HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

S53/2022

PETER LEONARD STEPHENS

Appellant

- and -

THE QUEEN

Respondent

APPELLANT'S SUBMISSIONS

1. The Appellant appeals, by special leave granted on 8 April 2022, from that part of the judgment of the New South Wales Court of Criminal Appeal given on 9 July 2021 in *Stephens v The Queen* (2021) 290 A Crim R 303 (**CAB 290**) which rejected Grounds 1–4 of the Appellant's appeal against conviction to that Court.

Part I: Certification

2. These Submissions are in a form suitable for publication on the Internet.

Part II: Statement of Issue Presented by the Appeal

3. The issue which is presented by this appeal is whether the application of s 80AF of the *Crimes Act 1900* (NSW) to the Appellant's trial affected a pre-existing substantive right of the Appellant, namely not to be convicted of (or an immunity from conviction for) an offence contrary to s 81 of the *Crimes Act* where the conduct said to constitute that offence could not be proven to have occurred before the repeal of s 81 effective as of 8 June 1984, such that the Court of Criminal Appeal ought to have:

   a. held, consistently with authority of this Court, that s 80AF of the *Crimes Act* did not apply to the Appellant's trial which, having commenced at the latest on 29 November 2018, was already pending when s 80AF commenced on 1 December 2018; and

b. ordered that the Appellant's convictions on counts 6, 7 and 13 be set aside, and verdicts of acquittal be entered on those counts.

Part III: Section 78B of the Judiciary Act 1903 (Cth)

4. The Appellant considers that notice is not required under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Citation of the Judgment of the Court Below

5. The reasons of the Court of Criminal Appeal in *Stephens v The Queen* are reported at (2021) 290 A Crim R 303.

Part V: Relevant Facts

The trial

6. On 29 November 2018, the Crown presented an 18-count indictment against the Appellant (**CAB 5–10**), and the Appellant was arraigned on that indictment in the District Court at Parramatta (**CAB 11–14**).

7. The charges against the Appellant on that indictment each alleged sexual offending against a child, "C". Eight of the counts alleged offending contrary to s 81 of the *Crimes Act* (indecent assault upon a male person). The remaining ten counts alleged offending contrary to s 78K of the *Crimes Act* (homosexual intercourse with male of or above the age of 10 years and under the age of 18 years). Section 81 caried a maximum penalty of five years' imprisonment. It was omitted from the *Crimes Act* upon the commencement of Schedule 1 of the *Crimes (Amendment) Act 1984* (NSW) on 8 June 1984. That same amending Act inserted s 78K of the *Crimes Act*, which commenced on 8 June 1984, and which carried a maximum penalty of 10 years' imprisonment.

8. The Crown asserted that the Appellant had committed several of the alleged offences within a period which spanned before, and after, 8 June 1984. The approach taken by the prosecutor in the 29 November 2018 indictment was to charge two alternative offences in those circumstances: one offence contrary to s 81 covering the period to 7 June 1984, and one offence contrary to s 78K covering the period from 8 June 1984

until the end of the charge period. That approach is evident in charges 5 and 6, 7 and 8, 9 and 10, and 11 and 12 of the 29 November 2018 indictment.

9. On 1 December 2018, s 80AF of the *Crimes Act* (inserted by the *Crimes Legislation Amendment (Child Sexual Abuse) Act 2018)* came into force.[1] Section 80AF relevantly provided, in summary, that in trials of sexual offending against children in which there was uncertainty about the time when an offence was committed, 'any requirement to establish that the offence charged was in force' was satisfied if the prosecution was able to 'establish that the offence was in force at some time during' the charge period.[2]

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10. On 5 February 2019, the prosecutor was granted leave, under s 20 of the *Criminal Procedure Act 1986* (NSW), to amend the indictment by way of substitution of a 14-count indictment. The express purpose of that amendment was to enable the prosecutor to take the benefit of s 80AF.[3] Relevantly to this appeal, an effect of the amendment of the indictment by substitution was to 'consolidate':

    a. counts 7 and 8 into a single count alleging an offence contrary to s 81 with a charge period of 6 July 1982 to 6 July 1984 (new count 6); and

