IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY No. D12 of 2015

BETWEEN:

IMM

Appellant

and

THE QUEEN

Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

These submissions are in a form suitable for publication on the internet

Part II: Issues

1 Was the learned trial Judge required to assume that evidence would be accepted by the jury, when determining whether the evidence was admissible for a tendency purpose under sec 97? If not, could it be said that the evidence lacked significant probative value?

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2 Was the learned trial Judge required to assume that the complaint evidence would be accepted by the jury when considering probative value for the purposes of the sec 137 exclusion? If not, could it be said that the probative value of that evidence was outweighed by a risk of unfair prejudice?

3 Was there a risk of unfair prejudice if the use of the complaint evidence was not limited? Was the learned trial Judge required to limit the use of complaint evidence under sec 136, in the absence of the appellant having made that application?

20 ## Part III: Notice under sec 78B of the *Judiciary Act 1903*

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4 The issues raised and the arguments presented do not require such a notice, on consideration of that possibility on behalf of the respondents.

Part IV: Facts

5 The appellant's summary at paras 5.1 – 5.8 is not disputed.

6 Further to that summary, the following is noted:

Offences

7 The appellant was charged with the four offences as set out in the appellant's submissions at para 5.1.

8 The indictment dated 11 November 2013 was filed on the first day of trial and replaced the original indictment. The amended indictment effectively reversed the order of count three and count four.

9 Further to the descriptions provided by the appellant, it is relevant to note that with respect to the allegations concerning count two and count four, the appellant was alleged to have rubbed his penis on the outside of the complainant's vagina, whilst on top of her (complainant's CFI 31/08/11: 48.7, 49.5, 50.2 – 50.3, 51.4, 53.2 – 53.4 as to count two; complainant's CFI 3/09/11:15 – 18 as to count four). This assumes significance in the consideration of the evidence of the complaint to KW.

Additional aspects of complaint evidence

10 Further to the complaint evidence referred to by the appellant at para 5.8, the complaint witnesses also gave evidence in relation to the distress of the complainant when making the complaint:

(a) SS: "she was crying most of the time", she was still crying at the end of the phone call; and "she was very emotional" (30/01/12 CFI at 24.8; 26.6; 27.8).

(b) SW: "she was physically upset, she was crying, but it was like pent up emotion, it was, yeah, it was of release type thing, it's hard to describe"; "and she sat there and cried"; "she wasn't forthcoming. She was upset" (T 14/11/13 at 104.7; 104.8; 110.1).

(c) SC: "(the complainant) just started sobbing and then we let her go for a few moments and (SW) cuddled her; (SW) asked whether (the appellant) had been touching her, this is when she started sobbing more and said that we didn't care and can't protect her" (14/02/12 statutory declaration: [48];[49]).

(d) KW: In statutory declaration:

- References to complainant crying throughout complaint (19/01/12 at [71]; [75]; [79]; [87])

At voir dire:

- "(the complainant) was visibly distressed. She had bags; you could see she had been crying. She was sitting curled up in the car. Normally she's all over me. She was just rocking on the side of the – I sat in the middle to be close to her and I just put my arm around her and she just started sniffing, like, to start crying again and I just said, "I love you. We will talk when we get home" (T 26/03/13 at 49.4).
- "she was shaking, she was tearful. She said 'Pop used to lie on top of me. I don't know what he was doing. He used to squash me. I just lied there, Mum'. Something along those things. She was crying her eyes out when she said that" (T 26/03/13 at 54.5).

At trial:

- "I was trying to cuddle her but she was curled up in a ball and like her knees were pressing into my stomach so I was almost leaning over her so I could get close and she was just crying and crying" (T 15/11/13 at 126.7).
- "she was sobbing, she was shaking, she was tight, sort of curled. I've never seen her cry so much and so hard in her life (T 15/11/13 at 145.1).

11 In addition to the synopsis of the complaint evidence provided by the appellant, it is necessary to note that the complaint to KW included a denial of penetration, consistent with the complainant's evidence of the alleged offences (statutory declaration 19/01/11 at [86]-[87]; T 15/11/13 at 145.7).

12 A summary of previous rulings and directions in this matter is included below.

Admission of tendency evidence

13 Over objection, the Crown was permitted to lead evidence of an occasion where the appellant ran his hand up the complainant's leg when she was giving him a massage. It was admitted at trial as it possessed significant probative value, on the basis of the learned trial Judge having assumed the acceptance of the evidence by the jury. Once accepted, it was capable of showing inappropriate sexual interest and the appellant's lack of inhibition regarding sexual conduct with the complainant and had a strong temporal nexus to the charged acts. It was ruled the evidence was not unfairly prejudicial and ought not be excluded under sec 135 and sec 137. Given its capacity to establish improper sexual interest, its probative value outweighed the risk of unfair prejudice (*IMM (No 3)* at 9:[10]).

