IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A38 of 2017

BETWEEN:

DL
Appellant

and

THE QUEEN
Respondent

RESPONDENT'S SUBMISSIONS

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Part I: INTERNET PUBLICATION

1. This submission is in a form suitable for publication on the internet.

Part II: ISSUES ON APPEAL

2. The sole ground in the Notice of Appeal and on which special leave to appeal was granted is premised on the asserted failure of the trial judge to identify the particular sexual offences, separated by at least three days, which were found proved.[1] Contrary to the appellant's submission, this appeal does not raise for consideration whether the trial judge's reasons for verdict were inadequate because they *"did not identify...the process of reasoning leading to guilt..."*.[2] The appellant had complained before the Court of Criminal Appeal that the trial judge's reasons were inadequate for failing to *"deal with incontrovertible, or arguably incontrovertible, inconsistencies affecting the credibility of the complainant and consequently his conclusion beyond reasonable doubt"*. Special leave to appeal to this Court was not sought (or granted) in respect of that ground.

3. The disposition of this appeal turns upon whether, in the particular circumstances of this case, the acts of sexual exploitation of which the trial judge was satisfied beyond reasonable doubt are apparent from his Honour's reasons.

4. Two other issues are raised by the appellant's grounds of appeal, although neither is capable of being supported by the complaint of error in failing to identify *"the particular sexual offences... which were found proved"*:

    i. The first is whether, in a trial by judge alone for an offence against s 50(1) of the *Criminal Law Consolidation Act 1935* (SA) (***CLCA***), a failure on the part of the trial judge to identify in his or her reasons the acts of sexual exploitation which were found proved beyond reasonable doubt, renders any guilty verdict so returned legally uncertain.

    ii. The second is whether such a failure in a trial judge's reasons is capable of rendering the guilty verdict *"unsafe"* or *"unreasonable"*.

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[1] Appellant's Notice of Appeal at [2].
[2] AS [2](1).

Part III: SECTION 78B NOTICE

5. Notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) need not be given.

Part IV: SUMMARY OF CONTESTED FACTS

6. The respondent contests the appellant's submission at AS [22] to the effect that the trial judge's criticism of the appellant's *"presentation"* was *"tempered"* by his recognition of the disadvantages faced by the appellant. The trial judge's observations about the accused's evidence at TJ [69] were made *notwithstanding* the matters taken into account at TJ [70]-[72]. The trial judge variously found the accused's answers on some topics to be *"glib and evasive"*, *"understating"* of the complainant's interest in slot cars, which was relevant to the opportunity for sexual misconduct, and *"quite evasive"* on the aspect of the charge that incorporated showing the complainant adult pornography.

7. With respect to AS [26], neither *"the reasonableness of the verdict by reference to proof of two or more particular acts of sexual exploitation"*, nor *"the adequacy of the judge's reasons in identifying the basis upon which he was satisfied beyond reasonable doubt of two or more such acts"*, formed the subject matter of any ground of appeal before the Court of Criminal Appeal.

Part V: LEGISLATIVE PROVISIONS

8. The appellant's statement of applicable legislative provisions is accepted.

Part VI: RESPONDENT'S ARGUMENT

Persistent sexual exploitation of a child: s 50(1) CLCA

9. The appellant appeals against his conviction for an offence of persistent sexual exploitation of a child, contrary to s 50(1) of the *CLCA* as in force at the time of his trial.[3]

10. An offence against s 50(1) is committed where an adult, *"over a period of not less than 3 days, commits more than 1 act of sexual exploitation of a particular child*

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[3] Section 50 has since been substituted: see s 6, *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA). References in these submissions to s 50 CLCA are references to the provision as it existed before its substitution by that amending Act on 23 October 2017.

under the prescribed age".[4] *"[A] person commits an act of sexual exploitation of a child if the person commits an act in relation to the child of a kind that could, if it were able to be properly particularised, be the subject of a charge of a sexual offence".*[5]

11. So defined, s 50(1) creates *"but one single offence".*[6] However, that offence is constituted of *"underlying acts of sexual exploitation",*[7] rather than of *"maintaining an unlawful sexual relationship".*[8] It is for that reason that a jury may only return a guilty verdict for an offence against s 50(1) if the jury unanimously agrees (or, after four hours, agrees by a requisite statutory majority[9]) that the *same* two or more underlying acts of sexual exploitation have been proved beyond reasonable doubt.[10]

