IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S296 of 2013

BETWEEN:

PETER VERSI
Applicant

and

THE QUEEN
Respondent

APPLICANT'S SUBMISSIONS

PART I: SUITABILITY FOR PUBLICATION

1. The applicant certifies that these submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. Whether SD1's evidence was inadmissible by virtue of ss 98(1) or 101(2) of the *Evidence Act 1995* (NSW).

3. Whether SD1's evidence was treated improperly once admitted, by being used to support a finding of guilt on a count for which it was not admitted, such that the Court of Criminal Appeal erred in its view that the verdicts on counts 2 and 3 were not unreasonable.

4. As a result of the above, whether there was a miscarriage of justice.

PART III: *JUDICIARY ACT 1903*, S 78B

5. The applicant considers that notice is not required pursuant to s 78B of the *Judiciary Act 1903*.

PART IV: REPORT OF DECISIONS BELOW

6. The decision of the NSW Court of Criminal Appeal is unreported. Its internet citation is [2013] NSWCCA 206. The decision of the District Court is unreported.

PART V: RELEVANT FACTS

7. The applicant is the complainant's stepfather. The applicant and the complainant's mother were married in October 1981 and had children together in November 1985

Dated: 15 May 2014
Filed on behalf of the applicant
Nyman Gibson Stewart
Level 3, 17 Brisbane Street, Darlinghurst, NSW, 2010
Telephone: (02) 9264 8884
Fax: (02) 9264 9797
Attn: Phillip Gibson (Partner)
DX 881 Sydney

(CCA [82]-[83]). Before his marriage to the complainant's mother, the applicant was married to another woman and thus had two stepdaughters in that marriage, the elder of whom was SD1 (CCA [95]).

8. In 2011 the applicant was tried in the District Court (Taylor DCJ and a jury) on four counts of sexual assault against the complainant, alleged to have occurred between 1981 and 1987. The alleged offences were of varying severity. Count 1 alleged assault and an act of indecency on a person under 16 years of age, carrying a maximum penalty of 6 years' imprisonment. Count 2 alleged an act of indecency on a person under 16 years of age, carrying a maximum penalty of 2 years' imprisonment. Counts 3 and 4 alleged sexual intercourse with a person 10-16 years of age under the applicant's authority, carrying a maximum penalty of 10 years' imprisonment.

9. The applicant was found guilty on counts 2 and 3 (CCA [1], [38]). Count 2 was that in 1985 the applicant had invited the complainant into his bedroom and asked her to apply some cream onto his genitals (CCA [52]). Count 3 was that in 1986 the applicant got into the complainant's bed and touched and digitally penetrated her (CCA [55]).

10. The applicant denied all the allegations against him (CCA [98]-[103]). There was conflicting evidence before the District Court. In support of the prosecution, the complainant gave evidence of the alleged conduct (relevantly for counts 2 and 3 at CCA [52], [55]). The complainant's brother gave evidence that the complainant told him about the alleged count 2 conduct (CCA [61]). One of the complainant's school friends gave evidence that the complainant told her about the alleged count 3 conduct (CCA [62]). There was evidence from a counsellor who provided notes from a 1994 session with the complainant (CCA [76]). And there was evidence from SD1 in relation to count 2 only, which is addressed below.

11. Against the prosecution's case was evidence from the applicant (CCA [98]-[104]) and from the applicant's wife / complainant's mother (CCA [82]-[94]), including evidence from her which directly contradicted the complainant's evidence in relation to count 2 (CCA [85]) and count 3 (CCA [87]). Five character referees also gave evidence about the applicant and his family and social interactions which they had observed over many years (CCA [105]).

12. SD1 gave evidence which was admitted in relation to count 2 only (CCA [95]-[97]). SD1 alleged an incident in 1979 when she was 13, that the applicant asked her into a bathroom, was naked under his bathrobe, asked her to help him with his hernia and then had her grip his genitals while he thrust against her hand (CCA [95]). This alleged conduct was not mentioned by SD1 to anyone at the time (whether family, friends or the police), was not alleged to have occurred again, was not the subject of a charge and was reported to the police in 2010 for the purpose of these proceedings involving the complainant's allegations (CCA [96]). Three or four months before reporting the alleged conduct to the police, SD1 had told her mother that the applicant had made improper advances to her but that her "response was to just laugh at him" (Jane Morgan statement, 14.6.11, p 4, par [21]).

