IN THE HIGH COURT OF AUSTRALIA
ADELAIDE OFFICE OF THE REGISTRY

No: A17 of 2012

BETWEEN

10 **RAYMOND HOWARD LYLE DOUGLASS**
APPELLANT

and

THE QUEEN
RESPONDENT

20

WRITTEN SUBMISSIONS OF THE RESPONDENT

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Part I: PUBLICATION

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

Part II: CONCISE STATEMENT OF ISSUES

2. At the Appellant's trial the prosecution adduced evidence of an out of court statement made by the Complainant of an indecent assault perpetrated against her by the Appellant when the two were alone. In South Australia that statement may be used testimonially. The Complainant, who did not give evidence in chief but was submitted for cross-examination unsworn, was not asked whether or not she adopted her out of court statement as true and correct, but did not give evidence to the contrary. The Appellant gave evidence on oath denying the offence occurred. The Appellant was convicted. The learned trial judge gave no reasons for rejecting the Appellant's evidence but did give reasons as to why the Complainant's evidence satisfied him of guilt beyond reasonable doubt. In the premises:

   i. was it open to the Court of Criminal Appeal to conclude that the Appellant's evidence was necessarily rejected as not giving rise to a reasonable possibility consistent with innocence and the prosecution case accepted as proving guilt beyond reasonable doubt?

   ii. was the status and character of the evidence of the Complainant inherently lacking in cogency or reliability such that on an independent assessment of the evidence, and confronted by the Appellant's denials given on oath, the Court of Criminal Appeal ought to have concluded that the evidence was not capable of supporting the verdict?

Part II: COMPLIANCE WITH s78B OF THE JUDICIARY ACT

3. Notices pursuant to s 78B of the *Judiciary Act 1903* (Cth) are not required.

Part III: CONCISE STATEMENT OF CONTESTED FACTS

4. The Respondent does not disagree with the factual summary of the Appellant.

Part IV: APPLICABLE STATUTORY PROVISIONS

5. The Respondent accepts the Appellant's statement of applicable statutory provisions, adding reference to: *Evidence Act 1929* (SA) s34M and *Criminal Law Consolidation Act 1935* (SA) s 353. These provisions are extracted in full in the Annexure to these submissions.

Part V: RESPONDENT'S ARGUMENTS

Grounds 1.1, 1.2 and 2.1

A. The Appellant's Contentions

6. The Appellant contends that:

6.1. because the learned trial judge provided no reasons for rejecting his evidence, the risk that the learned trial judge reasoned to guilt by preferring the evidence of the Complainant to that of the Appellant cannot be nullified, with the consequence that his conviction is unsafe and unsatisfactory.

6.2. this was not a case where that risk could be nullified by implication from the learned trial judge's treatment of the Complainant's evidence and his conclusion that that evidence satisfied him beyond reasonable doubt of the Appellant's guilt.

7. The Appellant's argument hinges on the acceptance of the contention that acceptance of the Complainant's evidence as proving the elements of the offence beyond reasonable doubt, could not necessarily operate as the rejection of the appellant's denials as giving rise to a reasonable possibility consistent with innocence.

B. The Respondent's Contentions

8. Where a complainant's evidence is not corroborated and is diametrically opposed to that of the accused, the trier of fact is to determine whether or not they are satisfied of guilt beyond reasonable doubt. If the complainant's version does not so satisfy the trier of fact, or the trier of fact thinks the accused's version reasonably possible, they must acquit.[1] It is not a matter of reasoning to a conclusion by simply determining where the truth lies by preferring the evidence of a complainant over that of an accused or *vice versa*. So much is settled.

9. This is not a case where the learned trial judge reasoned to guilt by simply preferring the evidence of the Complainant, CD, to that of the Appellant. The evidence of CD was sufficient to prove the offence beyond reasonable doubt and negative the denials of the Appellant as a reasonable possibility. In assessing her evidence, the trial judge had regard to evidence

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1 *Murray v The Queen* (2002) 211 CLR 193 at [23] (Gaudron J), [57] (Gummow and Hayne JJ); *The Queen v Calides* (1983) 34 SASR 355 at 357-9 (Wells J); *Selig v Hayes* (1989) 52 SASR 169 at 171-2 (Jacobs J).

supporting the prosecution case and matters requiring particular caution. The matters to which the trial judge had specific regard were:

9.1. It was for the prosecution to bear the onus of proof of the elements of the offence beyond reasonable doubt.[2]

9.2. The evidence of initial complaint by CD to her father – he found the complaint made by CD to her father to be 'completely spontaneous'[3], 'detailed',[4] and 'striking in its consistency with her evidence.'[5]

9.3. The reports about the allegation that CD made to her mother, LD, which he found to be 'significantly consistent'[6] with the evidence of CD, and 'important bolsters' to her credibility.[7]

9.4. The cross-examination of CD, as well as her demeanour during cross-examination in the face of contradiction – that she was not deterred in cross-examination from her position that she had touched both the Appellant's and her brother's penis, and those were the only penises she had touched.[8]

9.5. The statements made by CD when interviewed by Child Protection Services (**CPS**)[9] – including her initial denials of the allegation[10] and the fact that she said that she had touched her brother's penis while urinating.[11] The detail that CD provided about touching the Appellant's penis[12] – it occurred in the shed, she was holding his penis, she did not want to touch his penis, she held it twice, the penis looked like her brother's and the Appellant wore pants and a singlet. [13] In addition, the trial judge did not mention but had evidence about further details CD recalled namely that grandpa was doing a wee and the wee was yellow.[14]

9.6. The age of the Complainant being relevant to her failure to initially disclose the allegation when interviewed by CPS[15]. As the trial judge remarked, the interview with CPS was the first occasion that CD had spoken to a stranger about the event,[16] and it

