HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S158/2023
File Title:	Cook (A Pseudonym) v. The King
Registry:	Sydney
Document filed:	Form 27A - Further redacted Appellant's submissions
Filing party:	Appellant
Date filed:	18 Apr 2024

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IN THE HIGH COURT OF AUSTRALIA S158/2023
SYDNEY REGISTRY

BETWEEN: **Cook (A Pseudonym)**
Appellant

and

The King
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification for publication

1. This submission is in a form suitable for publication on the internet.

Part II: Concise statement of the issue or issues presented by the appeal

2. Did the evidence excluded under s 293(3) of the *Criminal Procedure Act 1986* (NSW) (**CPA**) fall within the definitions of "sexual experience" and "events that are alleged to form part of a connected set of circumstances", and/or relate to a "relationship that was existing or recent", at or about the time of the alleged offences, such that it fell within an exemption in s 293(4)?

3. Is it permissible to deliberately mislead a jury in order to attempt to mitigate the unfairly prejudicial effect of an exclusionary rule?

4. Which of a retrial or an acquittal is a "more adequate remedy" of an identified miscarriage of justice under s 8 of the *Criminal Appeal Act 1912* (NSW), if "in all of the circumstances" it is known that significantly probative exculpatory evidence with the capacity to affect the trial outcome will not be admitted?

Part III: s78B Notices

5. The appellant does not consider that such notice is required to be given.

Part IV: Citation

6. The primary judgment is *R v Cook (a pseudonym)* [2019] NSWDC 420 (**DCJ**): Appellant's Further Material (**AFM**) 64. The judgment of the intermediate court is *Cook (a pseudonym) v R* [2022] NSWCCA 282 (**CCA**): Core Appeal Book (**CAB**) 61.

Part V: A narrative statement of the relevant facts

7. The appellant was charged with 17 sexual offences against the complainant. The complainant was the appellant's wife's niece. She resided with the appellant and his wife at the time of the alleged offences, between 2011 and 2014 when she was between eight and 12 years old.

8. The appellant sought a pre-trial ruling in the District Court of NSW pursuant to s 192A of the *Evidence Act 1995* (NSW) as to the admissibility of evidence relating to complaints made by the complainant against another person (**the Qld offender**) of sexual offences (**the Qld offences**) which occurred prior to coming to live with the appellant and his wife. It was common ground that the fact and timing of the reporting of the Qld offences was significantly probative to the appellant's defence at trial: CAB 68, CCA [8]; CAB 93, CCA [89].

Background facts

9. In early 2008, when the complainant was six years old, she was placed with her aunt and her aunt's partner, being the Qld offender: CAB 89, CCA [71]. In June 2009, when she was seven, the complainant told her stepmother she was being sexually assaulted by the Qld offender, and she was then placed at the home of the appellant and his wife: CAB 90, CCA [73].

10. In mid- to late-2009, the complainant confided in the appellant about the Qld offences: CAB 91, CCA [74]. This occurred over a number of conversations spread over a number of months: AFM 98, Sentence Ex. B(S) [16]. The first two conversations occurred at times when the complainant and appellant were getting into a car. The complainant was repeatedly reluctant to sit in the front seat of the car, and the appellant asked her why: AFM 96-97, Sentence Ex. B(S) [4], [12]. She told him some details about being assaulted by the Qld offender in a car, and the appellant said something to the effect that he would not do that or that she was safe with him: AFM 97, Sentence Ex. B(S) [7]-[8]. She later told him further details, including describing acts of fellatio: AFM 97, Sentence Ex. B(S) [12]. (A version of this statement redacting what the complainant described to him and how he responded was tendered at his trial as *inculpatory* evidence; excised of its substance, it was tendered to show that the complainant and appellant had been alone together: AFM 93, Trial Ex. O).

11. The appellant and his wife intervened to persuade the complainant's father that she was telling the truth: CAB 93, CCA [87]. She disclosed further aspects of the Qld

offender's conduct to her father and stepmother in February 2010: CAB 91, CCA [75]. At the urging of the appellant and his wife, she was taken to the police station, and was interviewed by Qld police in March and April of that year: CAB 91, CCA [75]; AFM 70, Trial Transcript (**TT**) 115.22-.24. The appellant gave a statement to Qld police on 21 July 2010 affirming the fact of the complainant's complaints: CAB 91, CCA [74]; AFM 96, Sentence Ex. B(S).

12. On 10 December 2017, when she was 15 years old, following nightmares, the complainant first alleged that the appellant had also sexually assaulted her, and that the first assault occurred at some time between 1 January 2011 and 31 December 2011: CAB 91, CCA [77]; CAB 93, CCA [86]; AFM 8, VD Ex. 1, [5]. The earliest offence alleged against the appellant was thus said to have occurred over a year after she first told him about the Qld offences, and many months, at least, after both had given statements to police in that regard: CAB 93, CCA [78]. The second alleged assault occurred six weeks after the Qld offender's committal proceedings, in which the appellant gave evidence: CAB 93, CCA [86]; AFM 32, VD Ex. 2 [13].[1]

13. The charges against the appellant ultimately comprised 17 assaults on 11 occasions between 2011 and 2014, including allegations of penile/vaginal and penile/anal intercourse, cunnilingus and fellatio: CAB 78, CCA [34]; CAB 91, CCA [77].

14. On 18 April 2012, the complainant, then nine years old, gave pre-recorded evidence against the Qld offender; at this point, counts 1-11 had allegedly already been committed by the appellant: CAB 92, CCA [79]. The Qld offender was tried in late 2012, and the appellant gave complaint-supporting evidence: CAB 92, CCA [80].