14 The learned trial Judge informed the jury that the Crown's purpose in leading the evidence was to prove the appellant had a sexual interest in the complainant. The jury were directed that if they accepted beyond reasonable doubt that the incident occurred and that it showed the appellant was sexually interested and attracted to the complainant and was willing to act on that attraction, it could be used in determining whether the appellant committed the offences charged. The jury were warned that the evidence could not alone prove guilt, could not substitute evidence of the offences charged, nor

allow them to close their mind against the accused or have less regard to the other evidence (T 19/11/13 at 23.4 – 23.10).

15 The Court of Criminal Appeal agreed with the respondent's arguments that the evidence clearly possessed the capacity to demonstrate the appellant had a sexual interest in the child and had a strong temporal nexus with the charged acts, whereby lack of corroboration would be a matter of weight for the jury and not of admissibility (*IMM v The Queen* [2014] NTCCA 20 at 15: [43]-[44] per Kelly J with whom the others agreed).

16 The Court of Criminal Appeal ruled evidence which is solely from the complainant will not necessarily lack sufficient probative value to allow for admission under sec 97 and noted that there was no general rule to that effect (15: [44] and 16: [45]). The approach in *R v Shamouil* (2006) 66 NSWLR 228 was endorsed, noting it still allowed for circumstances whereby, having regard to issues of credibility and reliability, the judge could determine it would not be open for the jury to conclude the evidence had probative value. The Court held this was distinct from cases assessing the possibility of mutual concoction when considering coincidence evidence, given that such a risk must affect the probative value of coincidence evidence by its very nature (17-18: [40] – [50]). In any event there were no credibility issues that affected the probative value of this evidence, noting the appellant had not advanced any reason why the complainant's credibility should be judged any less on this point than for other aspects of her evidence. It was held there was no danger of unfair prejudice.

Admission of complaint evidence

17 The learned trial Judge ruled that the complaint evidence was relevant, notwithstanding that there was scope for it to be tested and for its weight to be challenged (*IMM (No 2)* T 8 – 9:[21]). The complaints made to SS and KW and the distressed demeanour described by these witnesses qualified for admission under sec 66 of the Act, noting the representations were likely to be clear in the complainant's memory at the time they were made. The complaint to KW was to be viewed in relation to what was said to SW and SC the night before (*IMM (No) 2,* T 11:[26]). Exclusion of the evidence was not warranted under sec 135 as it was not misleading or confusing (*IMM (No) 2,* T 13:[31]). Approaching probative value on the basis espoused in *Shamouil*, it was assumed the evidence would be accepted by the jury (12-13: [29]-[30]). Here, the evidence did not create the prejudice sec 137 was directed to; a real risk the evidence will be misused or divert jurors from their task, in spite of directions (12:[28]; 13:[30]).

18 No application was ever made to the learned trial Judge to limit the use of the complaint evidence pursuant to sec 136.

19 The jury were directed that it was a matter for them whether a complaint was made, when it was made and what its contents were (T 19/11/13: 24.7). Further, if they were satisfied the complaint evidence was substantially to the effect that the accused had been engaged in sexual misconduct with the complainant, they were entitled to use the

evidence of what was said in the complaint as some evidence that the offence did occur (T 19/11/13: 28.3). If they did use it as some evidence of the charges, then the weight they gave it was a matter for them (T 19/11/13: 28.5). The jury were told they were also entitled to consider the distress of the complainant but that it could have been caused by some other factor (T 19/11/13 at 28.6). In accordance with sec 165, the jury were given a reliability warning in relation to the complaint evidence (T 19/11/13: 24.7; 28.5).

20 The Court of Criminal Appeal ruled that the prejudicial effect of the complaint evidence could not have outweighed its probative value (9:[28]). The preponderance of evidence supported the complaint to SS being made first and it had significant probative value (3-4:[5]-[6]; 5:[10]). The disclosure to KW were referable to the counts on the indictment, both as general disclosures of sexual misconduct by the appellant, and also as including details consistent with individual charges (8-9: [26]). Given the detail and significant distress, the complaint to KW also had significant probative value (8-9:[26] -[27]).

21 It was found there was no error in failing to limit the use of the complaint evidence as the use permitted under sec 66 was not contingent on specificity and was a matter of weight for the jury (12: [34]-[35]). The possibility that complaints of a general nature may also apply to uncharged acts should not prevent the jury from using them "as some evidence" the offence occurred (12-13: [35]). The Court of Criminal Appeal were satisfied that the jury would have understood the strong earlier tendency warnings to apply to all of the evidence of uncharged acts (13:[37]).

PART V – Legislation

22 The applicable legislative provisions are as attached to the appellant's submissions. Additional applicable provisions, which continue to be in force, are contained in an annexure.

PART VI – Argument

Tendency Evidence

23 The evidence of the massage incident was sought to be adduced by the Crown as tendency evidence for the purposes of demonstrating a sexual attraction and interest on the part of the appellant towards the complainant, and a willingness to act upon that attraction.