20 b. counts 9 and 10 into a single count alleging an offence contrary to s 81 with a charge period of 6 July 1982 to 6 July 1984 (new count 7).[4]

11. On 19 February 2019, the 14-count indictment was further amended on the Crown's application.[5] The effect of the amendment, relevantly, was that counts 11[6] and 13, which had alleged offences contrary to s 78K of the *Crimes Act*, were amended to allege offences contrary to s 81 of the *Crimes Act*. As amended, count 13 alleged an offence contrary to s 81 with a charge period of 6 July 1983 to 6 July 1986, extending well beyond the repeal of s 81.

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[1] Proclamation of Commencement made 28 November 2018 (2018 No 671).
[2] *Crimes Act 1900* (NSW) s 80AF(2)(a).
[3] Transcript of 5 February 2019, 13–15 (**CAB 15–17**); *Stephens v The Queen* (2021) 290 A Crim R 303, [27]–[30] (Simpson AJA) (**CAB 304–306**).
[4] Counts 5 and 6 were also consolidated into a new count 5 alleging an offence contrary to s 81, and count 8, alleging an offence against s 81, replaced counts 11 and 12. Verdicts of not guilty were returned on both counts 5 and 8 as numbered on the 5 February 2019 indictment, and so those counts are not relevant to this Court's consideration of this appeal.
[5] Transcript of 19 February 2019, 446–458 (**CAB 30–42**); Ruling of 19 February 2019 (**CAB 50–53**) *Stephens v The Queen* (2021) 290 A Crim R 303, [33] (Simpson AJA) (**CAB 307**).
[6] On which a verdict of not guilty was returned.

12. As a result of the amendments to the indictment, relevantly to this appeal:

    a. count 6 alleged an offence contrary to s 81 with a charge period extending beyond the repeal of s 81 to 6 July 1984;

    b. count 7 alleged an offence contrary to s 81 with a charge period extending beyond the repeal of s 81 to 6 July 1984; and

    c. count 13 alleged an offence contrary to s 81 with a charge period extending beyond the repeal of s 81 to 6 July 1986.

13. The table below outlines the progressive amendments to the indictment relevant to the alleged conduct which formed the basis of what became the counts relevant to this appeal: counts 6, 7 and 13. (Counts not in issue on this appeal are omitted).

Count on 29/11/18 indictment	**Offence charged and date range**	**Charged conduct**	**5/2/19 amendments**	**Count number from 5/2/19**	**19/2/19 amendments**
7	Section 81 - 6/7/82 to 7/6/84	"the Training Room Charge" (see Sentence Remarks, page 5 (**CAB 230**))	Section 81 – 6/7/82 to 6/7/84	6	N/A
8	Section 78K – 8/6/84 to 6/7/84				
9	Section 81 - 6/7/82 to 7/6/84	"the Poster charge" (see Sentence Remarks, page 6 (**CAB 231**))	Section 81 – 6/7/82 to 6/7/84	7	N/A
10	Section 78K – 8/6/84 to 6/7/84				

17	Section 78K – 6/7/85 to 6/7/86	"the $50 charge" (see Sentence Remarks, page 6 (**CAB 231**))	N/A	13	Section 81 – 6/7/83 to 6/7/86

14. On 4 March 2019, the jury returned verdicts of guilty on counts 1, 2, 3, 6, 7, 13 and 14 (**CAB 224–225**). The Appellant's conviction on count 14 was set aside by the Court below.[7] The convictions on counts 1, 2 and 3 are not in issue on this appeal.

Judgment of the Court of Criminal Appeal

15. On 9 July 2021, the Court below, by majority, dismissed those grounds of the Appellant's appeal to that Court which concerned the applicability of s 80AF to his trial.

16. Simpson AJA (with whom Davies J agreed) concluded that s 80AF applied to the Appellant's trial, notwithstanding that that section had commenced when the Appellant's trial was already pending,[8] as (a) s 80AF was procedural and not substantive;[9] and (b) if s 80AF were substantive, the section was 'clearly intended to alter the existing law with respect to proof of sexual offending against children', and the context in which s 80AF was enacted indicated that it was intended to apply even to pending trials.[10] For the reasons below, both of those conclusions were wrong.

