IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A9 of 2017

BETWEEN:

MARCO CHIRO
Appellant

and

THE QUEEN
Respondent

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APPELLANT'S SUBMISSIONS

I PUBLICATION

1. This submission is suitable for publication on the Internet.

II CONCISE STATEMENT OF ISSUES PRESENTED BY THE APPEAL

2. Should the learned trial judge have requested a special verdict, or asked the jury questions, in order to identify the two (or more) sexual offences which they found the appellant committed, resulting in a verdict of guilty of "persistent sexual exploitation of a child" contrary to s 50 of the *Criminal Law Consolidation Act* 1935 (SA) (**CLCA**)?

20 3. Having failed to do so, was the conviction uncertain, or did the trial judge err by sentencing the appellant on the basis of her conclusion that the appellant was guilty of **all** of the sexual offending alleged by the prosecution?

III SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)

4. Notice pursuant to s 78B of the *Judiciary Act* 1903 (Cth) is not required.

IV CITATION

5. *R v Chiro* (2015) 123 SASR 583; [2015] SASCFC 142 (**CCA**).

V NARRATIVE STATEMENT OF FACTS FOUND OR ADMITTED

Overview and background

6. The appellant is a former high school teacher at the middle school campus of a high
30 school in Adelaide (Norwood Morialta High School). He was charged with persistent sexual exploitation (**PSE**) in relation to a student, the complainant (V), from July 2008 to November 2011. V was a student in a class given by the appellant in 2007 and 2008, and in 2009 she was supervised on a major project by the appellant. By 2010 and 2011, V had moved to the senior school campus but she would attend at the middle school campus to obtain assistance from the appellant with her Italian lessons (CCA [3]).

7. The prosecution alleged that conduct of a sexual nature commenced in 2008 when V was in Year 9. The conduct was alleged to have commenced with kissing (first, a "peck on the lips", and subsequently, an open-mouthed kiss) and became progressively more intimate (CCA [4]). It was alleged to have progressed to the point of an incident of the appellant

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digitally penetrating V, masturbating the appellant, and V fellating the appellant in 2009 (Year 10), and continued until either 2010 or 2011, before V made a report to police in April 2012.

The first trial

8. The appellant was initially charged with four counts of separate offending:

   (1) Aggravated indecent assault (a kiss on an occasion when the appellant exposed his penis) during year 9 [CLCA s 56].

   (2) Unlawful sexual intercourse (digital penetration) during year 10 [s 49(5)].

   (3) Procuring an act of gross indecency (V masturbating the appellant) during year 10 [s 58].

   (4) Unlawful sexual intercourse (fellatio) during year 10 [s 49(5)].

9. The appellant was convicted by the jury of count 1 alone, and the jury was hung on the remaining counts.

10. His appeal against conviction on count 1 was allowed[1]. The conduct that was the subject of that count was a kiss which was described by V as a "quick peck kind of kiss", albeit she said that there was an accompanying act of the appellant producing his penis. The CCA found that the verdict was unsafe, and that there had been a miscarriage, in that the offence of indecent assault required proof of a sexual connotation, and the combined effect of the prosecutor's address and the summing up was to lead the jury to think that they could and should convict on count 1 simply on the basis that there had been a "quick peck". Because the jury had not convicted on the other counts it was possible they may have convicted on count 1 without having found any sexual connotation.

The re-trial

11. On the morning of the re-trial, the DPP filed a fresh information laying one count of PSE contrary to s 50. Following discussions about the pleading of the charge, a fresh information was filed the following day. In its final form, the information appeared as follows[2].

Statement of Offence

Persistent Sexual Exploitation of a Child. (Section 50(1) of the Criminal Law Consolidation Act, 1935).

Particulars of Offence

Marco Chiro between the 1st day of July 2008 and the 19th day of November 2011 at Rostrevor, over a period of not less than 3 days, committed more than one act of sexual exploitation of [V], a child under the prescribed age, and in relation to whom he was in a position of authority.

The acts comprising the persistent sexual exploitation were:

1. kissing [V] on the lips, on more than one occasion;
2. touching [V]'s vagina, on more than one occasion;
3. touching [V']s breasts, on more than one occasion;
4. inserting his finger into [V]'s vagina;
5. causing [V] to touch his penis, ~~on more than one occasion~~[3]; and
6. inserting his penis into [V]'s mouth.

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1 *R v C, M* [2014] SASCFC 116.

2 Particular 4 corresponded to former count 3, particular 5 to count 3 and particular 6 to count 4.

3 At the close of the prosecution case the evidence was only of one occasion.

12. As the information identifies, while it was alleged there were multiple occasions on which the "acts" described in particulars 1 – 3 occurred, each of the "acts" in particulars 4 – 6 was said to have occurred once.

13. While the information did not identify the "sexual offences" said to have been comprised by the different "acts", as the case developed, it was the prosecution case that the acts described in particulars 1 – 3 and 5 each amounted to "indecent sexual assault" (s 56 of the CLCA) and acts described in particulars 4 and 6 amounted to "unlawful sexual intercourse" (s 49 of the CLCA).

The evidence and the forensic issues

14. While the evidence of V and the incidents to which she referred are described in the addresses and the summing up, some aspects, in chronological sequence, are emphasised below.

Background: year 8 (2007)

15. The appellant was V's Japanese teacher during the first semester when she was in Year 8 and V said she and another student (FC) would give him hugs. V gave evidence that she and FC would then come to class early to avoid giving him hugs (Tr 98-101). Notes would be passed in class between she and the appellant, and FC and the appellant, and the appellant passed V a note asking "Why aren't you hugging me anymore?" which made V feel guilty and resulted in her hugging him again.

(a) First, there was an inconsistency between V's trial evidence that she received the note from the appellant, and a statement she made to police three years prior that she and FC received notes to that effect from the appellant (something she could no longer remember at trial) (Tr 416, 417, 577, SU5).

(b) Secondly, FC's evidence was that there was one, perhaps two or three hugs, that she did not plan with V to avoid the appellant's hugs (Tr 415, 419), that she did not receive a note from the appellant or ever pass him a note, and did not ever see the appellant passing notes to other students or vice versa (Tr 416, 578).

Year 9 (2008)

16. V said she did not have face-to-face contact with the appellant again until the second half of 2008 when the appellant was her Italian teacher (Tr 84, 120, 579, SU21).

17. V said the Italian classes were in LOTE5 or LOTE6 and there was an office adjoining LOTE6 that the appellant and other teachers used (Tr 120, 121, SU21).

18. V gave evidence that the appellant kissed her for the first time (a quick peck on the lips) in the office adjacent LOTE6 (Tr 123, SU21). Another kiss (an open mouthed) occurred in that office with the appellant was leaning up against the desk (Tr 124, SU22).

19. V went on to give evidence of further physical activity occurring during Year 9. In particular, she gave evidence of touching that she said occurred in the Italian class in LOTE5 (Tr 125). She described sitting next to the appellant behind the teacher's desk with him touching her including over the top of her clothing and him rubbing her vagina,

and she also described an incident where she touched him through his fly and touched flesh (what she believed was his penis) (Tr 128, SU22).

(a) As to these allegations, it was put by the appellant's counsel that the jury should be sceptical that these incidents, which would require perceptible movement and close contact between them, would occur within a classroom environment and that it was significant that there had been no evidence of witnesses to this behaviour (Tr 580-581).

(b) It was also emphasised that in her evidence she said that these incidents happened in LOTE5 and that she didn't remember them occurring in LOTE6, whereas during the earlier trial (one year earlier) she had said the touching happened most lessons in LOTE6 (Tr 582, SU5-6).

(c) While there was one witness who gave evidence of the appellant and V being quite close during Year 9, the evidence of that witness (KK), was highly problematic[4] and on the appellant's submission was "torpedoed" by the evidence of another student (JG) (Tr 585)[5].

Year 10 (2009)

20. V's evidence was that during Year 10 the appellant supervised a project she was undertaking (Tr 84). She described serious sexual touching in the computer room during Year 10. The computer room was adjacent the LOTE3 classroom. She described an incident when she masturbated the appellant to the point of ejaculation, an incident when she performed fellatio on him, and incident when, while standing kissing up, he put his finger inside her vagina, and an incident when while sitting at the computer, he went down between her knees and tried to kiss up her legs (Tr 133-146).

