IN THE HIGH COURT OF AUSTRALIA

PERTH REGISTRY

No. A9 of 2018

BETWEEN:

IAN DOUGLAS JOHNSON

Appellant

and

THE QUEEN

Respondent

10 RESPONDENT'S OUTLINE OF ORAL ARGUMENT

Part I:

The respondent certifies this outline is in a form suitable for publication on the internet.

Part II:

1. The specific nature of the miscarriage alleged by the appellant must be identified. This will inform the consequences.

Admissibility of evidence relating to Count 1 and the acts preceding it

2. The primary issue at the trial was the complainant's credibility. It was said by the appellant that the complainant had fabricated all of the allegations because she was bitter about the manner in which the family estate had been divided **(AFM 211)**.

20 3. Evidence is relevant if it meets questions which might naturally arise in the minds of the jury and which if left unanswered may be expected to reflect adversely upon a witnesses credibility or reliability. Ideas of normal or predictable behaviour will inform the jury's evaluation of a witness **(RS [60] and CAB 59)**.

BBH v The Queen (2012) 245 CLR 499 [150] per Crennan and Kiefel JJ **(JBA 237)**.
Roach v The Queen (2011) 242 CLR 610 [42] per French CJ, Hayne, Crennan and Kiefel JJ **(JBA 889)**.
HML v The Queen (2008) 235 CLR 334 [6] per Gleeson CJ **(JBA 385)**.

4. The absence of the impugned evidence would have resulted in the complainant's evidence as regards count 2 (and later counts) appearing to the jury as implausible and
30 contrary to human experience.

5. As to count 2, questions of the following nature were obvious: why would the complainant physically fight back during the incident and yet wait in the car for his return, why would the complainant not seek out someone in the town for help immediately afterwards or complain to her oldest brother when she was driven home or her parents when she arrived home and why wasn't the complainant surprised at what had occurred?

Office of Director of Public Prosecutions
Level 7
45 Pirie Street
Adelaide SA 5000

Telephone: (08) 8207 1529
Fax: (08) 8207 1799
Email: ian.press@sa.gov.au
Ref: Ian Press SC

6. As regards the appellant's actions, the following questions naturally arose: why would the appellant think he could demand sex from his sister without any forewarning, why would the appellant brazenly risk leaving her in the car when he returned to the hotel and why would he take the risk she would not inform their parents.

7. It was open for the jury to find the complainant's account was credible when regard was had to what had occurred previously, the length of time over which it occurred and the apparent unwillingness of her parents, from a very young age, to stop the appellant's offending. The complainant gave evidence that "nothing changed" after talking to her parents about earlier incidents **(RS [13])**.

10 8. The appellant submits the above reasoning is not reflected in the closing address of the prosecutor **(AR [18(3)])**. This submission fails to have regard to the uses of the evidence left to the jury **(CAB 85)**, the address of the prosecutor at AFM 415 and most significantly, the fact that "*when jurors evaluate the evidence of a complainant they are not limited to considering arguments advanced by the lawyers.*"

HML v The Queen 235 CLR 334 [9], per Gleeson CJ **(JBA 386)**.

9. The ability of the evidence to answer the questions and the significance of those answers to the issues at the trial informs its probative value. As the evidence was directly relevant to an assessment of the complainant's account on the charged incidents, it was highly probative.

20 *Roach v The Queen* (2011) 242 CLR 610, 624 [42 and 46], per French CJ, Hayne, Crennan and Kiefel JJ (**JBA 889-890**).

10. The fact the appellant did not know that his acts at the time of count 1 and before were seriously wrong, did not undermine the ability of the evidence to inform his or her subsequent behavior. The temporal connection between the acts remained strong. The evidence also did not give rise to a "heightened" risk of prejudice.

R v H [2010] EWCA Crim 312 **(JBA 799)**.
R v M (D) [2016] EWCA Crim 674 **(JBA 793)**.
DPP v Peter Martin (a pseudonym) (2016) 261 A Crim R 538 [112] **(JBA 350)**.

30 11. The evidence of the acts prior to count 1 are admissible for the same reasons.

12. Contrary to the appellant's submission at **(AR [18(4)(b)])** the cross-examination by the appellant and the matters raised in closing argument are instructive. Both attempted to exploit the type of questions raised above **(RS [67]).**

13. The prejudice was no different to that which may arise whenever more than one act is alleged. The directions cured the risk of this prejudice. SU8 **(CAB 38)**, SU36 **(CAB 66)**, SU54-55 **(CAB 83-85)**, SU57 **(CAB 87)**.

If the aforementioned evidence is admissible, has a miscarriage of justice nonetheless occurred as regards the trial on counts 2, 4 and 5 because count 1 was left to jury?

14. In a trial where credibility is the central issue, there is a significant difference between the possible risks occasioned by a misdirection on a crucial topic, and a jury's erroneous finding that conduct was known to be seriously wrong in circumstances where the later charged conduct was committed several years later.

    Collins v The Queen [2018] HCA 18 [36], per Kiefel CJ, Bell, Keane, Gordon JJ **(JBA 293)**.

15. To determine whether there has been a miscarriage as regards counts 2, 4 and 5 it is necessary to consider whether there is a risk that the jury reasoned improperly to guilt on the other counts by reason of their finding that the appellant knew the conduct was seriously wrong.

16. There is no logical or obvious reason why a finding that the appellant knew the conduct was seriously wrong would have caused the jury to reason improperly as to the other counts or that it would have otherwise deflected the jury from its task.

17. The two "improper" risks relied upon by the appellant are stated at **(AR [14(1)] and [(2)])**. Neither stands scrutiny. As to the first risk, such reasoning would have been contrary to the numerous warnings given to the jury not to reason in such a matter. Further, it encouraged an assessment of his state of mind, not his character. Such state of mind was no different to any of the other counts alleged when he was older. Insofar as it is suggested it encouraged "an assessment of the appellants conduct", it is not clear how this could have been potentially prejudicial. As to the second risk, its probative value was always only to explain his confidence, her failure to complain and that any subsequent act did not come out of the blue. These uses were not adversely impacted by a finding that he knew the conduct was seriously wrong.

18. That the jury considered and determined beyond reasonable doubt that count 1 occurred could not have caused a miscarriage of justice on the other counts. There was no risk such a finding could be used improperly **(CAB 195 at [120-122])**.

Re Count 3

19. The appellant does not explain why allegations of sexual abuse which are general in nature may not inform the subsequent behaviour of both the complainant and the appellant. Its generality does not rob it of its probative value when it assists the jury to understand their later conduct.

Dated: 19 June 2018

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Ian Press SC