12. The *"evident purpose"* of the provision is *"to permit the prosecution of offenders in cases in which the pattern of abuse is such that the child is unable to differentiate one act of sexual exploitation from another".*[11] To this end, the provision modifies the common law requirements for particularity, both in the charging of the offence and in its proof.[12] Although the provision requires a jury to find the same two or more acts committed over three or more days, *"it does not require the occasions of those acts to be particularised other than as to the period of the acts and the conduct constituting the acts".*[13] Importantly, the evidence relied upon on a charge under s 50 need not allow acts of sexual exploitation *"to be delineated by reference to differentiating circumstances".*[14]

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[4] Section 50(1), *CLCA*. The *"prescribed age"* is defined for the purposes of s 50 in subs 50(7) and relevantly, for this case, is 17 years.
[5] Section 50(2), *CLCA*. The term *"sexual offence"* is defined for the purposes of s 50 in subs 50(7).
[6] *Chiro v The Queen* (2017) 91 ALJR 974 at [44] (Kiefel CJ, Keane and Nettle JJ); see also *Hamra v The Queen* (2017) 91 ALJR 1007 at [26] (the Court).
[7] *Chiro v The Queen* (2017) 91 ALJR 974 at [19], [39]-[40], [42], [44], [51]-[52] (Kiefel CJ, Keane and Nettle JJ).
[8] See *KBT v The Queen* (1997) 191 CLR 417 at 422 (Brennan CJ, Toohey, Gaudron and Gummow JJ), referred to with approval in *Chiro v The Queen* (2017) 91 ALJR 974 at [19]-[20] (Kiefel CJ, Keane and Nettle JJ).
[9] See s 57, *Juries Act 1927* (SA).
[10] *Chiro v The Queen* (2017) 91 ALJR 974 at [19] (Kiefel CJ, Keane and Nettle JJ); *R v Little* (2015) 123 SASR 414 at [11], [19] (the Court); see also *Hamra v The Queen* (2017) 91 ALJR 1007 at [28] (the Court).
[11] *Chiro v The Queen* (2017) 91 ALJR 974 at [57] (Bell J); see also *Hamra v The Queen* (2017) 91 ALJR 1007 at [23]-[26] (the Court); South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 25 October 2007 at 1474 (the Hon M J Atkinson, Attorney-General).
[12] *Hamra v The Queen* (2017) 91 ALJR 1007 at [27]-[28], [33] (the Court).
[13] *Hamra v The Queen* (2017) 91 ALJR 1007 at [27] (the Court); see s 50(4), *CLCA*.
[14] *Hamra v The Queen* (2017) 91 ALJR 1007 at [45], see also at [33], [46] (the Court).

Summary of contentions

13. The sole complaint on appeal is that the Court of Criminal Appeal erred in failing to hold that the trial judge's reasons did not identify the particular acts of sexual exploitation found to have been proved beyond reasonable doubt.[15] Three consequences are said to flow from this: first, that the guilty verdict is *"uncertain, unreasonable and unsafe"*;[16] second, that the trial judge's reasons were inadequate as a matter of law;[17] and third, (but apparently merely consequent upon the first or second) that there has been a miscarriage of justice.[18]

14. The respondent accepts that in the appellant's trial for an offence against s 50(1) *CLCA*, the acts of sexual exploitation of which the trial judge was satisfied beyond reasonable doubt must be apparent. However, if those acts were not apparent, the guilty verdict would not be bad for uncertainty, nor would it be rendered, on that basis, unreasonable or unsafe. Rather, that state of affairs would reveal the trial judge's reasons to be inadequate in this case as a matter of law, and in such a way as to give rise to a miscarriage of justice.

15. An assessment of whether the trial judge's reasons are adequate in this respect, requires that his Honour's reasons be considered in their entirety, with due regard had to the nature of the contest and evidence at the appellant's trial. So considered, it is not open to doubt that the acts of sexual exploitation accepted beyond reasonable doubt by the trial judge were *all* of the acts of sexual exploitation alleged by the complainant in his evidence. That being so, his Honour's reasons cannot be said to be inadequate for failing to identify the acts of sexual exploitation his Honour found proved.

16. The appellant's submissions to the effect that his Honour's reasons disclose some error in the process of reasoning to guilt[19] are not supported by a ground of appeal.