17. Button J concluded that s 80AF did not have retrospective application to the Appellant's trial. His Honour reasoned that 'because it is to be thought of as an expansion of inculpation in a real and practical sense, not least in terms of outcomes of criminal proceedings, it is the kind of legislative change that attracts the principles applicable to pending proceedings discussed by Spigelman CJ (with whom McClellan

[7] *Stephens v The Queen* (2021) 290 A Crim R 303, [60]–[65] (Simpson AJA), [82] (Davies J); [84] (Button J) (**CAB 314–316, 320**).
[8] Simpson AJA accepted the proposition that the Appellant's trial had commenced by no later than 29 November 2018, upon the Appellant's arraignment on an indictment of that date: *Stephens v The Queen* (2021) 290 A Crim R 303, [48]–[58] (Simpson AJA) (**CAB 312–314**). See also *R v Nicolaidis* (1994) 33 NSWLR 364, 367D; *R v Taylor* [2003] NSWCCA 194, [132]–[156] (Bell J); *GG v The Queen* (2010) 79 NSWLR 194, [63] (Beazley JA).
[9] *Stephens v The Queen* (2021) 290 A Crim R 303, [43] (**CAB 310**).
[10] *Stephens v The Queen* (2021) 290 A Crim R 303, [44]–[58] (**CAB 310–311**).

CJ at CL and Sully J agreed) in *Lodhi v The Queen*…'.[11] Further, given that Parliament had not enacted a transitional provision, his Honour was 'not satisfied that Parliament necessarily intended that the legislation is to apply to the relatively small subset of criminal proceedings for child sexual assault that had already commenced and that would feature the specific chronological problem of proof to which the legislation is addressed'.[12]

Part VI: Argument

Relevant authorities

17. The question whether s 80AF applied to the Appellant's trial had to be decided in accordance with the holdings of this Court in *Newell v The King* ('*Newell*')[13] and *Rodway v The Queen* ('*Rodway*'),[14] and the decision of the New South Wales Court of Criminal Appeal in *Lodhi v The Queen* ('*Lodhi*').[15] The majority of the Court below failed to apply correctly the principles set out in those cases, and so erred in holding that s 80AF applied to the Appellant's trial.

18. There is a presumption of statutory interpretation that a statute which affects existing substantive rights is not intended to apply retrospectively to pending criminal proceedings in the absence of express words or a necessary implication of Parliament that the statute is to have such application.[16] Thus, in *Newell*, the *Jury Act 1936* (Tas), which provided for majority verdicts 'on the trial of any criminal issue', was held to be confined in its application to 'the trial of any criminal issue joined after the commencement of the Act': at 712 (Dixon J). Dixon J added that the words 'on the trial of any criminal issue' used in the Act 'should not be construed as depriving a prisoner standing in peril at the time of their enactment of so important a thing as his

[11] *Stephens v The Queen* (2021) 290 A Crim R 303, [98] (**CAB 322**).
[12] *Stephens v The Queen* (2021) 290 A Crim R 303, [99] (**CAB 322**).
[13] (1936) 55 CLR 707.
[14] (1990) 169 CLR 515. See also *Victrawl Pty Ltd v Telstra Corporation Ltd* (1995) 183 CLR 595, 615–616.
[15] (2006) 199 FLR 303.
[16] See also s 30(1) of the *Interpretation Act 1987* (NSW) which limits the effect of an 'amendment or repeal of an Act' so as not to, among other things, 'affect any right, privilege, obligation or liability acquired, accrued or incurred under the Act …' or 'affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability or penalty': ss 30(1)(c), 30(1)(e). The *Interpretation Act* 'applies to an Act … except in so far as the contrary intention appears in this Act or in the Act … concerned': s 5(2).

protection from conviction except by a unanimous verdict': at 712–713. All members of the Court in *Newell* agreed in the result.[17]