(a) As to these incidents, the focus of the appellant's address was that it was simply not credible that these incidents would happen in such a public place and that V's evidence that, with the exception of the masturbation incident when she recalled there was a class in LOTE3, she did not know if there was a class in LOTE3 during the other incidents, was not credible, and to be contrasted with the evidence of other witnesses about how full to capacity the classrooms were (Tr 590-591).

(b) It was also put that it was not credible that no other students would be using the computer room at the relevant times (Tr 591).

(c) There was also an inconsistency in V's recollection of the masturbation incident in that she had given a statement that it had occurred towards the middle of Year 10, but in evidence she could not remember when it occurred (Tr 592, SU6).

(d) Of further relevance to the allegations in 2009 was the fact that it was V's evidence that in that year there was a rumour that went around the school of a relationship

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4 KK had great difficulty remembering what classes she had been in and there was real doubt she was in fact in the Year 9 Italian class. The difficulties with her evidence were summarised in closing (Tr 583-585).

5 KK claimed that there was an incident when she and another student JG were coming back from a science class and decided to go to the appellant's classroom, LOTE3. From a distance of about 3 metres she saw the appellant and V kissing in the front of the classroom near the desk. She said they both panicked and ran away (Tr 317, SU26). However, JG gave evidence that she **never witnessed** anything physical including kissing between V and the appellant (Tr 385, SU27), and V denied in cross-examination that they had **ever kissed in LOTE3** (Tr 225, SU40).

between them (Tr 147, SU23). The timing of the alleged rumour was important in terms of the likelihood or otherwise of the brazen acts of sexual conduct having occurred subsequent to the rumour (Tr 592). In the previous trial, V said that it was in Year 10 that she set up an email address "lucy.black", and she gave a statement to police that it was early in 2009, and that this was at the request of the appellant in order to avoid her friends seeing her communicate with him (Tr 594-595). However, shortly prior to the second trial she was shown an email (exhibit P6) which suggested she created the email address in the middle of the following year (Year 11, 2010) and that the appellant had no idea about the name used in the email address. Then, during her evidence at the second trial, her evidence (contrary to that at the first trial) was that she could not remember whether she had that email address in Year 10 or created it later (Tr 151). It was put that she was changing her evidence to accommodate objective evidence (Tr 596).

Year 11 (2010)

21. In Year 11, V moved to the Magill Campus, and would only see the appellant when she went back to the middle-school campus for help with Italian. Apart from a reference to seeing him at the "gold subschool" and the "withdrawal room", at trial she claimed she could not recall any particular occasions of sexual contact between them apart from the one time during Year 11 (she could not be more specific as to timing) when she visited him in portable room 34 and they kissed and he turned her around so he could put his hand up her skirt and touch her breasts (Tr 152-154, SU25). In cross-examination she was sure she could not remember any incidents occurring in the computer room during 2010 (Tr 274).

    (a) However, in her statement of 2012 she had said that during 2010 and 2011 there were incidents where the appellant would pull her against him and kiss her while he rubbed his erect penis on top of her clothing and that this happened most of the time in the computer room, and once in portable room 34 (Tr 275).

    (b) By 2010, the school had introduced CCTV in the computer room (SU25) and in the appellant's case was that this was why at trial V now made no claim of misconduct occurring in the computer room (Tr 597, SU6).

22. Apart from the evidence of V, there was evidence from other students and teachers who witnessed interactions between the appellant and V which suggested some relationship or proximity between them[6], albeit only one witness (KK), whose credit was in issue, claimed to see the appellant and V kissing (Tr 317).

23. The appellant gave evidence. He admitted that in the emails he was expressing a sexual interest in V in email correspondence between him and V, and that by 2011 he had a sexual interest in V and was flirting with the possibility of sexual contact with V once she turned 18 (Tr 574-575), but he denied the offending (SU33). There was no dispute that his behaviour towards V was unacceptable (Tr 572), and that their relationship had crossed a line (Tr 573), but he denied the charged offending.

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[6] For example: Hiroshi Haga, the other Japanese teacher, saw the appellant and V both sitting in close proximity at the teacher's desk in LOTE3 and in LOTE6 (Tr 339-341, SU27); a student MJ saw the appellant sitting at the table at the gold subschool with V standing between his legs, deep in discussion (Tr 356, SU27); Mark Zivokovich, a teacher, would smoke with the appellant in the stairwell of the gold subschool and on occasions V came and spoke to them, but he did not see any physical contact between them (Tr 372, SU28).

24. This was not a case where there was no reason to differentiate, in terms of credibility or reliability, between the interactions and episodes described by the appellant. As the appellant's counsel emphasised in closing, and the judge's summing up demonstrates, there were inconsistencies attending some aspects, and there were other aspects which, on the appellant's submission, were simply inherent unlikely to have occurred, or unlikely not to have been witnessed by anyone among the 600 students or the staff of the school, particularly in view of the layout and uses of the classrooms and offices.

Directions, deliberations and verdict

25. In the course of directing the jury about combinations of acts available for proof of the second element of the s 50 offence, the judge twice directed the jury that if they were satisfied of the kissing indecent assaults, then that alone would be sufficient to prove that element of the offence (SU13, SU17).

26. The jury retired at 1.15 pm on 14 May 2015 (SU40). At 5.50 pm, the jury asked a question about the definition of "touching" in relation to particulars 2 and 3. The effect of this was whether touching would be satisfied by rubbing groin or groin contact or required touching by hand (SU41-42).

27. At 7.58 pm they indicated they had reached an impasse and needed further direction, and a '*Black* direction' was given (SU42-43). They were released at 8.19 pm and resumed their deliberations the following morning (SU45).

28. At 11.54 am on 15 May 2015, the jury raised a further question whether they were to be asked for a verdict on indecent assault and a verdict on unlawful sexual intercourse[7]. When this was raised with counsel, the appellant's counsel indicated that if the jury had a verdict in relation to PSE, she would be asking for a special verdict. The judge responded (SU45-46):

> No, there are **no special verdicts**. In the case of [*R v N, SH* [2010] SASCFC 74], the Court of Criminal Appeal has ruled in relation to that very issue. I understand what you're saying. I was, in fact, counsel in that matter where there were special verdicts taken, for the obvious reason that exists for this charge, I thought – I was wrong. The court said 'No'. [Emphasis added]

29. The judge the directed the jury in these terms (SU46).

> Thank you ladies and gentlemen, I have received your note. There is **one charge** before this court, that is the charge of persistent sexual exploitation of a child. When you return, if you have a verdict, you will be asked 'In relation to the offence of persistent sexual exploitation of a child, do you find the accused guilty or not guilty of that charge?'. And then you will be asked – it's irrelevant what your verdict is, guilty or not guilty, for the asking of this question – 'And is that the verdict of you all?'. If it's unanimous you say 'Yes', if it's a majority you say 'No'. If it's a majority then you will be asked 'Is that a verdict of 10 or more of you?'. **So there is one charge before this court, that is persistent sexual exploitation of a child**. That's what you have to decide in this matter. [Emphasis added]

30. The jury subsequently delivered a majority verdict of guilty (SU46).

Sentence

31. The trial judge rejected a submission that the appellant should be sentenced on the basis that the second element of the offence was comprised only of the acts of kissing

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[7] The question is not reproduced in the summing up (SU 45) however it has been common ground before the CCA and was common ground on the special leave application that the question was to the effect described.

(amounting to indecent assault), citing authority to the effect that when the view of the jury of the particular factual issue in question for the purpose of sentencing is unknown, and the judge is prepared to make a finding on it beyond reasonable doubt based on his own opinion of the sworn evidence before him, the judge can act upon, so long as consistent with the verdict of the jury (Remarks p 1).

32. The trial judge went on to say (Remarks p 2):

> It follows that I must sentence you on the basis of those facts of which I am satisfied beyond reasonable doubt, consistent with the verdict of the jury. **The very nature of the offence of persistent sexual exploitation of a child means that there has been a course of conduct of sexual abuse that has occurred over a period of time involving a range of conduct.** [Emphasis added]

33. The trial judge then proceeded to sentence the appellant on the basis he committed the full range of acts alleged in the charge over the relevant period. The judge accepted V's evidence beyond reasonable doubt and said that it followed that she rejected the appellant's denials as a reasonable possibility (Remarks p 2). No reference was made to any of the inconsistent statements or the other forensic issues that had emerged in the case.

