

**SHORT PARTICULARS OF CASES**  
**APPEALS**

**MAY 2024**

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No.	Name of Matter	Page No
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Tuesday, 7 May 2024 and Wednesday, 8 May 2024

1.	Willmot v The State of Queensland	1
2.	RC v The Salvation Army (Western Australia) Property Trust	3

Thursday, 9 May 2024

3.	HBSY Pty Ltd ACN 151 894 049 v Lewis & Anor	5
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Friday, 10 May 2024

4.	BQ v The King	7
----	---------------	---

Tuesday, 14 May 2024

5.	The King v Hatahet	9
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Wednesday, 15 May 2024

6.	Cook (A Pseudonym) v The King	10
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## **WILLMOT v THE STATE OF QUEENSLAND (B65/2023)**

Court appealed from: Supreme Court of Queensland Court of Appeal  
[2023] QCA 102

Date of judgment: 16 May 2023

Special leave granted: 9 November 2023

The appellant is an Indigenous person who was a child under the care of the State of Queensland (“the State”). Between 1957 and 1967, the State placed the appellant in foster care with an indigenous couple (“the Demlins”, who also had in their care three other foster children including RS); at the Girls’ Dormitory at Cherbourg; and with the appellant’s grandmother (where the appellant alleges she was sexually assaulted by NW and another). By virtue of section 11A(1) of the *Limitation of Actions Act 1974* (Qld) (“the LAA”), which came into force in March 2017, the appellant was no longer statute barred and brought a claim against the State for damages for negligence on the basis of psychiatric injury resulting from sexual abuse and/or serious physical abuse while in the care of the State.

The State applied for a permanent stay of proceedings on the basis that the lapse of time since the alleged conduct occurred, and the consequential effects of that, have had a burdensome effect on the State that is so serious that a fair trial is not possible. The primary judge granted a permanent stay, which the Court of Appeal upheld on appeal and concluded that no error in the exercise of discretion had been demonstrated by the primary judge.

The appellant states that while the Demlins, the appellant’s grandmother and some witnesses at the Girls’ Dormitory are dead or could not be located, other witnesses are alive, including RS, who gave a detailed account of the Demlin assaults in an affidavit which was relied on by the appellant. There are other living witnesses to the Girls’ Dormitory assaults who also gave evidence by affidavit. NW is alive but has not had the allegations of abuse put to him, nor had any statement taken from him.

The appellant relies on the principles upon which a permanent stay should be granted as per the High Court’s decision in *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32 (“GLJ”), which considered the issue of a permanent stay in the context of the New South Wales equivalent of the LAA. The appellant submits that the Court of Appeal should have reviewed the primary judge’s decision in accordance with the “correctness standard”, rather than approaching the question as one of the review of a discretionary decision such that an error of principle was required to be identified before the decision could be overturned. The appellant contends that her claim is not an exceptional case where the administration of justice would be brought into disrepute by permitting the claim to proceed to trial; and the respondent has failed to discharge its onus of establishing that the litigation of the issues in this case would be such as to render the trial so unfair or oppressive to the respondent so as to justify a permanent stay.

The respondent insists that by allowing the trial to proceed, it would constitute an abuse of process for which there are no mechanisms available to ameliorate the unfairness to the respondent where there is no way of gauging how such mechanisms may be applied in a future hearing. The respondent submits that the

“new context” or “new reality” that the majority in *GLJ* determined has arisen from the lifting of the limitation period for claims of sexual abuse would go too far in favour of the appellant if the permanent stay was discharged in the circumstances of this case. Accordingly, the permanent stay should remain in place. Alternatively, the respondent submits that the matter should be referred to the Court of Appeal for further consideration under the “correctness standard”.