15. The Qld offender was found guilty of seven counts of indecent treatment of a child and four counts of rape (per ss 210 and 349 *Criminal Code* (Qld)). However, the Queensland Court of Appeal quashed his convictions and ordered a retrial in July 2013: AFM 17, VD Ex. 1, *R v WAU* [2013] QCA 265; CAB 92, CCA [81]-[82].

16. The complainant gave pre-recorded evidence against the Qld offender a second time in October 2013. Prior to retrial, the Qld offender pleaded guilty to four counts of indecent treatment of a child and the rape charges were withdrawn: CAB 92, CCA [83]. The four counts of indecent treatment of a child to which the Qld offender pleaded

[1] CCA [76] appears to misattribute committal evidence to the complainant; it appears, however, that it was the appellant and not the complainant who gave evidence at committal: AFM 32, VD Ex. 2 [13].

guilty involved committing two sexual acts upon the complainant (forcing the complainant to touch his penis, and rubbing his penis on her stomach after which he ejaculated on the floor), one act of masturbating in front of her and one act of showing the complainant an image of himself engaging in a sexual act: AFM 25-26, VD Ex. 1; AFM 27, VD Ex. 1, *The Queen v ADW* (District Court of Queensland, Rafter J, 31 March 2014).

17. The complainant alleged the appellant's offending continued until 31 December 2014: CAB 92, CCA [84]. On 11 December 2017, the day after she first complained to the appellant's wife, the appellant's wife took her to the police station to report her allegations: CAB 93, CCA [86]. When asked in that interview why she had not told anyone, she said she "didn't know how… cause of what happened the first time": CAB 93, CCA [86]. She also said that the appellant told her she could not tell anyone because everyone thought she was a liar, and she said this was because "no one believed me the first time": AFM 52, VD Ex 2, [91]. Her account of the appellant telling her everyone thought she was a liar was included in the record of her interview played to the jury, however her explanation that this was because "no one believed" her "the first time" (which could have been disputed by the excised evidence, thereby casting doubt on her credibility) was excised pursuant to s 293(3): AFM 76, MFI 5, A495.

18. When interviewed by the police, the appellant was asked why the complainant would allege he sexually abused her. He said (AFM 9, VD Ex. 1):

> A. [My ex-wife] put it up, per her up to it. …once before.
>
> Q. What do you mean by that?
>
> A. We were having an argument and [my ex-wife] said to me she's taken someone to court before, wouldn't be hard to get anyone to believe if she takes somebody else.
>
> Q. So had, um [your ex-wife] taken someone else to court before - - -
>
> A. No, [the complainant] did. … Why do you think we got her out of the situation she was in? I didn't go all that trouble (sic) and then do the, do the same sort of shit. Wouldn't touch a kid like that. It's, you're making me sick.

19. The underlined words were redacted from the record of interview played to the jury.

Trial

20. The appellant sought leave to cross-examine the complainant about the fact of the reporting of the previous sexual assaults and the Qld proceedings, but not to examine on the fine details of the sexual offending itself: CAB 95, CCA [92].

21. The precise evidence sought to be adduced under the s 293(4) exception is identified at AFM 62-63, VD Ex. 2, [149]-[176] and CAB 67; CCA [7]. The probative value of the evidence in the particular factual matrix of this case was set out in detail by the appellant in writing: AFM 47-59, VD Ex. 2 [52]-[141].

22. The application was refused by the trial judge on the basis that such a course was prohibited by subs (2) and (3) of s 293, and did not fall within an exception in subs (4): CAB 95, CCA [93]. The trial judge accepted the cross-examination would be significantly probative and that it would "directly bear upon the objective likelihood of the offences having been committed": AFM 66, DCJ [14]-[15]. His Honour accepted that it would not give rise to the type of cross-examination s 293 was intended to proscribe. The trial judge also observed that its exclusion "would lead to an unfair distortion of the facts" and that Parliament did not intend the result which had occurred in this case, but, nevertheless, held s 293 did not permit admission: CAB 95, CCA [93]. His Honour concluded (AFM 67-68, DCJ [23]-[24]):

> In the result, therefore, the complainant cannot be cross-examined as extensively as, in my view, the interests of justice require. Parliament has spoken and has deliberately not given the Court any wide discretion. I cannot help but think, however, that Parliament did not intend the result which has occurred in this case. This, of course, does not mean that the counsel for the accused cannot modify his proposed cross-examination so as to delete the context in which the Queensland proceedings occurred. Some of his proposed cross-examination will necessarily have to fall by the wayside but there is still scope for cross-examination of the complainant, provided the nature of the proceedings is not disclosed.

23. In view of the ruling, it was agreed that defence counsel could, as he then did, examine the complainant on the premise that there had been a series of "physical assaults" upon her, and that some of the offending happened "in the midst of … legal proceedings in relation to the [Qld] matter" which were "very important to [her] at the time": CAB 96-97, CCA [94]-[95]. In cross-examination she accepted that she knew immediately after the first alleged assault that if she complained, something would likely happen in terms of police and/or courts, because of her experience in Queensland: AFM 70, TT 117.2-.4. She did say, however, that she did not say anything because she "didn't want it all to start again. It's hard for me to speak up about things sometimes": AFM 72, TT 117.11-12. She said it took her "a few years to come up about" what happened in Queensland: AFM 72, TT 117.16-18. She was also asked if she recalled telling the appellant that the Qld offender had tied her up with cable ties and said she could not

remember: AFM 69, TT 114.17. She denied telling the appellant about the Queensland offending "in detail": AFM 69, TT 114.24. She later said "Things aren't easy to speak up about, especially when it's going to ruin a family. And when I'm so young and I'm going through another court case about a similar issue": AFM 73, TT 124.42-44. There was and could be no elaboration as to how or why she considered it to be a "*similar issue*".

