IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No. S193 of 2016

BETWEEN:

RP
Appellant

and

The Queen
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Form of Submissions

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

Part II: Issues

2. In relation to Ground 1 of the Notice of Appeal:

2.1. There is no issue as to the nature, content or operation of the common law presumption of *doli incapax*. In particular:

2.1.1. it is not in dispute that the presumption may not be rebutted merely by evidence of the charged act, without more.[1] It follows that the issue identified in paragraph [1(a)] of the appellant's submissions does not arise on this appeal;

2.1.2. it is not in dispute that the Crown must prove beyond reasonable doubt that the defendant knew that the act charged is "seriously wrong, as distinct from an act of mere naughtiness or mischief".[2] It follows that paragraph [1(b)] of the appellant's submissions does not accurately state the issue arising on this appeal. The real issue is whether it is sufficient for the Crown to prove that the defendant knew that the act charged was "seriously wrong" in the relevant sense, or

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1 Cf. *R v ALH* (2003) 6 VR 276 at [20], [86].
2 See *BP v R* [2006] NSWCCA 172 at [27], citing *The Queen v M* (1977) 16 SASR 589; *C v DPP* [1996] 1 AC 1 at 38; *R v ALH* (2003) 6 VR 276.

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whether the Crown must, in addition, prove that the *reason* the defendant knew the act charged to be seriously wrong corresponded with the basis upon which such conduct is criminalized (as reflected in an analysis of the individual elements of the offence, including as compared to the elements of other offences). Put another way, must the Crown prove that the defendant would also have understood that a different, hypothetical, act constituting the offence charged would also have been seriously wrong?; and

2.1.3. it is not in dispute that proof of the relevant knowledge of the defendant proceeds in accordance with the ordinary rules of evidence, and the ordinary approach to the evaluation of evidence. The issue identified in paragraph [1(c)] of the appellant's submissions should thus properly be understood as asking nothing more than whether the evidence in the present case was sufficient to support the finding that was made. That question must, of course, be approached in the limited way required by the principles governing appeals concerning factual matters.

2.2. In relation to the relevant principles governing appeals concerning factual matters, it is not in dispute that the Court of Criminal Appeal is not bound by the trial judge's assessment of evidence. The issue is thus not that which is stated in paragraph [2] of the appellant's submissions, but whether the Court of Criminal Appeal did in fact treat itself as bound in the manner contended for by the appellant.

3. In relation to Ground 2 of the Notice of Appeal, the real issue is whether the majority in the Court of Criminal Appeal erred in finding that the trial judge did not make the error alleged in Ground 3 of the appellant's notice of appeal to the Court below.

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

4. The respondent considers that no notice need be given under s. 78B of the *Judiciary Act 1903* (Cth),

Part IV: Facts

5. In relation to Count 2, the respondent relies on the following matters in addition to those contained in the appellant's written submissions:

5.1. on the day in question, when there were no adults present in the house, the appellant was left in charge of the complainant and their other siblings by their father (CCA [24]; Ex A Q202-Q206);

5.2. a punishment for misbehaviour that was meted out to the children by their father when he was supervising them was being locked in a

bedroom of the house (Ex A Q127-Q130);

5.3. the appellant, being in charge of the complainant, locked the complainant in the bedroom as a punishment for misbehaviour (fighting with another sibling) (CCA [24]; Ex A Q215-Q222);

5.4. when the appellant's written submissions (at paragraph [7]) describe the appellant has having put his hand "on or around the complainant's mouth", the context makes plain that by "around" his mouth the complainant meant "covering", and not "near" (Ex A Q238-Q240, Q 246); and

5.5. contrary to the appellant's written submissions (at paragraph [7]), the appellant first put his hand over the complainant's mouth *before* inserting his penis into the complainant's anus, and not after (Ex A Q238-Q247).

6. In relation to Count 3, the respondent relies on the following matters in addition to those contained in the appellant's written submissions:

6.1. when the appellant's and the complainant's father left them alone (with their sister) it was to "check the ponds" at the sewerage treatment plant, a task which took "about an hour" (Ex A Q314);

6.2. the appellant was initially outside the office building with the complainant and their sister (Ex A Q327); and

6.3. the appellant summonsed the complainant to go with him into the office building, away from his sister who remained outside (Ex A Q314-Q328).

