IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A9 of 2018

BETWEEN:

IAN DOUGLAS JOHNSON
Appellant

and

THE QUEEN
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

1. INTRODUCTION

(1) Over objection the appellant was tried with 5 counts spanning approximately 20 years commencing with an allegation of indecent assault at the instigation of his brother in the company of others as a young child (the 'shearing shed incident' which comprised count 1) {AS [8]-[10]}.

(2) The CCA held that the convictions on counts 1 and 3 were unsafe and an acquittal should be entered {CCA [100] CAB186, CCA [116] CAB194}, but otherwise dismissed the appeal on the other counts finding **no inconsistency** between upholding those verdicts and entering acquittals on the others, and concluding the evidence the subject of the impugned counts would have been admissible in any event {CCA [21] CAB157, [120]-[121] CAB195}, {AS [34]-[39]}.

(3) Even if evidence relating to the impugned counts might have been led as an uncharged act, there was prejudice to the appellant, and a miscarriage of justice, by reason that the appellant was charged with and (wrongly) found guilty of those counts in the course of a joint trial of all charges.

(4) Because the shearing shed incident was the subject of a charge, the question whether the appellant was, by a very young age, consciously engaging in seriously wrong conduct, became a focal point in the trial, and invited attention to alleged misconduct by the appellant at an even younger age. The CCA held the jury erred in its consideration of that issue but did not consider whether the appellant was prejudiced as a consequence.

(5) In any event, the evidence of and preceding count 1, and the evidence relating to count 3, could not satisfy the requirements of s 34P of the *Evidence Act* had it been led as evidence of uncharged acts in proof of the other counts. It lacked the probative value to "substantially outweigh" the prejudicial effect.

2. ASPECTS OF THE EVIDENCE

(1) The counts apart from count 1 were uncorroborated. A number of relevant witnesses were deceased or unavailable {AS [19]}.

(2) VW gave evidence of numerous complaints {AS [18]}.

(3) There was significant delay between the subject matter of the allegations and the trial. There was evidence of a significant family breakdown culminating around the time VW made a formal complaint to police {AS [16]}.

(4) There was a qualitative difference between the context and nature of the allegations comprising and predating count 1, and the later counts.

(5) Count 1 assumed significance at the trial and was relied upon (together with the earlier uncharged acts) by the prosecution as the start of a horrific and persistent pattern of conduct {AFM.409, AFM.415-416}.

3. MISCARRIAGE OF JUSTICE {AS [40]-[55], Reply [4]-[14]}

(1) The concept of a miscarriage of justice (s 353(1) CLCA) is broad and includes where there is some feature of the case raising a substantial possibility that, either in the conclusion itself, or in the manner in which it has been reached, the jury may have been mistaken or misled: *Davies & Cody v The King* (1937) 57 CLR 170 at 180, {AS [41]-[45], Reply [7]}.

(2) It is not necessary to identify an error of law by the trial judge. The test is backward-looking, particularly in the context of a trial of multiple counts: *R v Demirok* [1976] VR 244, *R v Collie* (1991) 56 SASR 301, {AS [44], Reply [7]}.

(3) The appellant faced a trial on charges in respect of which the evidence was not sufficient to sustain a conviction, and in respect of which the jury erred in their consideration of the evidence.

(4) Further, in respect of count 1, the jury had to confront what was in truth a false, but prejudicial issue, namely, whether the appellant as a young child knew it was seriously wrong to engage in sexual conduct with his younger sister but did so nevertheless. In their deliberations on count 1 the jury necessarily rejected the appellant's credibility and made a damning assessment of his character, in circumstances where the prosecution case was that this was the start of a persistent pattern.

(5) It is unrealistic to think that in being called upon to decide guilt on count 1, and erring in their assessment of the appellant's moral culpability in respect thereof, there was not a risk that the whole complexion of the trial was affected.

(6) This was plainly not a case where the evidence on the other counts was overwhelming or where the jury would have approached proof of each count as an entirely discrete exercise, cf. *Bounds v The Queen* (2006) 226 ALR 190, {AS [55]}.