24. Central to the trial was the truthfulness and reliability of the complainant. The relevance of the excluded evidence included the following (and see further AFM 47-59, VD Ex. 2 [52]-[141]):

a. It could have provided a source for the complainant's detailed description, and evident memory, of sexual acts and offending against a child. Without the context of the Qld offences, jurors would have naturally attributed the detail and veracity of her evidence to the truth of her allegations. Unanswered, the complainant's knowledge of these matters was powerful evidence against the appellant. It was inherently misleading. The appellant was deprived of offering the jury alternative explanations for the complainant's evidence that were fairly available to him: that she had conflated or confused her memories, or that she had made false allegations that were based on actual experiences with the Qld offender.[2]

b. It demonstrated the inherent improbability of the appellant offending at all. The complainant and appellant, and other adults around them, were engaging with authorities on the subject of the complainant's childhood sexual abuse. The seriousness of the alleged misconduct was understood by the complainant, and it would have been obvious to the appellant that the chances of detection were extremely high. The jury were not made aware of the brazenness of the conduct that the complainant and Crown were actually alleging.

c. The clear opportunity for complaint to be made to police and others, and the complainant's previous experience of having been believed *about sexual misconduct*. She was aware of the powerful weapon she possessed to stop it. Having explained her delay in part by not "know[ing] how to tell anyone, [be]cause of what happened the first time", the jury are likely to have distinguished her experience

[2] See [62], below, as to the inferences arising from the Crown's closing address.

reporting "physical assaults" from reporting sexual assaults, and rationalised that she found reporting sexual assaults more difficult.

d. The true nature of the relationship between the complainant and appellant, which involved her confiding in him about the Qld offences, and his advocating for police intervention on her behalf, prior to the commencement of the alleged abuse.

25. Absent this critical contextual evidence, the appellant was found guilty by the jury of all 17 charged counts of sexual offences against a child, contrary to ss 61J, 61M and 66A of the *Crimes Act 1900* (NSW).

26. The appellant appealed his conviction on the ground, *inter alia*, that the trial judge erred in excluding the evidence of the Qld offences or that the trial otherwise miscarried by reason of its exclusion (**CCA ground 3**). The appeal was successful on an unrelated ground (**CCA ground 1**) and the appellant's convictions quashed. That ground related to the trial directions and, without more, the appropriate order was for retrial. The Court therefore addressed and determined the issues raised by CCA ground 3, as this was determinative of whether the evidence of the Qld offences would be admissible on any retrial, and, if not, whether a retrial should be ordered.

27. By majority (Beech-Jones CJ at CL, as his Honour then was, dissenting) the CCA found that the evidence of the Qld offences was correctly excluded, but for different reasons to the trial judge. The CCA then proceeded on the basis that the question whether or not to order a new trial was "governed by the same principles which would apply to the question whether it was appropriate to permanently stay the trial": CAB 107, CCA [126]. Adamson J (as her Honour then was), with whom Bellew J agreed, held that the inadmissibility of the Qld offences was not capable of causing a "fundamental defect" in the appellant's trial, as its benefit to the appellant was not unequivocal, and accordingly ordered a retrial: CAB 107, CCA [128].

Part VI: Argument

Ground 1: Section 293(4) of the *Criminal Procedure Act 1986* (NSW)

28. Section 293 of the CPA (now renumbered as s 294CB) relevantly provides:

> (3) Evidence that discloses or implies:
> (a) that the complainant has or may have had sexual experience or a lack of sexual experience, or
> (b) has or may have taken part or not taken part in any sexual activity, is inadmissible.
>
> (4) Subsection (3) does not apply:

> (a) if the evidence:
>
> (i) is of the complainant's sexual experience or lack of sexual experience, or of sexual activity or lack of sexual activity taken part in by the complainant, at or about the time of the commission of the alleged prescribed sexual offence, and
>
> (ii) is of events that are alleged to form part of a connected set of circumstances in which the alleged prescribed sexual offence was committed,
>
> (b) if the evidence relates to a relationship that was existing or recent at the time of the commission of the alleged prescribed sexual offence, being a relationship between the accused person and the complainant,
>
> …
>
> and if the probative value of the evidence outweighs any distress, humiliation or embarrassment that the complainant might suffer as a result of its admission.

29. The provision has not changed substantively since its first introduction as s 409B of the *Crimes Act 1900* (NSW) in 1981. Its history is comprehensively set out in the judgment of Leeming JA in *Jackmain (a pseudonym) v R* (2020) 102 NSWLR 847 (***Jackmain***) from [96]. The provision's purpose, as described in the Second Reading Speech, was to prohibit (*Jackmain* [10]):

> irrelevant questioning of sexual assault victims about their prior sexual behaviour… based upon the premise that a person who seeks sexual intercourse with another should not be able to rely on scandal or gossip about the other person or on rumour or knowledge of that other person's sexual behaviour with others, as a basis of assuming consent to intercourse. 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.