Ground one

24 It appears from paras 2.1, 6.5 and 6.12 that the heart of the appellant's complaint is the "assumption" made by the learned trial Judge when assessing the probative value of the evidence sought to be adduced as tendency pursuant to sec 97, that the jury would accept the complainant's evidence.

"Probative value" and "significant probative value": interpretation and assessment

Assessment of "significant probative value" having regard to definition of "probative value"

25 Probative value is defined in the dictionary of the *Evidence (National Uniform Legislation) Act* ("the Act") as follows:

"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* (emphasis added)

26 The word "could" is by its nature a reference to capability; in this context, the extent to which the evidence is capable of rationally affecting the assessment of the probability of the existence of a fact in issue. Naturally 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. The assumption that evidence will be accepted ought to be read into the definition of probative value (*Adam v The Queen* (2001) 207 CLR 96 at 115:[59]-[60] per Gaudron J. See also *JLS v The Queen* (2010) 204 A Crim R 179 at 189: [26] and *DSJ v The Queen* (2012) 84 NSWLR 758 at 771:[56] per Whealy JA both citing *R v Mundine* (2008) 182 A Crim R 302 at 309: [33] per Simpson J).

27 The focus on capacity relies upon what it is *open* for the jury to conclude, not what it is *likely* for the jury to conclude (see *R v Shamouil* (2006) 66 NSWLR 228 at [61]) per Spigleman J). It is necessary to consider the contribution which such evidence might make, if accepted, to whether the facts to be proved are rendered more likely to have occurred, and not the credibility or weight that might be given to the evidence (*JLS v The Queen* (2010) 204 A Crim R 179 at 189: [26] per Redlich JA).

28 The reference in the definition to the "extent" to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue is based upon the importance the piece of evidence assumes in the overall scheme of the evidence, if or once it is accepted. For example, it may be relevant but trivial, or relevant but so similar to much of the already adduced evidence so as to assume little significance.

29 For the purpose of determining significant probative value, the judge is to consider whether the significance of the evidence can be of sufficient materiality to justify departure beyond it merely proving the direct circumstances. In the instant case, that was, to demonstrate a sexual interest in the complainant that the appellant was willing to act upon, which could then be to be used in determining whether the appellant committed the offences charged. The relevant enquiry is whether the evidence is capable, to a significant degree, of rationally affecting the assessment (ultimately by a jury) of the probability of the existence of a fact in issue *(DSJ v The Queen* (2012) NSWLR 758 at 770 [55] per Whealy JA).

30 The appellant contends at para 6.26, that the ability for a court to conclude that evidence lacks probative value based on a risk of joint concoction supports there being no assumption that evidence be accepted when assessing probative value. However an assessment by a judge of the risk of joint concoction is not akin to a judge considering whether or not the jury would accept evidence based on a consideration of its reliability.

Joint concoction strikes at the heart of an assessment of significant probative value for admissibility on a coincidence basis, given it would undermine the very purpose the evidence was sought to be adduced for. This was noted in the Court of Criminal Appeal decision in this case. Coincidence evidence relies upon the probability of different complainants telling similar lies as the foundation for its probative value. If that probability is undermined by a reasonable risk of concoction, then it cannot be capable of achieving significant probative value and therefore is not of sufficient materiality to justify admission on a coincidence basis.

Whether reliability ought to be considered in the ordinary course of determining "significant probative value"

31 Whether or not the assessment of "probative value" and "significant probative value" allows the judge to assess reliability has been an issue of some divergence in case law.

32 In *Shamouil,* Spigelman CJ (with whom Simpson and Adams JJ agreed) held:

The preponderant body of authority in this Court is in favour of a restrictive approach to the circumstances in which issues of reliability and credibility are to be taken into account in determining the probative value of evidence for purposes of determining questions of admissibility. There is no reason to change that approach. (237:[60]. See further discussion at [61] – [65]).

33 However Chief Justice Spigelman CJ went on to acknowledge that "*there will be rare circumstances in which issues of reliability or credibility are such that it is possible for a court to determine that it would not be open to the jury to conclude that the evidence could rationally affect the assessment of the probability of the existence of the fact in issue* (at 237-238:[63]).

34 Following *Shamouil,* the Victorian Court of Appeal convened a five judge bench in *Dupas v The Queen* (2012) 218 A Crim R 507 to consider this issue, holding departure from *Shamouil* was warranted as it had been decided incorrectly. The following conclusions were reached (at [63]):

(a) The common law did require the trial judge, in assessing probative value, to evaluate the weight that the jury could rationally attach to the evidence. The contrary conclusion was inconsistent with a continuous line of High Court authority.

(b) The legislative intention, as disclosed by the language of s 137 and its context, is that the task under s 137 is the same as that at common law.

(c) The trial judge undertaking the balancing task is only obliged to assume that the jury will accept the evidence to be truthful but is not required to make an assumption that its reliability will be accepted. The phrase "taken at its highest" is more appropriately used in considering a no case submission, when the judge must accept that the jury may find the evidence credible and reliable.