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2 *R v Douglass* (Unreported, 1 October 2010, DCCRM-10-178), 1 [6].
3 *R v Douglass* (Unreported, 1 October 2010, DCCRM-10-178), 6 [32].
4 *R v Douglass* (Unreported, 1 October 2010, DCCRM-10-178), 5 [32] – 6 [33].
5 *R v Douglass* (Unreported, 1 October 2010, DCCRM-10-178), 21 [82].
6 *R v Douglass* (Unreported, 1 October 2010, DCCRM-10-178), 21 [83].
7 *R v Douglass* (Unreported, 1 October 2010, DCCRM-10-178), 21 [83].
8 *R v Douglass* (Unreported, 1 October 2010, DCCRM-10-178), 23 [93]; Trial Transcript, 208, lines 10-27 (CD XXN).
9 *R v Douglass* (Unreported, 1 October 2010, DCCRM-10-178), 21 [84] – 22 [86].
10 *R v Douglass* (Unreported, 1 October 2010, DCCRM-10-178), 21 [84] – 22 [86].
11 *R v Douglass* (Unreported, 1 October 2010, DCCRM-10-178), 21 [82].
12 *R v Douglass* (Unreported, 1 October 2010, DCCRM-10-178), 22 [85].
13 *R v Douglass* (Unreported, 1 October 2010, DCCRM-10-178), 22 [85].
14 Interview Transcript in *R v Douglass* (Unreported, 1 October 2010, DCCRM-10-178), 13-14 [45].
15 *R v Douglass* (Unreported, 1 October 2010, DCCRM-10-178), 22 [86].
16 *R v Douglass* (Unreported, 1 October 2010, DCCRM-10-178), 21 [84].

took place in a foreign environment – as those factors may impact less upon an adult or older child, it was appropriate to have regard to her age when assessing the statements CD made to CPS, and the detail she provided. In those circumstances, it was reasonable for the trial judge to conclude that a lack of detail or initial denials by CD did not diminish her credit in the way that it would for an adult or older child.[17]

9.7. That CD was not confusing any touching of her brother with that of her grandfather in the shed.[18]

9.8. The possibility of an inconsistency between the reports to mother and other reports about the location of the offence.[19]

9.9. The caution required in accepting the evidence of a child who was not yet 4 years old at the time of the offending.[20]

9.10. The fact that CD's evidence was uncorroborated, was that of a very young child, was not supported by any other evidence and that the prosecution relied for proof of the allegation on the evidence.[21]

9.11. The provisions of s 9(4) of the *Evidence Act 1929* (SA) and the caution required in determining whether to accept CD's unsworn evidence and the weight to be given to it.[22]

9.12. The fact that the evidence of the complainant LD could not be used as evidence of similar fact to corroborate the account of CD.[23]

9.13. The accused bore no onus in identifying, and indeed proving, the reasons for CD to be mistaken or to lie about the allegation.[24]

9.14. The sworn evidence of the accused denying the allegations, and his finding that there was nothing in his demeanour that assisted the prosecution.[25]

9.15. There was an admission of opportunity to commit the offence from the evidence of the Appellant.[26]

10. Thus the reasoning of the learned trial judge discloses that he did not reason to guilt by preferring the evidence of CD to that of the Appellant or having regard to irrelevancies. He

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17 *R v Douglass* (Unreported, 1 October 2010, DCCRM-10-178), 22 [86].
18 *R v Douglass* (Unreported, 1 October 2010, DCCRM-10-178), 21 [82].
19 *R v Douglass* (Unreported, 1 October 2010, DCCRM-10-178), 21 [83].
20 *R v Douglass* (Unreported, 1 October 2010, DCCRM-10-178), 22 [86].
21 *R v Douglass* (Unreported, 1 October 2010, DCCRM-10-178), 24 [94].
22 *R v Douglass* (Unreported, 1 October 2010, DCCRM-10-178), 24 [96] & [97].
23 *R v Douglass* (Unreported, 1 October 2010, DCCRM-10-178), 24 [95].
24 *R v Douglass* (Unreported, 1 October 2010, DCCRM-10-178), 21 [82].
25 *R v Douglass* (Unreported, 1 October 2010, DCCRM-10-178), 24 [98].
26 Trial Transcript 288 L 13 - 291, L 4 (Accused XN).

correctly applied the burden of proof in reaching the conclusion that he was satisfied of the elements of the offending beyond reasonable doubt on the basis of all the evidence before him, including that of CD. In coming to that determination, he had regard to particular matters in the case that required caution. It is clear from the reasons of the trial judge that he reached the requisite finding beyond reasonable doubt in accepting CD as a credible and reliable witness.

11. In the Court of Criminal Appeal Doyle CJ observed:

> [63] Upon the central issue, whether the alleged offence was committed on the afternoon in question, this was a case of word against word. The Judge had to assess the credibility and reliability of C's evidence. The same applies to the evidence of Mr Douglass. If the Judge was persuaded that C was credible and reliable, Ms Hay's evidence did not provide any significant obstacle to a finding of guilt. The fact that there was no inherent weakness in the evidence given by Mr Douglass, and the fact that there was nothing in his demeanour that led the Judge to reject his evidence, do not mean that the Judge was not entitled to do so.
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> [64] The Judge adequately explained why he found C to be credible and reliable. Mr Edwardson was right in saying that the Judge does not explain how and why he came to the conclusion that he could and should reject the denials by Mr Douglass, and make a finding of guilt beyond reasonable doubt. But to my mind, the explanation is obvious. Having considered the evidence as a whole, and being satisfied of the truth and reliability of C's evidence, the Judge necessarily rejected the denials by Mr Douglass.
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> [65] In the particular circumstances, it was not necessary for the Judge to spell out why he rejected Mr Douglass's denials. Indeed, there is little he could say other than that; because he accepted and acted on the evidence of C, he necessarily rejected the evidence of Mr Douglass. This is a case of a kind referred to by McHugh J in *Soulemezis* at 280 and by me in *Keyte* at [59]. Unlike *Papps*, it is not a case in which the failure to explain why the Judge rejected the evidence of Mr Douglass leaves this court unable properly to consider the appeal. There were no flaws in the defence case that needed to be exposed and explained. The Judge's acceptance of C's evidence is the explanation for the rejection of the defence case.
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> [66] In this respect the case differs from *AK v Western Australia* [2008] HCA 8; (2008) 232 CLR 438. In Western Australia, as in New South Wales, s 120(2) of the Criminal Procedure Act 2004 (WA) provides that in a criminal trial by a judge alone the judgment must include the principles of law that the judge applied and the findings of fact on which the judge relied. All members of the court agreed that the Judge had failed to meet the statutory requirement. Exchanges in the course of argument with counsel might have been said to indicate how the Judge came to his conclusion, but as Gleeson CJ and Kiefel J pointed out, these exchanges did not form part of the statement of reasons, and the Judge "simply did not address the arguments of counsel at any level either of specificity or generality": at [16]. Similarly, Gummow and Hayne JJ said that there was a "... complete failure to articulate any of the reasoning by which the trial judge reached the ultimate conclusion that the appellant was guilty ...": at [55]. They went on to say at [58]:
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> > [58] Once it is recognised that the Criminal Procedure Act requires that a trial by judge alone is to be concluded in this way, it is evident that to examine, as the Court of Appeal did, whether a chain of reasoning could be articulated that would support, even require, the verdict that was