13. The trial judge gave directions to the jury in respect of SD1's evidence (T, 30.8.11, pp 24-26). This included the following summary of why SD1's evidence was "coincidence" evidence and a direction for its use:

> "The accused is charged only with the offences stated in the indictment. You have before you evidence that the Crown relies upon as establishing that he committed the offences. That is accused complainant [*sic*]. However you also had evidence before you that the accused is alleged to have inappropriately had contacts with [SD1], that conduct being of allegedly the sexual kind.
>
> When we consider what is described as coincidence evidence we can see[1] the similarity between the acts and the circumstances. The Crown case here is that the circumstances were stepfather, stepdaughter in the home. The acts involved each person touching the stepfather's penis. A further circumstance being the alleged purpose of a spurious medical reason. That evidence is before you because sometimes there may be such a similarity between two different acts and the circumstances in which they have occurred which I have identified that a jury may be satisfied that the person who did one act must have done the other. Now when I say it is important to communicate that to you, it is not the others as alleged. It is only count 2 in the indictment because it is count 2 in the indictment that refers to the acts involving the touching of the penis in the circumstances that are said to be spurious. *You must not take [SD1]'s evidence into account when you are reasoning in respect of counts 1, 3 and 4 and if during your discussions it drifts into that then you should correct the position.*" (emphasis added)

PART VI: ARGUMENT

Special leave

14. The applicant's Application for Special Leave to Appeal, Summary of Argument and Reply for the purposes of the application heard on 11 April 2014 before Kiefel and Keane JJ, and referred into a Full Bench in [2014] HCATrans 081, are included in this Application Book at pages ___, ___ and ___ respectively.

15. The applicant makes the application for special leave and adopts the arguments which are made in those documents. In the applicant's submission, this is a case meriting the grant of special leave.

Summary of submissions

16. In summary, the applicant submits that the Court of Criminal Appeal used SD1's evidence in a manner contrary to the trial judge's directions for the treatment of that evidence, with three consequences:

(a) *first*, the Court of Criminal Appeal erred by failing to apply ss 98(1) and 101(2) of the *Evidence Act*. Those sections required that SD1's evidence have significant probative value which substantially outweighed any prejudicial effect. The trial judge admitted SD1's evidence as coincidence evidence for count 2, refused to admit it as tendency evidence for the other

[1] The transcript records "can see" but the parties agreed below that his Honour might have said "consider".

counts, acknowledged a risk of prejudice but sought to address it with his directions. By putting SD1's evidence to a use expressly prohibited by those directions, and by not otherwise doubting the directions or considering relevant prejudice, the Court of Criminal Appeal failed to apply ss 98(1) and 101(2);

(b) *secondly*, the Court of Criminal Appeal erred in its view that the verdicts on counts 2 and 3 were not unreasonable, since the Court of Criminal Appeal used SD1's evidence to be satisfied that the verdicts on *both* counts 2 and 3 were reasonable when SD1's evidence could not and should not have been used in that way; and

(c) *thirdly*, as a result of the above, there was a miscarriage of justice because of the decisive nature of SD1's evidence for the convictions on each of counts 2 and 3. In short, in the applicant's submission, the Court of Criminal Appeal should have set aside the applicant's convictions on the basis that SD1's evidence should have been held inadmissible. Further, SD1's evidence was not properly used by the Court of Criminal Appeal.

17. Before expanding upon these submissions, it is convenient first to make submissions about the operation and history of the relevant *Evidence Act* provisions.

Operation and history of relevant *Evidence Act* provisions

18. Sections 97, 98 and 101 are the principal *Evidence Act* provisions for tendency and coincidence evidence. They are set out in full in Annexure A. They "cover the relevant field" to the exclusion of the common law: *R v Ellis* (2003) 58 NSWLR 700 at 716 [74], 717 [83] per Spigelman CJ; approved by Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ in *Ellis v The Queen* [2004] HCATrans 488 at p 58, line 2593.

19. As a result, the common law rules for what is (often interchangeably) described as 'circumstantial', 'propensity' or 'similar fact' evidence will not determine the proper application of ss 97, 98 and 101. Indeed in *Ellis* a submission that s 101(2) involved applying the "*Pfennig* test" was rejected (at 717 [89]). But Spigelman CJ went on to say (at 718 [96]):

> "[T]he construction of s 101(2) should not be understood to suggest that the stringency of the approach, culminating in the *Pfennig* test, is never appropriate when the judgment for which the section calls has to be made. There may well be cases where, on the facts, it would not be open to conclude that the probative value of particular evidence substantially outweighs its prejudicial effect, unless the 'no rational explanation' test were satisfied."