34. After referring to the appellant's lack of prior convictions, and to other relevant sentencing considerations including the feature of an abuse of trust, the judge stated that she was to apply the principles in *R v D*[8] by virtue of s 29D of the *Criminal Law (Sentencing) Act* 1988 (SA) (Remarks p 4).

35. Noting that the particulars of fellatio and digital intercourse would amount to "unlawful sexual intercourse", the judge then said (Remarks p 5):

> I can see no reason why a starting point of 10 years is not appropriate. There is no reason to reduce that. You have not expressed any remorse, nor do you appear to have any insight into your own brazen and manipulative behaviour. Accordingly, I sentence you to 10 years imprisonment. ... I set a non-parole period of six years.

Appeal to CCA against conviction and sentence

36. The judge's decision not to make any inquiry of the jury in relation to the verdict was pertinent to the appeal regarding conviction[9] and sentence. Vanstone J (Kelly J and David AJ agreeing), relied upon the decision in *R v Isaacs*[10], referred to with approval by the plurality in *Cheung v The Queen*[11] (***Cheung***). She set out the considerations referred to in those cases as militating against asking the jury about the basis for its verdict (CCA [16]), and concluded (CCA [18]-[19]):

> The prospect of having to answer for its findings on specific conduct or types of conduct might have confused the jury in its deliberations on the general issue and, as well, the framing of the question or questions which counsel would have had the judge ask is not necessarily straightforward. ... **[T]here could have been disagreement within the jury on certain particulars**, or whether the conduct

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8 *R v D* (1997) 69 SASR 413 was a decision in which the Court held that a sentence of imprisonment for 6 years (4.5 years non-parole) for persistent sexual abuse of a 13 year old (step-daughter) of the accused was manifestly excessive, but Doyle CJ indicated that in the future, offences involving unlawful sexual intercourse, for children over 12 years, where there are multiple offences committed over a period of time, should attract "as a starting point" a head sentence of about 10 years imprisonment. By an unusual mechanism, Parliament subsequently effectively enshrined the observations in *R v D* in s 29D.

9 It was argued that where such divergent acts were particularised, in the absence of special verdicts, the verdict of guilty was void for uncertainty.

10 (1997) 41 NSWLR 374.

11 (2001) 209 CLR 1.

> occurred more than once; and, in addition, the jury might have chosen not to reach a firm view on all particulars, once it had determined that the appellant was guilty. ...
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> More importantly, there was no need for a special verdict. It was for the judge to sentence on such of the facts as she found proved so long as they were not inconsistent with the verdict of the jury. ... As was put to [counsel] during the argument, the situation facing a sentencing judge where the Court is concerned with a s 50 offence is **little different from a verdict of guilty for manslaughter where different bases for that verdict have been left to the jury**. [Emphasis added]

37. Vanstone J held it was open to the judge to accept the evidence of the complainant with respect to all particulars and to sentence accordingly, and that the sentence of 10 years (6 years non-parole) was not manifestly excessive (CCA [33]-[39]). She rejected the various grounds for the appeal against conviction (CCA [6]-[32]).

VI SUCCINCT STATEMENT OF THE APPELLANT'S ARGUMENT

38. The appellant's argument involves the following propositions.

(1) Section 50(1) requires proof of two or more discrete sexual offences separated by three or more days, in respect of which the jury must be unanimous (or at least agreed by majority). It is impossible to infer from the verdict of "guilty" that the jury was satisfied that any more than two sexual offences were found proved; and in the particular circumstances of the case, it was a real possibility they were only able to reach a majority verdict in respect of two (or more) occasions involving kissing amounting to indecent assault.

(2) A sentencing judge may find facts relevant to the degree of culpability of an offender's conduct, but not to the extent to which it constitutes an element of the offence charged. Nor can or should a sentencing judge make and act on findings of facts as to discrete episodes of the commission of sexual offending each of which would constitute serious sexual offences which could not be shown to be proved by the jury's verdict.

(3) There were strong grounds for the exercise of discretion to take a special verdict or to ask questions to identify the sexual offences the jury found to constitute the *actus reus*.

(4) The learned trial judge erred by considering it was not open to her, or if it was open to her, was not appropriate, to accede to the request for a special verdict or alternatively to pose questions which would elucidate the basis for the verdict, and the CCA erred by failing to so hold.

(5) The failure to identify the basis for the verdict here resulted in the verdict being uncertain. Alternatively, having decided not to proceed in that way, the judge ought not to have sentenced the appellant for alleged conduct which might have been the subject of a verdict but was not, and the CCA erred by failing to so hold.

(1) What is required to prove PSE and what is signified by the verdict?

39. Section 50(1) requires proof of more than one act of sexual exploitation of a particular child separated by 3 days or more, and the concept of an act of sexual exploitation is

defined by s 50(2) as an act which amount to a "sexual offence", itself a defined term picking up various recognised sexual crimes against South Australian law (see s 50(7))[12].

40. In *R v Little*[13], handed down on the day the CCA heard argument in the present case, five judges confirmed[14] that where multiple acts of sexual exploitation are alleged, it is an error of law to fail to direct the jury that it must agree unanimously, or by majority after four hours, that a "prescribed pair" of the same two sexual offences has been proven beyond reasonable doubt (at [4]).

41. In doing so, the CCA held that s 50 was relevantly to be treated in the same way as s 229B(1) of the *Criminal Code* (Q)[15], which was considered in *KBT v The Queen*[16] (***KBT***). This marked a departure from the assumption which had informed the decision in *R v N, SH*[17] (the authority referred to by the learned trial judge in rejecting the request for a special verdict). While there have been differences in emphasis regarding the construction of s 50, subsequent decisions have not challenged the requirement of unanimity[18], and no challenge is made by the respondent to that requirement in the within proceedings.

42. In *KBT* it was emphasised that the offence is not the engaging in a "course of conduct" but the commission of particular acts constituting offences. The trial judge in that case had failed to instruct the jury that they had to be satisfied of the same three offences and the same three occasions. The Court of Appeal held this was an error but dismissed the appeal on the basis there was no substantial miscarriage of justice. In the High Court, the plurality (Brennan CJ, Toohey, Gaudron and Gummow JJ) said (at 422-424):

> The offence created by s 229B(1) is described in that sub-section in terms of a course of conduct and, to that extent, may be compared with offences like trafficking in drugs or keeping a disorderly house. In the case of each of those latter offences, the actus reus is the course of conduct which the offence describes. However, an examination of sub-s (1A) makes it plain that that is not the case with the

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12 Although the application of s 50 is retrospective (s 50(6)), the offences which comprise "sexual offences" apparently are determined by reference to the timing of the offending, otherwise s 50(7)(c) would be unnecessary.

13 [2015] SASCFC 118.

14 See *R v M, BJ* (2011) 110 SASR 1 at [70].

15 At the relevant time, s 229B(1) provided: "Any adult who maintains an unlawful relationship of a sexual nature with a child under the age of 16 years is guilty of a crime and is liable to imprisonment for 7 years", and s 229B(1A) provided: "A person shall not be convicted of the offence in subsection (1) unless it is shown that the offender, as an adult, has, during the period in which it is alleged that the offender maintained the relationship in issue with the child, done an act defined to constitute an offence of a sexual nature in relation to the child, other than an offence defined in section 210(1)(e) or (f), on 3 or more occasions and evidence of the doing of any such act shall be admissible and probative of the maintenance of the relationship notwithstanding that the evidence does not disclose the dates or the exact circumstances of those occasions".

16 (1997) 191 CLR 417.

17 In *R v N, SH* [2010] SASCFC 74 the Court said that the section "clearly contemplates a course of conduct as distinct from particular specific acts being proved beyond reasonable doubt" (at [11]) and considered it was unwise to take a special verdict "because of the possibility of the jury's responses to the specific questions being unclear and does not allow for the fact that there possibly may have been various views of the evidence in relation to each particular. Even allowing for a difference of views on specific particulars, the charge could still be made out" (at [12]).