> reached at trial was not to the point in deciding whether there was a substantial miscarriage of justice. It was not to the point because the relevant error or miscarriage which is the premise for consideration of the proviso is an error or miscarriage constituted by a failure to provide, as s 120(2) required, a reasoned decision about the central issue that was tried. The appellant was not tried in accordance with the requirements of s 120.
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> In the present case the Judge has not failed to provide a reasoned decision about the central issue. The Judge's finding in relation to the evidence of C, in the particular circumstances, explains his rejection of the evidence of Mr Douglass on the central issue. It is not necessary for this court to identify a chain of reasoning that "could be articulated". The Judge's reasons are clear, subject only to the failure to spell out that he rejects Mr Douglass's evidence because he accepts the evidence of C.
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> [67] In other circumstances it might not be sufficient for this court to say that the Judge's decision might have rested on his acceptance of the evidence of a central witness, leading to the conclusion that he rejected the evidence of the accused on that point. But this merely demonstrates how the question of a sufficiency of the reasons must be considered in light of the particular issues in the case.

12. Twice in his judgment the Chief Justice refers to this case as being one of 'word against word'.[27] On the first occasion[28] His Honour is concerned with addressing the question of whether the absence of any reason for rejecting the Appellant's evidence gives rise to a reason to consider that the learned trial Judge should have entertained a reasonable doubt. The Chief Justice is not suggesting that in a case where the evidence of the complainant is opposed to that of an accused and the difference cannot be explained by misunderstanding that it is permissible to convict on the strength of whichever of the competing versions is preferred.

13. The same applies in relation to the second reference to this being a case of 'word against word'.[29] Here the Chief Justice is concerned with the adequacy of the learned trial judge's reasons as facilitating the appeal process. Neither instance demonstrates a misapplication of the standard of proof nor a departure from the correct approach of a court of criminal appeal to an appeal asserting that the verdict is unsafe and unsatisfactory.

14. It is conceded that there is a qualitative difference between the Complainant's out of court statement and the Appellant's evidence given on oath. However, that this is in any way conclusive of which form of evidence is truthful and reliable is denied. The Respondent also contends that there exists no positive requirement that reasons must allude to the

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27 *R v Douglass* [2010] SASCFC 66 at [56] and [63].

28 *R v Douglass* [2010] SASCFC 66 at [56].

qualitative difference between evidence which is sworn and that which is not. At issue is the capacity of the evidence to persuade the trier of fact to guilt beyond reasonable doubt. Whether particular evidence is truthful and reliable, irrespective of whether it has been given on oath, involves a process of evaluation, taking into account all relevant factors. Here those relevant factors included consistency with the evidence of initial complaint, the evidence given by the Complainant in cross-examination, and consideration of the Complainant's age and her cognitive development. That some factors are not mentioned, does not mean they were not taken into account, or were not appreciated. In this regard, the reasoning of the learned trial Judge disclosed no error. Confronted by the consistency of the Complainant's out of court statement with the evidence of initial complaint given by her mother and her father,[30] and her adherence to touching her grandfather's penis in cross-examination, it is not surprising that the learned trial judge made no mention of the qualitative difference between the out of court statement and the Appellant's sworn evidence. The other evidence and the Complainant submitting to cross-examination prohibited any real weight being given to the fact that her out of court statement was not made on oath. The Appellant's contention overlooks the other evidence. It follows that articulation of the qualitative difference between an out of court statement and sworn evidence in this matter was not required. It would take the matter no further.

15. The learned trial judge was all too well aware of those factors that adversely impacted upon the evaluation of the Complainant's evidence. He refers to the internal contradictions and to her age.[31] He notes that her age provides reason of itself to proceed with caution.[32] These inherent weaknesses were dealt with by the Chief Justice.[33]

16. The critical question is whether or not it was open to the learned trial judge to be satisfied that the complainant was truthful and reliable such that the elements of the offence were proven beyond reasonable doubt. Nothing in the Court of Criminal Appeal's judgment as referred to by the Appellant casts any doubt upon the learned trial Judge's process of reasoning, nor the Court of Criminal Appeal's assessment of that process.

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29 *R v Douglass* [2010] SASCFC 66 at [63].
30 Trial transcript at 217-8 (TD XN), 230 and 232(TD XXN); 84 (LD XN).
31 *R v Douglass* [2010] SASCFC 66 at [84]-[85].
32 *R v Douglass* [2010] SASCFC 66 at [86].
33 *R v Douglass* [2010] SASCFC 66 at [52].

17. This is not a case where the trial judge reasoned toward a finding of guilt by preferring the evidence of one witness to another.[34] While his Honour did not consider the defence case in great detail, nor explicitly express why he rejected the evidence of the Appellant, he conducted a thorough and careful examination of the evidence of the CD, and made significant findings of her creditworthiness and the consistency of her evidence.

18. Implicit in the trial judge's acceptance of the truthfulness and reliability of the evidence of CD is his rejection of the account of the Appellant. The two accounts were diametrically opposed – as the trial judge was satisfied beyond reasonable doubt of the evidence of CD, it necessarily follows that he did not accept the Appellant's denials of the allegation as giving rise to a reasonable possibility. The fact that an accused gives evidence in his or her defence is not a matter which of itself can detract from proof of the prosecution case – unless and until that evidence casts doubt upon the prosecution case in that it cannot be excluded as a reasonable possibility.

19. The Appellant complains that this is not a contest of word against word - on the basis that the evidence of CD was not sworn and consists of an out of court statement. While it is conceded that the out of court statement has a different qualitative status to the Appellant's sworn evidence, the contest remains capable of being characterised as one of word against word. Such characterisation by the Court of Criminal Appeal is not indicative of error for the reasons given above.