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[15] Appellant's Notice of Appeal at [2]; *DL v The Queen* [2017] HCATrans 215 at lines 13-18.
[16] Appellant's Notice of Appeal at [2.2].
[17] Appellant's Notice of Appeal at [2.1].
[18] Appellant's Notice of Appeal at [2.3].
[19] See AS [34], [38(2)-(5)], [51], [52]-[53], [55], [56], [57], [60], [61].

Uncertain, unreasonable or unsafe

17. Whilst ignorance as to the acts of sexual exploitation found by the trial judge to be proved beyond reasonable doubt may found a complaint of inadequate reasons, it is incapable of rendering the verdict legally uncertain, or relevantly *"unreasonable and unsafe"*.

18. In *Chiro v The Queen*,[20] the appellant contended that his guilty verdict for an offence against s 50(1) *CLCA* was uncertain because the jury had not specified which of the alleged acts of sexual exploitation they had found proved beyond reasonable doubt.[21] That submission was unanimously rejected by this Court.[22] If a guilty verdict for an offence against s 50(1) is certain notwithstanding the absence of any articulation by the jury of the particular acts found proved beyond reasonable doubt, then so is it certain where a judge alone provides no such articulation.

19. The minimum features necessary to supply certainty in respect of a verdict derive from the nature of the offence to which the verdict pertains, the manner in which that offence was charged, the evidence adduced at trial and the footing upon which the trial was conducted by the parties.[23] The *mode* of trial – whether it proceeds before a jury or judge sitting alone – is logically unconnected to those requirements for certainty. Merely altering the mode of trial cannot heighten or reduce the minimum features necessary to render a verdict certain.

20. As to the allegation that a shortcoming in the comprehensiveness of the trial judge's reasons has rendered his guilty verdict *"unreasonable and unsafe"*; the former is not rationally capable of impacting the latter. Where a verdict is said to be unreasonable or unsafe, the question for the appellate court is whether it considers that, upon the whole of the evidence, it was open to the trial judge to be satisfied beyond reasonable doubt of guilt.[24] That question is to be answered by the appellate court

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[20] (2017) 91 ALJR 974.
[21] See *Chiro v The Queen* (2017) 91 ALJR 974 at [25] (Kiefel CJ, Keane and Nettle JJ).
[22] *Chiro v The Queen* (2017) 91 ALJR 974 at [46] (Kiefel CJ, Keane and Nettle JJ), [59] (Bell J), [82] (Edelman J).
[23] See *WGC v The Queen* (2007) 233 CLR 66 at [112]-[139] (Hayne and Heydon JJ); [168]-[170] (Crennan J); see also *Johnson v Miller* (1937) 59 CLR 467 at 488-490 (Dixon J).
[24] *Libke v The Queen* (2007) 230 CLR 559 at [112]-[113] (Hayne J, Gleeson CJ agreeing at [1], Heydon J agreeing at [117]); *M v The Queen* (1994) 181 CLR 487 at 493 (Mason CJ, Deane, Dawson and Toohey JJ); *Fleming v The Queen* (1998) 197 CLR 250 at [46] (the Court); *R v Hore* [2010] SASCFC 60 at [4] (Gray J, White J agreeing); see also *AK v The Queen* (2008) 232 CLR

undertaking its own review of the trial evidence,[25] and drawing its own conclusions about that evidence, making due allowance for the advantages possessed by the trial judge.[26] Even were the appellant to make good his allegation that the trial judge's reasons in this case failed to identify the acts of sexual exploitation he found proved beyond reasonable doubt, that fact of itself would be incapable of rendering the verdict unreasonable or unsafe in the relevant sense.

Adequate reasons

The obligation in this case: Identifying the acts of sexual exploitation found proved

21. The appellant's trial proceeded before a judge sitting without a jury pursuant to s 7 of the *Juries Act 1927* (SA). Unlike the statutes of some other States,[27] the *Juries Act 1927* (SA) does not prescribe any express statutory requirements as to the content of the reasons for verdict of a trial judge so sitting. Nevertheless, ordinary common law principles apply regarding the existence of an obligation to give reasons, the rationale underpinning that obligation, and the impact of that rationale upon the scope of the obligation in a given case.[28] A trial judge sitting without a jury has an obligation to give reasons for the verdict he or she reaches, and a failure to comply with that obligation may constitute an error of law.[29]

22. It is common ground between the parties that the trial judge possessed such an obligation in this case. Recalling that an offence against s 50(1) *CLCA* is constituted of underlying acts of sexual exploitation,[30] as much follows in this case from the uncontroversial proposition that *"a judge returning a verdict following a trial without*

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438 at [18]-[22] (Gleeson CJ and Kiefel J), [65], [82] (Heydon J, Gummow and Hayne JJ agreeing at [38]).

