IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY
BETWEEN:

No. D12 of 2015

IMM

Appellant

AND

THE QUEEN

Respondent

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APPELLANT'S REPLY

PART I. It is certified that these submissions are in a form suitable for publication on the Internet.

PART 2. REPLY

1. The respondent supports an approach to the definition of "probative value" whereby "[a]n assessment of reliability and the weight to be given to evidence ought to be reserved as a matter for the jury unless in the rare case of inherent unreliability whereby a judge, in considering the probative value, could conclude it was not open for the jury to accept the evidence" (RS [60]). This approach is supported on the basis that "[t[he function of a properly instructed jury as the final arbiter of the facts ought not be usurped, unless in those rare cases envisaged in *Shamouil*" (RS [51]). However, this approach ought not be accepted for the reasons advanced in the appellant's submissions and, in particular:

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(a) It effectively adds words to the statutory definition. The definition is to be read as if it said: "*probative value* of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue, *disregarding considerations of reliability unless those considerations lead to the conclusion that the evidence is so inherently unreliable that it would not be open to accept it*". It is difficult to explain such an exception as a matter of statutory construction (*Dupas* at [207]).

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(b) It is inconsistent with the approach proposed by the ALRC, which stated, in a completely unqualified way, that "[t]he reliability of the evidence is an important consideration in assessing its probative value" (ALRC 38 at [146]).

(c) It severely compromises the gate-keeping role of the trial judge. As explained at AS [6.43(c)], Chapter 3 of the Act imposes a series of obligations on trial judges to make admissibility decisions which inherently interfere with the jury's fact finding process. Other policy concerns are given priority, particularly the goal of accurate fact-finding (and minimising the risk of miscarriages of justice in criminal proceedings). Chapter 3 reflects the long standing judicial concern with respect to certain categories of potentially unreliable

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evidence, such as hearsay evidence, identification evidence and tendency and coincidence evidence, where there may be a real danger of jury misuse. To require trial judges to assess probative value on the assumption that the evidence will be accepted (except in "rare cases") undermines that important role. As the Victorian Court of Appeal stated in *Dupas* at [68]:

> "By divesting the trial judge of a power that had previously existed, a safeguard was removed that is critical to the avoidance of miscarriages of justice and to ensuring that the accused has a fair trial."

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3. The respondent adopts the view that "[t]he assumption that evidence will be accepted ought to be read into the definition of probative value" (RS [26]). This is supported with the argument that "[n]aturally the evidence would not be capable of rationally affecting the assessment of the probability of the existence of a fact in issue to any extent, unless the jury were to accept the evidence". However, as explained at AS [6.23], there are degrees of "acceptance" and degrees of probative value, recognised in the definition by the words "the extent to which ...".[1]

4. The approach supported by the appellant, that no words should be read into the definition
20 of "probative value" and that considerations of reliability may be taken into account, will allow the assessment of probative value to be determined in the light of the issues at the trial and an assessment of the extent to which the evidence could rationally affect assessment of those issues – always bearing in mind that the definition requires that the evidence must be assessed at the highest level of cogency that it can rationally be given (see AS [6.30]).

5. As regards the requirement of "significant probative value" in s 97, it is somewhat curious that the respondent asserts at RS [29] that "[t]he relevant enquiry is whether the evidence is capable, to a significant degree, of rationally affecting the assessment
30 (ultimately by a jury) of the probability of the existence of a fact in issue", citing *DSJ* at 770 [55] per Whealy JA. The appellant agrees that this is the applicable test. In *DSJ*, the Court of Criminal Appeal held that a trial judge applying s 98 had erred in declining to have regard to alternative innocent explanations for the evidence said to have the capacity to point towards guilt. While there was no occasion to consider the correctness of *Shamouil*, it was held that a trial judge was not required to assume that a guilty inference would be accepted. However, the NSW Court of Criminal Appeal has since held in *R v Burton* [2013] NSWCCA 335, 237 A Crim R 238 that a court assessing the probative value of circumstantial evidence for the purposes of s 137 (as opposed to s 98) *is* required to assume that the inference(s) sought to be drawn by the prosecution will be accepted, that is,
40 to disregard alternative innocent explanations (at 272[159], 276[177] - 278[184]).

6. It appears to follow from the respondent's submissions at [30] that risks of joint concoction and contamination must be disregarded when assessing probative value under s

[1] See also Adams G, Wareham C, "Is Judicial Consideration of Credibility and Reliability under Section 137 of the Uniform Evidence Law a Guarantee of Fairness or 'Moral Treason'?" [2014] MonashULawRw 14; (2014) 40(2) *Monash University Law Review* 243 at 266, 277.