(d) In order to determine the capacity of the evidence rationally to affect the determination of a fact in issue, the judge is required to make some assessment of the weight that the jury could, acting reasonably, give to that evidence. Where it is

contended that the quality or frailties of the evidence would result in the jury attaching more weight to the evidence than it deserved, the trial judge is obliged to assess the extent of the risk. That does not require the trial judge to anticipate the weight that the jury would *or* will *attach to it. The judge is obliged to assess what probative value the jury could assign to the evidence, against which must be balanced the risk that the jury will give the evidence disproportionate weight.*

(e) So to construe s 137 accords with the language of the statute and its context. To construe it otherwise does not.

(f) Such a construction does not involve any enlargement of the powers of a trial judge or any encroachment upon the traditional jury function.

35 Notably, the only point of material divergence between *Dupas* and *Shamouil* lay in the third conclusion of *Dupas* that the trial judge was obliged to assume that the jury will accept the evidence to be truthful but is not required to make an assumption that its reliability will be accepted. Here "truthfulness" can be considered to be synonymous with credibility.

36 Given the definition of probative value does not include the words "reliability" or "credibility" there is difficulty contending it should be read as if they were. This contention is even harder to support in the way proposed in *Dupas*; that one of these terms (credibility) be read into the statute and not the other (reliability). This observation, along with a detailed consideration of the two lines of authority, was made by the Honorable JD Heydon AC QC in his article "Is the Weight of Evidence Material to its Admissability" (2014) *Current Issues in Criminal Law* 219.

37 *Dupas* did not consider the portion of *R v Dupas* (No3) (2009) 28 VR 380 in which Weinberg JA cited with approval the principles in *R v Peirce* [1992] 1 VR 273, namely that despite a theoretical possibility of exclusion in the exercise of the sec 137 discretion, the occasions upon which that might occur would be few and far between, given the issues raised would normally be left to the jury as matters of credibility for their determination (at 521:[260]). In *Dupas (No 3)* the Court unanimously concluded that there was no error in refusing to exclude identification evidence.

38 The Court of Criminal Appeal in the instant case considered the extent of the divergence between *Dupas* and *Shamouil* and were not convinced that they were irreconcilable when taking a *"purposive approach to the different provisions of the Act"* (17-19: [47]-[51]). In support of this, the Court considered the concession in *Shamouil* referred to above at para 33.

39 Following *Dupas*, the New South Wales Court of Criminal Appeal convened a five judge bench to give further consideration to this issue in *R v XY* (2013) 84 NSWLR 363. Four of the five judges in *XY* endorsed the approached taken in *Shamouil* and held that the function of the trial judge in applying sec 137 was to assess the capacity of the evidence to support a particular finding, but not its credibility and reliability, those

being matters to be left to the jury if the evidence were to be admitted (see for example 371: [25] per Basten JA).

40 *XY* criticised the analysis of common law authorities in *Dupas*, observing the only principle distilled from those authorities was that clear "express language is required to abrogate or curtail a fundamental right, freedom or immunity". *XY* noted this requirement did not extend to all common law principles, for example the *Christie* discretion. *XY* instead endorsed the view expressed in *Papakosmas v The Queen (1999) 196 CLR 297* per Gleeson CJ and Hayne J [10], Gaudron and Kirby JJ [46] and [51] and McHugh J [74]) that once acknowledged that the Evidence Act has changed the common law in a significant manner, attention must be paid to the language of the statute as the primary source of the law. *XY* has since been followed by the recent case of *McIntosh v R* [2015] NSWCCA 184.

41 As with *Shamouil, XY* still acknowledged there may be some cases where reliability can be taken into account in considering the sec 137 test (377:[48] per Basten JA). This provides a sufficient safeguard to protect against the admission of evidence which is *prima facie* inherently unreliable, to the extent it cannot be assessed as having probative value such that it was open for the jury to accept it (for example *PG* [2010] VSCA 289). This is akin to the law on no case submissions set out in *Doney v The Queen* (1990) 171 CLR 207), whereby evidence that is so lacking in cogency that, even taken at its highest, the judge can be satisfied that the jury *could* not accept it.

42 To the extent that *Shamouil*, followed in *XY*, acknowledges that there will be rare cases in which reliability and credibility can be taken into account for the relevant enquiry, they do not sit at odds with *Dupas*, as was noted by the Court of Appeal in this case. Nor does *Shamouil* sit at odds with either the ALRC recommendation that reliability be taken into account in assessing probative value (noting the important qualification to consideration of that report in that it involved consideration of a discretion and not a mandatory exclusion) or the comments by Justice McHugh in *Papakosmas*.

Unworkable & undesirable outcomes if reliability to be taken into account by judiciary in considering admissibility

43 Whilst the appellant contends at paras 6.29 and 6.31 that the construction they advance would not result in any absurd or unworkable outcomes, that contention appears inconsistent with the natural consequences of their construction.