20. Further, the common law rules assist in understanding the policy sought to be addressed by the *Evidence Act* provisions: as quoted by Spigelman CJ in *Ellis* (at 715 [67]), an explanation accompanying the exposure draft to the then *Evidence Bill* made clear that the safeguard in proposed s 101 "reflects the rule applied at common law in relation to what is conventionally termed 'similar fact' evidence:

See *Hoch v The Queen* (1988) 165 CLR 292; *Harriman v The Queen* (1989) 167 CLR 590". Those cases are referred to below.

21. As to the content of the common law rules, the starting point was identified by Lord Herschell for the Board in *Makin v Attorney-General (NSW)* [1894] AC 57 at 65:

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried."

22. His Lordship then said (at 65) that "the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury", and his Lordship gave two examples:

(a) *first*, to establish criminal intent rather than accident; and

(b) *secondly*, to rebut a defence otherwise open to the accused.

Another example was given in *McConville v Bayley* (1914) 17 CLR 509 at 512 by Griffith CJ (Isaacs and Gavan Duffy JJ agreeing), namely:

(c) *thirdly*, to establish the relevant relationship between an accused and other person.

23. In *Martin v Osborne* (1936) 55 CLR 367 at 376, Dixon J (Latham CJ agreeing) drew a general conclusion from the early authorities, that the exceptions where circumstantial evidence could be admitted were "whenever they form a component in a combination of circumstances which is unlikely to occur without the fact in issue also occurring". Dixon J said that "[t]he frequency with which a set of circumstances recurs or the regularity with which a course of conduct is pursued may exclude, as unreasonable, any other explanation or hypothesis than the truth of the fact to be proved" (at 376). His Honour had earlier noted that "[i]n the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation" (at 375; see also the same test in the dissenting reasons of Starke J at 372 and the concurring reasons of McTiernan J at 404).

24. In *Martin v Osborne* Evatt J said that "it is plain that the degree of resemblance and connection between the fact in issue and the fact sought to be adduced in evidence must be closely examined", and "[m]ere general resemblance is insufficient" (at 384). Referring to the exception referred to above of establishing criminal intent rather than accident, Evatt J noted that "poisonings and fires, though often the result of accident, do not, in ordinary human experience, recur in the same family circle or in the case of the same occupier", such that "evidence is allowed to prove the recurrence of such poisonings or such fires respectively without proof that the party concerned was more than 'involved', in order to show the high degree of improbability attending the hypothesis that the poisoning or fire under particular scrutiny is an accident" (at 385).

25. Dixon J's observation in *Martin v Osborne* that the evidence "must bear no other reasonable explanation" was used in the later cases of *Hoch v The Queen* (1988) 165 CLR 292 and *Pfennig v The Queen* (1995) 182 CLR 461. In *Hoch* the Court held that the relevant similar fact evidence could reasonably be explained as concoction and accordingly was inadmissible (see at 297, 305). In *Pfennig* the Court held that the propensity evidence was admissible because of the "similarity and unity between the two incidents", the "considerable cogency" of the evidence and the lack of any reasonable hypothesis to explain the death in a way other than that contended for by the prosecution (see at 488-490).

26. In the years between *Hoch* and *Pfennig* the Court held in *Harriman v The Queen* (1989) 167 CLR 590 that evidence of an accused's previous relationship (including drug dealing) with a co-accused was sufficiently cogent and compelling to be admissible to prove that the only reasonable inference for his presence in Thailand with the co-accused was that he was there to purchase heroin (at 596, 602-603, 609-610, 615, 635), whereas evidence of the accused's drug *taking* was held by a majority of the Court to be inadmissible for want of probative value in relation to the charged offence of being knowingly involved in the importation of heroin (at 610, 615, 635).

27. In the applicant's submission, it follows that when applying ss 97, 98 and 101, expressions such as 'high degree of improbability', 'striking similarity', 'similarity and unity', 'considerable cogency' and 'no other reasonable explanation' cannot be determinative tests in and of themselves. But the expressions reflect the relevant policy of the *Evidence Act* provisions for tendency and coincidence evidence and continue to appear in the authorities, including in both *Ellis* (as noted by Spigelman CJ in the passage quoted in paragraph 19 above (at 718 [96]; see also Hidden and Buddin JJ at 719 [105])) and, as will be seen, in the present proceedings also.

Improper use of SD1's evidence by the Court of Criminal Appeal

28. As summarised in paragraph 16 above, the applicant submits that the Court of Criminal Appeal used SD1's evidence in a manner contrary to the trial judge's directions, with three consequences. Before turning to those consequences, it is necessary to establish the premise.