Ground 2.2

A. The Appellant's contentions

20. The Appellant contends that:

20.1 The Court of Criminal appeal has misunderstood the task required of it under s353 of the *Criminal Law Consolidation Act 1935* (**CLCA**) in that it was not a matter of determining whether or not there was evidence *entitling* the learned trial judge to conclude as he did, and

20.2 The Court of Criminal Appeal has failed to appreciate and to take into account the character of the evidence of the Complainant which inherently lacked cogency and

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[34] *Murray v The Queen* (2002) 211 CLR 193.

reliability such that on an independent assessment of the evidence, and confronted by the Appellant's denials given on oath, it was not open to the Court of Criminal Appeal to be satisfied that the evidence was not capable of supporting the verdict.

21. The argument turns on the impact that procedural changes in South Australia to the way in which the evidence of a young child[35] may be adduced have on the weight that may be given to that evidence.

B. The Respondent's contentions

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22. In *The Queen v Nguyen*[36] five members of this Court said:

> [33] The task of an appellate court in considering whether a verdict of guilty returned by a jury "should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence" was described by this Court in *M*. As four members of the Court pointed out in *M*, the conclusion that a verdict should be set aside on this basis is often expressed in terms of the verdict being "unsafe or unsatisfactory", "unjust or unsafe" or "dangerous or unsafe". The question for the appellate court is one of fact.
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> 20 "[T]he question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty."
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> As the plurality in *M* went on to point out:
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> "But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations"
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> The authoritative guidance which this Court provided in *M* about the task of a court of criminal appeal was expressed in the following terms:
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> "It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in
> 40 such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence. In doing so, the court is not substituting trial by a court of appeal for trial by jury, for the ultimate question must always be whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty."[37] (footnotes omitted)

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35 *Evidence Act 1929* (SA) s 4.

36 *The Queen v Nguyen* (2011) 242 CLR 491, 499 [33] – 500 (Hayne, Heydon, Crennan, Kiefel and Bell JJ).

37 See also *SKA v The Queen* (2011) 243 CLR 400, 405 [11] – 406 [14] (French CJ, Gummow and Kiefel JJ).

23. To the extent that Doyle CJ considers that there is a difference between practice of Courts of Criminal Appeal in South Australia and New South Wales in approaching the task – which is not conceded by the Respondent – the law to be applied is that enunciated in *M v The Queen*. This is what Doyle CJ did.[38]

24. The test to be applied is the same whether the case is heard by a judge alone or with a jury.[39] The task involves an independent assessment of the evidence – the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.[40] Due regard must be had to the advantages of the trial judge in seeing and hearing the witnesses.[41]

25. In *Libke v The Queen*,[42] Hayne J, with whom Gleeson CJ and Heydon J agreed, said that the question for an appellate court in determining whether it was open to a jury to be satisfied of guilt beyond reasonable doubt involves consideration of whether the jury *must*, as distinct from *might*, have entertained a doubt about the appellant's guilt.[43] Hayne J said:

> It is not sufficient to show that there was material which might have been taken by the jury to be sufficient to preclude satisfaction of guilt to the requisite standard.[44]

26. In this case Doyle CJ referred to the test in *M*[45] saying that the task of the Court was to make its own review of the evidence and that it could draw its own conclusions as to the quality of the evidence, making due allowances for the advantage of the trial judge.[46] To focus on the use of the word *entitled* as indicative of error runs the risk of overlooking what was actually

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38 *R v Douglass* [2010] SASCFC 66, 6 [37] – 7 [39], per Doyle CJ.

39 *Fleming v The Queen* (1998) 197 CLR 250, 256 [13], cf 262 [26] (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ).

40 *SKA v The Queen* (2011) 243 CLR 400, 405 [11] (French CJ, Gummow and Kiefel JJ); *M v The Queen* (1994) 181 CLR 487 at 494 (Mason CJ, Deane, Dawson & Toohey JJ); *The Queen v Nguyen* (2011) 242 CLR 491, 499 [33] – 500 (Hayne, Heydon, Crennan, Kiefel and Bell JJ).

41 *M v The Queen* (1994) 181 CLR 487 at 493 (Mason CJ, Deane, Dawson & Toohey JJ).

42 *Libke v The Queen* (2007) 230 CLR 559.

43 *Libke v The Queen* (2007) 230 CLR 559, 596 - 597 [113] (Hayne J), [1] (Gleeson CJ), [117] (Heydon J).

44 *Libke v The Queen* (2007) 230 CLR 559, 597 [113] (Hayne J).

45 *R v Douglass* [2010] SASCFC 66, 6 [37] and 7 [39], per Doyle CJ.

46 *R v Douglass* [2010] SASCFC 66, 7 [39], per Doyle CJ.

done. The reference to the trial judge being *entitled* must be examined in the context of the assessment undertaken by the Court as a whole.

27. The Court carefully examined the evidence presented by the prosecution at trial. Doyle CJ, with whom Anderson and David JJ agreed, stated:

> [52] It was open to the Judge to accept C as truthful and as reliable in relation to the alleged offence. One might argue with particular steps in his reasoning. For example, I am not confident that I would say that the incident was something that a three year old child was unlikely to make up. But I would certainly not say that the Judge was not able to take that approach, this being part of the experience of life that a trier of facts brings to bear in making findings of fact. I agree with the Judge that C's statements to her father and to L were consistent with her evidence about the offence. At trial and on appeal Mr Edwardson made some valid points about C's responses to questions from the psychologist. But these matters were dealt with by the Judge, and were dealt with in a manner that was open to him. I agree with the Judge that the inconsistencies between the statements to the psychologist and other statements by C, and C's initial statements to the psychologist that no-one had asked her to touch their "willy" or penis, are explicable on the basis of C's young age. This is not to say that the points made by Mr Edwardson are to be dismissed out of hand. Nor did the Judge do that. The submissions made by Mr Edwardson required careful consideration. One cannot simply say that because C was a three year old one could discard any difficulties with her evidence, accepting and acting on her evidence of the alleged offence. But equally one cannot say that C's evidence should be assessed in the same way as one would assess the evidence of an adult. Nor could one say that C's evidence was inherently unreliable because of her age. However, having regard to C's age, it was open to the Judge to decide that she was truthful and reliable during the interview by the psychologist, which became her evidence, despite the problems with that evidence that Mr Edwardson identified. I also agree with the Judge that he was entitled to be influenced by C's firmness in cross-examination, although again I am not sure I would give that as much weight as did the Judge.
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> [53] C's evidence was not to be assessed in isolation. It was to be assessed along with other evidence in the case, including defence evidence. I have treated C's evidence separately, as a matter of convenience.
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> [54] The evidence of Ms Hay supported that of Mr Douglass in a general way. But her evidence could not exclude the Judge's conclusion that Mr Douglass had the opportunity to commit the offence alleged. Ms Hay's evidence that C behaved normally after she had accompanied Mr Douglass is of no particular significance. There is nothing to suggest that C was or would have been upset if the alleged offence was committed that afternoon. So it was not necessary for the Judge to reject the evidence of Ms Hay, before accepting that of C.
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> [55] C's identification of the shed in which the offence occurred as a shed on Mr Douglass's mother's property also required consideration. But this evidence was by no means decisive. The circumstances under which C did this were unsatisfactory. It was open to the Judge to decline to be influenced by this evidence, or at least to have approached this evidence in the manner in which he did.