[25] *M v The Queen* (1994) 181 CLR 487 at 492 (Mason CJ, Deane, Dawson and Toohey JJ); *Fleming v The Queen* (1998) 197 CLR 250 at [46] (the Court).

[26] *M v The Queen* (1994) 181 CLR 487 at 493 (Mason CJ, Deane, Dawson and Toohey JJ).

[27] See, eg, *Criminal Procedure Act 1986* (NSW), s 133(2); *Criminal Procedure Act 2004* (WA), s 120(2).

[28] See *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 270, 272-273 (Mahoney JA); *R v Keyte* (2000) 78 SASR 68 at [38]-[39] (Doyle CJ), referred to with approval in *Douglass v The Queen* (2012) 86 ALJR 1086 at [14] (the Court); *AK v Western Australia* (2008) 232 CLR 438 at [107] (Heydon J).

[29] *Douglass v The Queen* (2012) 86 ALJR 1086 at [14] (the Court); *R v Gjergji* (2016) 126 SASR 106 at [55] (Doyle J, Kourakis CJ and Bampton J agreeing).

[30] *Chiro v The Queen* (2017) 91 ALJR 974 at [19], [39]-[40], [42], [44], [51]-[52] (Kiefel CJ, Keane and Nettle JJ).

a jury is obliged to give reasons sufficient to identify the principles of law applied by the judge and the main factual findings on which the judge relied".[31]

23. If the acts of sexual exploitation found by the trial judge to have been proved beyond reasonable doubt were not apparent, then in the circumstances of this case the respondent would not dispute that an error of law had been established.

24. The true contest between the parties in this appeal arises in respect of the appellant's contention that the trial judge's reasons do not, as a matter of fact, identify the acts of sexual exploitation his Honour found proved. The respondent contends that they do.

10 *Was the obligation complied with in this case?*

25. An assessment of whether the trial judge's reasons make apparent the acts of sexual exploitation he found proved, requires that those reasons be considered in their entirety, with due regard had to all the circumstances of the case.[32] There is no *"rigid formula"*[33] as to the way in which his Honour was required to identify the acts of sexual exploitation he found proved. Certainly, a recitation of a list of the *"occasions"* of acts which have been accepted was not mandated nor, in many cases, would such a recitation be desirable or even possible.[34]

26. In this case, after summarising the complainant's evidence,[35] and noting that there existed some inconsistencies and implausibilities in it,[36] the trial judge held that he
20 accepted the complainant as a truthful witness[37] and *"as a reliable witness as to the core allegations".*[38] In observing the presence of inconsistencies and implausibilities, and articulating the matters accepted as (only) the *"core"* allegations, it is clear that the trial judge was not satisfied beyond reasonable doubt of the entirety of the

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[31] *Douglass v The Queen* (2012) 86 ALJR 1086 at [8] (the Court); see also *AK v Western Australia* (2008) 232 CLR 438 at [107] (Heydon J) which was cited with approval by the Court in *Douglass v The Queen.*
[32] *Hamra v The Queen* (2017) 91 ALJR 1007 at [40]-[42] (the Court); *Major Engineering Pty Ltd v Helios Electroheat Pty Ltd* [2006] VSCA 107 at [18] (Chernov JA, Ashley JA and Mandie AJA agreeing); *Hunter v Transport Accident Commission* [2005] VSCA 1 at [21] (Nettle JA, Batt and Vincent JJA agreeing).
[33] See *Hamra v The Queen* (2017) 91 ALJR 1007 at [42] (the Court), citing with approval *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 270, 272-273 (Mahoney JA).
[34] See *Hamra v The Queen* (2017) 91 ALJR 1007 at [28], [33], [45]-[46] (the Court).
[35] TJ at [17]-[25].
[36] TJ at [64].
[37] TJ at [65].
[38] TJ at [66].

matters about which the complainant gave evidence. However, it does not follow that the acts of sexual exploitation which were found proved remain unidentified.