44 As a gatekeeper to admissibility, a judge lacks the weapons in their armoury to properly assess the reliability of evidence, as they would necessarily be called upon to do so in a vacuum. It is the responsibility of the jury to undertake the weighing task at the point where all the evidence in the trial has been assembled and concluded (*DSJ v The Queen* (2012) 84 NSWLR 758 at 787: [131] per Whealy JA). Such an assessment of potential probative value is evaluative and is not a forecast of the weight that the tribunal of fact would give the evidence, otherwise a single piece of evidence may have different

probative value dependent upon the stage at which the assessment was made (*XY* at 376: [44] per Basten JA).

45 It does not seem realistic to suggest, as the appellant appears to do at para 6.31, that if their approach were favoured, such applications would be restricted to a limited number of cases where only a "coherent argument is advanced" by the party seeking exclusion. As the only way to appropriately test the reliability of a witnesses' account would be to assess it within the full 'mosaic' of the evidence, such applications would ordinarily give rise to a need for voir dire in order to assess the merit of the application.

46 Such a voir dire would essentially result in running the trial twice (as was noted in *XY* at 376: [44]). This is manifestly unworkable and inherently undesirable given the cost to an accused and the community, the consequential delays as well as creating unfairness to witnesses in having to give evidence on numerous occasions. In the absence of such a proceeding the judge would be required to speculate as to the weight of the evidence devoid of the ability to assess it in the context of the totality of the evidence. Such an assessment would be inherently liable to error or vulnerable to idiosyncratic views not easily the subject of appellate review.

47 In the present matter, whilst the learned trial Judge had the benefit of seeing the complainant tested under cross examination on two occasions prior to considering admissibility, had her Honour been required to assess the reliability of the complainant's account at that point, she would not have had the benefit of taking into account the full mosaic of the evidence which may have significantly impacted upon this assessment.

48 For example, in relation to count four, the complainant was not challenged in cross examination on either occasion about whether or not that incident had occurred. Her evidence included that the appellant collected her from school and took her home without stopping elsewhere (CFI 03/09/11 at 4; 9-10). The appellant gave evidence at trial that he collected the complainant from school that day and took her to his work and that he thought when they left at about 3pm that he then took her to her grandmother's work (T 15/11/15 at 191). Further evidence was called in the defence case from the appellant's work colleague at the time count four was alleged to have occurred, to the effect that on that date the appellant had returned to work with the complainant after collecting her from school and that the complainant and appellant remained at the workplace until about 3pm when they left together (T 15/11/13 at 207 – 208).

49 Aside from contradicting the complainant's account about whether she went to the appellant's work, the purpose of the evidence was clearly to suggest that the appellant did not have the opportunity to commit the alleged offence. However, in rebuttal the Crown lead further evidence from the complainant's grandmother, SC, that she had a diary entry of having stayed at work until 6:30 that night, and that it would have taken her 20 to 25 minutes to travel home (T 15/11/13 at 225-226). This evidence provided a window of opportunity for the offending and would necessarily therefore bear upon an assessment as to the complainant's reliability.

50 Whilst this evidence is entirely distinct from the tendency evidence, it exemplifies the inherent difficulty in inviting a judge to consider reliability, given that different conclusions may be arrived at dependent upon the time at which that exercise is undertaken. In relation to the above example, an assessment in favour of the reliability of the evidence was more likely to be made following the evidence of SC, the final witness in the trial.

51 Without the benefit of the living fabric of trial a judge is ill equipped to venture into a function traditionally reserved for the jury. The 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* and discussed above.

If reliability were able to be considered here would not alter outcome

52 The appellant contends at paras 6.32 and 6.33 that if reliability were able to be taken into account when considering "probative value" it was open to the court to conclude the complainant's evidence regarding the massage incident lacked "significant probative value", given the evidence was from the complainant alone and her credit was in issue.

53 The statute does not suggest that for evidence to be admitted on a tendency basis it must be adduced otherwise than from the complainant. The task for a judge considering the admissibility of a specific piece of evidence under sec 97, is to determine whether the evidence is capable, to a significant degree, of rationally affecting the assessment (ultimately by a jury) of the probability of the existence of a fact in issue.

54 Here, there was no basis to impugn the reliability of the complainant's evidence. No basis was identified to the Court of Criminal Appeal, nor has the appellant sought to advance any such basis in these proceedings. There is no basis upon which it can be said that it was not open to the jury to accept the evidence. Rather the appellant's argument, including at para 6.30, appears to solely rest on the dangerous proposition that evidence from a complainant ought automatically be assumed as less creditworthy or believable, merely by virtue of that person's role as the primary witness in the proceedings whereby their credit is fundamentally in issue.