7. Count 4 concerned an allegation of indecent assault. The complainant was watching a DVD with the appellant whilst their father was out of the room. The appellant put his hand on the complainant's penis on the outside of his clothing and rubbed it for approximately five minutes. The complainant then said that he was "starting to get sick of this" and the appellant stopped (CCA [33]).

8. In relation to Exhibit D:

8.1. although the appellant's overall "Full Scale IQ" score, in 2012, was "at the top of the borderline disabled range" (Ex D at [11]), his "potential was probably in the low-average range" (Ex D at [12]). There was a "fair measure of variation in his scores on the various sub-scales which comprise the test" (Ex D at [11]). Indeed, all of his results were in the average or low-average bands, with the exception of an arithmetic subtest (above-average), and his performance on the "verbal comprehension scale" (borderline disabled) (Ex D at [12]-[16]). The appellant had "surprisingly good basic academic attainments given the other test results" (Ex D at [17]);

8.2. the appellant's test results were "above the level which would allow a formal diagnosis of mild developmental disability" (Ex D at [17]);

8.3. the reference to "exposure to violence, possibly being a victim of molestation" was said to have been "indicated" by some comments of the appellant and his father (Ex D at [23]). Those comments were not in evidence, and there was nothing to identify whether they referred to events before or after the date of the offences;

8.4. according to the appellant's father, there was no history of any allegations of sexually inappropriate behaviour on the part of the appellant (Ex D at [22]).

9. In relation to Exhibit E (the Job Capacity Assessment Report), that report was apparently prepared by contractors for the Department of Human Services and states that the assessors considered a report by psychologist Mrs Katrina Andrews, but that further report was not in evidence.

Part V: Legislative Provisions

10. The applicable legislative provisions are those identified by the appellant.

Part VI: Argument

Ground 1: what was required to be proved?

11. The fundamental premise of the appellant's case is that it is not sufficient to prove that a defendant knew that the act with which they were charged was seriously wrong; the prosecution must also prove that the defendant reached that conclusion for the "right" reasons (i.e., that the defendant's reasons for concluding that the act with which he or she was charged was seriously wrong do not depend in any way on any fact or circumstance other than those relevant to an element of the offence charged).

12. An immediate difficulty with such a contention is that the presence or absence of individual elements of different offences can be argued to suggest different things about the reason why such conduct is being criminalized. The appellant, for example, contends that the correct inference to draw from the absence of lack of consent as an element of the offence is that the presence or absence of consent is irrelevant to the criminality of offending conduct. An alternative (and, in the respondent's submission, better) inference is that s. 66A(1) recognizes that children under 10 are *incapable* of consenting to sexual intercourse, with the consequence that all such conduct inevitably occurs without consent (as the appellant acknowledges: see appellant's submissions at [34]). In this case, therefore, the absence of an element dealing with consent serves to emphasize, rather than eliminate, the relevance of consent to the "wrongness" of the conduct the subject of the offence. It thus follows both in logic and in law that absence of consent is highly relevant to the "moral quality of the act in respect of which [the appellant] was charged"

(cf. appellant's submissions at [30]).

13. Once it is appreciated that s. 66A(1) does in fact criminalize non-consensual conduct, one flaw in the appellant's argument is revealed clearly: that which is presumed by law, namely, the absence of consent on the part of the complainant, was, in this case, made explicit and obvious to the appellant. The appellant thus did not require a sophisticated understanding of the law's attitude towards the ability of children under 10 to give effective consent: there was no doubt in his mind that his complainant, in fact, did not consent.

14. There is also a further, more fundamental, difficulty. To expand the inquiry beyond whether the child understood that the act charged was seriously wrong, and to examine the basis upon which, or the reasons for which, the child held that view, is to ask a question that the law does not require to be answered. At that point, the focus shifts from the child's understanding of what he or she *did*, to the child's understanding of the *law*. The purpose of the presumption of *doli incapax* is to prevent the imposition of criminal liability on children who do not appreciate the difference between right and wrong: see, e.g., *C v DPP* [1996] 1 AC 1 at 38; *The Queen v M* (1977) 16 SASR 589 at 590, 592-3. Adults, of course, are presumed to know the difference. But there is no presumption or requirement that adults appreciate that their conduct is unlawful, let alone appreciate which aspects of their conduct are regarded by the law as essential, and which irrelevant, to the criminality of the act (cf., for example, *Ostrowski v Palmer* (2004) 218 CLR 493). The presumption of *doli incapax* simply requires the prosecution to prove that which is presumed to be the case for adults, and no more.