29. In his judgment admitting SD1's evidence as coincidence evidence (T, Judgment, 22.8.11, pp 3-4), the trial judge addressed both ss 98(1) and 101(2) of the *Evidence Act*. He said that the incident alleged by SD1 was "strikingly similar" to count 2. The similarities he noted were the stepfather relationship, the ages of the stepdaughters, the fact that both incidents "involved a spurious medical reason" and that "[e]ssentially the conduct was the use of a ruse or a trick by the accused to have his stepdaughter hold his penis". After stating that he was satisfied that SD1's evidence had "significant probative value" because of its similarity to count 2, thereby addressing s 98(1), the trial judge proceeded to address prejudice – albeit briefly, with respect – for the purposes of s 101(2). The trial judge said simply that the probative value of SD1's evidence "substantially overcomes the prejudicial effect". He acknowledged that it is "possible that the jury could reason that if the accused molested [SD1] he must have done the same thing to [the complainant]", but the trial judge said that the "potential issue of prejudice will be dealt with by

directions to the jury", rejecting counsel for the applicant's submission that the issue was incapable of being dealt with by directions.

30. It is interpolated that SD1's evidence was thus admitted on a similar basis to the "high degree of improbability" referred to by Evatt J in *Martin v Osborne*; relevantly, that two stepdaughters would be highly unlikely to make such allegations which were "strikingly similar" or, to use the Court of Criminal Appeal's later language, "so uncannily similar" (CCA [129]). But the present case is distinguishable in at least in two respects:

(a) *first*, because disaffected stepchildren have been known to make spurious – even malicious – allegations against a stepfather (see generally *A v New South Wales* (2007) 230 CLR 500); and

(b) *secondly*, because the similarities between count 2 and the conduct alleged by SD1 were overstated and were not striking or uncanny. This is addressed in further detail in paragraphs 39-40 below.

31. Nonetheless, accepting the trial judge's conclusions for the moment, he considered it necessary to give directions as to the use of SD1's evidence. The trial judge imposed the restriction noted earlier: "You must not take SD1's evidence into account when you are reasoning in respect of counts 1, 3 and 4 and if during your discussions it drifts into that then you should correct the position."

32. When the Court of Criminal Appeal came to consider ground 6 of the appeal to that Court – namely, that the trial judge erred in admitting the evidence of SD1 as evidence of coincidence relevant to count 2 (CCA [41]) – Adams J (Basten JA and Latham J agreeing) noted that the jury were entitled, if satisfied of guilt on one of a number of counts on the indictment, to conclude that the applicant had a "sexual interest" in the complainant and "that evidence could be used as supporting the Crown case on the remaining count or counts" (CCA [128]). Later his Honour said that "if the jury were satisfied that count 2 were proved beyond reasonable doubt, they were entitled to use that finding as establishing the existence of a sexual interest in the complainant, that resulting fact could be used in its consideration of whether the applicant had committed the other charges" (CCA [133]).

33. At this point Adams J noted (CCA [133]) the trial judge's direction to the jury, but his Honour, with respect, misapprehended the direction by referring to it as addressing "the risk that the jury might simply move from being satisfied that the applicant had misconducted himself with SD1, or for that matter, was guilty of count 2, to being satisfied of his guilt on the other counts". But the direction was instead "not [to] take [SD1]'s evidence into account when you are reasoning in respect of counts 1, 3 and 4". The jury *were* entitled to engage in tendency reasoning if satisfied of guilt on any one of a number of counts on the indictment, including count 2. But they were not entitled, contrary to CCA [128] and [133], to draw general conclusions about "sexual interest" from SD1's evidence in relation to count 2 and then apply those conclusions to the other counts. To do so would be to stray beyond legitimate tendency reasoning about guilt on one of a number of counts on an indictment to using SD1's evidence for counts other than count 2, contrary to the trial judge's direction.

34. When the Court of Criminal Appeal came to consider ground 4 of the appeal to that Court – namely, that the verdicts on counts 2 and 3 were unreasonable and could not be supported by the evidence (CCA [41]) – Adams J concluded that "the decisive matter which I have found convincing is the evidence of SD1" (CCA [157]). That conclusion was reached after Adams J had noted that "[l]eaving aside the evidence of SD1" (which in the applicant's submission is a practical impossibility from the jury's point of view), "so far as one can judge from the transcript, it is fair to say, I think, that there are sound reasons for concluding that the evidence of the complainant as to counts 2 and 3 was not so persuasive as to dispel the significant doubts raised by a number of seeming implausibilities and inconsistencies" (CCA [156]).