19. In *Rodway*, this Court (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ) stated the relevant principle:

> The rule at common law is that a statute ought not be given a retrospective operation where to do so would affect an existing right or obligation unless the language of the statute expressly or by necessary implication requires such construction. It is said that statutes dealing with procedure are an exception to the rule and that they should be given a retrospective operation. It would, we think, be more accurate to say that there is no presumption against retrospectivity in the case of statutes which affect mere matters of procedure.[18]

20. In *Lodhi*, Spigelman CJ (with whom McClellan CJ at CL and Sully J agreed), concluded that amending legislation which came into effect after an accused had been arraigned on terrorism offences, and which repealed and replaced provisions of the *Criminal Code* (Cth) under which the accused had been charged, did not apply to the accused's trial.[19] Having referred to this Court's judgment in *Newell*, Spigelman CJ stated that 'Parliament is "prima facie expected to respect" the principle that a statute will not retrospectively alter a criminal offence where a trial has commenced': at 314 [49].

21. Spigelman CJ's judgment further set out the following relevant propositions:

    a. First, 'there is a body of case law in which retrospectivity with respect to pending proceedings is treated as a distinct category'.[20] The case law recognises that 'variation of rights and obligations after the pre-existing law has been invoked or otherwise relied upon does add an element of injustice or unfairness which does not exist before any such step is taken'.[21]

[17] At 712 (Latham CJ); 713 (Evatt J).
[18] (1990) 169 CLR 515, 518.
[19] *Lodhi* (2006) 199 FLR 303, 310–14 [22]–[56].
[20] *Lodhi* (2006) 199 FLR 303, 310 [23].
[21] *Lodhi* (2006) 199 FLR 303, 310 [23].

b. Secondly, a 'statute will only be given retrospective operation to the extent intended by the Parliament and to no greater extent. This is to be determined by the words of the statute, construed in their full context, and in accordance with the scope and purpose of the legislation'.[22]

c. Thirdly, 'an overtly retrospective statute, which may have the effect of making past acts criminal, will not be understood to be applicable to criminal proceedings that have already been instituted, unless the Court can identify express words or a necessary intention that that is the intention of Parliament.[23]

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22. In Spigelman CJ's judgment, those propositions meant that it was 'open to construe' the statutory provision in issue in *Lodhi* 'so as not to extend to "offences committed before the commencement of this section" on which criminal issue was joined before the commencement of the section'.[24] His Honour added that 'the principles of the law of statutory interpretation, particularly the clear statement principle, lead to the result that that interpretation should be adopted'.[25]

The Appellant's 'existing right' affected by retrospective operation of s 80AF

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23. On the basis of these authorities, it was necessary for the Court of Criminal Appeal to address the question whether s 80AF affected an 'existing right'[26] of the Appellant, such that there was a presumption against its application to an already pending trial, or whether it was 'merely' procedural in application. In addressing this question, Simpson AJA (with whom Davies J agreed) rejected the Appellant's submission that s 80AF affected a pre-existing substantive right of the Appellant: namely, his right not to be convicted of an offence unless the prosecution is able to prove that the particular offence-creating provision was in force at the time of the alleged conduct which the prosecution asserts constitutes that offence.[27]

[22] *Lodhi* (2006) 199 FLR 303, 310 [25].
[23] *Lodhi* (2006) 199 FLR 303, 312 [35].
[24] *Lodhi* (2006) 199 FLR 303, 314 [50].
[25] *Lodhi* (2006) 199 FLR 303, 314 [50].
[26] *Rodway* (1990) 169 CLR 515, 518 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).
[27] *Stephens v The Queen* (2021) 290 A Crim R 303, [43] (**CAB 310**).

24. At the time that his trial commenced, that time being no later than 29 November 2018,[28] the Appellant could not have been convicted of an offence contrary to either s 81 or 78K of the *Crimes Act* unless the Crown was able to prove, beyond reasonable doubt, that the alleged conduct occurred at an identifiable time when s 81 was in force, or at an identifiable time when s 78K was in force. It would not have been sufficient for the Crown to have asserted that the alleged conduct was caught by *a* criminal offence at all times during the charge period, where it could not prove *which* offence-creating provision was in force at the time of the alleged conduct. The Crown was required to prove, beyond reasonable doubt, that the Appellant 'committed a past act which constituted a criminal contravention of the requirements of a valid law *which was applicable to the act at the time the act was done*'.[29]

25. In the absence of s 80AF, therefore, there was simply no statutory provision, or principle of law, which (a) permitted the Crown to bring a charge for an offence against s 81 which was not strictly confined to a charge period during which s 81 was in force; and (b) had the effect that the Crown was not obliged to prove that the alleged conduct occurred at a time when s 81 was in force.