15. In substance, the appellant says that the prosecution should have proved that he knew that a different, hypothetical, offence would *also* have been seriously wrong (i.e., that what he did to the complainant would *still* have been seriously wrong *if* the complainant had exhibited consent-like behaviour). So to submit effectively requires the prosecution to prove that a defendant knew that the full spectrum of conduct criminalized by the offence was seriously wrong. But it is beside the point that a particular defendant may draw a range of idiosyncratic distinctions between different examples of conduct criminalized by a particular offence. The prosecution need only prove that the defendant appreciated that the *particular* act charged was seriously wrong.

16. Still less is it necessary for the prosecution to prove that a defendant appreciates that a particular aspect of his or her conduct has a particular legal significance (for example, that a particular act, omission or state of mind gives rise to the possibility of an additional charge, punishable by a heavier penalty). The prosecution does not need to prove that a defendant appreciated that the act with which he or she was charged was "more seriously wrong" than some other act. Once it is proven that the child appreciated that the act with which he or she was charged was seriously wrong, criminal liability

attaches. To inquire into the child's appreciation of the relative seriousness (as reflected in the maximum penalty) of the offence charged compared to other possible offences with which he or she could have been charged, or the apparent reasons for that differential treatment (to the extent that such reasons may be inferred from the elements of the different offences), is to inquire into matters that are irrelevant to the imposition of criminal liability.

17. The overall effect of the appellant's fundamental contention is to suggest that the prosecution must prove that a child knows that a particular act amounts to an offence under the law, and/or must know the particular elements of that offence, and/or its relationship to other offences. Even if something less was intended, the appellant is explicit that "there must be an understanding of wrongness *which comprehends the moral quality or the basis of the offence with which they have been charged* in order to hold the child criminally responsible for that offence" (appellant's submissions at [49], emphasis added).

18. The level of analysis and appreciation required on the appellant's case goes well beyond that required by authority: *The Queen v M* (1977) 16 SASR 589 at 590-1, per Bray CJ; *BP v R* [2006] NSWCCA 172 at [28]. As Bray CJ observed in *The Queen v M* (1977) 16 SASR 589 at 593, the "question, simple, at least in appearance, [is] did he know the act was wrong according to the ordinary principles of reasonable or ordinary men". There is no requirement that that knowledge must include any particular appreciation of the "moral quality or the basis of the offence", let alone that it be arrived at by reference to an accurate and precise appraisal of the individual elements of an offence, viewed in the context of other offences which may have also been open to be charged under a reasonable exercise of prosecutorial discretion. The relevant knowledge relates only to the "act charged", not the law constituting the offence or the policy reasons underpinning its criminality.

Ground 1: was it open to find the presumption rebutted?

19. Once it is recognized that conduct of the complainant demonstrating that he was intensely and actively opposed to being sexually assaulted was not irrelevant to the question whether the presumption of *doli incapax* had been rebutted, the balance of the appellant's submissions on Ground 1 may be seen to be concerned solely with the sufficiency of the evidence to support a finding that the appellant knew his acts were seriously wrong.

The evidence rebutting the presumption:

20. Each of Counts 2 and 3 occurred when the appellant had been left in charge of his younger siblings when their father (and other adults) were absent.

21. The appellant appears to argue that because he was given supervisory and disciplinary authority over the complainant, it is more difficult to infer that he had the requisite knowledge that his acts were seriously wrong (see the

appellant's submissions at, e.g., [35]-[36]). Whatever the merits of that argument as a general proposition, in the particular circumstances of this case, that fact supports the finding that the appellant knew his acts were seriously wrong:

21.1. The fact that his father trusted the appellant to safely and effectively supervise his younger siblings is inconsistent with the attempts by the appellant to suggest that Exhibits D and E raise a question about his capacities at the relevant time. It is permissible to draw inferences from the level of trust placed by his father, being a person "who knows the defendant well" (*C v DPP* [1996] 1 AC 1 at 39, per Lord Lowry), on the appellant. That evidence is contemporaneous evidence of the capabilities and development of the appellant.

21.2. The appellant's knowledge and experience of parental discipline extended to locking misbehaving children in the bedroom, but did not extend to physically (let alone sexually) assaulting them while they were in there. There is no basis upon which it could be concluded that the appellant regarded his assault of the complainant as part of the legitimate disciplining of a disobedient child.