35. But after being satisfied that the applicant was guilty of count 2 on the basis of SD1's evidence (CCA [158]), Adams J said that "[t]his conclusion has the effect of very significantly changing the conclusion which one might otherwise draw from reading the evidence of the applicant and, for that matter, the evidence of Mrs Versi; as it were, the calculus of assertion and denial" (CCA [159]). His Honour noted that the applicant's denials were "otherwise apparently believable" (CCA [159]) but, applying SD1's decisive evidence, Adams J concluded that the applicant had "a sexual interest in the complainant which makes it more likely that her evidence about the other incidents is truthful" (CCA [159]). Accordingly ground 4 of the appeal to the Court of Criminal Appeal, that the verdicts on counts 2 and 3 were unreasonable and could not be supported by the evidence, was dismissed.

36. In the applicant's submission, the Court of Criminal Appeal's reasons quoted above amounted to using SD1's evidence contrary to the trial judge's directions – directions the express purpose of which was to ensure compliance with the *Evidence Act*. This had three consequences, as follows.

Consequence 1: The Court of Criminal Appeal failed to apply ss 98(1) and 101(2)

37. The trial judge's directions to the jury were a condition of SD1's evidence being admissible, applying the requirements of ss 98(1) and 101(2) of the *Evidence Act*. The trial judge said that it was "possible that the jury could reason that if the accused molested [SD1] he must have done the same thing to [the complainant]", but that "potential issue will be dealt with by directions to the jury" (T, Judgment, 22.8.11, p 4). Earlier, applying s 97(1) of the *Evidence Act*, the trial judge had rejected a submission by the Crown Prosecutor that SD1's evidence could be used not just as coincidence evidence on count 2 but also as tendency evidence on counts 1, 3 and 4 (T, 15.8.11, p 13, line 25ff).

38. Thus, by using SD1's evidence contrary to the trial judge's directions, it was incumbent on the Court of Criminal Appeal to consider for itself the interests those directions sought to protect, namely that SD1's evidence only be admitted if it has significant probative value which substantially outweighs any prejudicial effect. Failing which, ss 98(1) and 101(2) were not applied.

39. In the applicant's submission, the trial judge was correct to refuse to admit SD1's evidence as tendency evidence for counts 1, 3 and 4. The applicant submits that the trial judge should have refused to admit SD1's evidence as coincidence evidence for count 2, applying ss 98(1) and 101(2). For the purposes of s 98(1), the

applicant submits that SD1's allegations did not have the requisite significant probative value. There was in fact no evidence of a "spurious medical reason" or "spurious medical ground" to link SD1's allegations with count 2: in the case of count 2, the complainant's evidence, consistent with her earlier witness statement (17.3.8, p 2, par [12]), was that the applicant called her to "help [him] out with something" and she separately "knew that he'd had sort of a heat rash problem" (T, 22.8.11, p 37, lines 27-29). SD1's evidence, by contrast, involved trying to fix a hernia (CCA [95]). SD1 alleged advanced sexualised conduct whereas count 2 involved the application of a cream. SD1's allegations were brought after 32 years without any substantiation, corroboration, report or charge. There was also a prior inconsistent statement by SD1 to her mother that "her response was to just laugh at him" (Jane Morgan statement, 14.6.11, p 4, par [21]).

40. Whilst it is true that SD1 and the complainant were stepdaughters of the applicant, that similarity is not, in the applicant's submission, sufficient by itself to meet the significant probative value test of s 98(1) – as Evatt J said in *Martin v Osborne*, "[m]ere general resemblance is insufficient" (at 384). The Court of Criminal Appeal said that from the trial materials it appeared that there had been no opportunity for joint concoction between SD1 and the complainant and "it was simply accepted that communication had not occurred" (CCA [135]). But two points should be said against that:

(a) *first*, whether or not the applicant's trial counsel failed to raise the issue or take steps to verify or question it (e.g. by obtaining SD1's and the complainant's phone records, diaries or similar, or by exploring whether there was any opportunity for suggestion of the substance of count 2 to SD1 by a police officer or some other person), s 98(1) of the *Evidence Act* mandates that evidence is "not admissible" unless it satisfies the section. In the applicant's submission, the commonality of the stepdaughter relationship in SD1's allegations and count 2 was insufficient to amount to the "significant probative value" required by s 98(1); and

(b) *secondly*, in a criminal trial where satisfaction beyond reasonable doubt is required that the relevant offences occurred, any gap or uncertainty in the evidence about whether or not SD1 had the opportunity to communicate with the complainant, or had things suggested to her about the substance of count 2, should be construed either neutrally or in the applicant's favour as a matter telling against the probative value of SD1's evidence.[2]

41. This then raises the question of prejudice for the purposes of s 101(2). SD1's evidence, as coincidence evidence for count 2 only, could only be used against the applicant if its probative value substantially outweighed any prejudicial effect it may have had on the applicant. The applicant's trial counsel's submissions on this question were as follows (T, 15.8.11, p 29, lines 10-24):

