal law Consolidation Act 1935. The court found that upon a plea of guilty to the offence, any aggravating circumstances in dispute were for the sentencing judge to determine.

33. The appellant's argument is predicated on the submission a sentencing judge may only make findings as to conduct which does not constitute an element of the offence. This apparent restriction has no basis in law, practice or principle.

34. A simple example exposes the fallacy. Whether a defendant murdered another with the intention to do grievous bodily harm as distinct from an intention to kill is relevant to both an element of the charge and his culpability. The fact it is relevant to both would not require questions to be asked and nor is it an impediment to a sentencing judge making a finding in relation to his intention- provided it is not inconsistent with the verdict or the evidence.

10 35. The appellant has provided no basis upon which to distinguish the circumstances in this case with other occasions in which there is uncertainty as to the specific facts found proved by the jury. This "uncertainty" does not, in other circumstances, give rise to a suggestion such convictions are void, that a judge is unable to consider such matters when sentencing or that questions after the verdict must be asked. The following are examples:

(a) In cases of manslaughter, it will be unknown if the defendant was found guilty on the basis of excessive self-defence, provocation, or a lack of intention to kill or do grievous bodily harm. The former basis raises issues as to the conduct of both the deceased and the defendant. No questions are asked notwithstanding
20 the alternatives deal with different conduct and are relevant to the elements of the offence and the offender's culpability.

(b) In cases of rape, it will be unknown if the defendant was convicted on the basis he knew the victim was not consenting, he was recklessly indifferent as to whether the victim was not consenting or he simply gave it no thought at all.

(c) In cases of trafficking in controlled drugs when the defendant is charged on the basis that he took part in the sale of the drug, the evidence may allow an inference to be drawn that the defendant was involved in storing the drugs, guarding the drugs, transporting the drugs, arranging the sale of the drugs or arranging for the drugs to be delivered prior to their sale. Any of these acts
30 would alone satisfy the element of the charge. The fact such conduct could satisfy the element of the charge does not prohibit the sentencing judge from making findings of fact as to whether the defendant was involved in all or some of that conduct.

36. All of the above conduct is relevant to both culpability and proof of an element of the offence. The fact that there are a number of different avenues to guilt in a persistent sexual exploitation charge is no different.

37. There is no reason in logic to differentiate between the unknowns occasioned by a finding of guilt for an offence against s50 (PSE) and the unknowns occasioned by findings of guilt for other offences. The requirement for unanimity for PSE does not
40 alter this.

38. If a sentencing judge has no power to determine whether conduct, which could have satisfied the elements of the offence, occurred and the jury need only be satisfied of two acts, the respondent queries how any jury can be required to deliberate beyond

satisfaction of two acts having occurred. The respondent submits there is no power to require a jury to deliberate beyond satisfaction of the elements of the offence so as to ensure the jury makes findings of fact on all matters relevant to sentence.

39. If the appellant is correct, the necessary consequence is that a defendant cannot be sentenced by the trial judge or retried for any conduct alleged in the particulars which is not the subject of a finding by the jury. If a jury, having reached a verdict on the basis of being satisfied as to the commission of at least two acts does not deliberate at all on some of the conduct then s50(5) prohibits a retrial on the conduct the jury did not consider. Pursuant to s50(5) a defendant who has been convicted or acquitted of an offence of PSE may not subsequently be convicted of a sexual offence alleged to have been committed in the same time period as charged in the PSE. Such a consequence tells against the correctness of the appellant's submission.

40. The court below was therefore correct to find that established sentencing principles permitted the judge to proceed as she did and there was no impediment to the sentencing judge determining whether the other conduct occurred.[41] The ability to proceed as the sentencing judge did was a strong factor militating against the asking of questions as the basis of the verdict.

Was it "appropriate and useful" to exercise the discretion to ask questions to determine the basis of the verdict for the purpose of sentence?

41. When considering whether to exercise the discretion to ask questions of the jury it must be borne in mind that trial by jury in this country does not include sentencing by jury.[42] Once a jury has returned a verdict it has discharged its duties and has no further function to perform.[43] On the assumption that a jury may be directed ,as distinct from invited, to answer questions after the verdict, it will rarely be appropriate to do so. And if such a power is to be exercised there must be a significant and identifiable utility in doing so. The intrinsic function of the jury must inform both whether it is appropriate to ask questions and the extent to which such questions must be "useful".[44]

42. The appellant refers to *R v Warner,*[45] *R v Solomon*[46] and *R v Mathieson*[47] in support of the proposition that the practice of asking questions of a jury after they have delivered a verdict is common in the United Kingdom. *R v Mathieson* only approved of asking questions of a jury in diminished responsibility cases.[48] In *R v Solomon* the court said that the only instance in which "*it might be said to be common practice...is*