The grounds of appeal are:

- The Court of Appeal erred in determining that the trial judge did not err in the exercise of her discretion to grant a permanent stay of the appellant’s proceeding in that the Court of Appeal held:
  - a) that the fact that the investigation of a particular witness or other evidence that might be undertaken by the respondent was unlikely to have yielded valuable evidence did not “justify a moderation of the significance of the State’s inability to investigate foundational facts in the exercise of the discretion”;
  - b) that the respondent, in applying for a permanent stay, did not carry the onus of demonstrating that the capacity of the respondent to obtain instructions for the purpose of defending a claim would be materially different if the perpetrators or the persons they would obtain instructions from were alive;
  - c) that the availability of an eyewitness, RS, to the assaults by the perpetrator Demlin who may be called to give evidence in the appellant’s case to provide additional evidence about the assaults did not “repair the State’s inability to investigate, or obtain instructions, lead evidence or cross examine about foundational allegations”;
  - d) that the evidence before the trial judge of one psychiatrist who considered it was “difficult to disentangle the events with absolute precision” was sufficient to support a finding by the primary judge that it was “insurmountably difficult” to extract the impact of the alleged assault by NW from the impacts of the alleged mistreatment of the applicant by the Demlins and her other life events;
  - e) that the finding by the trial judge that the lack of inquiry by the respondent as to whether instructions could be obtained from NW, a perpetrator who was alive but who had not yet been interviewed, was of no significance given the findings in respect of causation of the applicant’s psychiatric injury.

## **RC v THE SALVATION ARMY (WESTERN AUSTRALIA) PROPERTY TRUST (P7/2023)**

Court appealed from: Supreme Court of Western Australia  
Court of Appeal  
[2023] WASCA 29

Date of judgment: 17 February 2023

Date referred to Full Court: 8 February 2024

This application for special leave to appeal from the judgment and order of the Court of Appeal of the Supreme Court of Western Australia has been referred to the Full Court of this Court as if on appeal. This application is listed for hearing immediately after the appeal in *Willmot v The State of Queensland*.

Following the introduction of section 6A of the *Limitation Act 2005* (WA)<sup>1</sup>, which came into force in July 2018, the applicant commenced proceedings against the respondent in the District Court of Western Australia claiming damages for sexual abuse allegedly committed by Lieutenant Frank Swift (“Lt Swift”), an officer of the respondent, in 1959 and 1960 while the applicant was in the care of the Nedlands Boys’ Home (“the Home”). The respondent owned and operated the Home. The applicant claims that the respondent breached common law and statutory duties and was vicariously liable for the actions of Lt Swift. The respondent filed an application seeking a permanent stay on the grounds of abuse of process, which was granted by the primary judge. The applicant sought leave to appeal the primary judge’s decision. The Court of Appeal granted leave to appeal, but otherwise dismissed the appeal.

This case raises the question of whether a permanent stay of the applicant’s sexual abuse action should be granted. It is not in dispute that the applicant’s claims were statute barred from 1971 to 2018 (when the limitation period was removed). Since the time of the alleged abuse and the commencement of the applicant’s action, the alleged perpetrator and multiple witnesses have died. The first time the respondent became aware of the applicant’s allegations of sexual abuse by Lt Swift was in February 2014 when police contacted the respondent. More specific allegations were put to the respondent by the applicant’s solicitors after July 2018. The respondent still has access to Lt Swift’s personnel records, but despite extensive enquiries, the respondent has not been able to make meaningful inquiries to ascertain other potential witnesses or obtain contemporaneous documents.

The applicant submits that there should not be a permanent stay on the basis that the respondent did not become aware of the applicant’s allegations of sexual abuse until after the death of the alleged perpetrator, particularly without proof that the respondent would have investigated the allegations had it been aware of them prior to Lt Swift’s death. The applicant contends that in light of the recent High Court decision in *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32 (“GLJ”)<sup>2</sup>, the cumulative effect of the deaths of Lt Swift and

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<sup>1</sup> Section 6A of the *Limitation Act 2005* (WA) provides that “despite anything in this or any other Act, no limitation period applies in respect of a child sexual abuse action”.

<sup>2</sup> In *GLJ*, the High Court held that the applicable standard of appellate review of a decision to grant a permanent stay of proceedings is whether a trial will be necessarily unfair or so unfairly and unjustifiably oppressive as to constitute an abuse of process. The facts pertained to allegations of historical institutional child sexual abuse.

other relevant witnesses, the fact the respondent had been denied the opportunity to make meaningful inquiries into what potential witnesses might have been able to contribute, and whether there previously existed any relevant records must be reconsidered as to whether it was actually adequate to justify the extreme step of granting a permanent stay.

The respondent's position is that it would be an abuse of process for the applicant's action to continue in circumstances where there is an absence of material and relevant witnesses such that a fair trial cannot be achieved. The respondent claims that it is at a forensic disadvantage or otherwise prejudiced through the loss of documents and inability to call witnesses, and has not had the opportunity to investigate the applicant's allegations at an earlier time. The respondent further claims that Lt Swift was an ordained minister of the respondent and not an employee, and therefore vicarious liability does not apply.