27. A fair and holistic reading of the reasons for verdict makes it apparent that the "*core allegations*" are those allegations that lie at the core of the charge the subject of the prosecution: namely, the allegations of acts of sexual exploitation, less the particular circumstances of those allegations which the trial judge has identified as problematic. Immediately after stating his acceptance of the complainant as a "*reliable witness as to the core allegations*",[39] his Honour noted that "[s]*ome of* [the complainant's] *estimates of his age when events occurred were not reliable (for example, when he rode the motorbike or being 'stoned')",* but that these were *"not sufficient"* to cause the trial judge to doubt the complainant's truthfulness or reliability in respect of the core allegations.[40] To accept the "*core allegations*" and identify as problematic the complainant's evidence regarding estimates of age in the same paragraph reveals that his Honour's reservations were limited to matters pertaining to timing and dates. So much is also apparent from his Honour's earlier comment that "*some of* [the complainant's] *evidence about* ***when*** *some events occurred is inaccurate*" (emphasis added).[41]

28. Importantly, the trial judge's reservations regarding times and dates were the only concerns his Honour expressed about the complainant's evidence regarding the alleged acts of sexual exploitation. In the absence of any other misgivings, it is tolerably clear that the only aspects of that evidence of which his Honour was not satisfied concerned the specific the times and dates at which the core allegations were said to have occurred.

29. The trial judge's comment that the complainant was *"describing* ***real events that happened*** *to him and was not led by the suggestions of others"*[42] (emphasis added) is instructive, and supports the contention that it was *all* of the allegations of acts of sexual exploitation that his Honour accepted. The passiveness attributed to the complainant (as events that *"happened to"* him) imbues them with the character of being events for which the complainant was not responsible and over which the complainant did not possess control. The description of these events as *"real"* and

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[39] TJ at [66].
[40] TJ at [66].
[41] TJ at [61].
[42] TJ at [65].

having *"happened"* confirms an acceptance on the part of the trial judge of their occurrence.

30. By identifying that he was satisfied that the complainant was a reliable witness as to the *"core allegations"*, the trial judge deliberately limited his statement of satisfaction to accommodate the other findings regarding the *"apparent inconsistencies and implausibility"* which attended other, non-essential, features of the complainant's evidence, namely the evidence relating to timing and dates.[43] Those problems did not cause the trial judge to doubt the truthfulness and reliability of the complainant's evidence that the acts of sexual exploitation alleged did in fact occur. Such a finding was doubtless open to his Honour.

31. What is clear from the above analysis is that, while the trial judge was not satisfied of the complainant's evidence in its entirety, he was satisfied of *all* of the complainant's evidence where he alleged acts of sexual exploitation, except insofar as that evidence contained estimates of time and dates. Insofar as he was not satisfied of such matters, he gave express consideration to whether *"the various criticisms of* [the appellant's] *evidence"* caused him to have a reasonable doubt and concluded that they did not.

32. The trial judge's treatment of the appellant's evidence is consistent with this understanding of his Honour's reasons. The appellant gave evidence denying all of the sexual misconduct alleged against him.[44] In his reasons, the trial judge *"reject*[s] *the evidence of the accused on substantive issues where he denied the alleged sexual conduct."*[45] This rejection *followed* the trial judge's acceptance of the complainant's evidence (as to the 'core allegations') beyond reasonable doubt. It also followed specific findings about the appellant's evidence, in particular as to the appellant having been glib and evasive on particular topics. Unlike *Douglass v The Queen*,[46] this was not a case where the status of the appellant's evidence had been left unclear by the reasons.[47]

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[43] TJ at [64], see also at [66]-[67].
[44] T 388, 345, 279, 270, 274, 252.
[45] TJ at [73].
[46] (2012) 86 ALJR 186; [2012] HCA 34 at [14] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[47] Cf. AS [47]-[48]

33. In the circumstances of this case, the appellant's denials were expressly rejected as being a reasonable possibility on the basis that the evidence of the complainant that the alleged acts of sexual exploitation occurred had been accepted beyond reasonable doubt.

Conclusion and orders sought

34. The appellant's grounds of appeal are not made out. The appeal should be dismissed.

Part VII: TIME ESTIMATE

35. The respondent estimates that 1 hour will be required for its oral argument.

Dated: 19 December 2017

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