---

[41] *R v Chiro* (2015) 123 SASR 583 [19].
[42] *Cheung v The Queen* (2001) 209 CLR 1 [16] per Gleeson CJ, Gummow and Hayne JJ.
[43] *R v Kingswell* (1985) 159 CLR 264, 283 per Mason J.
[44] *Cheung v The Queen* (2001) 209 CLR 1 [18] per Gleeson CJ, Gummow and Hayne JJ; "*For the reasons given in Isaacs there will be very few cases in which it is "appropriate or useful" to take a special verdict.*
[45] *R v Warner* [1967] 1 WLR 1209.
[46] *R v Solomon* [1984] 6 Cr App R (S) 120.
[47] *R v Mathieson* [1958] 1 WLR 474.
[48] *R v Mathieson* [1958] 1 WLR 474, 479-480.

in the case of a verdict of manslaughter, when the jury may have reached their decision on alternative grounds".[49]

43. In *Stosiek*,[50] and *Solomon* which were both decided after *Warner*, it was emphasised that juries should not, save in exceptional circumstances, be invited to explain their verdicts.[51]

44. In Australia it has been recognised that it is "*by no means clear that Diplock LJ was approving of the practice in R v Warner [1967] 1 WLR 1209.*"[52] In *R v Petroff*[53] Roden J continued: "*It seems implicit in [the remarks of Diplock LJ] that responsibility for deciding, for sentencing purposes, questions beyond those necessary for verdict, rests firmly on the trial judge*".[54]

45. Roden J recognised that there is a reason why it is important, in England, to know whether the jury found the accused guilty of manslaughter on the basis of diminished responsibility, or on some other basis. That is because in England, the courts "*seek to have the offender treated, and/or the community protected, by means of orders usually quite different from the corrective or punitive measures generally appropriate in manslaughter cases*".[55] Whilst Roden J was in dissent, the court in *R v Isaacs*[56] noted the criticisms of the practice advanced by Roden J were "convincing".

46. The fact that the court in *Cheung v The Queen* did not foreclose the possibility of questions having utility in certain cases does not of itself offer support for the submission that questions should be asked for s 50 offences, let alone that it was essential in this case.

47. The court in *R v Isaacs*[57] concluded that the practice should be discouraged other than in exceptional circumstances. The court set out a number of considerations which operated against asking special questions. In *Cheung v The Queen*[58] at [18] Gleeson CJ, Gummow and Hayne JJ referred with approval to this aspect of the judgment in *R v Isaacs*.

48. The considerations in *R v Isaacs* were not stated to be exhaustive. They are however significant because they reinforce the need for the court to identify the usefulness of the procedure.

49. In any event, four of the seven considerations identified by the Court in *Isaacs* tell against the asking of any questions in this case:

---

[49] *R v Solomon* [1984] 6 Cr App R (S) 120, 125.
[50] *R v Stosiek* (1982) 4 Cr App R (S) 205.
[51] *R v Stosiek* (1982) 4 Cr App R (S) 205, 208; *R v Solomon* [1984] 6 Cr App R (S) 120, 127.
[52] *R v Petroff* (1980) 2 A Crim R 101, 136; The Supreme Court of Hong Kong in *Kwok Yau Shing v R* [1968] Crim LR 175 said of *Warner* 'The Hong Kong court was unaware of the existence of any such practice, which, if it existed would appear to be inconsistent with the judgment of the Court of Criminal Appeal in *Larkin* (1929) Cr App R 18'.
[53] *R v Petroff* (1980) 2 A Crim R 101.
[54] *R v Petroff* (1980) 2 A Crim R 101, 136 - 137.
[55] *R v Petroff* (1980) 2 A Crim R 101, 139; see also *R v Isaacs* (1997) 41 NSWLR 374, 379.
[56] *R v Isaacs* (1997) 41 NSWLR 374, 378.
[57] *R v Isaacs* (1997) 41 NSWLR 374, 379.
[58] *Cheung v The Queen* (2001) 209 CLR 1 [18].

(a) while asking the jury to simply identify 2 acts upon which they are unanimous may not distract them in their task, such a question will have no utility. It does not for example answer whether some conduct was not considered. To determine whether such questions may distract the jury it is necessary for the appellant to identify the questions which ought to have been asked of the jury,

(b) as to the second consideration the appellant appears to suggest a special question is warranted to ensure the jury have followed the directions. This is not an appropriate basis for asking special questions. In any event the appellant assumes that the jury's responses to such questions will be clear. This necessarily depends on the nature of the question, the nature of the evidence that has been led at the trial and whether the jury have made specific findings in relation to each allegation.