30. The mandatory operation and lack of judicial discretion was deliberate, and its unintended and unfair effects have attracted significant judicial criticism: *Jackmain* [27], [102]. It was reviewed by the New South Wales Law Reform Commission in November 1998 and the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General in 1999, both of whom recommended reform: *Jackmain* [116]-[121]. By that time, every other Australian jurisdiction, New Zealand, England, Canada, and various of the United States had by then either introduced a discretion, or the non-discretionary approach had been read down or ruled unconstitutional: *Jackmain* [101], [103], [105]. In striking down a comparable non-discretionary provision in the Canadian *Criminal Code* in *Seaboyer v The Queen; Gayme v The Queen* [1991] 2 SCR 577, McLachlin J observed (at 274):

> Courts in other jurisdictions have found it necessary to curtail the effect of [the legislation] so as to permit accused persons to present evidence relevant to their

> defence. This fact reinforces the conclusion that the legislation offends the principles of fundamental justice underlying a fair criminal trial.
>
> In achieving its purpose – the abolition of the outmoded, sexist-based use of sexual conduct evidence – it overshoots the mark and renders inadmissible evidence which may be essential to the presentation of legitimate defences and hence to a fair trial. In exchange for the elimination of the possibility that the judge and jury may draw illegitimate inferences from the evidence, it exacts as a price the real risk that an innocent person may be convicted. The price is too great in relation to the benefit secured, and cannot be tolerated in a society that does not countenance in any form the conviction of the innocent.

31. In 1999, s 409B was "transferred", along with other procedural provisions then contained in the *Crimes Act 1900* (NSW), to the *Criminal Procedure Act 1986* (NSW): *Jackmain* [123]-[125]. It became s 105. No debate or commentary was directed to its operation, and minor textual error introduced at this time "suggests that the close attention to detail by parliamentary counsel to which one is accustomed may not have been present in the case of the redrafting of s 409B": *Jackmain* [126]-[129]. Further minor amendments and renumberings have been made without any express consideration or rejection of the repeated calls for reform.

32. Judicial and law reform disquiet has focused on two categories of frequently excluded evidence that were not anticipated by the legislature (Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (Attorney General's Department of New South Wales, December 2005), p 55): Evidence of previous false complaints of sexual assault made by the complainant, e.g. *Jackmain*; and evidence of other child sexual abuse which may explain the complainant's behaviour or knowledge, otherwise than by reason of the charged allegations, e.g. *HG v The Queen* (1999) 197 CLR 414 (***HG***) at [13] and this case.

33. The appellant submits that the CCA majority erred, and Beech-Jones CJ at CL was correct (in dissent) with respect to the meanings and application of: "sexual experience", "events… alleged to form part of a connected set of circumstances", and "relates to a relationship". None are expressly defined in the Act.

Subs (4)(a)(i) "Sexual experience"

34. In dissent, Beech-Jones CJ at CL found (correctly, with respect) that evidence concerning the complainant's disclosures of the Qld offences was evidence of her "sexual experience" as it was, "at or about the time of" the commission of the alleged offences by the appellant. His Honour accepted the description of "sexual experience" given by Harrison J in *GEH v R* [2012] NSWCCA 150 (***GEH***) at [63] (affirmed in *R v*

Edwards [2015] NSWCCA 24 at [30]), being a term which "encompasses a state acquired over time, whether long or short, but which refers to the condition of having experience in sexual matters", in contrast to "sexual activity" which describes a "discrete sexual activity or lack of it that occurred or in which the complainant took part or did not take part": CAB 73, CCA [21]. As Harrison J held in *GEH* (at [64]):

> a complainant's sexual experience will be his or her state of being at or about the time of the commission of any alleged prescribed sexual offence because that state of sexual experience or lack of sexual experience will in an ambulatory fashion always exist at the relevant time.

35. This approach was also adopted by Leeming JA in *Chia v R* [2021] NSWCCA 51 (***Chia***) at [58] (Walton J agreeing, Adamson J in dissent, but not on the meaning of "sexual experience": [89]-[90]).

36. This is consistent with the legislature's intention that "sexual experience" or "lack of sexual experience" as it appeared in the predecessor s 409B, would encompass, for example "the suggestion that the complainant was promiscuous" or "that she was a virgin or sexually inexperienced": Woods, *Sexual Assault Law Reforms in New South Wales: A Commentary on The Crimes (Sexual Assault) Amendment Act, 1981, and Cognate Act* (Department of the Attorney General and of Justice, June 1981), p 34.

37. The complainant's "sexual experience" at the time of the alleged offences was that of a child who had been made to engage in sexual acts of particular kinds with an adult male caregiver. Evidence of her disclosing these incidents to the appellant was also evidence "*of*" her "sexual experience" as it was, at the time of the alleged offences; in that it was evidence that she, at that time, "had experience of" child sexual abuse.

38. In contrast, Adamson J held that because 18 months elapsed between the last of the Qld offences and the first of the offences alleged against the appellant: "I do not consider that this time period falls within the statutory wording, 'at or about the time'. I do not accept that the 'aftermath', being the [Qld] proceedings ought to be counted in this reckoning of time": CAB 103, CCA [115]. This approach erroneously treats sexual experience as a singular event (possibly capable of being "extended" by subsequent events) and conflates it with the activity or event from which the experience accrued. It also fails to give the words "sexual experience" in subs (4)(a)(i) work to do, rendering the expression indistinguishable from "sexual activity taken part in by the complainant": and see, CAB 102-103, CCA [111]-[114].

39. Her Honour appears also to have (erroneously, it is submitted) considered the modifier "taken part in by the complainant" operated on the expression "sexual experience or lack of sexual experience" as well as the phrase to which it belongs, "sexual activity or lack of sexual activity taken part in by the complainant", thereby rendering "sexual experience" a singular temporal event: CAB 103, CCA [114]. That reading inserts a comma after the expression "sexual activity or lack of sexual activity" in subs (4)(a)(i) which does not appear.

