



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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Form 27F – Outline of oral submissions

Note: see rule 44.08.2.

S173/2023

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

BQ
Appellant

and

THE KING
Respondent

RESPONDENT’S OUTLINE OF ORAL SUBMISSIONS

Part I: Publication

This outline of oral submissions is in a form suitable for publication on the internet.

Part II: Outline of Oral Submissions

1. Sections 79(2) and 108C were enacted to overcome demonstrated judicial reluctance to admit expert opinion evidence on child development and behaviour (including the effects of sexual abuse on the development and behaviour of children). Such evidence is recognised as being important in assisting the tribunal of fact to assess other evidence and to prevent inappropriate reasoning processes based on misconceptions about victims of child sexual abuse and their behaviour: **RS [21]**; *Aziz (a pseudonym) v R* (2022) 110 NSWLR 317 (*Aziz*) at [49]-[61] (JBA 326-329); ALRC, *Uniform Evidence Law*, Report 102, [9.140]; [9.142]; [9.145]; [9.149]; [9.155]; [9.156] (JBA 637-638; 640-642); *DH v R* [2015] 1 NZLR 625 (*DH*) at [2] (JBA 343).
2. A determination of the admissibility of A/Prof Shackel’s evidence requires an identification of the opinion and its relevance to the facts in issue in the case: **RS [22]**; ss 55, 76 and 79 of the *Evidence Act 1995* (NSW) (JBA 9-11); *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 (*Dasreef*) at [31] (JBA 82).

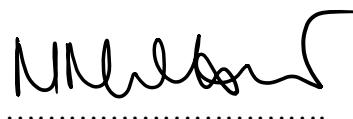
- a. The evidence was relevant because it could rationally have affected the assessment of the credibility and reliability of the complainants' evidence by correcting any misconceptions that the jury may have held: **RS [23]-[26]**; *Aziz* at [63] (JBA 329); *AJ v R* (2022) 110 NSWLR 339 (**AJ**) at [68] (JBA 289).
 - b. The risk that unjustified assumptions about the likely behaviour of a victim of child sexual abuse may have influenced the jury's assessment of the complainants' evidence is illustrated by aspects of the cross-examination pursued by trial counsel for the appellant: **RS [13]; [25]**; RBFM 4-10; Defence closing address ABFM 64-65.
3. The NSWCCA was correct to conclude that the portions of the evidence of A/Prof Shackel that the appellant (mis)characterises as opinions as to the behaviour of perpetrators are admissible: **RS [27]-[46]**.
- a. The challenged evidence was not an opinion as to perpetrator behaviour: s 76 (JBA 10); *Lang v The Queen* (2023) 97 ALJR 758 (**Lang**) at [6] (JBA 435). Evidential context and the purpose of its tender support that conclusion: *Dasreef* at [31] (JBA 82).
 - b. Reference by A/Prof Shackel to the circumstances in which child sexual assault takes place was for the purpose of explaining her opinion as to the behaviour of children who have been victim of such offences: *Lang* at [11] (JBA 436). Addressing misconceptions regarding the behaviour of child victims of sexual assault requires not only identification of the misconception but an understanding of why it is a misconception.
 - c. Both the proper characterisation of the challenged evidence and the use to which it was put distinguish this case from *AJ*: cf *AJ* at [66]; [72]; [83] (JBA 289; 291; 294-295).
4. The evidence of A/Prof Shackel sufficiently exposed the meaning of the term "intra-familial" (cf AS [41]). There is no doubt that the relationship between the complainants and the appellant fell within that characterisation. An understanding of the behaviour of child victims of sexual abuse requires consideration of the dynamics of the relationship rather than merely its formal characterisation: ABFM 20.30-43; 24-25. The CCA was correct to find that "any failure to more closely define what constitutes intrafamilial relationships neither detracted from the evidence nor gave rise to the risk of a miscarriage of justice" (CCA [237] (CAB 181)): **RS [47]-[54]**.

5. Even if found to be inadmissible, the challenged portions of the evidence of A/Prof Shackel did not give rise to a miscarriage of justice (CCA [241] CAB (183-184)). The evidence was of limited compass and given in obviously general terms. Neither party invited, directly or by implication, predictive reasoning (cf *AJ* at [72]; [88]; [171] (JBA 291; 296; 313): **RS [55]-[57]**).
6. As to Ground 2, the NSWCCA was correct to conclude that there is no universal rule or “invariable prescription” that a direction warning against the improper use of counter-intuitive behaviour evidence must be given in every case (CCA [269] (CAB 192)): **RS [58]-[61]** (see *M v The Queen* [2011] NZCA 191 at [44]-[48] (JBA 533-535); *DH* at [114]-[117] (JBA 365-366)).
7. A miscarriage of justice was not occasioned by the absence of further direction in relation to the evidence of A/Prof Shackel. There was not a real risk that the jury reasoned impermissibly in finding the appellant guilty of the offences having regard to all of the circumstances of the trial: **RS [62]-[73]**; (*Hamilton (a pseudonym) v The Queen* (2021) 274 CLR 531 at [43]-[48]; [67] (JBA 156-157; 162)).
 - a. The evidence was expressed in terms that guarded against the use of the evidence in a predictive or diagnostic sense (ABFM 17-27).
 - b. The Crown Prosecutor addressed the evidence in a manner consistent with the purpose for which it was admitted. The Crown Prosecutor neither invited predictive reasoning nor contributed to the risk that such reasoning would be used by the jury: Crown closing address (ABFM 44; 50; 54).
 - c. The directions, read as a whole, sufficiently ameliorated any risk that the jury may have engaged in predictive reasoning. Four aspects of the summing up are important: SU 2-3 (CAB 10-11); SU 6 (CAB 14); SU 8-9 (CAB 16-17); SU 39-40 (CAB 47-48).
 - d. The NSWCCA was correct to have regard to the failure of defence counsel to seek the directions that are now sought: CCA [272]-[275] (CAB 193).
8. The terms of the direction suggested by the appellant at AS [54]-[55] should not be adopted.

Dated: 10 May 2024



H Roberts SC
Counsel for the Respondent.



M Millward