(c) as to the fourth consideration counsel did not address on the issue of special questions and the summing up did not deal with the issue of special questions. The issue was only raised after the jury had been deliberating for some 9 hours. There was therefore "a substantial risk that the jury" was being invited to make a decision upon which they had not been properly addressed by counsel.

50. The seventh consideration identified in *Isaacs* is particularly apposite:[59]

> where two or more partial defences are advanced, if the jury were to come to a conclusion favourable to an accused on the first offence they considered, they might not consider the other or others; if that occurred, then an answer to the question might convey a false impression of having considered and rejected the other or others.

51. This consideration raises the nature of the questions to be asked, whether questions can be formulated such that the answers will have the necessary utility, and what such questions will mean for the deliberations of the jury.

52. The utility identified by the appellant appears to be certainty as to the basis of the verdict so that the factual basis of any sentencing will reflect the specific factual findings of the jury rather than the offence for which he was convicted.

53. The appellant's submission as to the usefulness of asking questions depends on an acceptance that it is appropriate that he only be sentenced on the basis of the facts determined by the jury as at the time the jury is ready to deliver its verdict. This assumption is not supported by principle.

54. The jury will be ready to deliver its verdict when the elements have been proved.In a trial in which many sexual acts are alleged, the likelihood of some factual aspects remaining unresolved at the time of the verdict is obvious. The jury may have determined some conduct was not proved beyond reasonable doubt, it may have reached an impasse as to some conduct and some it may not have considered at all.

55. It will only be appropriate or useful to the sentencing process to ask such questions if the jury has made findings of fact on all conduct alleged in the count. A jury would have to be directed to deliberate to conclusion on issues beyond those necessary to find the defendant guilty. This is not only contrary to the established role of a jury it

---

[59] *R v Isaacs* (1997) 41 NSWLR 374, 380.

imposes an unnecessary and inappropriate burden on that jury. The appellant does not appear to submit the court should force a jury to deliberate in such a manner.

56. There is a real possibility that the jury did not determine whether it was satisfied beyond reasonable doubt of each allegation. Such a possibility is borne out of the number of acts alleged and the fact the jury were not required to deliberate as to each and every allegation - whether general or specific, in order to reach a verdict.

57. When such a limitation on the usefulness of asking questions is so readily apparent, this is a fundamental reason not to ask the questions in the first place.

58. The appellant attempts to minimize the difficulties posed by the seventh consideration in *Isaacs*. As to [78-79] of the appellant's submission the respondent submits:

(a) the appellant assumes that the "spectrum of seriousness" is large and that this justifies questions. First the respondent does not concede that open mouthed kissing in the context of the appellant rubbing himself against the complainant or touching her when she was his student is a significantly less serious offence. Secondly, this "spectrum" cannot elevate the lack of utility in asking certain questions of the jury to a point where such questions become useful. The reliance on the nature of the different incidents alleged also ignores the possibility the jury did not determine whether all the conduct alleged by the complainant was proved beyond reasonable doubt.

(b) the appellant's submission that it was "very much on the cards" that the jury may not find the more serious incidents proved is speculation and not the basis upon which the trial was conducted. The reference to what occurred at the earlier trial is also irrelevant. The jury at the first trial were not aware that copies of emails existed which supported the complainant's evidence that the appellant had a sexual interest in her. The appellant at the first trial denied any sexual interest in the complainant.[60] The evidence before the jury in the first trial was therefore fundamentally different. In any event, even if the jury were not satisfied of the two acts which could amount to unlawful sexual intercourse (one occasion of digital penetration and one occasion of fellatio) that would not impact to any substantial degree on his criminal culpability given the number of other acts of indecent assault, his position of authority and the length of time over which the offending occurred. The assumption that a failure to find the 2 acts involving penetration proved would have resulted in a lesser sentence and justified questions is flawed;

(c) thirdly, if the point of the questions is to ensure a sentencing judge only sentences on the basis of the jury verdict, the jury must therefore continue to deliberate until it has reached a decision on each act which may satisfy the element of the offence or can advise the court that they have reached an impasse on that fact. To simply inform the judge of the conduct of which they are satisfied at the time of the verdict will be meaningless as it does not mean the jury will not be satisfied about other conduct if they continue to deliberate.

[60] TS 354, 378-379 of the first trial.