18 In *R v Johnson* [2015] SASCFC 170 at [2]-[12], [114]-[116], the CCA reiterated the importance of agreement on the same pair of offences by holding a conviction for PSE to be unsafe where the evidence was of intercourse on many occasions over a period of two years and did not permit the jury to delineate a pair of offences. In *R v Hamra* [2016] SASCFC 130 at [43], in the context of trials by judge alone, without purporting to overrule *Little* or *Johnson*, the CCA has held that neither the elements of the offence or its particularisation, nor any implication of the extended unanimity direction require the occasion on which each act of sexual exploitation was committed to be identified in a way which distinguishes it from other acts of sexual exploitation.

offence created by s 229B(1). Rather, it is clear from the terms of sub-s (1A) that the actus reus of that offence is the doing, as an adult, of an act which constitutes an offence of a sexual nature in relation to the child concerned on three or more occasions. **Once it is appreciated that the actus reus of the offence is as specified in sub-s (1A)** rather than maintaining an unlawful sexual relationship, it follows, as was held by the Court of Appeal, that **a person cannot be convicted under s 229B(1) unless the jury is agreed as to the commission of the same three or more illegal acts.**

... As already indicated, sub-s (1A) of s 229B requires the doing of "an act [which] constitute[s] an offence of a sexual nature ... on 3 or more occasions", albeit that it does not require proof of "the dates or the exact circumstances of [the] occasions" on which the acts were committed. **The sub-section's dispensation with respect to proof applies only to the dates and circumstances relating to the occasions on which the acts were committed. It does not detract from the need to prove the actual commission of acts which constitute offences of a sexual nature**.

It should be noted that, quite apart from any question of fairness to the accused, evidence of a general course of sexual misconduct or of a general pattern of sexual misbehaviour is **not necessarily evidence of the doing of "an act defined to constitute an offence of a sexual nature ... on 3 or more occasions" for the purposes of s 229B(1A).** Moreover, if the prosecution evidence in support of a charge under s 229B(1) is simply evidence of a general course of sexual misconduct or of a general pattern of sexual misbehaviour, it is difficult to see that a jury could ever be satisfied as to the commission of the same three sexual acts as required by s 229B(1A).

The Court of Appeal's decision that there was no substantial miscarriage of justice in relation to the offence created by s 229B(1) of the Code was based on two considerations. First, no complaint was made at the trial with respect to the failure of the trial judge to direct the jury regarding the need to agree as to the commission of the same three acts. The second was that "the trial was conducted as an 'all-or-nothing' contest between [M's] testimony and the evidence of the appellant" and, once the jury had accepted M's evidence, there was "no rational basis upon which different members of the jury might have doubted some, different, portions of her account." ...

The question whether, in this case, the appellant was deprived of a chance of acquittal that was fairly open is **not answered by describing the trial as an "all-or-nothing" contest**. To the extent that it was a contest of that kind, that was in large part the result of the evidence which, as already indicated, dealt with general patterns of sexual misconduct rather than specific sexual acts. But more importantly, the trial cannot properly be described as an "all-or-nothing" contest in which there was "no rational basis upon which different members of the jury might have doubted some, different, portions of [M's] account."

As the trial judge correctly instructed the jury in his summing up, it was open to the jury to accept some parts of M's evidence and to reject others. **And given the nature of the offence, which is established by proof of acts of a sexual nature on three occasions, there is no basis on which it can be concluded that the jury did accept all her evidence**. Moreover, the evidence in the defence case differed according to the different categories of incident to which M deposed. ...

Having regard to the evidence, it is possible that individual jurors reasoned that certain categories of incident did not occur at all but that one or two did, and more than once, thus concluding that the accused did an act constituting an offence of a sexual nature on three or more occasions without directing attention to any specific act. **It is, thus, impossible to say that the jurors must have been agreed as to the appellant having committed the same three acts**. Indeed, it may be that, had the jury been properly instructed, they would have concluded that the nature of the evidence made it impossible to identify precise acts on which they could agree. It follows that the accused was deprived of a chance of acquittal that was fairly open. [Emphasis added]

43. Returning to the circumstances of the present case, it follows that if some jurors found the offence proved by reference, say, to the incidents described in particulars 4 and 5, but other jurors only found proved two offences of the kind described in particular 1, their deliberations miscarried. Further, it follows that if, consistent with the judge's directions, the jury were satisfied only of two acts of kissing constituting indecent assault, they were entitled to return a guilty verdict.

44. Of course, they might have been satisfied of more than two sexual offences, or they might have been satisfied of the alleged act of masturbation and the alleged act of fellatio. It is not possible to exclude those possibilities. Sentencing on the basis of commission of the

more serious acts is therefore not demonstrably **inconsistent** with the verdict. But the question remains: for what was the appellant to be sentenced?

45. The appellant respectfully submits that:

(a) the verdict cannot without more be taken to signify that the appellant committed more than two acts amounting to sexual offences; it is impossible to say (without further information) that the jury found that the appellant committed more than two acts amounting to sexual offences; and

(b) in this particular case, having regard to: (i) the issues raised by the addresses which showed this was far from an "all or nothing" contest, (ii) the judge's repeated directions that they could convict if satisfied of only two offences, (iii) the two questions asked by the jury (particularly the second, which one might reasonably infer was some indication that the jury saw a difference in the evidence between acts amounting to indecent assault and acts amounting to unlawful sexual interference), (iii) the length of the deliberations and the difficulties the jury had in reaching a verdict, and (iv) the fact of the majority verdict, there is every reason to think that the verdict may reflect satisfaction of two occasions only, and/or certain only of the "particulars".

(2) The limits in sentencing upon fact-finding in relation to unproved offences

46. The division between the roles of the jury and sentencing judge was articulated by the plurality in *Cheung* (at [5]):

> The decision as to guilt of an offence is for the jury. The decision as to the degree of culpability of the offender's conduct, **save to the extent to which it constitutes an element of the offence charged**, is for the sentencing judge. If, and in so far as, the degree of culpability is itself an element of the offence charged, **that will be reflected in an issue presented to the jury for decision by verdict**. In such an event, the sentencing judge will be bound by the manner in which the jury, by verdict, expressly or by necessary implication, decided that issue. But the issues resolved by the jury's verdict may not include some matters of potential importance to an assessment of the offender's culpability. [Emphasis added]

47. The difficulty arises where, because of the unusual nature of the offence of PSE, where multiple and potentially alternative sexual offences may be placed before the jury, the question of which two or more sexual offences (which constitute the relevant *actus reus*) were committed is not revealed by a general verdict.

48. This appeal raises for consideration whether, in such a case, the discretions respecting special verdicts or questions of the jury should be deployed to identify the *actus reus* reflected by the jury's verdict, or whether in the absence of such identification, the sentencing judge should be astute to avoid administering punishment for alleged offending in respect of which he has been denied a specific jury verdict.

49. In resolving these matters, in the appellant's submission, a basic and informing consideration is the "general principle" identified by Gibbs CJ (with whom Mason and Murphy JJ agreed) in *The Queen v De Simoni* (***De Simoni***)[19] that "no one should be punished for an offence of which he has not been convicted".

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[19] (1981) 147 CLR 383 at 389. These observations were recently referred to in *Elias v The Queen* (2013) 248 CLR 483 at [26], fn 65.

50. It was held in *De Simoni* that the judge could not take into account circumstances of aggravation which would have warranted a conviction for a more serious offence. Reference was made to a long-standing common law principle that circumstances of aggravation not alleged in the indictment could not be relied upon if those circumstances could have been made the subject of a distinct charge[20].

51. Subsequently, in *Kingswell v The Queen*[21], the Court recognised a rule of practice to the effect that where the prosecution proposed to rely upon circumstances of aggravation, they should be included in the indictment (to permit a jury verdict upon them)[22].

52. In South Australia, this approach has resulted in the view being expressed that if an accused indicates a desire to plead guilty but denies a circumstance of alleged aggravation which would increase the maximum penalty, the issue should be tried before a jury[23]. Further, particular caution has been urged in the context of taking into account "surrounding circumstances" which could amount to crimes of a similar character, being in mind that[24]:

> If a person is to be punished for conduct which is said to be criminal, generally speaking justice requires that he be charged with it and have the opportunity of defending himself. If he is not charged with it, generally speaking it should not be relied upon as a circumstance of aggravation of some other crime.

