HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S158/2023
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Important Information

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Form 27F – Outline of oral submissions

Note: see rule 44.08.2.

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **Cook (A Pseudonym)**

Appellant

and

The King

Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: This outline is in a form suitable for publication on the internet.

Part II: Ground 1

1. While the CCA remitted the matter for retrial on an unrelated ground, if ground 1 is upheld then the order sought is that the matter is remitted to determine admissibility of the excluded evidence in accordance with this Court's ruling.

Section 293 overview

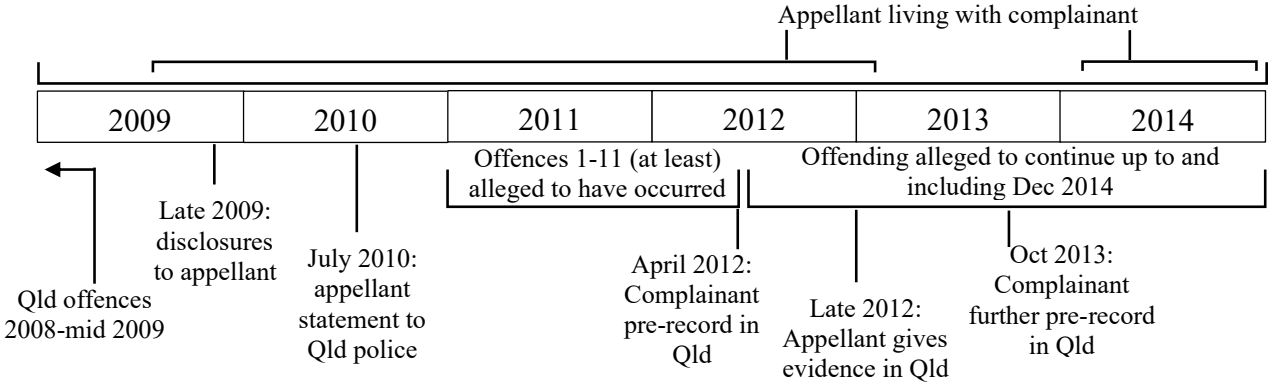
2. **Section 293(3) (JBA V1 p 112**): **(a)** "has or may have had sexual experience"; **(b)** "has or may have *taken part or not taken part* in any sexual activity" (*tied to sexual activity*).
3. This (with (2)) is the exclusionary provision, intended to (2nd reading, AS [29]):

> "prohibit *irrelevant* questioning of sexual assault victims about their prior sexual behaviour. … The law should not – and under this legislation will not – allow the accused to subject the victim of the sexual assault to humiliating and *irrelevant* questioning about details of previous sexual conduct and attitudes… (Premier; see further at **JBA V4 475-6 [10]**)

4. The **subs (4)(a)-(f)** exceptions are protective provisions, to "preserve the rights of the accused" … "where fairness requires that some evidence or cross-examination as to prior sexual history be permitted" (*Parliamentary Debates* extracted in **Reply** (**AR**) [5]).
5. **Subs (6)** recognises experience or activity can be of a "general or specific" nature.
6. "No narrow approach should be taken" to subs (4), since the evidence is "by hypothesis, relevant and of probative value": *R v* ***Morgan*** (1993) 30 NSWLR 543 per Gleeson CJ at p 554E **JBA V4 p 553E**; and ***HG*** *v The Queen* (1999) 197 CLR 414 at [24] **JBA V3 p 243.**

Excluded Evidence

7. The excluded evidence is accurately summarised at **CCA [7], CAB 67.** In addition to preventing cross-examination of the complainant, the exclusion also resulted in, among other things, redactions fundamentally altering the effect of the appellant's statement about the Qld complaints (Exhibit O, **AFM 93, 96**) and his police interview (see excised statement at **AS [18]** "I didn't go all that trouble [sic] and then do the… same sort of shit").
8. A timeline of relevant events is as follows (some dates are approximate):



9. It is, precisely, the "connected set of circumstances" (which, per AS [45], enlivens the (4)(a)(ii) exception) which constitutes the evidence's relevance: that the Qld offending led to her coming into the care of her aunt and the appellant, that she confided in the appellant about the Qld offending, and that the appellant was then allegedly brazenly committing offences when both he and the complainant were actively participating in sexual assault proceedings. The evidence also provided a basis for the complainant's knowledge and memories consistent with innocence, which is highly relevant (see **AS [24]**, and prosecutor's address at **AS [62]**) but did not independently ground an exception. See also **CCA [7]-[8], CAB 67-68** and **CCA [89] CAB 94.**

