CHIRO v THE QUEEN (A9/2017)

Court appealed from:	Court of Criminal Appeal of the Supreme Court of South Australia [2015] SASCFC 142
Date of judgment:	30 September 2015
Special leave granted:	10 February 2017

This appeal concerns the issue of whether a trial judge is obliged to make further enquiries of a jury who has found a defendant guilty of the offence of "persistent sexual exploitation of a child" ("PSE") in order to identify the two (or more) sexual offences which they found had been committed in order to be able to sentence the defendant.

Section 50(1) of the *Criminal Law Consolidation Act 1935* (SA) ("the CLCA") creates the offence of PSE, whereby an adult, 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. The Act defines the 'prescribed age' for present purposes (where the adult is a teacher of the child) as a child under the age of 18 years. The Act further defines an 'act of exploitation' as an act which could be the subject of a charge of a sexual offence.

The appellant is a former high school teacher at a school in Adelaide. He was convicted by jury verdict of 1 of 4 counts of separate sexual offences in relation to a student, the complainant ('V"). The 4 separate counts related to the period from July 2008 - when V was in Year 9 at the school where the appellant taught and was at times her teacher - to November 2011 when she was in Year 12. The appellant was convicted on count 1, a charge of aggravated indecent assault which took place in 2008 relating to "quick peck on the lips". The jury was hung on the remaining counts.

The appellant's appeal against conviction on count 1 was allowed on the basis that the Court of Criminal Appeal ("the CCA") found that the verdict was unsafe and that there had been a miscarriage of justice in that the offence of indecent assault required a sexual connotation. A retrial was ordered.

On the morning of the retrial, the DPP filed fresh information laying 1 count of PSE alleging that between 1 July 2008 and 19 November 2011 the appellant had committed more than 6 different sexual offences against V, and 3 of them on more than one occasion. During the learned trial judge's summing up the jury were twice directed that if they were satisfied of the kissing indecent assaults, then that alone would be sufficient to prove *actus reus*. During and after the trial judge's summing up the jury asked for direction as to several aspects of their task and answers were provided. The judge did not ask any questions in order to identify which of the alleged sexual offences the jury had found to be proven beyond reasonable doubt.

The jury delivered a majority verdict finding the appellant guilty of PSE. The learned trial judge sentenced the appellant to 10 years' imprisonment with a non-parole

period of 6 years on the basis that he had committed the full range of acts alleged in the PSE charge over the relevant period, noting that the maximum sentence for the most serious of the acts of fellatio and digital intercourse would amount to 'unlawful sexual intercourse' which under s 49 of the CLCA carries a maximum penalty of 10 years.

The appellant appealed to the CCA against conviction and sentence. The CCA dismissed his appeal.

The appellant appealed to the High Court. The grounds of appeal are:

- That the CCA erred in failing to hold that the trial judge erred by failing to ask the jury the necessary questions to identify, for the purposes of sentencing, the 2 (or more) sexual offences in respect of which they had found the charge of PSE proven beyond reasonable doubt.

- That the Court of Appeal erred in in finding that, in the absence of an answer by the jury to those questions and in light of the direction to the jury that they were entitled to convict if satisfied of only 2 episodes of sexual offending of a relatively less serious nature (kissing), it was open to the trial judge to sentence the appellant as if he were guilty of all the sexual offending alleged.

The Court has directed that this appeal be heard at the same time as the appeal of *Hamra v The Queen* (A14/2017) which raises similar issues.