53. In the United Kingdom, similar principles continue to apply[25]. United States jurisprudence, while heavily anchored in analysis of the Sixth Amendment, holds not only that any fact that increases the maximum penalty for a crime beyond a prescribed statutory maximum must be submitted to a jury[26], but also facts that "increase the floor"[27], and that the basic touchstone for determining whether a fact must be found by a jury is whether the fact is an "element" of the charged offence[28].

54. It is acknowledged that, in *Cheung*, the plurality:

(a) drew a distinction between the case addressed by *Kingswell*, in which a maximum penalty is altered or affected by uncertainty surrounding the basis upon which the jury convicted, and a case in which it is not (at [53]); and

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20 Gibbs CJ referred (at 389) to *Dominus Rex v Turner* (1718) 1 Str 140 [93 ER 435] and Chitty, *Criminal Law* (1826, 2nd ed) vol 1 at p 231b. In *R v Olbrich* (1999) 199 CLR 270, referring to *De Simoni*, the plurality observed (at [18]), that it would be "quite wrong to sentence an offender for crimes with which that offender is not charged". See also Kirby J at [53], [61].

21 (1985) 159 CLR 264 at 280 (Gibbs CJ, Wilson and Dawson JJ). See also *R v Meaton* (1986) 160 CLR 359 at 363-364 (Gibbs CJ, Wilson and Dawson JJ).

22 In *Cheng v The Queen* (2000) 203 CLR 248, the Court declined to re-open *Kingswell* (supra).

23 *R v Hietanen* (1989) 51 SASR 510 at 514 (King CJ, Mohr J agreeing).

24 *The Queen v Austin* (1985) 121 LSJS 181 at 183 (King CJ), quoted with approval in *R v Zahra* [1998] SASC 7010 at [18] (Olsson J), and referred to in *R v JCW* [2000] NSWCCA 209 at [61] (Spigelman CJ). See also *The Queen v Reiner* (1974) 8 SASR 102 at 105 (Bray CJ)

25 See, eg, the discussion by Lord Bingham CJ in *R v Kidd* [1998] 1 WLR 604 (reported sub nom *R v Canavan* [1998] 1 Cr App R 79) at 607; 81-82.

26 *Apprendi v New Jersey* 530 US 466 (2000).

27 *Alleyne v United States* 570 US ___ (2013).

28 *Apprendi* (supra) at slip op p 6 (Thomas J), referring to *United States v O'Brien* 560 US 218 (2010) slip op p 5 and Archbold, *Pleading and Evidence in Criminal Cases* (1846, 5th am ed) at 52. For these purposes, "facts that increase the prescribed range of penalties to which a criminal defendant is exposed" are elements of the crime: *Alleyne* (supra) at slip op 10.

(b) did not accept, at least in the circumstances of *Cheung*, an argument that if the prosecution could have but did not present an indictment framed in such a way as to require a distinction between the evidentiary bases upon which the prosecution case was argued, thus depriving the sentencing judge of the benefit of the jury finding on the alternative bases, the sentencing judge should have sentenced on the more favourable basis (at [40]-[51]).

55. While the particular offences found proved by the jury would not alter the maximum sentence that is applicable under s 50, they are plainly central to the selection of the appropriate sentence, according to basic principle[29], and settled practice. In respect of the predecessor provision, in *R v D*, Doyle CJ said that the starting point was to identify the different offences involved and the maximum punishment that they attracted[30].

56. However, it is submitted that when the reasons of the plurality in *Cheung* are examined, and compared with the peculiar context of an offence such as PSE where the **elements** of the statutory offence themselves involve **offences** which, by hypothesis, could have been separately charged, and which the jury may not have been satisfied were committed, the reasons do not militate against:

(a) the taking of a special verdict or the asking of questions of the jury; or

(b) an approach to sentencing designed to ensure that the defendant is not sentenced for offences not shown to be proved by the verdict.

57. Accordingly, *Cheung* does not directly govern the approach to sentencing in the peculiar case of a provision like s 50 and nor, for reasons to be developed, does it justify a reluctance to permit special verdicts, or to administer questions to the jury. Indeed, where the judge's directions encourage the jury to return a verdict on a sub-set of the offences particularised, without a special verdict, it is submitted that the general verdict is uncertain.

(3) Special verdicts and questions to identify the appropriate basis for sentencing

Distinction between evidentiary routes and conclusions on discrete acts and essential elements

58. For several purposes the law distinguishes cases where the possibilities presented by the prosecution case or the evidence involve merely the selection of different evidentiary routes by which a juror may make a finding with respect to an essential element of an offence, and cases where the jury must choose between discrete acts which go to proof of an essential ingredient or element of an offence.

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29 The court sentences *the* offender for *the offence*: *Elias v The Queen* (2013) 248 CLR 483 at [26]. It is upon the basis of the offence proved, the factual elements of it necessarily found by the jury in reaching its verdict, and other relevant facts found by the trial judge that the trial judge will exercise his or her sentencing discretion: *Savvas v The Queen* (1995) 183 CLR 1. No-one should be punished for an offence of which he has not been convicted: *De Simoni* at 389 (Gibbs CJ). Even within the permissible range, a prisoner must not be sentenced for other more serious offence that the trial judge is satisfied has been committed: *De Simoni* at 395-396 (Wilson J). The sentence must be proportionate to the gravity of the offence: *Veen v The Queen (No. 2)* (1988) 164 CLR 465.

30 *R v D* (supra) at 419-420. In other words, regard was to be had to the sentences for the underlying offending and the maximum of life was explicable because some of the sexual offences which could constitute elements of the charge themselves attract life imprisonment.

59. The distinction will govern whether the jury should be directed that they must be unanimous[31], albeit the identification in a given case of what amounts to an element may be difficult[32], and the necessity for unanimity may also turn on a practical consideration of whether alternative bases involve materially different issues or consequences[33].

60. The distinction may also be relevant to a consideration of duplicity and uncertainty: where the different possibilities or alternative bases left to the jury involve alleging multiple instances of one offence, this might give rise to latent uncertainty[34]. If the alternative bases are simply different evidential routes to a single alleged offence the position may be otherwise.

10 61. It is submitted that the distinction must also be borne in mind when considering the authorities respecting the discretion to take a special verdict or to ask questions of the jury to identify the basis upon which the jury convicted the defendant.

62. The appellant's essential proposition is that although s 50 may authorise a degree of duplicitous charging that would not be acceptable at common law[35], it is nevertheless an offence attracting the requirement for unanimity, recognising that the "sexual offences" to be found by the jury are "elements" (or at least material particulars) of the offence. Accordingly, and in contrast to verdicts of manslaughter where unanimous reasoning is **not** required, there is utility and merit in requiring that the otherwise opaque meaning of the verdict be identified.

20 63. The considerations which inform certainty are concerned not only with the avoidance of double jeopardy, or the avoidance of forensic prejudice during the trial, but extend to identifying the appropriate basis for sentencing[36].

64. Although s 50 contains its own protection respecting double-jeopardy (s 50(5)), the uncertainty that became patent in the present case ought to have been avoided by taking a special verdict or asking questions of the jury. As was noted in *Cheung* (at [4]-[5]), ordinarily, the issue or issued to be resolved by the jury will be defined by the terms of the indictment (and the elements of the offence charged therein). However when, as here, the judge's directions permit and invite the jury to proceed by accepting some but not all of the charged conduct, a general verdict is unrevealing.

30 ***Special verdicts and questions***

65. There is a distinction between special verdicts and questions designed to establish the basis upon which a jury brought in their verdict[37], albeit some of the relevant considerations are common to both[38].

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31 *R v Walsh* (2002) 131 A Crim R 299; [2002] VSCA 98 at [39]-[58] (Phillips and Buchanan JJA, Ormiston JA agreeing), and *Fermanis v State of Western Australia* [2007] WASCA 84 at [44]-[73] (Steytler P, Roberts-Smith and McLure JJA agreeing). See also *Cheung* at [4]-[7] (plurality).

32 Compare the majority and the minority approaches in *WGC v The Queen* (2007) 233 CLR 66.

33 See, eg, *R v Leivers* [1999] 1 Qd R 649 at 662-663, *Fermanis v State of Western Australia* [2007] WASCA 84 at [44]-[73] (Steytler P, Roberts-Smith and McLure JJA agreeing), *The Queen v Klamo* (2008) 18 VR 644 at [75] (Maxwell P, Vincent and Neave JJA relevantly agreeing). See also *WGC v The Queen* (supra) at [93] (Kirby J). See also *King v R* [2011] NZCA 664 at [17] (Miller and Asher JJ).