The grounds of appeal are:

- The Court of Appeal erred in law in concluding that it was open to the primary judge to grant a permanent stay of the applicant's action against the respondent on the basis that Lt Swift had died well before the respondent was first made aware of the allegations against Lt Swift such that the respondent did not have an opportunity to investigate those allegations, when there was no evidence (and the primary judge did not find) that the respondent would have investigated those allegations had it been made aware of them at any time prior to Lt Swift's death on 3 October 2006 (and in fact the evidence was to the contrary).
- The Court of Appeal erred in law in concluding that the applicant's ground of appeal to it the subject of the ground above should be dismissed on the basis that it did not appear to have been squarely put to the primary judge, when:
  - (a) the ground did not raise a mere discretionary consideration, but asserted the absence of evidence of prejudice which was necessary for the respondent to establish in support of its application for a permanent stay;
  - (b) further and alternatively, the respondent did not object to the ground being determined on its merits or otherwise assert (or identify) prejudice through the ground not having been 'squarely put' to the primary judge.
- Further and alternatively, the Court of Appeal otherwise erred in law in concluding that it was open to the primary judge to grant a permanent stay of the applicant's action having regard to the cumulative effect of the deaths of potential witnesses and the inability to investigate whether there existed relevant documentary records, when (a) Maj Watson had died in 1968 before the original limitation period had expired; (b) the respondent would not have investigated the allegations during Lt Swift's lifetime even if it had been made aware of them; and (c) there was no evidence as to any evidence which could have been given by witnesses who have since died and/or that any relevant documents had been lost or destroyed through the passage of time.

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**HBSY PTY LTD ACN 151 894 049 v LEWIS & ANOR (S106/2023)**

Date of decision sought to be quashed: 14 July 2023

Date application referred to Full Court: 22 November 2023

Anthony Lewis (“Anthony”) was one of the residuary beneficiaries under the will of his late aunt Marjorie Lewis (“Marjorie”). After Marjorie’s death in 2008, Anthony became liable to her estate (“the Estate”) for the sum of \$571,084.93, representing the loss he caused to the Estate resulting from a breach of the fiduciary duty he owed as an *executor de son tort*. Subsequently, in April 2009 he was declared bankrupt. In July 2011, Anthony’s trustee in bankruptcy made an agreement with the plaintiff (“HBSY”), pursuant to which various assets were transferred to HBSY in return for \$275,000. These assets included Anthony’s interest in the residue of the Estate. It is not disputed that the assignment was effective and that it was subject to, inter alia, Anthony’s liability to the Estate. In April 2012, Anthony was discharged from bankruptcy. The Estate remains in administration and there has been no distribution to the beneficiaries. Anthony’s brother, who is the first defendant, is the administrator as well as another of the residuary beneficiaries.

In proceedings in the Supreme Court of New South Wales, HBSY asserted a right to receive Anthony’s share of the residue free of any liability to contribute anything to the Estate in respect of Anthony’s breach of fiduciary duty. HBSY pleaded that Anthony’s liability to the Estate was extinguished upon his discharge from bankruptcy pursuant to section 153(1) of the *Bankruptcy Act 1966* (Cth) (“the Bankruptcy Act”). The primary judge held that Anthony’s liability was not extinguished by reason of s 153(2)(b) of the Bankruptcy Act. Although reliance on s 153(2)(b) was not originally pleaded, leave to amend was granted and the primary judge found that Anthony had committed a fraudulent breach of trust.

In preparing to appeal the primary judge’s decision, HBSY’s legal advisers came to the view that as the appeal would concern a matter arising under the Bankruptcy Act, an appeal lay only to the Full Court of the Federal Court of Australia pursuant to s 7(5) of the *Jurisdiction of Courts (Cross-Vesting Act) 1987* (Cth) (“the Cross-Vesting Act”). By that time, HBSY was required to file an application for an extension of time to appeal to the Full Court. One of the issues requiring determination in the proposed appeal was whether s 153(1) of the Bankruptcy Act operated to discharge Anthony from his liability to the Estate. The Full Court found that it did not have jurisdiction under s 7(5) of the Cross-Vesting Act to hear the appeal and that the application for an extension of time was incompetent for want of jurisdiction. Absent that matter, the Full Court would have granted the extension of time.