97 and s 137, but may be taken into account when assessing probative value under s 98 (coincidence evidence). Thus, the respondent would read the words "if accepted" into the definition when it applied in the context of s 97 and s 137 but not in the context of s 98. The current state of authority in NSW regarding the relevance of concoction in the assessment of probative value under ss 97 and 98 is somewhat uncertain and divided.[2] It is certainly the case that, in *McIntosh*, Basten JA seemed to hold that "contestable issues of reliability and credibility", including the risk of joint concoction, should not be taken into account when assessing the probative value of tendency evidence under s 97 and s 101 (at [47]). Yet, there is considerable authority that such risks are to be taken into account when
10 assessing the probative value of both tendency evidence and coincidence evidence.[3] The High Court in *Hoch* took the same approach to similar fact evidence in general. If such considerations are *not* to be taken into account when assessing whether tendency evidence has "significant probative value", the safeguards applicable to coincidence evidence could be effectively evaded by having the same evidence admitted as tendency evidence.

7. The respondent submits that "absurd or unworkable outcomes" would emerge if the appellant's construction were adopted for the purposes of both s 97 and s 137 (RS [43]-[51]). That submission should not be accepted: AS [6.30] – [6.31]. In addition:

20 (a) It is not suggested that the trial judge should engage in a "fact finding" assessment of how the jury would assess the reliability and credibility of the evidence. The question to be assessed by the trial judge is the rational *capacity* of the evidence to affect a jury's assessment of the issues at trial (AS [6.30]). As was observed in *Dupas* at [210], "'fact finding' is different from considering what it would be reasonably open to the jury to do" (see also *Dupas* at [163], *DAO* at 568, 586 [88]-[89] per Allsop P).[4]

(b) Evaluative assessments of probative value, including matters touching on reliability and credibility, are comfortably within the longstanding experience of trial judges, as outlined extensively in *Dupas*. There is no evidence that these assessments have resulted in
30 significant inefficiency or the need to "run the trial twice" (RS [46]): *Dupas* at [227].

(c) Contrary to the suggestion of the respondent (RS [44]), these assessments do not occur in a vacuum. In conformity with traditional practice, most assessments can be made with reference to material the prosecution proposes to rely upon and serves upon the defence in advance of the trial. As Price J stated in *XY* at [224], while "it is not uncommon for a witness to be cross-examined during a *voir dire* ... [m]ore often than not, the probative value of evidence may be assessed from the witness statements without the necessity of calling witnesses".[5] Pre-trial procedures including Basha and *voir dire* hearings are part of the "armoury" at the disposal of a trial judge where *viva voce* evidence is necessary. These
40 hearings are common in cases where a judge must assess the possibility that evidence has been concocted or contaminated.

[2] See *BC v R* [2015] NSWCCA 327 at [63], *Hughes v R* [2015] NSWCCA 330 at [201]-[203], *Jones v R* [2014] NSWCCA 280 at [86]-[90].

[3] *AE v R* [2008] NSWCCA 52 at [44]; *BP v R; R v BP* [2010] NSWCCA 303 at [110], [123]; *BJS v R* [2011] NSWCCA 239 at [24] and *Velkoski v R* [2014] VSCA 121 at [173](c).

[4] See also Adams G, Wareham C, *ibid* at p 278-281.

[5] See also Adams J (dissenting) in *BC v R* [2015] NSWCCA 327 at [55].

(d) The rules of evidence and procedure are not so ossified that unexpected developments in a trial cannot be accommodated. There is no requirement that evidentiary rulings take place only at the start of the trial. While the Act allows for advance rulings (s192A), applications to adduce or exclude evidence may be made at any stage. If evidence is adduced which is unexpected, or which changes the factual "mosaic", evidentiary rulings can be revisited. Judges are well adapted to making these decisions, it is "a quintessential task of a trial judge dealing with the living fabric of the trial and the evidence unfolding before him or her" (*DAO* at 589[99]).