55 However, *"it is not to the point that it might be viewed as having no greater credibility than the evidence of the charged acts. What must be considered is the contribution which such evidence might make, if accepted, to whether the facts to be proved are rendered more likely to have occurred" (R v Mundine* (2008) 182 A Crim R 302 at [33] per Simpson J with whom McClellen CJ at CL & Grove J agreed, cited with approval in *JLS v The Queen* (2010) 2014 A Crim R 179 at 189: [26] per Redlich JA). The Court of Criminal Appeal in the present case extracted and endorsed Justice Heydon's comments in *HML* to the same effect (15:[44]-[45] citing (2008) 235 CLR 334 at [280]). These cases demonstrate a departure from the views expressed by Justice Howie in *Qualtieri* v *The Queen* (2006) 171 A Crim R 463, as extracted at para 6.34 of the appellant's submissions.

56 In *JLS* it was held that even evidence of conduct that occurred after the last charged offence, when not remote in time from the occasions particularised on the indictment, was potentially capable of having significant probative value such that its admission for a tendency purpose was allowed. *JLS* was followed in subsequent Victorian Court of Appeal decisions, namely *MR v The Queen* [2011] VSCA 39 per Hansen J at [14], *PCR v The Queen* (2013) 279 FLR 257 per Buchanan JA with whom Priest JA agreed at [36] – [38] and Neave JA at [57] – [59] and *Lucas Gentry (A Pseudonym) v Director of Public Prosecutions [2014] VSCA 2011 per Redlich JA with whom Tait and Priest JJA agreed at [24]-[29].*

57 The contribution the evidence of the massage might make in this case, to whether the facts to be proved are more likely to have occurred, was a demonstration of a sexual interest in the complainant that was capable of supporting a finding of guilt for the charged sexual misconduct. The learned trial Judge did not err in finding the evidence had significant probative value in that context. In considering that the evidence had significant probative value the learned trial Judge and the Court of Criminal Appeal also noted the strong temporal nexus to the charged acts.

58 Whether or not that capacity was realised, having regard to the reliability of the evidence, was a matter for ultimate assessment by the jury and not the learned trial Judge. The Court of Criminal Appeal did not err in upholding the learned trial Judge's admission of the massage incident as tendency evidence, on the assumption the evidence would be accepted by the jury.

Complaint Evidence

Ground two:

59 In arguing against the admissibility of the complaint evidence the appellant contends, at para 6.39, that an assessment of the probative value of the complaint evidence should have included consideration of reliability for the purposes of sec 137 and that there was no requirement to assume the evidence would be accepted. Had that occurred, the appellant suggests when considering sec 137 it was open to find the probative value of the evidence was outweighed by the danger of unfair prejudice, as per para 6.48.

60 The above argument at paras 25 - 42 relating to the very restricted role of reliability when assessing probative value, applies equally to this ground. An 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. Notably, in *IMM (No 2)* the learned trial Judge specifically referred to the complaint evidence being tested at a future time, noting that there was the ability for the appellant to test the evidence and highlight any deficiencies that may exist (8:[21], 9:[23]). Inherent in this was the acknowledgement that there was insufficient basis upon which a

full assessment as to those matters could be made at that point, noting the testing of the evidence would occur at a future time, for assessment by the jury.

61 The complaint evidence had probative value as it was capable of rationally affecting the assessment of the probability of the existence of a fact in issue, namely whether the offences charged on the indictment took place. As was noted in *BD* (1997) A Crim R 131, evidence of complaint is of considerable significance in sexual assault matters and should be admitted in the ordinary course (at 150 per Bruce J). On this basis the jury were to be directed that it was open to them to consider the complaint evidence "as some evidence" that the charged acts occurred (see *Papakosmas* at 311: [42] per Gleeson CJ and Hayne J).

Complaint to SS

62 The complaint to SS, on the Crown case, was the first time that the complainant told anyone that the appellant had *"touched her"*. It occurred almost immediately following the ending of the relationship between the appellant and her grandmother. The complainant's fear of being the cause of the break-up of the relationship was according to her own evidence, a predominant factor in her failure to complain during the period of offending. The Court of Criminal Appeal endorsed the interpretation that the complaint to SS was made first, noting there was a "preponderance" of evidence in support of that conclusion, as set out in detail in that judgement (3-4:[5]-[6]). Given the preponderance of evidence in support of the disclosure to SS occurring before the complainant's disclosure to her family, it also critically undermined the defence contention at trial that the complainant had only made up these allegations to deflect criticism by her aunty and grandmother.

63 During the complaint to SS the complainant exhibited distress, including that she was crying and emotional (see para 10(a) above).

64 In the circumstances, there was no error by the trial judge in admitting the evidence or of the finding of the Court of Criminal Appeal *"that the probative value of the evidence of SS was strong"* (6: [11]).

Complaint to SW (aunt), SC (grandmother) and KW (mother)

65 Though the circumstances leading up to the disclosure to KW were somewhat unusual, involving both SW and SC as the persons to whom a disclosure was made initially, the circumstances surrounding this disclosure were thoroughly explored in cross-examination. The evidence of SW and SC was also necessary to put in context the disclosures to the complainant's mother, KW, shortly thereafter. The complaint evidence to SW and SC also included evidence of distress, as set out above at para 10 (b) and (c).