28. Ultimately, Doyle CJ concluded

> A case of this kind is difficult and worrying for the person who must decide the facts, be that person a judge or a member of a jury. But the fact is that there was evidence that the Judge was entitled to accept, and to rely upon to reach a finding of guilt beyond reasonable doubt. The evidence did not suffer from weaknesses that meant that the Judge should have had a reasonable doubt.[47]

29. From the above it is plain that the Court of Criminal Appeal did not err in its understanding of the task it was to undertake, nor in the discharge of that task.

30. Turning to the qualitative character of the Complainant's evidence. As indicated, It is conceded that there is a qualitative difference between the Complainant's out of court statement and the Appellant's evidence given on oath. Generally speaking, the evaluation of the weight to be given to an out of court statement admitted for testimonial purposes may take into account the fact that the statement was not given in circumstances intended to reinforce the necessity to be truthful and was not tested. Evaluation of a young child's evidence obviously must take into account the age and development of the child. That evaluation may also take into account the way in which the narrative that is the child's evidence unfolded, the extent to which external influences may have affected it, and the child's understanding of the concept of the truth and the importance of telling the truth. The assessment of a child witness and the evaluation of the weight to be given to their evidence, like that of witnesses generally, requires the synthesis of many factors, no one necessarily being indicative of an absence of credibility and reliability.

31. At issue is the capacity of the evidence to persuade the trier of fact to guilt beyond reasonable doubt. Whether particular evidence is truthful and reliable, irrespective of whether it has been given on oath, involves as indicated above a process of evaluation, taking into account all relevant factors. Here those relevant factors included consistency with the evidence of initial complaint, the evidence given by the Complainant in cross-examination, and consideration of the Complainant's age and her cognitive development. That some factors are not mentioned, does not mean they were not taken into account, or were not appreciated. In this regard, the reasoning of the learned trial Judge disclosed no error. Confronted by the consistency of the Complainant's out of court statement, with the

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47 *R v Douglass* [2010] SASCFC 66, 12 [57] per Doyle CJ.

evidence of initial complaint given by her mother and her father,[48] and her adherence to touching her grandfather's penis in cross-examination[49], it is not surprising that the learned trial Judge made no mention of the qualitative difference between the out of court statement and the Appellant's sworn evidence. The other evidence and the Complainant submitting to cross-examination prohibited any real weight being given to the fact that her out of court statement was not made on oath. The Appellant's contention overlooks the other evidence. It follows that articulation of the qualitative difference between an out of court statement and sworn evidence in this matter was not required. It would take the matter no further.

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32. In light of the age of CD, particular deference should be given to the advantage of the trial judge in observing demeanour during cross-examination and the manner in which she responded to questioning. His Honour's comments that the firmness of the Complainant's 'confirmation of the allegations in the face of contradiction was persuasive of her creditworthiness'[50] is a permissible and logical finding. It is reasonable to expect that a child of such a young age will be more pliable to cross-examination than an adult, and might not possess the wherewithal to stand her ground when contradicted by a stranger. In cases such as this, where there are no eye-witnesses to the offending, such deference is appropriate as an examination of the record of trial alone fails to disclose the manner in which questions
20 were answered - the vehemence or evasiveness of a young child in answering questions, and the ability of a young child to stand ground in the face of cross-examination by a stranger in a courtroom environment.

33. The findings of the trial judge as to the creditworthiness of the Complainant are logical conclusions based on his observations of her evidence - the age of the Complainant is inextricably linked to any assessment of her truthfulness and reliability.

34. The totality of the prosecution evidence was sufficient to sustain a conviction. Further, any argument that it is inherently dangerous to convict on the uncorroborated evidence of a
30 young child or on the evidence in this case, should be viewed in the proper context of the

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48 Trial transcript at 217-8 (TD XN), 230 and 232(TD XXN); 84 (LD XN), *R v Douglass* (Unreported, 1 October 2010, DCCRM-10-178), 21 [82] & [83].

49 Trial transcript at 208 (CD XXN), *R v Douglass* (Unreported, 1 October 2010, DCCRM-10-178), 23 [93].

50 *R v Douglass* (Unreported, 1 October 2010, DCCRM-10-178), 23 – 24 [93].

legislative reforms relating to the evidence of young children and the probative value of the evidence in this case.

Abolition of Common Law Warning

35. The obligation to warn against convicting on the uncorroborated evidence of a child was dispensed with in South Australia by the 1993 enactment of s 12A of the *Evidence Act 1929* (SA) (**EA**).[51] The section was again amended in 2008[52] to prohibit a judge giving such a warning to a jury[53] except where a number of pre-conditions are met:

10 a. the warning it is warranted because there are, in the circumstances of the particular case, cogent reasons, apart from the fact that the witness is a child, to doubt the reliability of the child's evidence; and

b. a party asks that the warning be given. [54]

36. In giving any warning under s 12A EA, the judge is prohibited from making any suggestion that the evidence of children is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults.[55] The purpose of the 2008 amendment to s12A EA was identified in *R v Haak*:[56]