40. Bellew J agreed with the reasons of Adamson J concerning subs (4)(a)(i), holding further that "a gap of that length [18 months] runs entirely contrary to a conclusion that the two *episodes* occurred 'at' the same time. Further… the phrase 'about the time' cannot encompass two events which are separated by such a period": CAB 110, CCA [137], *emphasis added*. The statutory criteria is not, however, directed to whether two different "episodes" or "events" occurred at or about the same time. "Sexual experience" is not an "event", albeit it may arise *from* an event. Rather, where the evidence concerns the complainant's "sexual experience", *any* prior sexual experience relevantly constitutes that person's "sexual experience" at the time of the alleged offending: *GEH* [64]. The evidence must then *also* satisfy the distinct, second criteria of being of *events* forming part of a connected set of circumstances.

41. In support of this interpretation, Bellew J also relied on the judgment of Basten JA in *GEH*: CAB 110, CCA [137]-[138]. In *GEH*, Basten JA held that the separation between alleged offending and subsequent allegations by the complainant of sexual conduct with another person "did not self-evidently satisfy the temporal element" of subs (4)(a)(i), and that it would "def[y] the ordinary meaning of the words" to suggest that an allegation against a different person made 15 months *after* the alleged offending could form part of a connected set of circumstances "in which" the alleged offending occurred: *GEH* [10]-[11]. However, in *GEH* the allegation of sexual misconduct against another person occurred *after* the allegations the subject of the charges against the accused. Any such "sexual experience" (or lack of sexual experience in the case of a false allegation) as accrued from an incident which occurred *after* the alleged offending could not, on any view, have existed "at or about" the time of the alleged offending. Nor could the evidence be in respect of events constituting part of a connected set of circumstances "in which" the offending occurred. Basten JA's

remarks in *GEH* refer to that basic temporality, and not the length of time separating the incidents *per se*. They are inapposite to this case.

Subs 4(a)(ii) "events … alleged to form part of a connected set of circumstances"

42. Beech-Jones CJ at CL (again, with respect, correctly) held that evidence of the complainant's disclosures was "bona fide" evidence of "events" alleged to form part of the "connected set of circumstances in which" the alleged offences were committed: CAB 74, CCA [23]. Those "circumstances" are, or include (CAB 74, CCA [23]):

> that the complainant was living with the [appellant] at a time when she was assisting the police and court in prosecuting the Queensland offender for sexually abusing her. The [appellant] raised a bona fide contention that the various disclosures made by the complainant between 2011 and 2014 rendered it unlikely in the circumstances that she would not have made similar disclosures about the [appellant]. That is a sufficient connection for the purposes of s 293(4)(a)(ii).

43. Accordingly, the two conditions in s 293(a) were satisfied; albeit his Honour considered it was for the trial judge to determine the balance of the issues under s 293(4) (whether the probative value outweighs any distress, humiliation or embarrassment): CAB 75, CCA [25].

44. Adamson J held the "connected set of circumstances" (CAB 104, CCA [117]):

> does not include the reporting of the [Qld] offences or the administration of justice in Queensland in respect of those offences. If it were otherwise, circumstances could be 'connected' merely because proceedings relating to previous circumstances were still on foot.

45. The connected set of circumstances were far more than the mere fact the proceedings in Queensland were still on foot. The earlier assaults and allegations were the reason the complainant was ultimately moved and placed into the appellant's care, and her disclosure of some of them to the appellant formed part of the relationship of confidence between them in which the offences were allegedly committed. His knowledge of the allegations and proceedings in Queensland informed the extreme riskiness, and so, the inherent unlikelihood, of the appellant assaulting the complainant at the time she was actively participating in the prosecution of a prior sexual assaulter. These events could only be described as a *critically* "connected set of circumstances in which the alleged prescribed sexual offence[s were] committed": s 293(4)(a)(ii).

46. As Gleeson CJ held in *R v Morgan* (1993) 30 NSWLR 543 at 544:

> … The relationship to which s 409B(3)(a)(ii) directs attention is circumstantial. The facts that could give rise to such a relationship are widely variable.

> Since the evidence in question is, by hypothesis, relevant and of probative value (otherwise it would be inadmissible without the need for any statutory exclusion), no narrow approach should be taken to that part of the statutory provision which permits its reception.

47. This Court should find the excluded evidence satisfies the subs 293(4)(a) criteria.

Subs (4)(b) "relates to a relationship"

48. Evidence of the complainant's disclosures *to the appellant* was sought to be tendered under subs 293(4)(b) as evidence that "relates to a relationship that was existing or recent at the time of the commission of the alleged prescribed sexual offence, being a relationship between the accused person and the complainant".

49. The term "relationship" is not defined and is generally construed broadly, without necessary limitation to an emotional or sexual relationship: *Taylor v The Queen* (2009) 78 NSWLR 198 (***Taylor***) per Campbell JA (Latham and Harrison JJ agreeing) at [31]-[36]. Albeit it is something "more than what exists between two people who have met one another once or twice before and who strike up a conversation on a beach": *R v White* (1989) 18 NSWLR 332, per Gleeson CJ, Carruthers and Badgery-Parker JJ, at 341D-F. It has been held to include even an abusive relationship between an adult and a child: *Taylor* [33]. As, Gleeson CJ said in *R v Henning* (NSWCCA, 11 May 1990, unreported, Campbell and Matthews JJ agreeing) at 77, "it would be unwise to attempt to define "relationship" under paragraph 3(b) too closely. In this volatile area of human activity, there must be a degree of latitude in order to enable judges to meet the particular exigencies of individual cases."

50. The width of the phrase "relates to" is "undoubted", and its operation is informed by the statutory context and purpose: *Taylor* [41]-[43], citing, inter alia, *Oceanic Life Ltd v Chief Commissioner of Stamp Duties (NSW)* (1999) 168 ALR 211 at [56] and *Commissioner of Inland Revenue v Maple & Co (Paris) Ltd* [1908] AC 22 at 26. The purpose and context here is the *exception* to the extreme operation of the prohibition in s 293(3), inserted as a critical protective provision for a criminally accused.