> "[L]et it be assumed that your Honour does think that they're strikingly similar and that it's significant probative of coincidence evidence [*sic*]. In my submission it will be very difficult indeed for a jury to not use that evidence in

[2] It should also be noted that "[t]he onus is on the Crown to negate the 'real chance' of concoction": *BP v R* [2010] NSWCCA 303 at [110] per Hodgson JA (Price and Fullerton JJ agreeing).

respect of counts 1, 3 and 4. If it's concluded that by coincidence reasoning that what happened in respect of [SD1], that what she says happened did happen, that will show a tendency to molest [SD1]. A jury will have to try to put that out of their mind when they're considering counts 1, 3 and 4 and I respectfully submit that will be a very difficult task indeed for the jury to engage in. He might be told to ignore it but we're human beings, if we concluded that he's sexually molested another stepdaughter, hasn't been punished for it and we're now considering whether or not he's guilty of sexually molesting the complainant, even subconsciously, we can't avoid taking it into account. And no human being with respect would be able to put that out of their mind when they come to consider their verdicts in respect of those other counts."

42. The trial judge rejected these submissions on the basis that his ultimate directions to the jury would suffice, in particular "You must not take [SD1]'s evidence into account when you are reasoning in respect of counts 1, 3 and 4". But as set out earlier in these submissions the Court of Criminal Appeal failed to do this and in the applicant's submission it would be naïve to assume that the jury were able to put SD1's evidence out of their minds.

43. It follows, in the applicant's submission, that the prejudicial effect of SD1's evidence was material and was not outweighed, much less substantially outweighed, by the probative value of that evidence. Section 101(2) of the *Evidence Act* should have been applied to render SD1's evidence inadmissible.

Consequence 2: The Court of Criminal Appeal erred in its view that the verdicts on counts 2 and 3 were not unreasonable

44. This consequence is related to the first in that it also underscores the Court of Criminal Appeal's failure, with respect, to apply s 101(2) of the *Evidence Act*.

45. Without SD1's evidence, the Court of Criminal Appeal said that "the evidence of the complainant as to counts 2 and 3 was not so persuasive as to dispel the significant doubts raised by a number of seeming implausibilities and inconsistencies" (CCA [156]). The Court of Criminal Appeal said that the evidence involved a "calculus of assertion and denial" and the applicant's denials, absent SD1's evidence, were "otherwise apparently believable" (CCA [159]).

46. Thus it may be inferred that without SD1's evidence there was not proof beyond reasonable doubt of the offences for the purposes of s 141 of the *Evidence Act*. Adams J said that disregarding SD1's evidence he was nonetheless content to defer to the jury's "advantage in seeing and hearing the evidence" such that there is not "a significant possibility that an innocent person has been convicted" (CCA [156]), but that is impossible: the jury were tainted by SD1's evidence. The fact that Adams J described SD1's evidence as "decisive" (CCA [157]) supports, in the applicant's submission, an inference that without SD1's evidence there was not proof beyond reasonable doubt.

47. The Court of Criminal Appeal applied SD1's decisive evidence to be satisfied beyond reasonable doubt that the applicant was guilty of count 2 (CCA [158]) and used that finding, in turn, to conclude that the applicant had "a sexual interest in the

complainant" such that the Court was satisfied beyond reasonable doubt of guilt on count 3 as well (CCA [159]-[160]).

48. The reason this amounts to more than legitimate tendency reasoning from guilt on one of a number of counts on an indictment, in the applicant's submission, is that the Court of Criminal Appeal was clear that the only reason the relevant "sexual interest" had been demonstrated was SD1's evidence. It was "decisive" (CCA [157]). Without SD1's evidence, there were "significant doubts ... implausibilities and inconsistencies" (CCA [156]).

49. This relates back to s 101(2) of the *Evidence Act* because it vindicates the applicant's initial submissions at trial about the dangers and prejudice of SD1's evidence, as compared with any probative value. In particular, the applicant had submitted that it would be impossible to cure such prejudice by directions. In the applicant's submission, it would be naïve to assume otherwise. Further, in the applicant's submission, SD1's evidence was exactly the kind of prejudicial evidence which the common law has long frowned upon. It did not seek to rebut an argument of accident or a defence. It did not seek to establish a relationship. It did not have 'striking' similarities, 'considerable cogency' or more than a 'mere general resemblance'. It was brought without anything to substantiate or corroborate the allegations. There should have been reasonable doubts as to the veracity of SD1's allegations such as to make them analogous to the inadmissible evidence in *Hoch v The Queen* and distinguishable from *Pfennig v The Queen*.

