

BETWEEN:



DL
Appellant

and

THE QUEEN
Respondent

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APPELLANT'S OULINE OF ORAL ARGUMENT

1. Introduction and essential submissions

(1) In light of the respondent's position {RS [14], [23]}, the issue is whether the trial judge's reasons make apparent the two or more of the alleged acts of sexual exploitation he found proved beyond reasonable doubt.

(2) Contrary to the respondent's submissions {RS [15], [27]-[30]}, a fair and holistic reading of the reasons for verdict does not make apparent that the judge found that all of the alleged sexual offences were found proved {AS [49]-[53], Reply [11]-[22]}.

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(a) The judge directed himself he did not need to find all acts proved and his reasons suggest he did not (eg, TJ [7] AB345, [61], [64]-[66], AB354-355).

(b) In view of the accepted inaccuracies and the unreliability of aspects of the complainant's evidence, it is unlikely that in finding the "core allegations" reliable, the judge accepted that all of the alleged sexual offences occurred.

(c) The judge did not identify the elements of sexual offences or analyse the evidence relevant to individual offences and explain the path of reasoning to guilt in respect of them. The reasons are inadequate to explain how each and every allegation was found proved.

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(3) The appellant submits that the reasons are inadequate because:

(a) they do not contain a finding as to the actus reus of an offence against s 50 of the *Criminal Law Consolidation Act 1935* (SA); and/or

(b) they do not exclude the possibility that the judge misdirected himself by failing to appreciate the need to find two or more of the allegations of sexual offences proved beyond reasonable doubt (which misdirection would result in a miscarriage);

- (c) if the reasons were intended to constitute a finding that each and every allegation of a sexual offence was found proved the reasons are manifestly inadequate in explaining the basis for that conclusion in light of the particular forensic issues that related to particular allegations.

2. **The allegations of acts of sexual exploitation and the forensic issues at trial**

- 10 (1) The charged particulars (AB6).
- (2) The timing of the allegations culminating in an admitted sexual assault committed by the complainant upon the appellant's daughter {AS [5]-[7]}.
- (3) The absence of any contemporaneous complaint and the complainant's knowledge of victims of crime compensation {AS [7]-[9]}.
- (4) The failure of the complainant to confront the appellant {AS [9]}.
- (5) The complainant's evidence as to when the conduct the subject of the allegations progressed to oral sex and the significance of the construction of a slot car track in 'Shed 2' {AS [12](4)}.
- (6) Forensic issues relating to other classes of allegations {AS [12]-[14]}.

3. **The trial judge's reasons {AS [15]-[23], Reply [11]-[22]}**

- 20 (1) The trial judge directed himself that he did not need to find each and every allegation proved: TJ [2], TJ [7] AB345, TJ [64] AB354.
- (2) The trial judge treated the real issue as being whether, in a general sense, the complainant, as distinct from the appellant, was a truthful and reliable witness: TJ [6] AB345, TJ [67] AB355, TJ [73] AB356.
- (3) Given the trial judge's doubts about important aspects of the evidence which would need to have been overcome in some way (TJ [61] AB354, TJ [64] AB354) the trial judge's acceptance of the complainant as to "core allegations" (TJ [66] AB355) cannot be understood as an acceptance of each and every allegation.
- (4) Accordingly, either the trial judge did not record which two or more allegations were found proved, or did not in fact make findings by reference to any particular allegations.

30 4. **The Court of Criminal Appeal's reasons**

- (1) Grounds of appeal (AB370).
- (2) The appeal grounds were disposed of without regard to the fact that the actus reus of the composite offence involved proof of two or more acts of sexual exploitation amounting to sexual offences {AS [25]-[28]}.

- (3) The unreasonable verdict ground {AS [29]-[31]}.
- (4) The inadequate reasons ground {AS [32]-[37]}.

5. **Relevant principles require the appeal to be allowed**

- (1) Proof of the s 50 offence required proof of two or more sexual offences, and not the resolution of a general issue as to whether the complainant, as distinct from the accused, was generally to be preferred as truthful or reliable: *Chiro v The Queen* (2017) 347 ALR 546; [2017] HCA 37 at [22], [37], cf. *Hamra v The Queen* (2017) 347 ALR 586; [2017] HCA 38 at [28], [46], {AS [39]-[45]}.
- 10 (2) The requirement to give reasons in a trial by judge alone required the reasons to show that the correct principles or issues had been identified and applied, the relevant factual findings, and the reasons for them: *Fleming v The Queen* (1998) 197 CLR 250 at [30], *AK v Western Australia* (2008) 223 CLR 438 at [111], *Douglass v The Queen* (2012) 86 ALJR 1086; [2012] HCA 34 [14], {AS [46]-[48], Reply [18], [20]-[22]}.
- (3) Because the reasons suggest (or at least do not exclude) that the trial judge did not make findings beyond reasonable doubt as to two or more particular acts of sexual exploitation, not only are the reasons inadequate but the verdict was unsafe and/or there was a miscarriage of justice.
- 20 (4) Indeed, were it to be concluded that the judge resolved each and every allegation against the appellant, without much more detailed reasons addressing the particular forensic issues that impinged upon particular allegations, there would inevitably be a failure to give proper reasons {Reply [20]-[22]}.
- (5) No issue of the application of the proviso has been or could be raised having regard to the fundamental nature of the requirement to give reasons and the extent to which guilt turned on an assessment of the witnesses {AS [66]-[68]}.

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