51. Beech-Jones CJ at CL accepted "at a level of generality" that "evidence of disclosure could relate to a relationship between a young complainant and someone they felt trust and confidence in, such as a parent or counsellor": CAB 71-72, CCA [16]. His Honour considered the material did not permit a finding as to whether there was such a relationship in this case, but that – given the trial judge had erroneously considered the appellant's submissions related to the relationship between the complainant and the

Qld offender, which would not fall within s 293(4)(b) – this ground of appeal should be upheld (thus s 130A of the CPA would not preclude admission on retrial).

52. In contrast, Adamson J accepted that the trial judge misunderstood the appellant's submission, but considered his Honour correct to reject the evidence under this exception (Bellew J agreeing at CAB 110, CCA [139]). Her Honour held that although the words "relate to" are "wide in import, I am not persuaded that the disclosure by [the complainant to the appellant] of offences perpetrated on [the complainant by the Qld offender] can be said to "relate to" the relationship between [the complainant and the appellant]": CAB 105, CCA [121]. Her Honour referred to *HG* per Gleeson CJ at [33] in this regard (CAB 105, CCA [120]), where it was held that questions as to the "scope" of the term "relationship" did not require resolution in that case, as the evidence sought to be tendered disclosed an earlier sexual encounter between the complainant and her natural father which did not relate to her relationship with the appellant in that case. Her Honour did not refer to *Taylor* at [41]-[43] nor the cases there cited on "relates to".

53. Beech-Jones CJ at CL (correctly, with respect) distinguished *HG*, recognising that it was not direct evidence that the complainant was abused by the Qld offender, but evidence that the complainant disclosed that abuse to the appellant, which could "relate to" a relationship of confidence: CAB 71-72, CCA [16].

54. This Court should uphold Beech-Jones CJ at CL's finding that the evidence of disclosure to the appellant in this case could relate to a relationship of confidence for the purposes of s 293(4)(b).

Ground 2: Error in holding it permissible to mislead a jury

55. Following the trial judge's ruling, the complainant was cross-examined about being "physically assaulted" by a "person": CAB 68-70, CCA [9]-[11]. The cross-examiner (CAB 70, CCA [11]):

> sought to place [her] evidence about her sexual abuse by the applicant and its timing in the context of her ongoing participation in the proceedings in Queensland. The complainant's response was consistent with the above in that she emphasised how difficult it was to put herself through the process she was undertaking in Queensland ("Things aren't easy to speak up about, especially when it's going to ruin a family. And when I'm so young and I'm going through another court case about a similar issue.").

56. Excising the fact that *sexual* offences were committed by a former adult male caretaker, and that the complainant confided in the appellant about, and otherwise reported, these offences, deprived the appellant of significantly probative evidence. It also rendered the complainant's evidence positively misleading. "Physical assaults" could only be interpreted, in these circumstances, as expressly *not* involving sexual offending. The jury would naturally presume they would be told if the prior offending was sexual. This manufactured a significant point of difference between what had happened previously and the complainant's conduct in this case. The jury could reasonably – and likely did – rely on this (false) difference to excuse the vagaries in the complainant's conduct. Her explanations as to why she did not report the alleged offending (set out above at [17]) were significantly more credible given – in the jury's mind – her previous experience had not involved more serious, and taboo, *sexual* misconduct. The evidence assumed particular significance where the jury's determination turned almost exclusively upon their assessment of the complainant's credibility and reliability: *contra.* CAB 106, CCA [125]. Changing the evidence's character to "physical assaults" by "a person" fundamentally altered its nature. Moreover, it was simply untrue.

57. The jury would also have assumed there was no alternative explanation for the complainant's knowledge and evident memory of sexual abuse, which the complainant had described in some detail. Notably, her interview played to the jury included exchanges premised on her having no familiarity with sexual intercourse or ejaculate, and that she did not "understand it all": e.g. AFM 78-81, MFI 5, A505, Q/A585-587. To this may be added inferences arising from the Crown's closing address that she had no source for her knowledge and memories of sexual abuse (see, below at [62]). Given the nature of the Qld offences (including the withdrawn offences where the general nature of the offences, being rape and indecent treatment, is known) the evidence of the nature of those offences assumes significance.

58. No part of the "forensic benefit" of this aspect of the excised evidence – that there was another source for her knowledge of sexual assaults against children – was retained by the expedient adopted (nor was the unfair prejudice remedied by it).

59. Beech-Jones CJ at CL accepted that it was "false" to characterise the Qld offences as "physical assaults" in this way (including because the first offence involved no touching; the complainant was shown pornography): CAB 70, CCA [12].

60. Adamson J held that "[w]hile it is preferable that a jury not be misled by expurgated evidence, there is a distinction between not being told the whole truth and being told something which is untrue" a "not uncommon" practice in criminal trials to take into account the rules of evidence: CAB 108, CCA [131]. (Bellew J did not separately consider the issue, but agreed with the orders of Adamson J: CAB 110, CCA [140]). In essence, her Honour considered that because the misleading arose by omission, it was permissible: CAB 108, CCA [130]-[131]. This should not be accepted.

61. The law is well able to recognise a lie by omission. Literally true statements and silence can constitute misleading and deceptive conduct, or untrue representations: e.g. *Hawkins v The Queen* (1994) 181 CLR 440. Courts are also well able to recognise where evidence that is literally true is so distorted without proper context as to become misleading; for example, under the general discretion to exclude evidence that is misleading pursuant to s 135 of the *Evidence Act 1995* (NSW).