21.3. If the appellant did consider that his assault of the complainant was part of the imposition of legitimate discipline in response to misbehaviour, the attempt to silence the complainant (both by covering his mouth, and by telling him not to say anything) does not make sense. Those acts are explicable only as attempts to conceal what he was doing, which would not have been necessary (and indeed would have been unlikely) if he (wrongly) considered himself both authorised and justified in punishing the complainant in that way. In those circumstances, evidence that might ordinarily be unequivocal (like running away) becomes unequivocal: see *C v DPP* [1996] 1 AC 1 at 39, per Lord Lowry.

21.4. Similarly, the appellant's anxiety to cease the assault before his father's girlfriend could observe it is inconsistent with any suggestion that he considered himself to be acting as a parent would be justified in acting.

22. Next, both Counts 2 and 3 were committed, not only in circumstances where no adults were present, but also in circumstances whether the appellant had (calculatedly) sequestered the complainant away from other children. Moreover, in respect of Count 2, the appellant covered the complainant's mouth to stop him calling out to other *children* (the appellant was aware that adults were out of range of hearing). While it may be accepted that, as a general proposition, children will not wish adults to observe either their naughtiness or their seriously wrong conduct, a desire to conceal conduct from other children is far more revealing of the child's perception of the degree of

misconduct involved.

23. All of the "naughty or even slightly more than naughty" conduct identified by the appellant (appellant's submissions at [43]) may well be carried on away from the gaze of parents, but will commonly occur in full view of other siblings or playmates. A desire to avoid *all* witnesses to conduct expresses another level of appreciation by the perpetrator of the wrongness of that conduct, and the fact that it falls outside of the bounds of "ordinary roughhousing".

24. Finally, the circumstances of both Counts 2 and 3 were such as to make clear that the complainant was intensely opposed to the appellant's conduct and was in great distress. In *BP v R* [2006] NSWCCA 172 at [30], it was observed that "assuming the jury accepted LD's evidence that she was crying and screaming and struggling and asking BP to stop, these would in my opinion be factors that could support the inference that BP knew that what he was doing was seriously wrong". In this case:

    24.1. in relation to Count 2:

        24.1.1. the appellant locked the complainant in the room and said if "you want to come out, you gotta' let me do this to ya". The complainant kept saying "No [RP], no";

        24.1.2. the appellant was only able to anally penetrate the complainant by exercising considerable force and restraint upon him, namely, by grabbing him, throwing him on the bed, pulling his pants and underpants down, holding him down, and putting his hand over his mouth;

        24.1.3. all the while the complainant was crying and trying to tell him to stop.

    24.2. in relation to Count 3:

        24.2.1. the complainant tried to run away when he saw what the appellant was about to do, but was physically blocked by the appellant;

        24.2.2. the complainant called for help from his sister;

        24.2.3. the appellant was only able to anally penetrate the complainant by, once again, exercising force and restraining the complainant: he grabbed him and put him face-down on the floor on a pile of clothes, and pulled down his pants.

25. As in *BP*, all of that evidence (either alone, or with all of the other evidence) is well capable of supporting a finding that the appellant knew that what he was doing was causing great distress to another human being and as such was seriously wrong.

26. In view of the above, there was an ample evidentiary foundation upon which the Court of Criminal Appeal could have concluded that the presumption had been rebutted.

The errors asserted by appellant

27. None of the errors sought to be attributed to the Court of Criminal Appeal by the appellant arise on a fair reading of the majority's reasons. Those errors, once distilled, appear to be that the Court of Criminal Appeal erred:

27.1. by allowing "the sexual acts" to play some unexpressed but decisive part in finding the presumption rebutted, and thereby "attribut[ing] adult value judgments to the appellant" (appellant's submissions at [45]);

27.2. by having regard to evidence showing the appellant's desire to conceal his conduct and avoid detection, thereby failing to "distinguish[] between knowledge on the part of the appellant that his conduct was subject to some form of prohibition and knowledge it was seriously wrong" (appellant's submissions at [51]);

27.3. by failing to recognize that various aspects of the prosecution case (principally Exhibits D and E, and the evidence of condom use) gave rise to a reasonable hypothesis consistent with innocence which the Crown did not disprove (appellant's submissions at [59]-[63], [66]);

27.4. by erroneously relying on the cumulative effect of all of the evidence (appellant's submissions at [76]); and

27.5. in relation to Count 3, by relying on the rebuttal of the presumption in relation to Count 2 (appellant's submissions at [74]).