66 The disclosure to KW made specific reference to the fact that the offending started when the complainant was aged four. The complainant's age was directly referable to the timing of count one which alleged that the offending occurred on the complainant's fourth birthday. Also in her complaint to KW, the complainant said that the appellant lay on top of her naked, squashing her. This conduct is referable to the acts alleged in Counts 2 and 4.

67 The complaint to KW contained far greater detail than the complaint to SS and the complainant showed clear and significant distress when making the disclosures (see para 10 (d) above). This distress was a significant matter for the jury when assessing the weight to be attached to the complainant's evidence as well as assisting to understand why the complainant waited such a significant time before disclosing the offending to her family.

68 Accordingly, the trial judge was not in error in finding that the evidence possessed clear probative value and admitting it for a hearsay purpose under sec 66 as *"some evidence that an offence did occur"* (T 19/11/13 at 28.2).

Not of lesser probative value owing to generality

69 The appellant suggests at 6.53 that the complaints were general in nature and did not go directly to proof of the charges, therefore they were essentially context evidence which meant they had limited probative value.

70 However, once a representation is deemed relevant under s56, use or admission of the representation under sec 66 is not contingent upon the specificity of the complaint. The only express requirements under sec 66 are that the representation was first hand hearsay, that it was fresh in the memory of the maker at the time it was made and that the maker is available to give evidence.

71 In *R v XY* (2010) 79 NSWLR 629, Whealy J (with whom Campbell JA and Simpson J agreed) held that complaints made to a school friend two years after the end of the offending period and a complaint made to the parents four years after the end of this same period, were representations made that were *"fresh in the memory"*. Further, that despite the complaints being referrable to an ongoing repeated course of conduct and not to a specific incident, the evidence was significantly probative and was admissible pursuant to sec 66 of the Act even taking into consideration the relevant exclusionary provisions. The Court stressed that: *"ambiguity or apparent inconsistency is not a sufficient reason to reject evidence in a criminal trial. It is for the jury, not the trial judge, to evaluate evidence and the weight to be given to evidence* (629 at 646: [90]).

72 In *LMD v The Queen* [2012] VSCA 164, Harper JA (with whom Bongiorno JA and Davies AJA agreed) held that separate complaints by the victim to two friends that she

had been *"molested"* by the accused six or seven years after the incident satisfied the test under sec 66 of the *Evidence Act* 2008 (Vic). The court also found that the complainant's reaction to her boyfriend's sexual advances, by 'freezing' prior to making a disclosure, some 10 years after the incident, satisfied the requirements of sec 66. The Court held once this test was satisfied then the jury were entitled to use it not only as evidence of consistency of conduct, but also for a hearsay purpose, regardless of whether details of the particularised acts where specifically referred to by the complainant ([20]-[26]).

73 In *IMM (No2)* the learned trial Judge noted that the complaint to KW was logically relevant to at least count one, but also to the remaining counts (9:[22]). The Court of Criminal Appeal held the complaints to others were also referable to counts on the indictment (12:[35]). The Court of Criminal Appeal accepted that the complaints expressed in general terms might also have applied to uncharged acts, however noted that it could not be said that the complaints went *exclusively* to uncharged acts. Therefore they were to be admissible pursuant to sec 66 as "some evidence that an offence occurred" (12-13:[35]).

Freshness in the memory of the particularised acts

74 The appellant suggests that if the representations were referable to the counts on the indictment, they failed to meet the criteria of "freshness in the memory" to allow for admission under sec 66 for a hearsay purpose. This argument is advanced on the basis that it would only be open to be satisfied that the complainant had, at the time, a fresh memory of a history of having been sexually touched in the past and not a fresh memory of the particular allegations constituting counts on the indictment (para 6.55). This argument cannot be sustained. The suggestion that when making the representations the complainant only had a fresh memory of generalised sexual activity and not of the conduct she ultimately recounted with sufficient specificity to found counts on the indictment, is artificial.

Complaint evidence was more than context

75 In most cases the circumstance in which the assertion is made will be capable of giving a self-serving statement probative value and whether or not it does so is a question for the jury (*BD* per Hunt CJ at CL at 138). It would not usually be appropriate to exclude evidence of "complaint" pursuant to sec 66 in the exercise of any discretion. Such evidence is of substantial importance in sexual assault cases (*BD* per Hunt CJ at CL at 139). In BD it was noted that "*each of the complaints in this matter were accompanied by distress, to varying degrees. Where the complaint is accompanied by distress it is often not easy to separate the complaint and the distress and it is artificial to do so. The distress, while far from decisive, may point to the probability of the sexual assault occurring. That depends on the circumstances. Where the complaint and the distress*

are closely interweaved I would not regard the complaint-distress evidence as relevant only to the witnesses credibility" (at 146 per Smart J).