62. The misleading and unfairly prejudicial way in which the evidence was left can be further demonstrated through the Crown's closing address. Notwithstanding that the Crown was cautious in closing not to expressly suggest that the complainant had no other source for her knowledge and apparent memories of sexual abuse, that inference inevitably arose. The Crown said, relevantly (AFM 82-92):

> it might immediately occur to you that there are really only two options, or two possibilities. The first is that it's not true, that's one possibility that you need to think about obviously, and that either [the complainant herself] on her bat or in cahoots with [the appellant's ex-wife], has come up with this set of lies and put it before you. I'll come back to that. The second really only other possibility is that she's told you the truth. You might think that there aren't any other possibilities…" (TT 281.22-28)
>
> … There are seven reasons why I'm going to suggest that when you critically analyse the idea that either [the appellant's ex-wife] put her up to it, or she's done it all on her own, all by herself, it's not even a remote possibility. The first point I'll call multiple and persistent, multiple and persistent, and what I mean by that is that if she's been put up to making these false allegations or she's dreamt it up all on her own, as was suggested to her, she had to lie not once, not twice, not three, multiple times [to each of the investigators and under oath each time she was interviewed or examined] (TT 282.5-10)…
>
> The second is complicated but consistent… This wasn't just one or two allegations, there are 11 separate individual occasions. If [the complainant] had set out on her own or at the urging of [the appellant's ex-wife], to tell a pack of lies, the plan involved a lot of information… it was never suggested to her, not once that anything that she said to you here was different to what she said to the police… It's not like she forgot what happened or the details of any of these events. … to have maintained

> such a complicated series of lies, from back in December 2017, right through to this week, is you might think incredible, if they were lies. Not so if they happened to her. Not so if they were vivid memories. Complicated and consistent… (TT 282.35-38, .45-48).
>
> Finally [the complainant]… was asked directly on multiple occasions if she'd dreamt it up or it was lies and the like. … she said, "Are you kidding?,", and you would've seen her reaction to that. It was genuine, I submit to you (TT 285.33-37).
>
> …I'd suggest you might think that it would be impossible for someone to lie so brazenly and confidently and make it look as convincing and believable as she did, both to police and to you. … The second point, the physical demonstrations; when you watched that video you would've seen there, she's talking about how he placed his hand on her head and she physically does it, she doesn't just describe it to you like she's learned a script, she's physically demonstrating things that were happening during these things that are memories for her because they physically happened to her you might think (TT 290.7-9.15-21).
>
> … she was distressed there as well, exactly as you might expect from someone who's recounting distressing memories like this. All an act?... (TT 291.21-31).

63. The probative force of each of these submissions is dramatically diminished by the fact (unknown to the jury) that the complainant *had* experienced sexual assault by an adult male caregiver. She *could* speak from memory and re-enact assaults, without the appellant necessarily having been the offender. That is, there was a *third* possibility, in addition to those proposed by the Crown: she was speaking from true memory, it was just not of the appellant (whether deliberately or unintentionally).

64. As Beech-Jones CJ at CL held, while it may be common to exclude prejudicial evidence "or to otherwise describe a body of evidence in general terms to avoid such prejudice", a jury "should not be misled" as they were here: CAB 70, CCA [12]. Indeed, in the commonly excluded categories of evidence cited in *KS v Veitch (No 2)* (2012) 84 NSWLR 172 (***KS***) which Adamson J relied on at CAB 108, CCA [131] (e.g. public interest immunity, legal professional privilege, etc.), withholding disclosure triggers mandatory consideration of whether the charges should proceed at all: *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) r 88; *Legal Professional Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) r 29.6. In the case of public interest immunity, the Court is *required* to consider whether to stay the proceedings if the evidence at risk of exclusion is sought to be adduced by a criminal defendant: s 130(5)(f) of the *Evidence Act 1995* (NSW).

65. In none of those cases is the answer to cross-examine on a false version of the facts so as to attempt to confer some similar forensic "benefits" to those being excised by the

exclusion. Such a practice is quite distinct from circumstances in which prejudicial information, not integrally related to the allegations, may be avoided in evidence. For example, the fact the accused is or was in custody, or has a criminal record, is often avoided. However, where those facts are integral to the allegations, they are presented to the jury. Where facts integral to the allegations and/or the defence case cannot be tendered, the accused cannot obtain a fair trial and the prejudice to him cannot be alleviated. His trial can only ever be an unfair one.

66. So much was also recognised by Harrison J in *Taylor,* where s 293 had been erroneously applied to excise the *sexual* nature of the relationship between the appellant and complainant (at [89]):

> As a general proposition, 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. In simple terms, the jury should be given the full picture if there is any chance that being given only some of it might lead to a misunderstanding of precisely what that picture was. What the jury does thereafter with that information is of course strictly a matter for the jury concerned. A jury might reason that the appellant and ABC had some form of financial interdependence from the evidence that was admitted at the trial. That was certainly an important part of their relationship but it was not the full picture. In my view, knowledge of less than all of the admissible facts about the relationship between ABC and the appellant in the particular circumstances of this case was potentially, if not actually, misleading. The exception that is contained in s 293(4)(b) appears to anticipate or to recognise this without doing any disservice to the very important safeguards and protections that it enshrines. The acts or omissions that led the jury in this case to decide it without the full picture also led to a miscarriage of justice.

67. Any question of retrial under s 8 should be determined on the basis it will not be permissible to adopt the expedient of cross-examining the complainant (or playing pre-recorded evidence) on the false premise that the Qld offences were assaults *simpliciter*: contra. CAB 95, CCA [90]. At most, the complainant could be examined about the fact of proceedings in Queensland with no mention at all of their content. Plainly, that cannot substantively ameliorate the unfairness worked by s 293(3).