28. The first of those errors appears to be nothing more than a postulated explanation for the result reached by the Court of Appeal, on the premise that "[n]othing in any of the matters [relied upon], either individually or cumulatively, take the appellant's actions outside of ordinary (albeit naughty or even slightly more than naughty) roughhousing" (appellant's submissions at [43]). The appellant appears to concede that there is nothing express in the reasons of the Court of Criminal Appeal to support his contention in this regard, relying instead on the "practical effect" of the judgment (appellant's submissions at [45]). In fact, for the reasons given above, there was a more than adequate evidentiary foundation for the Court of Criminal Appeal's conclusion. It follows that this error has not been established.

29. To the extent that the appellant seeks to rely on psychological and neurological academic writings in support of this asserted error (see the appellant's submissions at [37]-[40]), he is not assisted:

29.1. Those studies cannot be used to prove anything about the appellant's individual circumstances (cf., perhaps, the last sentence of appellant's

submissions at [38]). Plainly enough, they do not purport to do so, and any such attempt would be impermissible on an appeal under s. 73 of the *Constitution*: see, e.g., *Eastman v R* (2000) 203 CLR 1; *Mickelberg v R* (1989) 167 CLR 259.

29.2. Nor can they be relevant to the content or application of the presumption at some more general level. The appellant does not contend for any change to the existing law, so there is no occasion for the introduction of "legislative facts", of which judicial notice *may* be possible (see *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at [65] per McHugh J, cf. at [162]-[169] per Callinan J).

30. The second of the alleged errors identified by the appellant (above at [27.2]) has already been dealt with. Even accepting that evidence of a desire to avoid detection may often be equivocal, in this case it pointed positively to an appreciation that the conduct was seriously wrong. That conclusion is only reinforced once *all* of the evidence is taken into account. This error too, therefore, has not been made out.

31. The various pieces of evidence that the appellant contends give rise to a reasonable hypothesis consistent with innocence (above at [27.3]) in fact do no such thing. The problems with Exhibits D and E have already been outlined above. In short:

31.1. Exhibit D was prepared over 6 years after the charged acts for a purpose different from an assessment of *doli incapax*, and in any event revealed that it was not even possible to diagnose the appellant with a "mild developmental disability", let alone anything more severe. It provided no basis upon which it could be concluded that the obvious and natural inferences described above should not be drawn from his conduct and the surrounding circumstances. Furthermore, the statement that it was "possible" that the appellant had been molested (without specifying whether before or after the offences) could not mean that it was not open to the trial judge to find the *doli incapax* presumption rebutted. This statement is so equivocal that it could not rationally bear upon the issue of the applicant's guilty knowledge.[3] It could give rise to no reasonable doubt. Both the CCA (at [1], [67], [161]) and the trial judge correctly discounted it from their analysis.

31.2. Exhibit E contained statements to the effect that the appellant as at October 2010 had an intellectual disability, moderate behavioural problems, and a low capacity for independent living, each of which were made in reliance upon a psychologist's report that was not in evidence, and are thus of very low probative value for determining the *doli incapax* question.

[3] See *Lithgow City Council v Jackson* (2011) 244 CLR 352 at [25]-[26].

32. Insofar as the appellant's use of a condom is concerned, the appellant's counsel at trial was correct to observe that the evidence was "equivocal", that there were "many inferences available as to why [the appellant] obtained a condom", and that an inference that the appellant did so because he had seen condoms used before by adults was "equally available" with inferences that it demonstrated a level of thinking that revealed that the appellant appreciated the difference between right and wrong (T31:5, 11-12, 44-46). The appellant's counsel submitted, correctly, that the trial judge should "just make nothing of it" (T31:45-46), and the trial judge agreed, stating that he had ignored this evidence because "it was the position of both parties that nothing could be drawn from" it (TJ 7). Given that the evidence could equally support these competing inferences, it is incapable of giving rise to a reasonable hypothesis consistent with innocence.

33. It is in this light that the alleged failure to apply the test in *M v The Queen* (1994) 181 CLR 487 at 493-4 needs to be considered. Read in context (and especially the words "likely to mean" at CCA [68]), Davies J was merely saying that where a trial judge correctly determines that evidence is of no value, such that it should be disregarded, then an appellate court will likely reach the same conclusion. Here, the evidence about the condom was so equivocal that the trial judge was right to disregard it, and Davies J plainly agreed.