20 [30]. It appears to me therefore that the purpose of the amendment of s 12A of the Act was to ensure that the child witness warning, which judges had continued to give notwithstanding the abrogation of the rule of practice, was not given as readily. The section was calculated to eliminate the child witness warning where there was no good reason to think that the juvenile immaturity of the child witness materially undermined the weight of his or her evidence. For example, in the absence of a particular developmental disability, it is difficult to see why a warning would generally be required for child witnesses in their late teenage years. If warnings were given indiscriminately, irrespective of the cognitive development of the particular child witness, the effect would be to suggest that the evidence of children, as a class, was inferior to the evidence of adults. The consequences of that implication in trials of sexual assaults, where the accused is often an adult
30 and the alleged victim a child, obviously concerned the legislature enough to amend s 12A of the Act

[31]. In my view, understood in its historical context, it is the child witness warning which is prohibited by the first part of s 12A(1) of the Act and it is that warning which may nonetheless be given if there are cogent reasons to doubt the reliability of the child's evidence. Whether or not there are cogent reasons to give a child witness warning can only be meaningfully assessed by reference to the content of that warning. In my view, the warning required by s 12A of the Act is

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51 Introduced from 15 July 1993 by *Evidence (Miscellaneous) Amendment Act 1993* (SA) s 3.

52 Introduced from 23 October 2008 by *Statutes Amendment (Evidence and Procedure) Act 2008 No. 7* (SA) s 12

53 See *R v E, DJ* [2012] SASCFC 6 [16] (Anderson J).

54 *Evidence Act 1929* (SA) s 12A(1).

55 *Evidence Act 1929* (SA) s 12A(1)(2).

56 *R v Haak* [2012] SASCFC 19, [30]-[31] (Kourakis J).

> that it is unsafe to convict on the particular child witness's evidence because there are cogent reasons, "apart from the fact that the witness is a child"[57], to doubt the reliability of his or her evidence because of his or her state of cognitive development, psychological immaturity, susceptibility to influence, or other youth related circumstances. Inconsistencies between the accounts given by the child, a paucity of detail, or the inclusion of fanciful details all may, depending on the circumstances, raise the prospect that the child's testimony is affected by such factors. It is not possible to be definitive about the features of a child's evidence which will engender that concern. However, only when the cogent reasons to doubt the child's testimony are related to the juvenile immaturity to which the child witness warning alerts juries must a judge warn the jury that it is "unsafe to convict on a child's uncorroborated evidence.

37. The abolition of the common law requirement to warn a jury that it is unsafe to convict on the uncorroborated evidence of a child reflects contemporary understanding of a child's capacity to give truthful and reliable evidence. So much is clear from the Second Reading Speech introducing s 12A EA, referring to the requirement for such a warning as founded on an 'old fashioned and unjustified' premise 'that children of any age are inherently unreliable witnesses'.[58]

38. In *JJB v The Queen*,[59] Spigelman CJ refers to the comments of Deane and McHugh JJ in *Longman v The Queen*[60] about the fragility of the recall by children of events of sexual abuse. Spigelman CJ observed:

> Their Honour's observations are based on assumptions about child psychology which are widely held but which are not necessarily well founded. Many judges share a conventional wisdom about human behaviour, which may represent the limitations of their background. This has shown to be so in sexual assault cases.
>
> Legislative intervention was required to overcome the tendency of male judges to treat sexual assault complainants as prone to be unreliable. The observations of Deane J and McHugh J in Longman reflect a similar legal tradition that treated children as unreliable witnesses. In the past both witnesses required corroboration.[61]

39. His Honour went on to note that, '[t]here is a substantial body of psychological research indicating that children, even very young children, give reliable evidence'.[62] The common law

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57 *Evidence Act 1929* (SA) s 12A(1)(a).

58 Parliament of South Australia, Parliamentary Debates, House of Assembly, Hansard, 25 March 1993, at 2662.

59 *JJB v The Queen* (2006) 161 A Crim R 187.

60 *Longman v The Queen* (1989) 168 CLR 79, 101 per Deane J; 107 -108 per McHugh J.

61 *JJB v The Queen* (2006) 161 A Crim R 187, 188-189 [3] – [4] per Spigelman CJ.

62 *JJB v The Queen* (2006) 161 A Crim R 187, 189 [7], per Spigelman CJ.
The complexity of the issues surrounding the cognitive underpinnings of the child as witness is reflected in the scope of the research on the topic – covering issues such as the ability of children to distinguish fantasy from reality, the ability to accurately recall stressful events, the propensity of children to lie and errors in disclosure, the resistance of children to suggestibility and language

warning had the effect of labelling children as an unreliable class of witness. It follows from the abolition of such a warning that the law recognises that evidence of children, as a class, does not possess the intrinsic dangers of other classes of evidence where a warning is required - such as evidence of accomplices,[63] identification evidence,[64] evidence of lies of an accused,[65] and evidence of uncharged acts.[66] The introduction of s 12A EA allows for a trial judge to give a warning that is tailored to the evidence in a particular case – where the potential unreliability of that evidence arises from a circumstance separate to the relative youth of the child.[67] The use of s 34CA EA does not preclude the use of that warning.

10 40. No warning was given in this case. Generally a warning would only be given where the danger was not otherwise apparent to the trier of fact. Here it was apparent. The learned trial judge was alive to the age of the Complainant and the absence of corroboration.[68]

Section 34CA of the Evidence Act 1929 (SA)

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development. Research has found that children's cognitive skills relevant to giving evidence have been undervalued, and that the presumed lesser eyewitness abilities of children as compared with adults have been seriously exaggerated. There is no empirical basis for concluding that children have any greater or lesser propensity to lie than adults. See Layton, R 'The Child and the Trial', in *Essays in Advocacy*, (eds. Gray, Hinton, Caruso, 2012); Australian Institute of Judicial Administration Incorporated, 'Child Development, Children's Evidence and Communicating with Children', in *Bench Book for Children Giving Evidence in Australian Court* (2009); Oates, RK, 'Problems and Prejudices For the Sexually Abused Child' (2007) 81 *Australian Law Journal* 313; Westcott, HL, 'Child Witness Testimony: What Do We Know and Where are We Going?' (2006) 18 *Child and Family Law Quarterly* 175; Baker-Ward, L and Ornstein, PA, 'Cognitive Underpinnings of Children's Testimony', in *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (eds. Westcott, Davies and Bull, 2002); Fivush, R, 'The Development of Autobiographical Memory', in *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (eds. Westcott, Davies and Bull, 2002); Powell, M and Thomson, D, 'Children's Memories for Repeated Events', in *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (eds. Westcott, Davies and Bull, 2002); Pexdek, K and Hinz, T, 'The Construction of False Events in Memory', in *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (eds. Westcott, Davies and Bull, 2002); London, K, Bruck, M, Ceci, SJ and Shuman, DW, 'Disclosure of Child Sexual Abuse: What does the Research Tell Us About the Way That Children Tell?' (2005) 11 *Psychology, Public Policy and Law* 194.