76 *BD* was approved in *Papakosmas* (at 308: [29]; 313: [52]). In that case it was noted that "*the scheme of the Act evinces a legislative purpose that evidence of recent complaint in sexual assault cases was henceforth to be admitted as evidence of sexual intercourse and as evidence of lack of consent to that intercourse. Once that is understood, few, if any, cases would require the trial judge to exercise the power conferred by s 136 of the Act and limit the use that the jury may make of the complaint evidence*" (at 319: [74] per McHugh J. See also 309:[32] per Gleeson CJ and Hayne J).

77 Given the distress that accompanied all of the complaints, in particular significant distress in the complaint to KW, the probative value of the complaint evidence could not properly be characterised as limited only to context. The complaint evidence added greater force to the complainant's account such that it could bear upon the jury's assessment as to whether or not the offences occurred. Its probative value therefore could not be characterised as "low" when being balanced against the risk of unfair prejudice when considering sec 137.

Risk of unfair prejudice did not outweigh probative value

78 The appellant contends that there was a real danger of unfair prejudice arising from the complaint evidence, even with careful directions as to its use (para 6.56). The suggested unfair prejudice was said to lie in the risk of tendency reasoning.

79 Direct evidence was led from the complainant regarding a history of the appellant's sexual misconduct towards her, in order to provide context to her evidence of the charged acts. In relation to this evidence the jury were given strong and clearly worded directions against tendency reasoning:

> *I must give you some important warnings with regards to the use of this evidence of other incidents. Noting firstly that it is put in general terms but first you must [not] use this evidence of other incidents as establishing a tendency on the part of the [appellant] to commit offences of the type charged. You cannot act on the basis that [the appellant] is likely to have committed the offences charged because [the complainant] has made these other generalised allegations against him. This is not the reasons [sic] that the Crown placed the evidence before you. The evidence has a very limited purpose, as I have explained to you and it cannot be used for any other purpose or as evidence that the particular allegations contained in the charges have been proven beyond reasonable doubt* (19/11/13 at 22.8).

80 These directions were given to the jury at the same time as directions in relation to the complaint evidence. Given the strength and clarity of the directions, and their timing, there is no basis to suggest that the jury would have applied tendency reasoning to their

assessment of the complaint evidence. It was the view of the Court of Criminal Appeal that "strong appropriate warnings" regarding the use to be made of evidence of uncharged sexual acts would have been understood to apply to all evidence of uncharged acts.

Ground 3:

81 The appellant argues that the failure to limit the use of the complaint evidence to a credibility use only, resulted in a miscarriage of justice (para 6.57). No application was made to the learned trial Judge pursuant to sec 136 to limit the evidence in such a way.

82 In accordance with the legislative scheme, once the party seeking to adduce the evidence has satisfied the requirements in sec 66 - namely that the evidence is first hand hearsay, that the representation was made when it was fresh in the memory of the maker and that the maker is available to give evidence – the evidence is admissible for a hearsay purpose, subject to the exclusionary provisions.

83 The next step urged by the appellant in ground two is the exclusion of the evidence pursuant to sec 137 on the basis its probative value is outweighed by the danger of unfair prejudice. In that assessment however, the court is to consider all of the factors that bear upon the probative value of the evidence. In respect of complaint evidence, this includes the timing of the complaint and the distress shown by the complainant as well as the content of the disclosure. For the reasons set out above, the probative value of the complaint evidence outweighs the risk of unfair prejudice.

84 If otherwise admissible, an application can be made pursuant to sec 136 which creates a general discretion to limit the use of evidence where there is a danger a particular use might be unfairly prejudicial or misleading or confusing.

85 The essence of the present ground is much the same as ground two, in that it is centred on the risk that the jury would engage in tendency reasoning.

86 The directions given by the learned trial Judge as to use of the complaint evidence required the jury to be satisfied that a complaint or complaints were made "at a time and in a manner that would indicate that the allegation was reliable" (19/11/13 at 28). The jury were only able to use the complaint evidence as some evidence that an offence did occur if they were satisfied that the complaint made the allegations (forming counts on the indictment), having regard to the circumstances in which it was made, more likely to have occurred. These directions provided sufficient guidance as to the use that could be made of the complaint evidence in supporting the charged allegations.

87 As noted, not only had the jury received warnings against tendency reasoning, these warnings were strongly and clearly worded. In addition, they were delivered a very short time before the directions on complaint evidence, as discussed above.

88 There was no other basis to limit the use of the evidence to credibility, as to do so should generally be seen to be an "*unacceptable attempt to constrain the legislative policy underlying the statute by reference to common law rules, and distinctions, which the legislature has discarded*" (*Papakosmas* per Gleeson CJ and Hayne J at 310: [39]).

89 No error has been established in relation this ground.

Part VII: Time estimate

90 The respondent would seek no more than two hours for the presentation of the respondent's oral argument.

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Dated this fourteenth day of January 2016.

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