26. The issue is illustrated by the decision of the New South Wales Court of Criminal Appeal in *R v Greenaway* ('*Greenaway*').[30] There, a conviction for an offence contrary to s 81 of the *Crimes Act* was set aside where the charge period extended beyond the repeal of s 81. Greg James J stated that it was 'not possible to fix the occasion upon which the indecent assault alleged [was] said to have occurred with any greater accuracy than at some time during the period particularised', and it was 'not possible to say whether an offence was committed under the repealed provision or under the new provision'.[31] In the circumstances, the conviction could not be maintained.[32]

27. If s 80AF(2)(a) applied to the Appellant's trial, however, it removed the requirement for the prosecutor to prove that the alleged conduct founding counts 6, 7 and 13 occurred at a time when s 81 was in force (provided that s 81 was in force *at some time* during the charge period).

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[28] *Stephens v The Queen* (2021) 290 A Crim R 303, [48] (Simpson AJA) (**CAB 312**).
[29] *Polyukhovich v The Commonwealth* (1991) 172 CLR 501, 610 (Deane J) (emphasis added).
[30] (2000) 118 A Crim R 299; [2000] NSWCCA 368.
[31] (2000) 118 A Crim R 299; [2000] NSWCCA 368, [9].
[32] (2000) 118 A Crim R 299; [2000] NSWCCA 368, [12]. See also *Stephens v The Queen* (2021) 290 A Crim R 303, [12] (Simpson AJA) (**CAB 299**).

Errors in the reasoning of the Court below

28. In these circumstances, this Court's authorities dictated the conclusion that s 80AF did not apply to the Appellant's pending trial. The Appellant had the 'existing right' described above, such that s 80AF was not to be given a retrospective operation so as to affect that right unless the section required that result, either 'expressly or by necessary implication': *Rodway* (1990) 169 CLR 515, 518.[33]

29. Central to Simpson AJA's conclusion that s 80AF was procedural in character was that there was 'no time during the range of dates spanned in the 5 February indictment (as amended on 19 February) that the conduct charged would not have constituted a sexual offence for which [the Appellant] was liable to be convicted and punished.[34]

30. This reasoning misconceives the effect of s 80AF and the nature of the Appellant's existing substantive right which it affected. The section's practical effect was, as described above, to remove the Appellant's right to an acquittal should the prosecutor be unable to prove, beyond reasonable doubt, that the conduct alleged occurred at a particular time when s 81 was in force, or at a particular time when s 78K was in force. The application of that right is evident in *Greenaway*, among other cases,[35] and the right derives from the fundamental proposition that (unless expressly or necessarily altered by the legislature) criminal liability depends upon proof of an act that constituted an offence against a particular offence-creating provision that was in force at the time the act was done.

31. Simpson AJA's reasoning did not allow for the fact that the Appellant's 'existing right' persisted, notwithstanding that the alleged conduct may have constituted *a* criminal offence throughout the entire charge period under one of two offence-creating provisions successively in force.

[33] See also *State of Victoria v Robertson* (2000) 1 VR 465, [21] (Batt JA); *Zainal bin Hashim v Government of Malaysia* [1980] AC 734, 742; *Attorney-General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557, 570–574, [48]–[66] (Spigelman CJ); *R v JS* (2007) 175 A Crim R 108, 118-22 [22]–[50] (Spigelman CJ).
[34] *Stephens v The Queen* (2021) 290 A Crim R 303, [43] (Button J).
[35] *Kailis v The Queen* (1999) 21 WAR 100; (1999) 107 A Crim R 195; *SI v The State of Western Australia* [2014] WASCA 44.