HBSY filed an application in this Court seeking the issue of writs of certiorari and mandamus in respect of the Full Court’s decision. A notice of a constitutional matter was filed by HBSY. In November 2023, the application was referred to be heard by the Full Court of the High Court. The Attorney-General of the Commonwealth has intervened in support of HBSY (as well as having filed a further notice of a constitutional matter).

HBSY submits that the Full Court was wrong to hold that, if construed literally, s 7(5) of the Cross-Vesting Act effected: (a) an implied partial repeal of s 39(2) of the *Judiciary Act 1903* (Cth) (“the Judiciary Act”), and (b) a fundamental change in

the allocation of jurisdiction in respect of “*matter[s] arising under*” any of the Acts listed in the Schedule to the Cross-Vesting Act. Thus, mistakenly denying jurisdiction is a jurisdictional error attracting the relief of a writ of certiorari.

The Attorney-General of the Commonwealth submits that the Full Court erred because it concluded that s 7(5) of the Cross-Vesting Act does not have its ordinary or literal meaning, and that it is properly construed as directing appeals to the Full Court of the Federal Court *only* where a single judge of the Supreme Court of a State was exercising jurisdiction conferred by s 4 of the Cross-Vesting Act. Further, the Full Court’s interpretation of s 7(5) departs unjustifiably from its text, and has the consequence that it fails to achieve its manifest purpose. The Full Court should have construed s 7(5) as operating in accordance with its terms, so that it requires any appeal from a single judge of a Supreme Court that arises under an Act listed in the Schedule to be instituted in and determined by the Full Court of the Federal Court, the Full Court of the Federal Circuit and Family Court of Australia (Division 1) or, with special leave, this Court, irrespective of the source of the federal jurisdiction exercised by the Supreme Court.

The first defendant submits that the Full Court was correct when it dismissed the extension of time application and awarded costs against HBSY on the bases that:

- (a) s 7(5) of the Cross-Vesting Act does not apply where a single judge of a Supreme Court made a determination of a matter arising under the Bankruptcy Act pursuant to jurisdiction conferred by s 39(2) of the Judiciary Act;
- (b) s 7(5) only applies where a single judge of a Supreme Court made a determination in the exercise of cross-vested jurisdiction (namely s 4(1) of the Cross-Vesting Act); and
- (c) as a consequence, s 7(5) did not give the Full Court jurisdiction to either determine HBSY’s extension of time application or the substantive appeal.

The issue for determination is whether the Full Court of the Federal Court erred in its interpretation of s 7(5) of the Cross-Vesting Act.

**BQ v THE KING (S173/2023)**

Court appealed from: Court of Criminal Appeal of the Supreme Court of  
New South Wales  
[2023] NSWCCA 34

Date of judgment: 3 March 2023

Special leave granted: 7 December 2023

The appellant stood trial for a second time in the District Court of New South Wales on 11 counts of child sexual offences against his two young nieces, AA and BB, who were sisters. The offences were alleged to have occurred between 2007 and 2012 when AA and BB were aged 5-9 and 10-13 years respectively. A jury found the appellant guilty of 9 counts (counts 1-4 and 7-11) and acquitted him on 2 counts (counts 5 and 6). The offences (apart from counts 1, 5 and 6) were alleged to have been committed by the appellant during visits by the complainants to their grandparents' home or farm. The appellant lived at that home when some of the alleged offences occurred. The appellant's case was that none of the offences had occurred. He also relied on good character evidence. On appeal to the Court of Criminal Appeal ("the CCA") his convictions on counts 8 and 11 were quashed. He was acquitted of count 11 and the CCA substituted a verdict of guilty of indecent assault in respect of count 8.

Associate Professor Shackel ("Shackel") gave evidence, over objection, in the prosecution case. It was to the effect that victims of child sexual assault respond in different ways and that there is no typical response. Shackel gave general evidence about certain behaviours that are not uncommon in children and children who have been sexually abused and the possible reason of a child for those behaviours. Shackel also gave evidence in relation to perpetrator behaviours, risk factors for child sexual abuse and intrafamilial relationships. Counsel for the appellant at trial objected to the admission of Shackel's evidence in its entirety. The trial judge admitted Shackel's evidence, limited to educative evidence as to children's behaviour and responses generally under section 79 of the *Evidence Act 1995* (NSW) ("the Evidence Act"). The trial judge ruled Shackel's evidence in respect of the credibility of each particular complainant to be inadmissible.