34 *Johnson v Miller* (1937) 59 CLR 467.

35 *KBT* at 423 (Brennan CJ, Toohey, Gaudron and Gummow JJ), at 432 (Kirby J).

36 *S v The Queen* (1989) 168 CLR 266 at 284 (Gaudron and McHugh JJ), *Walsh v Tattersall* (1996) 188 CLR 77 at 84 (Dawson and Toohey JJ), at 90 (Gaudron and Gummow JJ), at 106 and 111 (Kirby J).

Special verdicts

66. In South Australia, common law principles are applicable. Legislation acknowledges the facility for a special verdict to be returned but makes no particular provision with respect thereto[39].

67. An accused has a prima facie right to a general verdict but a jury may return a special verdict[40] and whether the special verdict process applies is a question for the exercise of the trial judge's discretion in which it has been said a court will rarely interfere[41].

68. Generally speaking, a special verdict consists of findings made by a jury in answer to questions asked by the trial judge on particular issues of fact which then raise a question of law, and while modern practice exhibits developments from the origins of special verdicts, one reason they became encouraged was the possibility that general verdicts might conceal error[42].

69. Like questions administered after the general verdict, the use of special verdicts has on occasions been advocated as penetrating the veil of the general verdict to assist in sentencing[43].

Questions as to the basis for the verdict

70. The asking of questions of the jury to establish the basis for the verdict involves a discretion[44], and the issue is ordinarily whether the discretion miscarried[45]. In *Veen v The Queen*[46], Stephen J recognised the existence of such a discretionary power, and indicated that ordinarily it should be exercised in relation to a manslaughter verdict where different bases of liability were raised by the evidence.

71. That practice has been described as common in the United Kingdom[47], and the facility to ask questions relevant to sentence has long been recognised[48]. Special interrogatories are

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37 *Russell v Victorian Railways Commissioners* [1948] VLR 118 at 131; *R v Brown* [1939] VLR 177 at 183; *Cheung* at [18], [19] (Gleeson CJ, Gummow and Hayne JJ); *R v Spanos* (2007) 99 SASR 487 at [2](4) (Debelle J).

38 In the present case, the CCA dealt with the principles relating to questions as relevant to the issue of whether a special verdict ought to have been taken (CCA [15]-[20]). It may be that considerations which inhibit courts from seeking to render jurors answerable or accountable for their verdicts (which may restrain the desirability of interrogation following the verdict) apply with less force to the formulation of questions for the purposes of a special verdict: *Otis Elevators Pty Ltd v Zitis* (1986) 5 NSWLR 171 at 181 (Kirby P). Sometimes the expression "special verdict" has been used in a formal sense and to describe questions put by the judge: *Otis Elevantors* (supra) at 188 (Priestley JA).

39 Section 354(3) of the CLCA; *Spanos* (supra) at [2](3) (Debelle J), at [33] (Layton J, Nyland J agreeing).

40 *Hawkins' Pleas of the Crown* Ch 47, s 3; Archbold, *Criminal Pleading Evidence in Practice* (2007) at para 4-465; *Russell v Victorian Railways Commissioners* [1948] VLR 118 at 121-122 (Gavan Duffy J), at 130 (O'Bryan J). Probably the jury can be invited but not compelled to return a special verdict: see *Cunningham v Ryan* (1919) 27 CLR 294 at 297-298 (Isaacs J), *Cheung* at [19] (Gleeson CJ, Gummow and Hayne JJ); *Spanos* (supra) at [2](2) (Debelle J).

41 *Otis Elevators* (supra) at 183 (Kirby P).

42 *Otis Elevators* (supra) at 197 (McHugh JA).

43 Fox & O'Brien, "Fact Finding for Sentencers" (1975) 10 *Melbourne University Law Review* 163 at 172 and 174 (referring to Thomas, "Case Stated in the Court of Appeal" (1962) *Criminal Law Review* 820 at 825).

44 *R v Clarke* [1959] VR 645 at 654-655; *Brown v Lizars* (1905) 2 CLR 837 at 848 (Griffith CJ); *R v Lindner* [1938] SASR 412 at 417.

45 *R v Isaacs* (1997) 41 NSWLR 374 at 377 (The Court).

46 (1979) 143 CLR 458 at 466.

47 *R v Warner* [1967] 1 WLR 1209, referred to in *R v Solomon* [1984] 6 Cr App R (S) 105; [1984] Crim LR 433. See also *R v Matheson* [1958] 1 WLR 474.

often used in United States Courts to assist with sentencing and may be favoured in some circumstances where they tend to ensure jury unanimity[49].

72. In *R v Isaacs*[50] (***Isaacs***), it was held that there was power, in a case involving manslaughter where alternative bases of liability were raised by the evidence, to ask such a question, but it was said to be discouraged rather than encouraged save in exceptional circumstances.

73. In *Cheung*, the issue apparently only arose during oral argument, and in circumstances where the trial judge was requested by trial counsel to undertake the relevant fact-finding (see at [18]). The plurality considered that, for the reasons given in *Isaacs*, there would be few cases in which it would be useful or appropriate to ask questions, Kirby J took a different approach (at [133]), and Gaudron and Callinan JJ did not address the issue.

The factors considered persuasive in Isaacs are inapposite in the present case

74. It is important to appreciate that the Court in *Cheung* did not foreclose the possibility that there will be cases in which it is appropriate and useful to ask questions or to seek a special verdict. It is also critical to appreciate that the force of the reasons set out in *Isaacs* may be lacking in contexts outside manslaughter.

75. In *Isaacs*, the Court, acknowledging that there had hitherto been a divergence of judicial opinions regarding the appropriateness of questions to the jury, concluded the practice should be discouraged other than in exceptional circumstances, identifying seven considerations including (at 379-380):

> First, to inform the jury, in the course of a summing-up, that they will later be invited to answer a question, or questions, as to the basis of the verdict, may distract them from their task of seeking unanimity on a general verdict, and provoke unnecessary confusion and disagreement as to the basis of the verdict.
>
> Secondly, the jury's response to any such question may be unclear. A response that indicated two grounds of decision might, depending upon the circumstances, indicate that the jury were unanimous on both grounds, or that some jurors adopted one ground, and the remainder adopted another. The response may create more uncertainty than previously existed.
>
> Thirdly, there may be various possible views of the evidence in a case; different jurors may adopt different views and yet, consistently with their directions, reach a common verdict. To invite them to refine their verdict may be productive of mischief.
>
> Fourthly, there is a substantial risk that the jury will be invited to make a decision upon which they have not been properly addressed by counsel ...
>
> [The fifth consideration concerned a scenario involving multiple accused and is not relevant here.]
>
> Sixthly, the judge may be embarrassed if he or she does not agree with the jury's answer to the question. ...

76. Having regard to the differences between manslaughter and s 50, those considerations were inapplicable in the present case.

(1) As to the first, since unanimity with respect to the incidents comprising the *actus reus* was essential, there is no distraction. In so far as a special verdict or the

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48 *R v Doherty* (1887) 16 Cox CC 306 at 309 (Stephen J).

49 See the discussion in Nepvey, "Beyond 'Guilty' or 'Not Guilty': Giving Special Verdicts in Criminal Jury Trials" (2003) 21 *Yale Law & Policy Review* 263 at 272, 283-284.

50 (1997) 41 NSWLR 374 at 377 (The Court).

foreshadowing of questions would reinforce the extended unanimity direction, it would in fact be beneficial[51].

(2) As to the second, the answers could not create more uncertainty than would result from a general verdict. Further, if the jurors based themselves on different incidents, this is something that would indicate error (and not something to be suppressed). It would be better that the error be identified before the jury have dispersed[52].

(3) As to the third, while the potential for a mixed response has often been identified as a chief consideration militating against making inquiries[53], and while there was clearly no assumption of unanimity in *Cheung* (see at [7]), by contrast, in the context of the present charge, the jurors could not, consistent with their directions, base themselves on different incidents. Unanimity was required.