59. If the purpose of the questions is to ensure certainty as to the jury's determination of the defendant's culpability the respondent further asks whether the trial judge must determine how many acts the jury will need to make a finding about or which conduct the jury must make a finding about or the duration of the offending. At some point there will be no difference in his culpability whether he offended in one way or if he offended in another. And more problematically - the permutations are endless. Will kissing and touching on the vagina be just as culpable as kissing and touching her breasts? If he kissed and touched her breasts and vagina for 12 months as her teacher will that result in a lesser sentence than if done for 18 months? The appellant has not attempted to formulate questions to illicit such detail.

60. The appellant's assumption that a lesser penalty may have been appropriate if questions were asked therefore fails to have regard to the nature of the questions that would need to be asked and the fundamental task and obligations of the jury.

61. The Court of Criminal Appeal did not exclude the possibility of a special verdict being taken in an appropriate s50 case, rather, it reasoned that on the facts and circumstances of this particular case, there was no good reason to depart from the general practice against the taking of special verdicts. As the appellant's senior counsel acknowledged in argument before the CCA: "*I don't think you can lay down a rule and certainly the law wouldn't permit your Honours to lay down a rule*".[61]

62. The approach of the court below is consistent with the NSW Court of Criminal Appeal in *ARS v R*.[62] In that case the appellant was charged with an offence akin to persistent sexual exploitation. Bathurst CJ (James and Johnson JJ agreeing) referred to both *R v Isaacs* and *R v N, SH* and stated:

> ...the courts have consistently emphasised that generally speaking courts should be reluctant to enquire of juries on what basis they reached their verdict....In the present case, for the enquiry to be of any real utility it would have to encompass not only the question of which foundational offences led the jury to convict but also which of the remainder they in fact considered and rejected. It does not seem to me to be desirable to make enquiries of the jury in this fashion. More relevantly, the trial judge did not err in failing to do so.[63]

The earlier trial

63. The appellant relies on the fact jury were hung in an earlier trial when the appellant was charged with individual offences. This fact is said to be a relevant consideration when determining whether to ask questions of the jury.[64] The connection between the two is difficult to ascertain. In any event the differences between the first and second trial reveals the irrelevance of this consideration:

    (a) copies of the emails from which it could be inferred the appellant had an inappropriate relationship with the complainant whilst she was in Year 10,11 and 12 and that he had a sexual interest in her were not led at the first trial; The

---

[61] Transcript of CCA appeal hearing 20 August 2015, p18.28.
[62] *ARS v R* [2011] NSWCCA 266.
[63] *ARS v R* [2011] NSWCCA 266 [131].
[64] The appellant also submits it is relevant to whether a retrial should be ordered if the conviction is overturned.

defendant gave evidence at the first trial and denied any sexual interest in the complainant.[65]

(b) At the retrial copies of the emails were tendered and the defendant admitted to contemplating a sexual relationship with her.[66] At the first trial the jury was therefore left without significant support for the complainant's evidence and were faced with the appellant's evidence that he had no sexual interest in her.

64. The result in the previous trial is therefore irrelevant.

Uncertainty

65. If the appellant is correct then questions must be asked in every instance in which s50 is charged, more than two acts are alleged, and the defendant is convicted. If one conviction is bad for uncertainty on this basis then so must every conviction be. The appellant's submission makes such questions of the jury mandatory in the absence of any statutory requirement to that effect.

66. The inscrutability of a jury verdict however means the specific conduct a jury relied upon to find proved certain elements of an identifiable offence will frequently be unknown. This "uncertainty" is not a basis upon which to declare a verdict void.

67. At [82] the appellant relies on a decision in which the particulars on the information failed to sufficiently identify the conduct the subject of the charge. The charge was one of rape. Because the information did not identify the specific offence which had been committed by the defendant and because the evidence disclosed more than one incident capable of answering the description of the offence as charged, the jury verdict was uncertain.

68. The appellant's argument conflates the requirement to identify the particular offence for which he has been convicted with the requirement to identify specific conduct. The reason to identify the conduct is that this will be the only way to identify the offence committed by the defendant. It is the failure to identify the particular offence committed which results in a conviction being bad for uncertainty. There is however no uncertainty as to the particular offence for which the appellant has been convicted. He has been convicted of persistent sexual exploitation on the basis of at least 2 of the acts particularised on the information during the period alleged. The appellant's submission does not have regard to the elements of this offence. If a question had to be asked it was only relevant for the purposes of sentencing. The absence of such a question does not make this conviction bad for uncertainty.

69. If the respondent's argument that there was no requirement to take a special verdict or ask questions is not accepted, the respondent submits any error is only relevant to the question of sentence. This accords with the primary submission of the appellant which appears to be that the utility of such questions is to ensure that the factual basis of any sentencing will reflect the verdict.