32. In his dissenting reasons, Button J accurately described the substantive effect of s 80AF (at [95] (**CAB 321**)):

> To express things bluntly: the commencement of the legislation has the practical effect that some accused persons who previously would have been at liberty at the conclusion of their trial, having been acquitted, will now be in prison, having been convicted.

33. For those reasons, it was wrong to characterise s 80AF as merely procedural such that the presumption against retrospective operation to pending trials did not apply. It affected the Appellant's then existing substantive right in just the same way as would have a statutory provision which provided that despite its repeal, s 81 of the *Crimes Act* was deemed to have been in force throughout the charge period of counts 6, 7 and 13 alleged against the Appellant. Adopting the language of Spigelman CJ in *Lodhi*, s 80AF 'alter[ed]'[36] s 81 as it applied to the Appellant's trial by extending the period for which that offence was taken to be in force for the purposes of the Appellant's trial.

34. The second basis for Simpson AJA's conclusion that s 80AF applied to the Appellant's trial was that 'even if the effect of s 80AF is substantive and not procedural, it was clearly intended to alter the existing law with respect to proof of sexual offending against children.'[37] Her Honour added that s 80AF was to be interpreted 'in the context of the circumstances in which it came to be enacted', which demonstrated that the section was 'in direct response to what was perceived to be (and clearly was) a problem in the prosecution of … "historic sexual offences" against children'.[38]

35. The complete answer to this reasoning is that there is nothing in the text of s 80AF, or even in any extrinsic materials, which indicates that the Parliament *necessarily* intended that s 80AF apply to trials *already pending* at the time of its commencement. As Button J observed, Parliament did not enact a transitional provision which expressly stated that s 80AF was to have such application.[39] It could easily have done so.

[36] *Lodhi* (2006) 199 FLR 303, 314 [49].
[37] *Stephens v The Queen* (2021) 290 A Crim R 303, [44] (**CAB 310–311**).
[38] *Stephens v The Queen* (2021) 290 A Crim R 303, [45] (**CAB 311**).
[39] *Stephens v The Queen* (2021) 290 A Crim R 303, [91] (**CAB 320**).

36. Further, not only did Parliament not enact a transitional provision, s 80AF was not of a class or category of legislative provision which must necessarily have been intended by Parliament to have retrospective effect. In that respect, it may be contrasted with validating legislation. Such validating legislation — for example, that considered by the New South Wales Court of Appeal in *Lazarus v Independent Commission Against Corruption*[40] — has as its 'entire purpose … to alter the legal status of historical conduct', and '[s]elf-evidently … has retrospective force'.[41] In such a case, distinguishable from the present, the presumption against retrospective operation of statutory amendments so as to affect already commenced criminal proceedings may be displaced, as illustrated by the result in *Lazarus*.

37. It may be accepted that by enacting s 80AF, Parliament resolved to address the problem of proof in prosecutions for sexual offending against children caused by the historic repeal and replacement of relevant offence-creating provisions. That problem was apparent in the result of cases such as *Greenaway* and *R v Page*,[42] and was addressed in the departmental discussion paper to which Simpson AJA referred.[43] However, it is not enough simply to identify the problem which s 80AF was intended to solve. The relevant question is whether Parliament intended to solve that problem of proof only for proceedings yet to be commenced when s 80AF came into force, or whether it intended for s 80AF to apply also to trials pending when the section commenced. On that question, the text of s 80AF (and the *Crimes Legislation Amendment (Child Sexual Abuse) Act 2018*, which inserted s 80AF), is silent.

38. For the above reasons, the Court below erred in holding that s 80AF applied to the Appellant's trial.

39. The effect of the error of the Court below is that on each of counts 6, 7 and 13, the Appellant was convicted of an offence contrary to s 81 in circumstances where the Crown alleged that he had engaged in conduct within a range of dates which extended beyond the repeal of s 81 effective as of 8 June 1984. As s 80AF had no application to

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[40] *Lazarus v Independent Commission Against Corruption* (2017) 94 NSWLR 36 ('*Lazarus*').
[41] *Lazarus* (2017) 94 NSWLR 3, 54 [73], 56 [86] (Leeming JA). See also *Attorney-General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557, 570 [47] (Spigelman CJ).
[42] New South Wales Court of Criminal Appeal, Unreported, 25 November 1991, quoted by Simpson AJA at (2021) 290 A Crim R 303, [12] (**CAB 299**).
[43] *Stephens v The Queen* (2021) 290 A Crim R 303, [13] (**CAB 299–300**).

the Appellant's trial, there is no statutory provision or principle of law which can save the convictions on counts 6, 7 and 13. The convictions on those counts must be set aside.