34. Turning to the appellant's submission that there was an error in the Court of Criminal Appeal's reliance on the cumulative effect of all of the evidence (above at [27.4]), the Court of Criminal Appeal did not "apply" *Shepherd v The Queen* (1990) 170 CLR 573 at 580 and *R v Hillier* (2007) 228 CLR 618 at [48] (cf. appellant's submissions at [76]). The Court of Criminal Appeal simply referred to *Shepherd* and *Hillier* by way of analogy (see CCA [65]: "In a similar way ...") to support the obvious proposition that "all of the matters identified by the Trial Judge must be viewed together and not individually" (CCA [63]). Indeed, in *O'Toole v Arnold* (1982) 61 FLR 372, the Supreme Court of the Northern Territory allowed an appeal on the question of whether *doli incapax* had been established on the ground that the magistrate wrongly considered certain aspects of the accused's record of interview "in isolation" from other evidence (at 376).

35. There is no error of the kind identified in the appellant's submissions at [76]. Each of the facts and circumstances identified above adds to the strength of the overall inference that the appellant understood that what he was doing was seriously wrong. Those individual facts and circumstances do have a cumulative force that is greater than their individual impact. For example, it may be that the fact that the appellant covered the complainant's mouth, assessed in isolation, may be equivocal – but when considered in conjunction with the commission of the offences in seclusion, away from adult supervision

or even the presence of other children, the complainant's obvious distress, the appellant's cessation of the sexual act when adults returned, and the appellant's instruction to his brother not to say anything, it is not ambiguous or equivocal.

36. This holistic approach makes particular sense when the relevant evidence concerns one continuous course of events. However, it also supports the Court of Criminal Appeal's use of the circumstances of Count 2 as evidence the appellant must also have known the act constituting Count 3 was seriously wrong (CCA [4]-[5], [78]). Taking into account evidence of past conduct and experience to shed light on the charged acts reflects the fact that *doli incapax* must be considered by reference to the "developing understanding of a child" against the backdrop of his or her previous acts and experiences (CCA [5]). There is no error in taking into account the circumstances of Count 2 as evidence in respect of Count 3 (above at [27.5]).

Conclusion on Ground 1

37. For all of the above reasons, the Court of Criminal Appeal was amply justified in finding that the evidence led at trial did establish, to the criminal standard, that the appellant knew that his acts the subject of Count 2 and Count 3 were "seriously wrong".

Ground 2: No error in approach

38. Ground 2 of the appeal in this Court is framed in broad terms. It alleges that the Court of Criminal Appeal erred in failing to quash the appellant's conviction on Count 3 on the basis that he had been denied a fair trial. However, the appellant's submissions indicate that his complaint is in respect of the operation of the proviso in respect of Count 3, and in particular with the decision of Davies J at CCA [78].

39. At CCA [78], Davies J was addressing Ground 3 of the appellant's appeal to that Court. Ground 3 of the CCA appeal alleged a specific patent error – namely, that "[t]he Trial Judge erred in finding that "as a matter of logic" the accused must be guilty of counts 3 and 4".

40. Justice Davies concluded that in circumstances where counts 2 and 3 charged the "same act", and where the surrounding circumstances demonstrated that the appellant knew that the act charged in respect of count 2 was seriously wrong it was open to the trial judge to find "as a matter of logic" that the appellant also knew that count 3 was seriously wrong. However, as count 4 did not involve the "same act" as count 2, it could not be said that the act charged in count 2 threw any light on whether the appellant knew that count 4 was seriously wrong. Accordingly, Davies J found that the error complained of in Ground 3 was made out in respect of count 4 (at CCA [79]), but was not made out in respect of count 3 (at CCA [78]).

41. In circumstances where the majority did not find error, no question of

miscarriage arose. The present case is unlike *AK v Western Australia* (2008) 232 CLR 438. As the Court of Criminal Appeal observed, the right question was asked, and the correct conclusion was reached in relation to Count 2. Count 3 stood to be assessed in the context of the appellant's previous acts, knowledge, experiences and understanding, including, importantly his knowledge as to the "serious wrongness" of his conduct in relation to Count 2. Count 3 concerned the same act in substantially similar circumstances to Count 2 and occurred a few weeks after Count 2. Both the Trial Judge and the Court of Criminal Appeal correctly concluded that the circumstances attending Count 3 and the manner in which it was done establish that the appellant was aware, as with Count 2, that what he did was seriously wrong: CCA at [8].

Part VII: Estimated Hours

42. The respondent estimates that 1.5 hours will be required for the presentation of its oral argument.

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