---

[65] TS 354, 378-379 of the first trial.
[66] TS 478.

Ground 3 - The Sentencing Basis

70. The appellant submits that in the absence of questions a trial judge must sentence on the basis of the least serious offending alleged. In the appeal in the court below this was described as a requirement to sentence on the basis of the "low level" offending.

71. For the reasons articulated above, if there was no requirement to ask questions and the limitation suggested by the appellant on the role of the sentencing judge does not exist, then in accordance with established principle the judge was entitled to make the findings as to other conduct committed by the appellant.

72. It is well settled that the primary constraints on a sentencing judge determining the factual basis for sentence after trial are that such findings must not be inconsistent with the verdict of the jury and any findings of fact against the offender must be proved beyond reasonable doubt.[67]

73. The appellant acknowledges that requiring the judge to sentence on the lesser offending carries a risk of an unduly generous sentence. The sentence may not be appropriate and it may not reflect the verdict but the appellant justifies the position on the basis that unless the jury is directed to acquit if it is not satisfied of the entirety of the complainant's evidence, any sentencing for a charge of PSE must be on the basis only 2 acts were committed.

74. The appellant effectively submits that the defendant is entitled to be sentenced on a potentially improper basis that is not necessarily consistent with the verdict and which is contrary to the facts as the judge would find them on the basis the judge should be precluded from making findings of fact on conduct because the prosecution charged PSE instead of individual offences.

75. The appellant's argument creates an artificial line at the point at which the verdict is delivered. In the absence of a power to require the jury to continue to deliberate as to all the conduct alleged it will be a matter of happenstance as to which conduct a jury has considered at the time the verdict is delivered. Depending on the individual jury a defendant may be sentenced for more or less offending. No proper basis has been put forward by the appellant as to why the normal powers exercised by the sentencing judge should not be exercised in circumstances such as the present. The appellant's argument is also inconsistent with the following statement by the plurality in *Cheung*:

> there was no obligation on the prosecution to frame an indictment in such a manner as to elicit, in an artificial fashion, a jury verdict covering every possible view of the facts which might be of significance to sentencing.[68]

76. The court below followed the plurality in *Cheung* in holding the resolution of the sentencing basis was a matter for the trial judge provided such basis was not in conflict with the verdict of the jury.[69]

---

[67] *Filippou v The Queen* (2015) 256 CLR 47 [64]; *Cheung v The Queen* (2001) 209 CLR 1 [14]; *R v Isaacs* (1997) 41 NSWLR 374, 378.
[68] *R v Chiro* (2015) 123 SASR 583 [12] citing the plurality in *Cheung* (2001) 209 CLR 1 [44].

77. The principles are settled. The court below found the sentencing judge followed the usual rules of sentencing and that there was no reason to depart from such principles.[70] The court was correct to do so.

Lateness of the Request for Special Verdict or Questions after verdict

78. Finally, the exercise of the discretion must be considered in light of the application only occurring after the addresses, the summing up and after the jury had been deliberating for about 9 hours.

79. The fourth consideration referred to by NSW Court of Appeal in *Isaacs* and cited with approval by majority of this court in *Cheung* at [18] (2001) 209 CLR 114 referred to the undesirability of the jury being invited to make a decision upon which they had not been properly addressed by counsel. In this case there were neither addresses by counsel nor directions from the trial judge.[71] The decision not to ask special questions was not therefore incorrect.

80. The court below was correct to determine that in the circumstances of this case, there was no requirement to ask questions of the jury.

Part VII: Notice of Contention

81. Not applicable.

Part VIII: Time for Argument

82. The respondent submits the appeal will take half a day.

Dated: the 7th day of April 2017

.....
Counsel for the Respondent
Ian Press SC
Telephone: 08 8207 1529
Facsimile: 08 8207 1799
Email: ian.press@sa.gov.au

.....
Counsel for the Respondent
Ben Lodge
Telephone:08 8207 1529
Facsimile: 08 8207 1799
Email: ben.lodge2@sa.gov.au

---

[69] *Cheung v The Queen* (2001) 209 CLR 1; *R v Stehbens* (1976) 14 SASR 235, 245; *R v Isaacs* (1997) 41 NSWLR 374, 378.

[70] *R v Chiro* (2015) 123 SASR 583 [19].

[71] Richardson (ed), *Archbold Criminal Pleading, Evidence and Practice* (Sweet & Maxwell, 2014) 586: "*Where it is proposed to attempt to elicit the basis of the jury's verdict, the necessary questions should preferably be left with the jury when they retire: the foreman should not be asked to indicate the basis on which the verdict has been reached after the verdict has been returned.*"