(4) As to the fourth, one would expect that counsel will have addressed on each incident, and there had been detailed submissions on the various particulars in the present case.

(5) As to the sixth, in a case where the questions or the special verdict related to the actual elements of the offence (as they would here) it would be of no moment that the judge disagreed; he or she would have to act consistently with the verdict insofar as it identified the *actus reus* found proved.

77. Critically, in a case of manslaughter (the circumstance with which *Isaacs* was concerned), unanimity as to the ground upon which that verdict is reached is unnecessary. That point was acknowledged by Roden J in *R v Petroff*[54], whose judgment was cited in *Isaacs* (at 379), and has been recognised on other occasions[55].

78. Of the other considerations in *Isaacs*, only one (the seventh) is relevant here. Translated to the circumstances of a s 50 charge, the seventh consideration is that if the jurors were agreed as to two incidents (say, two incidents within the class in particular 1), they may not necessarily have resolved whether, in respect of the balance of the incidents, there was a fundamental impasse, or whether the potential for a unanimous or majority view remained. This consideration is a real one, but in the circumstances of this case (where the jury required a *Black* direction), it was not a weighty one.

79. Further, the desirability of identifying the elements of the offence about which the jury was satisfied was significant in the present case.

(a) First, the spectrum of seriousness of the incidents particularised was large, and covered a large time frame. The sentence given by the judge would plainly have

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51 Nepvey, "Beyond 'Guilty' or 'Not Guilty': Giving Special Verdicts in Criminal Jury Trials" (2003) 21 *Yale Law & Policy Review* 263 at 283-284.

52 The court can and should interrogate the jury to ensure a verdict is properly concurred in unanimously (or where applicable by majority): *Milgate v The Queen* (1964) 38 ALJR 162 at 162 (Barwick CJ), referred to in *NH v Director of Public Prosecutions (SA)* (2016) 90 ALJR 978; [2016] HCA 33 at [17] (French CJ, Kiefel and Bell JJ). It was also reiterated in the latter decision that once the jury has been discharged and dispersed, recalling the verdict is problematic: see, eg, at [22].

53 In addition to *Isaacs*, see, *Spanos* (supra) at [7] (Debelle J), at [44] (Layton J, with whom Nyland J agreed), Fox & O'Brien (supra) at 172 and 173. In *Cheung*, it was argued (at [4]) unanimity was not required.

54 (1980) 2 A Crim R 101 at 134-135.

55 *Clarke and Johnstone* [1986] VR 643 at 661, *R v Walsh* (2002) 131 A Crim R 299; [2002] VSCA 98 at [45].

been inappropriate if only two incidents within particular 1 were found proved. By contrast, there is no accepted hierarchy of seriousness in respect of the different forms of manslaughter (as acknowledged in *Isaacs* at 381, and see also *R v Borkowski*[56]), and therefore less utility in asking the question in that context.

(b) Secondly, it was very much on the cards that the jury did not find the more serious incidents proved. An earlier trial on corresponding counts had resulted in a hung jury. In this case, the jury required a *Black* direction, asked questions concerning a particular in the mid-range of seriousness, inquired whether they would be asked to differentiate indecent assault from unlawful sexual intercourse and ultimately delivered a verdict by majority only; all this in circumstances where the judge explicitly directed them that two incidents of kissing with an indecent element would suffice to found a verdict.

(4) Trial judge's discretion miscarried and CCA ought to have identified error

80. The judge's approach suggests she considered she had no discretion to ascertain the basis for the verdict. While her remarks related to a special verdict, in context, they also foreclosed consideration of asking questions of the jury. With respect, she gave no proper consideration to the exercise of the relevant discretion, in that she appeared to deny the existence of the discretion, and further, based her reasoning on an authority which had approached s 50 on the erroneous footing that there was no unanimity requirement[57].

81. The CCA erred by failing to find the trial judge erred in that respect, and itself erred by considering that the present situation was "little different" from a verdict of manslaughter where different bases were open (at [19]). The short point is that while the judge may find facts relevant to sentencing which are consistent with the verdict, the identification of the *actus reus* is a matter for the jury, and the judge should only sentence a defendant for the acts comprising the relevant criminal conduct.

(5) Consequences of error

Uncertainty

82. Where one offence is charged but evidence is led of two (or more) incidents, each of which could constitute the offence, the charge may not necessarily be bad for duplicity but the verdict or conviction may be bad for uncertainty because it is unclear exactly of what the defendant has been convicted[58], particularly where, as here, the directions to the jury invite a conviction on a sub-set of the conduct particularised. In *The Queen v Martinovic*[59], King CJ said:

> When an information is so drafted and the case has been left to the jury to the jury in such a way that it is impossible to identify the conduct which forms the basis of the conviction, the conviction is bad for uncertainty; *R v Hawkins v Sullivan* Vol 102 Canadian Criminal Cases 183; *R v Wakefield* [1966] 1 CCC 324. ...
>
> It is most desirable that [the particulars pleaded in the information] should be sufficient to identify the conduct which is the subject of the charge and to distinguish it from other similar conduct. ... If a

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56 (2009) 195 A Crim R 1; [2009] NSWCCA 102 at [49] (Howie J, with whom McClellan CJ at CL and Simpson J agreed).

57 *R v N, SH* [2010] SASCFC 74 at [12].

58 *Parker v Sutherland* (1917) 86 LJKB 1052; *R v McCarthy* [2015] SASCFC 177 at [209]-[215] (Peek J).

59 (1985) 122 LSJS 129 at 133 (Jacobs and O'Loughlin JJ agreeing).

> question arises ... as to the incident or conduct to which a conviction or acquittal relates, it should be possible to determine that question by reference to the information and the record of the verdict.

83. In the present case, the difficulty is that while the information specified six activities said to amount to acts of sexual exploitation, and certain of those were alleged to have occurred on multiple occasions, the judge's directions permitted and invited the jury to return a verdict of guilty on a sub-set of the alleged instances of sexual offending. The fundamental connection between the information and the verdict was therefore broken, resulting in uncertainty and, it is submitted invalidity. That would have been avoided by a special verdict or questions of the jury.

10 84. If the verdict is uncertain the conviction should be quashed. In the peculiar circumstances of this case, where there have been two trials, where there were obvious inconsistencies in V's account, and where the appellant will have served more than two years in custody by the time of the hearing of this appeal, it is respectfully submitted that the Court's discretion[60] to order a new trial following the quashing of a conviction ought not to be exercised.

Sentencing miscarried

85. Alternatively, and in any event, by erroneously denying or misconceiving the discretion to seek an identification of the basis for the verdict, the sentencing task miscarried, and the CCA ought to have so held.

20 86. In the appellant's submission, either a special verdict should have been invited, or questions asked of the jury, and unless it is assumed the result would have indicated an unreserved acceptance of V's account of each aspect of the alleged offending, the appropriate sentence would inevitably have differed from that reached by the trial judge. In this respect, it may be noted that not only did the judge essentially find that all the alleged offending occurred, but she gave conclusory reasons which, on one view, proceeded upon the fallacy[61] that the acceptance of V's account necessitated the rejection of the appellant's evidence as a reasonable possibility (Remarks p 1).

87. In those circumstances, since it is no longer possible to interrogate the jury, either the conviction should be quashed, or the matter should be remitted for re-sentencing on a
30 basis which would remove the risk of over-punishment caused by the error.

88. Indeed, even if, due to the discretionary nature of the facility to request a special verdict or ask questions, it cannot be said that such an approach ought necessarily to have been followed in the present case, the corollary ought to be that the sentencing should have been undertaken on the basis that avoids the risk of punishment for offences which are alleged but cannot be shown to have been the subject of the verdict. For reasons identified above, in the context of a provision such as s 50, *Cheung* does not speak against such an approach, and it is a just and fair one. If, at the request of, or with the acquiescence of the prosecution, the judge directs the jury that they may convict by reference to some but not all of the particularised sexual offences, the judge should not
40 subsequently sentence on the basis that notwithstanding the directions, the offending

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60 *Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627 at 630.

61 See, eg, *Douglass v The Queen* (2012) 86 ALJR 1086; [2012] HCA 34 at [12]-[13] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), referring to *Murray v The Queen* (2002) 211 CLR 193 at [57] (Gummow and Hayne JJ).

established by the verdict constitutes the full range of conduct. That would be to deny the defendant a jury verdict on elements of the offence which would clearly affect the relevant sentence.