The appellant appealed his convictions on several grounds. Ground 2B contended that the trial miscarried on account of the admission of Shackel's evidence and included a challenge to the admission of that evidence as an error of law, focusing on her evidence as to perpetrators, risk factors for abuse and intrafamilial relationships. Ground 2C asserted a miscarriage of justice on account of the trial judge's directions to the jury concerning Shackel's evidence. The Court of Criminal Appeal refused leave to appeal on ground 2C, granted leave to appeal on ground 2B and dismissed both grounds.

The appellant submits that Shackel's evidence in respect of the behaviour of perpetrators, risk factors for child sexual abuse and intrafamilial relationships did not satisfy the test for admission under s 79 of the Evidence Act and that the admission of that evidence caused the trial to miscarry. The appellant further submits that not only did the trial judge not direct the jury as to the permissible and impermissible uses of Shackel's evidence, but the directions impermissibly suggested that the jury could rely on this evidence in support of credibility



reasoning. The appellant asserts that the CCA erred in finding that there was no miscarriage of justice in this regard.

The grounds of appeal are:

- The CCA erred in holding that the evidence of Associate Professor Shackel concerning the behaviour of perpetrators of child sexual assault offences, risk factors for sexual abuse (including intra-familial relationships) and when abuse commonly takes place was admissible as expert opinion evidence and occasioned no miscarriage of justice in the trial.
- The CCA erred in holding that the trial judge's directions to the jury in respect of Associate Professor Shackel's evidence were adequate and did not occasion a miscarriage of justice.

## **THE KING v HATAHET (S37/2024)**

Court appealed from: Court of Criminal Appeal of the Supreme Court of  
New South Wales  
[2023] NSWCCA 305

Date of judgment: 29 November 2023

Special leave granted: 7 March 2024

In May 2021, the respondent pleaded guilty in the New South Wales Local Court to a charge that between September and December 2012 he had engaged in a hostile activity in a foreign State (Syria), contrary to section 6(1)(b) of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth). He was committed to sentence in the District Court where he was sentenced to imprisonment for five years, with a non-parole period of three years, commencing on 24 August 2020. The head sentence was to expire on 23 August 2025. The respondent sought leave to appeal against his sentence in the Court of Criminal Appeal (“the CCA”). By the time of the hearing, he had in fact been refused parole. The respondent was refused parole on the basis the Attorney-General of the Commonwealth was satisfied that s 19ALB of the *Crimes Act 1914* (Cth) (“the Crimes Act”) was engaged and that no exceptional circumstances had been established. Section 19ALB provides that, absent special circumstances, parole must be refused to a person convicted of an offence involving terrorist acts.

The CCA (Basten AJA, Davies & Cavanagh JJ agreeing) allowed the appeal. Basten AJA found specific error in the sentence which resulted in a conclusion of manifest excess. The specific error was said to concern “the effects of s 19ALB”. “The expectation (now a reality) that parole would be refused” is the “application of s 19ALB” which the sentencing judge should have, but did not, take into account as a factor mitigating sentence because it contributed to a more onerous experience of imprisonment for the respondent. Basten AJA concluded that apart from the specific error the sentence was not manifestly excessive.

The appellant submits that the CCA erred in three ways. First, in finding that the likelihood or unlikelihood of being granted parole is relevant to the sentencing task under s 16A(1) and (2) of the Crimes Act. Secondly, even taking into account s 19ALB and the more onerous hurdle it establishes before parole can be granted, a sentencing judge could not be sufficiently confident about prospects of parole in the future to place weight on this at sentence. Thirdly, Basten AJA’s analysis undermines the legislative intention in enacting s 19ALB of the Crimes Act. The respondent submits that there was no error by the CCA.

The grounds of appeal are:

- The CCA erred in concluding that the sentencing judge committed an error in principle in not considering s 19ALB of the Crimes Act in sentencing the respondent.
- The CCA erred in concluding that the expectation and/or fact that parole would be refused due to s 19ALB of the Crimes Act warranted the imposition of a lesser sentence than that imposed by the sentencing judge.