Evidence fell within subs (4)(a)

10. **As to (4)(a)(i)**, Beech-Jones CJ at CL is correct at **CCA [21]-[22], CAB 73-74** that the evidence of the disclosures was also evidence of the complainant's sexual experience.
11. It is not in issue that ***GEH*** *v R* [2012] NSWCCA 150 is correctly decided on this issue (**RS [24]**). The temporality "at or about the time" relates to "experience", which "in an ambulatory fashion always exists at the relevant time" (*GEH* [64] at **AS [34]**). Sexual activity evidence will often constitute sexual experience evidence; that does not render the more specific activity evidence necessarily relevant and admissible; the distinction between "experience" and "activity" remains meaningful. See also *Chia v R* [2021] NSWCCA 51 per Leeming JA at [58] **JBA V4 427** to similar effect.
12. The error in construction of (4)(a)(i) is at **CCA [115] CAB 103;** her Honour conflates "experience" with the underlying *activity* which gave rise to the experience, which led her to erroneously conclude the temporal element was not satisfied. And at **[114]**, her Honour erroneously applies "taken part in" to "experience".
13. Bellew J also errs at **CCA [137] CAB 110,** suggesting that two "episodes" need to have occurred at the same time, and conflating "experience" in (a)(i), with "events" in (a)(ii).
14. **As to (4)(a)(ii)**, Beech-Jones CJ at CL at **CCA [23] CAB 74-75** correctly distinguishes "events that are alleged to form part of a connected set of circumstances" in which the alleged offence was committed from necessarily being evidence (only) of the "sexual experience" "at or about the time" of the alleged offence.
15. Adamson J at **CCA [117] CAB 104** (adopted by Bellew J at [138] CAB 110) misstates the "connected set of circumstances"; cf. [9] above, AS [45] and the above timeline.
16. The respondent's attempt to parse each individual element of the connected circumstances inverts their nature as "connected … circumstances" (see ***GEH*** at **RS [10]**).

Evidence fell within subs (4)(b)

17. Contrary to **CCA [121] CAB 105**, *HG* was distinguishable because it did not concern the relationship between complainant *and accused*. The relationship here was one of confidence between complainant and accused. Beech-Jones CJ at CL was correct to distinguish *HG* at [16] (**CAB 71**) to find that evidence of disclosure *could* relate to a relationship of confidence, and to find that the matter should be determined on a voir dire at retrial.

Ground 2

18. The device of describing the Qld offences as "physical assaults" by a "person" or "man" is inadequate reflection of the probity of the evidence, and misleading. It is not a permissible means to deal with the unfairness occasioned by the excision.

19. As Harrison J held in *Taylor v R* (2009) 78 NSWLR 198 (and see AS [66]):

> …there is an unsettling air of unreality about requiring a jury to give some consideration to the importance of any set of facts, such as a relationship between an accused person and a complainant in a sexual assault trial, without proper and appropriate access to all of the admissible details of it.

20. Adamson J erred at CCA [130]-[131] (**CAB 108**) in concluding that because the expedient was proposed by the appellant's counsel (being consistent with *Jackmain*), and her view that it was a mere omission, it was permissible. Beech-Jones CJ at CL was correct at CCA [13] **CAB 70** that the jury should not be misled in this way.

Ground 3

21. The trial judge recognised that the exclusion unfairly distorts the facts: AFM 66 [14].

22. CCA Amended Ground 3(b) (**CAB 60**) argued a miscarriage due to excluded evidence, notwithstanding there was no legal error in excluding the evidence.

23. As Mahoney JA held in *Morgan* (**JBA V4 563C**) a trial in accordance with statute *can* lead to an unfair trial (and see Leeming JA in *Jackmain (a pseudonym) v R* (2020) 102 NSWLR 847 JBA V4 p 514 [202]-[204]).

24. If s 293 excludes the evidence of the complainant's history of childhood sexual assault, her evidence will be so misleading without that essential context, that any trial on which it depends will be unfair and constitute a miscarriage.

25. Here, s 8 happens to also be enlivened by ground 1, so the inadmissibility of probative evidence can be taken into account as part of "all the circumstances" (s 8 **JBA V1 p 83**). No miscarriage of justice is "more adequately remedied" by an unfair retrial.

Dated: 15 May 2024

Tim Game | Julia Roy | Rose Khalilizadeh