63 *Webb & Hay v The Queen* (1994) 181 CLR 41.

64 *Domican v The Queen* (1992) 173 CLR 555.

65 *Edwards v The Queen* (1993) 178 CLR 193.

66 *HML v The Queen* (2008) 235 CLR 334.

67 Recent authority on the operation of s 12A of the Act has questioned – without the issue being determined - whether the section requires a warning in trials by judge alone: see *R v E, DJ* [2012] SASCFC 6, 1 [2], per Vanstone J; *R v Haak* [2012] SASCFC 19, 10 [38] per Kourakis J.

68 *R v Douglass* (Unreported, 1 October 2010, DCCRM-10-178), 21 [82], 22 [86], 24 [94].

41. Section 34CA was deleted and substituted in 2008. The purpose underpinning 34CA EA was identified in the Second Reading Speech as:

> The aim of this provision is to make section 34CA work as originally intended, so that the court has the best possible available evidence before it, even if that is hearsay evidence. It does not, of course, derogate from any discretion the court may have to exclude evidence that is admissible in this way.
>
> These amendments are needed so that, where possible, people who commit crime do not escape liability simply because the youth or mental disability of the victim or a key witness stops them being available, in a technical sense, to give evidence in person. The ALRC recently identified this topic as need uniform treatment in Australia. It pointed out that:
> ...the admission of a child's out-of-court statement can preserve the child's account at an early stage, making it a reliable form of evidence, and could reduce the stress and trauma on the child of testifying in court.[69]

42. The original intention of s34CA, referred to in the Second Reading Speech, was to respond to the 1986 SA Government Task Force on Child Sexual Abuse which was consistent with the 1997 Australian Law Reform Commission (ALRC) Report. That report stated:

> 14.78...Hearsay evidence may be particularly important in cases involving child complainants. Many allegations of criminal acts against children are not prosecuted or do not proceed because the child is presumed incompetent to give evidence or does not understand the duty to tell the truth in court, or because the trauma of testifying at trial prevents the child from giving evidence satisfactorily or at all. The ability to introduce the hearsay statements of the child, in addition to or instead of the evidence of the child, might address these problems.
>
> 14.79. Where a child witness' previous statement was made in certain circumstances, it may fall into an exception to the rule against hearsay. There are exceptions for contemporaneous and spontaneous statements about the maker's health, feelings, sensations, knowledge and state of mind. In sexual cases, hearsay statements by a complainant are admissible under the common law as 'recent complaint' evidence, to support the complainant's credibility, if the complaint was made spontaneously at the first reasonable opportunity. Some children's initial disclosures of abuser or descriptions of an event fall into these categories. However, as patterns of disclosure among child victims of abuse often include disclosure of small pieces of information over periods of time, the current exceptions are not sufficient to get all relevant previous statements by children into evidence to prove the fact in issue at trial.[70] (footnotes omitted)

43. The reliability of the out of court statement can be tested by cross-examination. Indeed, the availability of the witness for cross-examination is one of the three pre-conditions of

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69 Parliament of South Australia, Parliamentary Debates, House of Assembly, Hansard, 25 October 2007, at 1457.

70 Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84, (1997), Chapter 14, Children's Evidence

admission of any evidence under s 34CA EA.[71] Cross-examination facilitates, amongst other things, the trier of fact developing an appreciation of the age and development of the young child. In this case, counsel for the Appellant was granted permission to cross-examine on all topics that he raised with the trial judge.[72] He made no further application nor any complaint that the Appellant's case was unfairly restricted. In the circumstances it is open to infer that no further testing of the Complainant's evidence was considered necessary by the Appellant in the presentation of his defence. Whatever the qualitative status of the out of court statement viewed in isolation, once the Complainant entered the witness box and submitted to cross-examination, her evidence had to be considered as a whole. Evaluating her evidence meant considering not only what she said in the out of court statement, but how she said it against the background of her presentation in court and what she said in court. Such assessment included the manner and extent to which the Appellant sought to test the out of court statement. The Appellant cannot now seek to obtain an advantage on the basis of what was not asked or not revealed where cross-examination proceeded in conformity with the Appellant's request and no difficulty was raised.

44. Moreover, the inability to cross-examine a young child at the time the out of court statement was made does not disadvantage an accused. It is not a practice commonly available in criminal trials – to cross-examine a witness at the time a statement was made. In any event the cognitive development of the child from the time the statement was made to time when she gave evidence in court was apparent.

The Complainant gave unsworn evidence in court

45. The Appellant does not contend that a miscarriage of justice has occurred by reason of the learned trial judge permitting the Complainant to give unsworn evidence under s9 EA.

46. If a child does not understand the obligation to be truthful entailed in giving sworn evidence then it can be taken that he or she does not understand the legal and moral consequences attendant upon giving false evidence after swearing an oath in court to tell the truth. That

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71 *Evidence Act 1929* (SA) s 34CA (1)(b)(ii). See *R v Byerley* (Question of Law Reserved No. 1 of 2010) (2010) 107 SASR 517, 526-528 [25], [28], [35]-[35], [40] (Doyle CJ and White J). *R v J, JA* (2009) 105 SASR 563, 573-574 [40]-[44] (Duggan J).

72 Trial Transcript, 53-54

does not mean that the child is incapable of telling the truth. All it means is that the gravity or solemnity of the occasion does not work fully to foster truthfulness in such a child. Whether it does so in an adult is a question of evaluating his or her evidence. Merely being sworn provides little guarantee, hence judges daily make no mention of the fact that a witness took an oath or made an affirmation as something central to the evaluation of their evidence. Understandably judges focus juries' attention upon things like whether or not the evidence has the ring of truth about it, how it fits with the other evidence, and how the witness stood up to the rigours of cross-examination. This is precisely what the learned trial judge has done in this case. The trial judge directed himself as to the caution and weight to be afforded to the Complainant's unsworn evidence.[73] The fact that the Appellant gave evidence on oath is a distinction that adds little to the evaluative task to be undertaken at first instance and on appeal.