89. Against the argument that this might unduly favour a defendant where a jury simply agrees that two incidents are proved and finds it unnecessary to consider the balance (even though it may well ultimately have been satisfied of them), the appellant makes two submissions:

(1) the circumstances of the present case suggest this is unlikely;

(2) while it is a matter for the prosecution how to frame a charge or charges[62], it does not follow that if it chooses to "roll up" numerous allegations of sexual offence into a single allegation of PSE the sentencing judge should be overly astute to the risk of under-punishment. If a verdict is required on all alleged acts of offending, separate charges could be laid (as indeed they were in the appellant's first trial). Alternatively, the prosecution should have invited the judge to direct the jury that unless they were unanimously satisfied that all the sexual offences particularised in the information were proved beyond reasonable doubt, they should acquit.

90. To the extent that the brief observations made in *ARS v R*[63] in relation to 66EA of the *Crimes Act* 1900 (NSW) are contrary to the submissions made herein, it is respectfully submitted the observations are wrong and should not be followed. In that decision, some reliance was placed upon the decision in *Emery v R*[64]. It may be noted that in that case, the Court considered that the difficulty created by an ambiguous verdict might be ameliorated by a process akin to the taking of a special verdict.

VII LEGISLATIVE PROVISIONS [see annexure]

VIII ORDERS SOUGHT

91. (1) Appeal allowed.

(2) Set aside order 1 made by the Court of Criminal Appeal on 30 September 2015 and, in its place, order that the appeal against conviction is allowed and the appellant's conviction is quashed.

(3) Alternatively:

(a) set aside order 1 made by the Court of Criminal Appeal on 30 September 2015 and, in its place, order that the appeal against sentence is allowed, and the sentence given by the trial judge is set aside; and

(b) the matter is remitted to that Court, or alternatively to the trial judge, for re-sentencing in accordance with the reasons of the Court.

16 March 2017

M E Shaw **B J Doyle**

Counsel for the appellant

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62 See, eg, *Maxwell v The Queen* (1996) 184 CLR 501, *Cheung* at [47] (Gleeson CJ, Gummow and Hayne JJ), *Elias v The Queen* (2013) 248 CLR 483.

63 [2011] NSWCA 266 at [230]-[233] (Bathurst CJ, James and Johnson JJ agreeing).

64 (1999) 9 Tas R 120; [1999] TASSC 141 at [5]-[6] (Underwood J) and [33] (Slicer J), s 383(1)(b) of the *Criminal Code* 1924 (Tas).

ANNEXURE (PART VI – STATUTORY PROVISIONS)

Section 50 of the *Criminal Law Consolidation Act* 1935 (SA) (**CLCA**)

50 Persistent sexual exploitation of a child

(1) An adult person who, over a period of not less than 3 days, commits more than 1 act of sexual exploitation of a particular child under the prescribed age is guilty of an offence.

Maximum penalty: Imprisonment for life.

(2) For the purposes of this section, 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.

(3) If –

(a) at any time when an act of sexual exploitation of a child was allegedly committed the child was at least 16 years of age; and

(b) the defendant proves that he or she believed on reasonable grounds that the child was of or over the prescribed age at that time,

the act of sexual exploitation is not to be regarded for the purposes of an offence against this section.

(4) Despite any other Act or rule of law, the following provisions apply in relation to the charging of a person on an information for an offence against this section:

(a) subject to this subsection, the information must allege with sufficient particularity—

(i) the period during which the acts of sexual exploitation allegedly occurred; and

(ii) the alleged conduct comprising the acts of sexual exploitation;

(b) the information must allege a course of conduct consisting of acts of sexual exploitation but need not—

(i) allege particulars of each act with the degree of particularity that would be required if the act were charged as an offence under a different section of this Act; or

(ii) identify particular acts of sexual exploitation or the occasions on which, places at which or order in which acts of sexual exploitation occurred; …

(5) A person who has been tried and convicted or acquitted of persistent sexual exploitation of a child may not be convicted of a sexual offence against the same child alleged to have committed during the period which the person was alleged to have committed the offence of persistent sexual exploitation of the child.

(6) This section applies in relation to acts of sexual exploitation of a child whether they were committed before or after the commencement of this section.

(7) In this section—

prescribed age, in relation to a child, means—

(a) in the case of a person who is in a position of authority in relation to the child—18 years;

(b) in any other case—17 years;

sexual offence means—

(a) an offence against Division 11 (other than sections 59 and 61) or sections 63B, 66, 69 or 72; or

(b) an attempt to commit, or assault with intent to commit, any of those offences; or

(c) a substantially similar offence against a previous enactment.

(8) For the purposes of this section, a person is in ***a position of authority*** in relation to a child if the person is—

(a) a teacher (within the meaning of the *Education and Early Childhood Services (Registration and Standards) Act 2011*) engaged in the education of the child; …

Section 49 of the CLCA

49 Unlawful sexual intercourse

(1) A person who has sexual intercourse with any person under the age of 14 years shall be guilty of an offence and liable to be imprisoned for life.

(3) A person who has sexual intercourse with a person under the age of seventeen years is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

(4) It shall be a defence to a charge under subsection (3) to prove that—

(a) the person with whom the accused is alleged to have had sexual intercourse was, on the date on which the offence is alleged to have been committed, of or above the age of sixteen years; and

(b) the accused—

(i) was, on the date on which the offence is alleged to have been committed, under the age of seventeen years; or

(ii) believed on reasonable grounds that the person with whom he is alleged to have had sexual intercourse was of or above the age of seventeen years.

(5) A person who, being in a position of authority in relation to a person under the age of 18 years, has sexual intercourse with that person is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

(5a) For the purposes of subsection (5), a person is in ***a position of authority*** in relation to a person under the age of 18 years (the ***child***) if the person is—

(a) a teacher (within the meaning of the *Education and Early Childhood Services (Registration and Standards) Act 2011*) engaged in the education of the child; or

(b) a foster parent, step-parent or guardian of the child; or

(c) ...

(6) A person who, knowing that another is by reason of intellectual disability unable to understand the nature or consequences of sexual intercourse, has sexual intercourse with that other person is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

(7) Consent to sexual intercourse is not a defence to a charge of an offence under this section.

(8) This section does not apply to sexual intercourse between persons who are married to each other.

Section 56 of the CLCA

56 Indecent assault

(1) A person who indecently assaults another is guilty of an offence.

Maximum penalty:

(a) for a basic offence—imprisonment for 8 years;

(b) for an aggravated offence—imprisonment for 10 years.

(2) If the victim of the offence was at the time of the offence under the age of 14 years, the offence is an aggravated offence and it is unnecessary for the prosecution to establish that the defendant knew of, or was reckless as to, the aggravating factor.

Section 354(3) of the CLCA

354 Powers of Court in special cases

(3) Where on the conviction of the appellant the jury has found a special verdict and the Full Court considers that a wrong conclusion has been arrived at by the court before which the appellant has been convicted on the effect of that verdict, the Full Court may, instead of allowing the appeal, order such conclusion to be recorded as appears to the Court to be in law required by the verdict and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law.

Section 29D of the *Criminal Law (Sentencing) Act* 1988 (SA)

29D Sentencing standards for offences involving paedophilia

(1) The Parliament declares that—

(a) the 1997 amendment of sentencing standards reflected an emerging recognition by the judiciary and the community generally of the inherent seriousness of offences involving paedophilia; and

(b) the reformed standards should be applied to offences involving paedophilia committed before or after the enunciation of the 1997 amendment of sentencing standards (or committed in part before, and in part after, the enunciation of the 1997 amendment of sentencing standards).

(2) In this section—

1997 amendment of sentencing standards means the change to sentencing standards enunciated in R v D (1997) 69 SASR 413;

offences involving paedophilia means all offences to which the 1997 amendment of sentencing standards is applicable (whether individual sentences for the offences have been, or are to be, imposed or a global sentence covering a series of offences1 or a course of conduct involving a number of criminal incidents2).

reformed standards means sentencing standards as changed by the 1997 amendment of sentencing standards.

Notes—

1 See section 18A of the *Criminal Law (Sentencing) Act 1988*.

2 See section 74 of the *Criminal Law Consolidation Act 1935*.