50. In the applicant's submission, the Court of Criminal Appeal should have held that the verdict on count 3 was unreasonable because the only "decisive" evidence for such a finding was SD1's evidence (CCA [157]), and SD1's evidence was inadmissible in respect of count 3. Further, the Court of Criminal Appeal's inability to quarantine SD1's evidence to count 2 shows, in the applicant's submission, that SD1's evidence was sufficiently prejudicial to be rendered inadmissible by s 101(2), such that the verdict on count 2 was unreasonable also, since SD1's evidence was "decisive" for that finding of guilt as well as for count 3.

Consequence 3: There was a miscarriage of justice

51. If either or both of the first two consequences set out above is accepted, there remains the question whether there was a miscarriage of justice. This involves considering whether the jury, "acting reasonably, must have entertained a reasonable doubt as to the guilt of the accused" or, to put it another way, it was not "open to the jury to be satisfied beyond reasonable doubt of the accused's guilt": *Chidiac v The Queen* (1991) 171 CLR 432 at 443; *M v The Queen* (1994) 181 CLR 487 at 492-495; *SKA v The Queen* (2011) 243 CLR 400 at 406 [14]; *Michaelides v The Queen* (2013) 87 ALJR 456 at 457 [3]-[4].

52. In the applicant's submission, there was such a miscarriage because of the "decisive" nature of SD1's evidence for the convictions on counts 2 and 3 (CCA [157]). In the Court of Criminal Appeal, Adams J sought to put SD1's evidence to one side, noted that without it there were "implausibilities and inconsistencies", but was content to defer to the "jury's advantage in seeing and hearing the evidence" (CCA [156]). But as submitted in paragraph 46 above, that is an impossible hypothetical scenario as the jury's deliberations were tainted by SD1's evidence.

The Court of Criminal Appeal undertook a review of the reasonableness of the jury's verdicts for counts 2 and 3 and concluded that the verdicts were reasonable on account of SD1's decisive evidence (CCA [157], [158]-[160]). There is every reason to conclude that the jury reasoned in the same way.

53. Thus without SD1's evidence the jury, acting reasonably, must have entertained a reasonable doubt as to the guilt of the accused, or put another way it was not open to the jury to be satisfied beyond reasonable doubt of the accused's guilt. The Court of Criminal Appeal noted that without SD1's evidence there were "significant doubts raised by a number of seeming implausibilities and inconsistencies" (CCA [156]). In the applicant's submission, there was a miscarriage of justice.

PART VII: LEGISLATIVE MATERIALS

54. See Annexure A.

PART VIII: ORDERS SOUGHT

55. Special leave to appeal granted.

56. Appeal treated as instituted and heard instanter.

57. Appeal allowed.

58. Orders 2, 5, 6 and 7 made by the New South Wales Court of Criminal Appeal on 14 November 2013 be set aside. In lieu thereof the following orders be made:

    (a) Appeal against conviction allowed.

    (b) The convictions on counts 2 and 3 of the indictment be quashed.

59. Such further or other order as the Court considers fit.

PART IX: ESTIMATE FOR PRESENTATION OF ORAL ARGUMENT

60. The applicant estimates that it will require half a day for its oral argument.

Dated: 15 May 2014

.....
D. F. Jackson QC
Tel. (02) 8224 3000
Fax (02) 9233 1850
jacksonqc@sevenwentworth.com.au

.....
J. C. Conde
Tel. (02) 8224 3000
Fax (02) 9233 1850
conde@sevenwentworth.com.au

ANNEXURE A

APPLICABLE LEGISLATIVE PROVISIONS

1. The following provisions were in existence at all relevant times and remain in force as at the date of making these submissions.

2. For completeness, it is noted that the current language of ss 97(1) and 98 of the *Evidence Act* was introduced in 2007 by Sched 1 [38] and [39] of the *Evidence Amendment Act 2007* (NSW). The explanatory notes to that amending Act made clear that the purpose of the amendments was to implement recommendations 11-1, 11-2 and 11-3 of ALRC Report 102, *Uniform Evidence Law*, (December 2005). Recommendation 11-3 was to remove double negatives from s 97(1) and to make other grammatical changes. Recommendations 11-1 and 11-2 were to amend s 98 to make clear that it would apply where there are any similarities in the events or the circumstances in which they occurred, or similarities in both the events and the circumstances in which they occurred. In the applicant's submission, these amendments are of no effect in relation to the present case.

(a) *Evidence Act 1995* (NSW), ss 97, 98, 101, 137, 141 and Dictionary

"97 The tendency rule

(1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless:

(a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence, and

(b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

(2) Subsection (1)(a) does not apply if:

(a) the evidence is adduced in accordance with any directions made by the court under section 100 ["Court may dispense with notice requirements"], or

(b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.