In conclusion

47. The Complaint made spontaneous disclosures about the offending during interview. While the interview involved some prompting and taking the child to topics, the critical aspects of the Complainant's statement were volunteered, in particular, the fact that she touched the Appellant's penis and that he was doing a wee were offered by the Complainant. The interviewer did not approach her task by suggesting an answer to the Complainant about the details of the offending. Indeed, as indicated the first mention of the Appellant in the interview is spontaneously offered by the Complainant.

48. That the prosecution case relied on the out of court statement of the Complainant does not affect the capacity of the trial judge to be persuaded of its truthfulness or reliability. The process of evaluating the truthfulness and reliability of the evidence must take into account all relevant factors, not just its status as an out of court statement. Here, those factors included the consistency of conduct of the Complainant as disclosed by the evidence of initial complaint, her evidence in cross-examination and consideration of her age and her cognitive development. The trial judge did not need to advert to the qualitative difference between the status of the evidence for those matters to have been properly considered.

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[73] *Evidence Act 1929* (SA) s 9(4). *R v Douglass* (Unreported, 1 October 2010, DCCRM-10-178), 24 [96] &[97].

Part VI: CONCLUSIONS/ ORDERS

49. The verdict is not unsafe. Upon an independent assessment of the evidence it can be concluded that it was open to the trial judge to be satisfied beyond reasonable doubt of the charge.[74]

50. The Appeal should be dismissed.

10 DATED: **3rd** day of **July 2012**

MG Hinton QC
Solicitor-General for the State of South Australia
Counsel for the Respondent

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AF Cairney
Counsel for the Respondent

J Litster
Counsel for the Respondent

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74 For the purposes of this Court's assessment of whether a substantial miscarriage of justice has occurred, it can consider the evidence that the prosecution sought to use for a testimonial purpose, but was used by trial judge only as evidence of consistency of conduct. The statements made by CD to her father TD were used by the trial judge as evidence of initial complaint under s 34M Evidence Act 1929 (SA) as evidence going to consistency of conduct: *R v Douglass* (Unreported, 1 October 2010, DCCRM-10-178), 21 [82]. The prosecutor sought to admit those statements under s 34CA of the Act. The trial judge heard submissions on the matter and deferred ruling on the topic. No ruling was delivered. The Trial Judgment shows that the statements were used as evidence of initial complaint only. This is an error that operated in favour of the Appellant – it was permissible for those statements to be admitted pursuant to s 34CA. The use of those statements for their truth would substantially strengthen the prosecution case - in light of their proximity to the offending and the context and manner in which they were made.

Annexure: Applicable Legislative Provisions

Evidence Act 1929 (SA): s34M Evidence relating to complaint in sexual cases

(1) This section abolishes the common law relating to recent complaint in sexual cases. See *Kilby v The Queen* (1973) 129 CLR 460; *Crofts v The Queen* (1996) 186 CLR 427

(2) In a trial of a charge of a sexual offence, no suggestion or statement may be made to the jury that a failure to make, or a delay in making, a complaint of a sexual offence is of itself of probative value in relation to the alleged victim's credibility or consistency of conduct.

(3) Despite any other rule of law or practice, evidence related to the making of an initial complaint of an alleged sexual offence is admissible in a trial of a charge of the sexual offence. Evidence may be given by any person about—

- when the complaint was made and to whom;
- the content of the complaint;
- how the complaint was solicited;
- why the complaint was made to a particular person at a particular time;
- why the alleged victim did not make the complaint at an earlier time.

(4) If evidence referred to in *subsection (3)* is admitted in a trial, the judge must direct the jury that—

(a) it is admitted—

(i) to inform the jury as to how the allegation first came to light; and

(ii) as evidence of the consistency of conduct of the alleged victim; and

(b) it is not admitted as evidence of the truth of what was alleged; and

(c) there may be varied reasons why the alleged victim of a sexual offence has made a complaint of the offence at a particular time or to a particular person,

but that, otherwise, it is a matter for the jury to determine the significance (if any) of the evidence in the circumstances of the particular case.

(5) It is not necessary that a particular form of words be used in giving the direction under *subsection (4)* .

(6) In this section—

"complaint" , in relation to a sexual offence, includes a report or any other disclosure (whether to a police officer or otherwise);
"initial complaint" , in relation to a sexual offence, includes information provided by way of elaboration of the initial complaint (whether provided at the time of the initial complaint or at a later time).

Criminal Law Consolidation Act 1935 **(SA) s 353 Determination of appeals in ordinary cases**

(1) The Full Court on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal; but the Full Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(2) Subject to the special provisions of this Act, the Full Court shall, if it allows an appeal against conviction, quash the conviction and either direct a judgment and verdict of acquittal to be entered or direct a new trial.

(2a) On an appeal against acquittal brought by the Director of Public Prosecutions, the Full Court may exercise any one or more of the following powers:

(a) it may dismiss the appeal;
(b) it may allow the appeal, quash the acquittal and order a new trial;
(c) it may make any consequential or ancillary orders that may be necessary or desirable in the circumstances.

(3) If the Full Court orders a new trial under *subsection (2a)(b)* , the Court—

(a) may make such other orders as the Court thinks fit for the safe custody of the person who is to be retried or for admitting the person to bail; but
(b) may not make any order directing the court that is to retry the person on the charge to convict or sentence the person.

(3a) If an appeal is brought against a decision on an issue antecedent to trial, the Full Court may exercise any one or more of the following powers:

(a) it may confirm, vary or reverse the decision subject to the appeal; and
(b) it may make any consequential or ancillary orders that may be necessary or desirable in the circumstances.

(4) Subject to *subsection (5)* , on an appeal against sentence, the Full Court must—

(a) if it thinks that a different sentence should have been passed—
(i) quash the sentence passed at the trial and substitute such other sentence as the Court thinks ought to have been passed (whether more or less severe); or
(ii) quash the sentence passed at the trial and remit the matter to the court of trial for resentencing; or

(b) in any other case—dismiss the appeal.

(5) The Full Court must not increase the severity of a sentence on an appeal by the convicted person except to extend the non-parole period where the Court passes a shorter sentence.