40. Having regard to the imprecise state of the complainant's evidence as to the timing of the commission of the conduct the subject of counts 6, 7 and 13,[44] the appropriate order — contrary to that which Button J considered to be appropriate were those counts to be set aside[45] — is that verdicts of acquittal be entered on those counts. Relevantly, the complainant gave evidence that the conduct the subject of count 7 took place when he 'wouldn't have been much older than 12 maybe, 13'. He accepted that he could have been as young as 11, but he did not 'think [he] would have been 13'.[46]

41. Given the state of the evidence led at trial, to order a retrial would be to 'give the prosecution an opportunity to supplement a defective case'[47] by seeking to elicit from the complainant sufficient evidence as to timing to place the conduct firmly, beyond reasonable doubt, on one side or the other of 8 June 1984, in circumstances where the evidence at the original trial was not 'sufficiently cogent to justify a conviction'[48] for an offence contrary to either s 81 or s 78K of the *Crimes Act*.

Part VII: Orders Sought

36. The Appellant seeks orders that:

    a. the appeal be allowed;

    b. paragraph (1) of the orders made by the Court of Criminal Appeal of the Supreme Court of New South Wales, which dismissed the appeal against conviction on counts 6, 7 and 13, be set aside, and in its place it be ordered that:

[44] The complainant's evidence on these counts appears at Transcript, 11 February 2019, 154–156 (counts 6 and 7) (**Appellant's Book of Further Materials ('ABFM') 22–24**), 166 (count 13) (**ABFM 34**).
[45] *Stephens v The Queen* (2021) 290 A Crim R 303, [102] (**CAB 323**).
[46] Transcript, 11 February 2019, 156 (**ABFM 24**).
[47] *Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627, 630 (Gibbs CJ, Murphy, Wilson, Deane and Dawson JJ). See also *Parker v The Queen* (1997) 186 CLR 494, 519–21 (Dawson, Toohey and McHugh JJ).
[48] *Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627, 630 (Gibbs CJ, Murphy, Wilson, Deane and Dawson JJ).

i. the appeal to that Court against conviction on counts 6, 7 and 13 be allowed;

ii. the verdicts of guilty on counts 6, 7 and 13 be quashed; and

iii. verdicts of acquittal be entered on counts 6, 7 and 13.

c. paragraph (3) of the orders made by the Court of Criminal Appeal of the Supreme Court of New South Wales be set aside (including the sentence imposed by that Court) and, in its place, it be ordered that the sentence imposed by the District Court of New South Wales on 13 November 2019 be set aside; and

d. the matter be remitted to the Court of Criminal Appeal of the Supreme Court of New South Wales for resentencing on counts 1, 2 and 3 only, and the Appellant be remanded in custody, without prejudice to any application for bail, to appear on the hearing of the remitter.

Part VIII: Time for Oral Argument

37. The Appellant's time required for oral argument is estimated to be 90 minutes.

Dated: 6 May 2022

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

PETER LEONARD STEPHENS

Appellant

- and -

THE QUEEN

Respondent

ANNEXURE: STATUTORY PROVISONS REFERRED TO IN APPELLANT'S SUBMISSIONS

1. *Crimes Act 1900* (NSW) s 78K (as in force from 8 June 1984 to 12 June 2003);
2. *Crimes Act 1900* (NSW) s 81 (as in force prior to its repeal effective on 8 June 1984);
3. *Crimes Act 1900* (NSW) s 80AF (as in force at the time of its commencement on 1 December 2018); and
4. *Crimes Act 1900* (NSW) Schedule 1A (as in force on 1 December 2018).