## **COOK (A PSEUDONYM) v THE KING (S158/2023)**

Court appealed from: Court of Criminal Appeal of the Supreme Court of  
New South Wales  
[2022] NSWCCA 282

Date of judgment: 15 December 2022

Special leave granted: 21 November 2023

The appellant was charged with 17 sexual offences against the complainant (who was the niece of the appellant's wife). The complainant lived with the appellant and his wife at the time of the alleged offences between 2011 and 2014 when she was between eight and twelve years old. The complainant first reported these allegations in 2017 to the appellant's wife. The appellant sought a pre-trial ruling in the District Court of New South Wales as to the admissibility of evidence relating to complaints made by the complainant against another person ("the QLD offender") of sexual offences ("the QLD offences"), which occurred prior to the complainant coming to live with the appellant and his wife. (The QLD offences had occurred between 2008 and 2009 and the complainant's disclosure – including to the appellant and his wife – and reporting of the QLD offences in 2010 led to the complainant being placed with the appellant and his wife, as well as the prosecution of the QLD offender in 2013). The appellant submitted that the fact and timing of the reporting of the QLD offences was significantly probative to his trial defence. The Crown acknowledged that this evidence was relevant, but not highly probative. The appellant sought leave to cross-examine the complainant about the fact of the reporting of the previous sexual assaults and the QLD proceedings, but not to examine the finer details of the sexual offending itself. It was common ground that the QLD evidence was covered by the prohibition in section 293(3) of the *Criminal Procedure Act 1986* (NSW) ("the CPA Act"), but the appellant sought to argue that it fell within the exemption in s 293(4), which provides:

(4) *Subsection (3) does not apply:*

(a) *if the evidence:*

- (i) *is of the complainant's sexual experience or lack of sexual experience, or of sexual activity or lack of sexual activity taken part in by the complainant, at or about the time of the commission of the alleged prescribed sexual offence, and*
- (ii) *is of events that are alleged to form part of a connected set of circumstances in which the alleged prescribed sexual offence was committed,*

(b) *if the evidence relates to a relationship that was existing or recent at the time of the commission of the alleged prescribed sexual offence, being a relationship between the accused person and the complainant,*

...

*and if the probative value of the evidence outweighs any distress, humiliation or embarrassment that the complainant might suffer as a result of its admission.*

The trial judge refused the appellant's application on the basis that such a course was prohibited by subsections (2) & (3) of s 293 of the CPA Act and did not fall within an exception in subsection (4). In view of this ruling, it was agreed that defence counsel could, as he then did, examine the complainant on the premise that there had been a series of "physical assaults" on her, and that some of the offending happened "in the midst of...legal proceedings in relation to the [QLD] matter", which were "very important to [her] at the time."

The appellant was found guilty by the jury of all 17 charged counts. He appealed his conviction on the grounds, inter alia, that the trial judge erred in excluding the evidence of the QLD offences (appeal ground 3) or that the trial otherwise miscarried by reason of its exclusion (appeal ground 1). His appeal was successful on an unrelated ground and a re-trial was ordered. The Court of Criminal Appeal ("the CCA") determined the issues raised by appeal ground 3 as this was determinative of whether the evidence of the QLD offences would be admissible on any re-trial and if not, whether a re-trial should be ordered. By majority (Adamson J & Bellew J, Beech-Jones CJ at CL dissenting) the CCA found that the evidence of the QLD offences was correctly excluded but for reasons different to the trial judge. The majority held that the inadmissibility of the QLD offences was not capable of causing a "fundamental defect" in the appellant's trial as its benefit to the appellant was not unequivocal, and so a re-trial was ordered.

The appellant submits that the majority erred with respect to the meanings and application of "*sexual experience*", "*events...alleged to form part of a connected set of circumstances*", and "*relates to a relationship*". The appellant submits that Beech-Jones CJ at CL's findings (in dissent) as to those terms should be accepted. Further, the appellant submits that excising the fact that the QLD offences were sexual (rather than physical) offences not only deprived the appellant of probative evidence but rendered the evidence positively misleading.

The grounds of appeal are:

- The CCA erred in its construction of s 293(4) of the CPA Act.
- The CCA erred in holding it permissible to mislead a jury in order to attempt to counteract unfairness occasioned by the exclusion of the s 293 evidence.
- The CCA erred in ordering the Appellant be retried.