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(e) There is a real practical risk of unfairness and wrongful conviction if the ability of trial judges to regulate the quality of evidence at trial is hampered (*Dupas* at [226], [224]-[225]). A number of judges have expressed concerns about the feasibility of assessing probative value divorced from considerations of reliability and credibility (see, eg, Evans J in *ASC v Marlborough Gold Mines Ltd,* extracted in *Dupas* at [223]). Examples of matters which might be excluded from consideration include the sobriety or mental health of the witness, conflicts between witness evidence and forensic evidence or CCTV footage, risks of displacement, concerns about the validity and reliability of expert testimony, risks of joint concoction, and available alternative inferences arising from circumstantial evidence.[6]

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(f) Voir dires may be required even if the restrictive approach to assessment of probative value advanced by the respondent is taken. Voir dires were held in the present case even though the trial judge assumed that the tendency evidence and the complaint evidence would be accepted. If the approach supported by the appellant were taken, it would not be necessary to call *viva voce* evidence on the question of whether the test in s 97 was satisfied because the consideration which compromised its probative value was the lack of any external evidentiary support for the complainant's account.

8. The respondent's submission that the outcome in the present case would not change if
30 reliability were taken into account (RS [52]-[55]) assumes some extrinsic consideration of reliability must exist even where the complainant is the sole source of the allegation. That is not correct: AS [6.32]-[6.35].

9. The respondent contests the appellant's submission that the generality of the complaints limited their probative value: RS [71] – [72]. However:

(a) The generality of the complaints necessarily diminished their probative value, contrary to the respondent's submissions at [69]-[73].

40 (b) The appellant does not accept that *XY v R* and *LMD v The Queen* were correctly decided in the light of *Graham v The Queen* at 608[4]–609[5], 614[34]. Both decisions were appropriately doubted by the Victorian Court of Appeal in *ISJ v The Queen* [2012] VSCA 321; 226 A Crim R 484 and *Pate v The Queen* [2015] VSCA 110 (at [141]-[146]).

6 See Edmond G, Hamer D, Ligertwood A, San Roque M, "Christie, s 137 and Forensic Science Evidence (After Dupas v The Queen and R v XY)" [2014] MonashULawR 18; G Edmond, "Against Oracular Pronouncement: A Reply to Heydon" (2015) 36 *Adelaide Law Review* 173 at 177.

(c) In any event, both cases are factually distinguishable. The representations in *XY* were confined to a limited time frame, specified an unusual location of the events and included specific details of unusual alleged acts. Unlike the representations in the present case the complainant painted a "vivid picture" which was held to convey that the events were "well and truly" implanted in the complainant's memory (at [84]-[86]). The complainant in *LMD* only alleged a number of discrete incidents (not a history of sexual abuse) and had constant revival of her memory in the form of flashbacks and physical manifestations.

10 (d) It is no answer to suggest the distinction drawn in the appellant's argument between the complainant's generalised memory of a history of sexual assault and her specific recollection of the charged acts is "artificial" (RS [74]). While the distinction is complex it is not merely technical or academic. The hearsay rule and exceptions exist as a significant safeguard to prevent "potential unreliability and the threat that hearsay evidence poses to procedural fairness" (McHugh J in *Papakosmas* at 322). It is appropriate to carefully scrutinize hearsay evidence to ensure it is both properly admitted and that fact finders are directed to its appropriate use. There are real issues of fairness which arise if vague or generalized hearsay statements can be used as evidence to support particularized charges. The hearsay provisions focus attention on the quality of the evidence given in court,
20 *Graham* at [5]. If hearsay complaint evidence is to be admitted for any reason, for example as context evidence, the boundaries of the use of that evidence should be carefully drawn.

10. The respondent's submissions place a great deal of emphasis on the evidence relating to the distress exhibited by the complainant as she made the complaints (RS at [10], [67]-[68], [75]-[77] and [83]). However, the cases relied upon by the respondent to suggest that the complaint evidence "went beyond context evidence" are not apposite to complaints made months or years after the alleged events. *Papakosmas* and *BD* were cases involving almost immediate complaint where the issue at trial was consent (see *Papakosmas* at 300[4]-[5] and *BD* at 144). The extracted quotes (RS [75] and [76]) should be understood in that
30 context (see *BD* per Smart J at 146; *Papakosmas* at 308 [29], 313[52]). Observable distress shortly after an alleged attack is relevant to whether a sexual assault in fact occurred, particularly where the defence case relies on consent, but the circumstances of the present case were very different. There was no issue of consent and no suggestion the offences had recently occurred. There were other available explanations for the alleged distress at the time of the complaints. More important, if the complaint evidence could only properly be used as context for the in-court testimony regarding the alleged offences, the distress could only be relevant for impermissible tendency reasoning (ie "the distress made it more likely that she was telling the truth about a history of abuse and this showed a tendency to commit the offences charged").

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