4. CROSS-ADMISSIBILITY {AS [56]-[73], Reply [16]-[19]}

Count 1

(1) The evidence of acts prior to count 1 led to rebut the presumption of *doli incapax* lacked an independent relevance to counts 2, 4 and 5, {AS [57], CCA [33] CAB163}.

(2) In so far as the CCA considered count 1 was relevant as demonstrating "sexual attraction", this would have engaged, but could not have satisfied, the requirement in s 34P(2)(b) of "strong probative value". The conduct of a young child in the company of others acting at the instigation of another is incapable of demonstrating a sexual interest relevant to the commission of offences many years later, {AS [62]-[64]}.

(3) In so far as the CCA considered count 1 may have been relevant as demonstrating "relationship", the actual content of that concept in the circumstances of the case was not identified and:

   (a) there was no analysis of the capacity of the evidence to contribute to the proof of each of counts 2, 4 and 5 (cf. *Hughes v R* (2017) 344 ALR 187 at [41], [216]), {AS [65]-[70]};

   (b) there was no actual consideration of whether any permissible use substantially outweighed any prejudicial effect (s 34P(2)(a)), nor any consideration of s 34P(3) (cf. *Sokolowskyj v R* (2014) 239 A Crim R 528 at [53]), {AS [69], [71], Reply [17]}.

(4) This was not a case where evidence relating to and preceding count 1 cast any significant light, or had the capacity to support the complainant's credibility, with respect to the circumstances of counts 2, 4 or 5, {AS [70], Reply [18]}.

(a) Apart from count 1 there were multiple allegations and uncharged acts, so that the "out of the blue" consideration was not a significant one (cf. *Roach v The Queen* (2011) 242 CLR 610), nor would it have been artificial for VW's account to have commenced after the circumstances of count 1 (which were of a different character to the later allegations).

(b) The evidence relating to count 1 did not in any material respect cast light on or make less improbable the complainant's account of her behaviour; there was no need to explain a lack of complaint or submission on her part (cf. the scenario posited by Gleeson CJ in *HML v The Queen* (2008) 235 CLR 334 at [6]), and the posited relevance to count 2 {RS [62]-[63]} was not the subject of evidence from VW or a submission by the prosecutor at trial.

(c) Acts committed in the presence of others during childhood which are not known to be seriously wrong cast little if any light on any relevant 'relationship' between two adults decades later; nor was that 'relationship' a relevant fact in issue or a matter calling for explanation: cf. a domestic violence case where some explanation may be called for as to how one spouse could commit a violent act on the other or why the victim stays in the relevant relationship.

(d) Nor can it be supposed that had the evidence relating to and preceding count 1 not been led defence counsel would have taken some unfair forensic advantage in attacking VW's credibility. The position as to complaints was governed by s 34M.

(5) There was a substantial risk of prejudice arising from the evidence relating to and preceding count 1, {AS [71], Reply [19]}.

(a) There was a risk, which could not be removed by directions, of propensity reasoning (and overestimation of weight).

(b) There was a risk that the jury might be so horrified by the shed incident and react to it on an emotional basis without being able to contextualise the (alleged) conduct of the elderly appellant as a 10 year old child in the company of others.

(c) There was significant forensic prejudice in seeking to meet allegations of conduct committed many decades earlier, let alone seeking to draw upon memories of matters of detail from one's early childhood.

(d) There was a risk of the jury failing to have due regard to the likely frailties in the (internally inconsistent) accounts of Des Flavel and VW in relation to the shed incident.

(6) The authorities relied upon by the respondent (*R v DM* [2016] EWCA Crim 674, *R v H* [2010] EWCA Crim 312, *DPP v Peter Martin* [2016] VSCA 219) do not foreclose that acts committed whilst a defendant is a child may lack sufficient probative value to justify their admission.

Count 3

(7) The evidence relating to count 3 was so general it could not prove the offence. Accordingly, it had all the risks associated with propensity evidence, and lacked the probative value to justify its admission with respect to other counts (*IMM v The Queen* (2017) 257 CLR 300 at [62]-[63]), {AS [72]-[73]}.

M E Shaw QC **B J Doyle**
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