Ground 3: The Court of Criminal Appeal erred in ordering the appellant be retried

68. The appellant's primary position is that the evidence of the Qld offences is admissible, and a retrial should be ordered with the benefit of this Court's ruling on the correct operation of s 293(4). This ground only arises for determination if the appellant fails on ground 1, and the following submissions are premised on this basis.

69. Section 8 of the *Criminal Appeal Act 1912* (NSW) provides that on an appeal against a conviction, a retrial is only available where there has been a miscarriage of justice and "that having regard to all the circumstances, such miscarriage of justice can be more adequately remedied by an order for a new trial than by any other order…". This has been held to "ordinarily" require a retrial where there is evidence to support the charge, unless the interests of justice require an acquittal: *Spies v The Queen* (2000) 201 CLR 603, Gaudron, McHugh, Gummow and Hayne JJ at [104].

70. Myriad circumstances may render a retrial a "less adequate" remedy than acquittal in any given case: See, e.g. *Jiminez v R* (1992) 173 CLR 572; *Gilham v R* (2012) 224 A Crim R 22 (see in particular [649]); and *R v Patton* (1995) 80 A Crim R 595. An order for acquittal can be made even if the appellate court considers that the appellant is probably guilty: *R v A2; R v Magennis; R v Vaziri* (2019) 269 CLR 507 at [179].

71. But for the issues raised by CCA ground 3, the appellant's success on CCA ground 1 would ordinarily have resulted in orders for retrial under s 8 (see CAB 84-85, CCA [58]-[59]). However, the issues raised by CCA ground 3 rendered that remedy unjust and inadequate.[3] It cannot be said that *any* miscarriage could be "more adequately remedied" by a retrial that would – by force of legislation or otherwise – be manifestly unfair. Nor could such a course be in the interests of justice.

72. The result of any retrial without the excluded evidence would be akin to that *Chia*, in which, by (erroneous) application of s 293 at first instance (at [70]):

> Relevant evidence was kept from the jury. It tended to support the appellant's defence. The result was that the complainant was never confronted with the entirety of what he said she told him before the pair had sexual relations, and the jury never saw how she reacted to that. It is impossible to say with what demeanour, with what pauses, with what tone of voice the complainant would have responded. …
>
> In the language of *Filippou v The Queen* (2015) 256 CLR 47… at [15], "the possibility cannot be excluded beyond reasonable doubt that the appellant has been denied a chance of acquittal which was fairly open to him".

73. The majority erred in importing the dramatically higher threshold required for a permanent stay; namely, that there would be a "fundamental defect which goes to the root of the trial and which is 'of such nature that nothing that the trial judge can do in

[3] It is strictly immaterial whether CCA ground 3 is separately determined to constitute a miscarriage of justice. Even if s 8(1) were "triggered" only by CCA ground 1, the facts underpinning CCA ground 3 form part of the "circumstances" to which regard must be had when considering the discrete question of whether or not a retrial is the "most adequate" remedy.

the conduct of the trial can relieve against its unfair consequences': *Jago v District Court of NSW* (1989) 168 CLR 23 at 24": CAB 107, CCA [128]. Section 8 prescribes no such test, and it is contrary to ordinary principles of interpretation to impose it.

74. However, even if the test for a pre-trial stay *is* to be imported into s 8, it would be met in this case. As was established in *KS* and affirmed in *Jackmain,* the proper application of the rules of evidence and procedure may, in particular circumstances, give rise to such unfairness as to warrant a stay of proceedings: *Jackmain* [202]-[203]. If ground 2 is upheld, the expedient of cross-examining on a misleading basis cannot be adopted; the institutional integrity of the court would be compromised. However, even if ground 2 is rejected and the expedient permitted, the appellant will still be prevented from providing the jury with the "third alternative": that the complainant *does* have knowledge and memories of sexual abuse that are not the result of his conduct. Her evidence will therefore still be inherently misleading, even without the false cross-examination. This manifest unfairness would be productive of a fundamental defect at the root of the trial, the unfair consequences of which the trial judge would be unable to relieve.

75. If the Court rejects ground 1, grounds 2 and 3 should be upheld.

Part VII: Orders Sought

76. The appeal be allowed.

77. In the event that ground 1 is upheld, remit the matter to the District Court of New South Wales to determine the admissibility of the evidence under s 294CB of the *Criminal Procedure Act 1986* (NSW) in accordance with this Court's ruling.

78. In the event that ground 1 is dismissed, direct that there be an acquittal as sought in ground 3.

Part VIII: Estimate of time to present oral argument

79. The appellant estimates presentation of his oral argument may take up to 2 hours.

Dated: 18 April 2024

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ANNEXURE TO THE APPELLANT'S SUBMISSIONS

Criminal Procedure Act 1986 (NSW) – as at 30 July 2019
s 293

Criminal Procedure Act 1986 (NSW) – as at 30 November 1999
s 105

Criminal Procedure Act 1986 (NSW) – current
s 294CB

Criminal Appeal Act 1912 (NSW) – current
s 8

Evidence Act 1995 (NSW) – current
ss 130, 135, 192A

Criminal Code (Qld) – as at 12 November 2012
ss 210, 349

Crimes Act 1900 (NSW) – as at 31 December 2011
ss 66A, 61M

Crimes Act 1900 (NSW) – as at 31 March 2012
s 66A

Crimes Act 1900 (NSW) – as at 31 December 2013
s 61J

Crimes Act 1900 (NSW) – as at 31 December 2014
s 61J

Crimes Act 1900 (NSW) – as at March 1981
s 409B

Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW)
r 88

Legal Professional Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW)
r 29.6