Note. The tendency rule is subject to specific exceptions concerning character of and expert opinion about accused persons (sections 110 and 111). Other provisions of this Act, or of other laws, may operate as further exceptions.

98 The coincidence rule

(1) Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless:

(a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence, and

(b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

Note. One of the events referred to in subsection (1) may be an event the occurrence of which is a fact in issue in the proceeding.

(2) Subsection (1) (a) does not apply if:

(a) the evidence is adduced in accordance with any directions made by the court under section 100 ["Court may dispense with notice requirements"], or

(b) the evidence is adduced to explain or contradict coincidence evidence adduced by another party.

Note. Other provisions of this Act, or of other laws, may operate as exceptions to the coincidence rule.

...

101 Further restrictions on tendency evidence and coincidence evidence adduced by prosecution

(1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.

(2) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.

(3) This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the defendant.

(4) This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the defendant.

...

137 Exclusion of prejudicial evidence in criminal proceedings

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

...

141 Criminal proceedings: standard of proof

(1) In a criminal proceeding, the court is not to find the case of the prosecution proved unless it is satisfied that it has been proved beyond reasonable doubt.

(2) In a criminal proceeding, the court is to find the case of a defendant proved if it is satisfied that the case has been proved on the balance of probabilities.

...

Dictionary

...

coincidence evidence means evidence of a kind referred to in section 98(1) that a party seeks to have adduced for the purpose referred to in that subsection.

coincidence rule means section 98(1).

...

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.

...

tendency evidence means evidence of a kind referred to in section 97(1) that a party seeks to have adduced for the purpose referred to in that subsection.

tendency rule means section 97(1)."

(b) *Criminal Appeal Act 1912* (NSW), ss 5, 6 and 8:

"5 Right of appeal in criminal cases

(1) A person convicted on indictment may appeal under this Act to the court:

(a) against the person's conviction on any ground which involves a question of law alone, and

(b) with the leave of the court, or upon the certificate of the judge of the court of trial that it is a fit case for appeal against the person's conviction on any ground of appeal which involves a question of fact alone, or question of mixed law and fact, or any other ground which appears to the court to be a sufficient ground of appeal, and

(c) with the leave of the court against the sentence passed on the person's conviction.

(2) For the purposes of this Act a person acquitted on the ground of mental illness, where mental illness was not set up as a defence by the person, shall be deemed to be a person convicted, and any order to keep the person in custody shall be deemed to be a sentence.

...

6 Determination of appeals in ordinary cases

(1) The court on any appeal under section 5(1) against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(2) Subject to the special provisions of this Act, the court shall, if it allows an appeal under section 5(1) against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.

(3) On an appeal under section 5(1) against a sentence, the court, if it is of opinion that some other sentence, whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.

...

8 Power of court to grant new trial

(1) On an appeal against a conviction on indictment, the court may, either of its own motion, or on the application of the appellant, order a new trial in such manner as it thinks fit, if the court considers that a miscarriage of justice has occurred, and, that having regard to all the circumstances, such miscarriage of justice can be more adequately remedied by an order for a new trial than by any other order which the court is empowered to make.

(2) Provision shall be made by rules of court for detaining the appellant until the fresh trial has terminated, or for ordering the appellant into any former custody."

(c) *Judiciary Act 1903* (Cth), ss 35A, 36 and 37:

"35A Criteria for granting special leave to appeal

In considering whether to grant an application for special leave to appeal to the High Court under this Act or under any other Act, the High Court may have regard to any matters that it considers relevant but shall have regard to:

(a) whether the proceedings in which the judgment to which the application relates was pronounced involve a question of law:

(i) that is of public importance, whether because of its general application or otherwise; or

(ii) in respect of which a decision of the High Court, as the final appellate court, is required to resolve differences of opinion between different courts, or within the one court, as to the state of the law; and

(b) whether the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court of the judgment to which the application relates.

36 New Trials

The High Court in the exercise of its appellate jurisdiction shall have power to grant a new trial in any cause in which there has been a trial whether with or without a jury.

37 Form of judgment on appeal

The High Court in the exercise of its appellate jurisdiction may affirm reverse or modify the judgment appealed from, and may give such judgment as ought to have been given in the first instance, and if the cause is not pending in the High Court may in its discretion award execution from the High Court or remit the cause to the Court from which the appeal was brought for the execution of the judgment of the High Court; and in the latter case it shall be the duty of that Court to execute the judgment of the High Court in the same manner as if it were its own judgment."

* * *