IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S193 of 2016**

BETWEEN: **RP**
Appellant

and

The Queen
Respondent

APPELLANT'S REPLY

Part I: We certify that this submission is in a form suitable for publication on the internet.

Part II: Reply to the respondent's argument

1. It appears there is agreement between the parties that:
   a. mere evidence of the charged act cannot rebut the presumption of *doli incapax*: Appellant's Submissions (**AS**) [1](a), [22], Respondent's Submissions (**RS**) [2.1.1];
   b. the test for rebutting *doli incapax* is properly articulated as whether the child knew that the charged act was seriously wrong: AS[1](b), [19]-[21], RS[2.1.2]; and
   c. The Court of Criminal Appeal (**CCA**) is not bound by the trial judge's assessment of the evidence: AS [1](c), [65], RS [2.2].

Appeal ground 1 – Error in determining the verdicts were not unreasonable

2. The respondent, it is respectfully submitted, fails to come to terms with the need to eschew adult value judgments in determining whether the presumption had been rebutted by the evidence led at trial.

3. Criminal offences are, at their core, prohibitions on interference with the rights of others. Adults, as full members of society, have rights and can be expected to respect the rights of others. Children do not have the same rights, either to property or personal autonomy. The extent of a child's rights in this regard will depend on his or her age, maturity and determinations of caregivers. Having limited rights and being at an earlier stage of development, children will have limited personal experience to draw upon in understanding the rights of others. This fundamentally distinguishes children (particularly those as young as the appellant) from adults and highlights the need to eschew adult value judgments in determining whether the prosecution has proved beyond reasonable doubt the child knew what he or she was doing was seriously wrong.

Seriously wrong – the relevance of the charged offence

4. In the present case the crime was an offence against s66A(1) of the *Crimes Act 1900* (NSW). That provision legislated the right of young children to be shielded from sexual intercourse and exposed transgressors to a penalty of up to 25 years in gaol. The prosecution was required to prove that the appellant knew that to interfere with the complainant's right in this regard was seriously wrong. If it did so, the appellant became exposed to that penalty. However, evidence of the appellant's understanding

Filed by: Legal Aid NSW
Level 2, 323 Castlereagh St
Sydney NSW 2000
Telephone: (02) 9219 5000 Fax: (02) 9219 5935
Email: sally.mclaughlin@legalaid.nsw.gov.au
Contact: Sally McLaughlin

was lacking. He himself was as young as 11. Once adult value judgments are eschewed, the paucity of evidence as to the appellant's capacity, and the respondent's corresponding failure to come to terms with the onus he bore, are exposed.

5. RS[11]-[18] misstate the appellant's position. The appellant does not submit that the Crown must prove that the child knew that his acts were against the law. Nor is it submitted that the child's understanding must be based on "an accurate and precise appraisal of the individual elements" (cf. RS[18]), or that some inquiry into the child's knowledge of the seriousness of an offence relative to other offences is required: cf. RS[16]. Indeed, knowledge that an act was against the law may or may not suffice to prove that a particular child knew it was seriously wrong; they are different enquiries. Insofar as the respondent appears to submit the enquiry is not concerned with the child's knowledge of the moral quality of act, reliance on *The Queen v M* (1977) 16 SASR 589 (***M***), 590, 592-3 and *BP v R* [2006] NSWCCA 172 (***BP***) is misplaced: cf. RS[18]. As knowledge of serious wrongness is not directed to knowledge of unlawfulness, it can only be directed to the moral quality of the offence: *BP* at [28] (referring to this Court's decision in *Stapleton v The Queen* (1952) 86 CLR 358 and to *M* as authority that serious wrongness means "wrong according to the ordinary principles of reasonable persons").

6. The respondent argues, effectively as a matter of statutory construction, that an offence against s66A is an offence of sexual intercourse without consent: RS[12]. This is not correct. Rather, consent is irrelevant to an offence against s66A (and s66B-D). The law marks out the age at which a person can give informed consent to sexual intercourse at 16: cf. all "children under 10" per RS [12]. Within Div 10 of Pt 3 of the *Crimes Act* an act of sexual intercourse with a person under 16, without consent, is separately criminalised by s61J(2)(d), attracting imprisonment for 20 years: cf s66A and s66C where consent is not an element. Section 77 specifically provides "[t]he consent of the child ... shall be no defence" to certain offences including an offence against s66A. Sexual intercourse with a child under 10 is both logically and legislatively directed to something other than a deemed lack of consent.

7. The appellant submits no more than that a child defendant must appreciate that the *charged act*, here sexual intercourse with a child under 10, was seriously wrong: AS[24]-[31], RS[2.1.2]. Indeed Bray CJ in *M* appears to acknowledge, in a case of murder, that it had to be proved the appellant knew "it was seriously wrong to kill or cause grievous bodily harm": at 593. The risks of applying the test without regard to the act in fact charged are acutely demonstrated in this case. Here, the inquiry was conducted in respect of a qualitatively different offence which the law considers (having regard to the maximum penalties) less serious: AS[24], [28]-[30].

8. The respondent contends that the only question is whether the child knew the act was seriously wrong, and it is incorrect to examine the reasons why the child understood it was seriously wrong: RS[14]. However, whether the child knew the act charged was "seriously wrong" requires some understanding of what this means and the evidence called upon to establish it. This highlights the difficulty for the respondent in this case.

The respondent's failure to deal with the onus it bore at trial

9. The respondent called no evidence from any expert witness, parent, teacher or caregiver, or evidence of admissions, directed to the appellant's capacity at the time of

the events: AS[57]-[58], see *Mahmood v Western Australia* (2008) 232 CLR 397, [27]. In seeking to establish that the presumption was, nonetheless, rebutted, the respondent's submissions fail to deal with the onus it bore. This is so irrespective of the use to be made of the complainant's demonstrated resistance. Rather, the respondent makes assumptions, or seeks to draw inferences that cannot be safely drawn. In particular, assumptions are made as to:

a. the quality of the appellant's father's parenting (at RS[21.1]) – the only real evidence of which was that he left a child of 11 or 12 in charge of younger siblings, which child, demonstrably, could not be trusted to care for them;
b. that a desire to conceal conduct that is not regarded as seriously wrong from adults, will not extend to other children (who might tell an adult): RS[23];
c. that the appellant's "knowledge and experience" of discipline did not extend to "physical[] (let alone sexual[])" assault (RS[21.2]) – noting that the appellant has not submitted, nor undertaken any onus to establish, that the conduct was committed as a form of legitimate discipline: cf RS [21.2]; and
d. that similar actions of covering his mouth,[1] "sequestering" or being directed to conceal assaults from adults or children, in the guise of discipline or otherwise, were not previously imposed upon the appellant (and again, the fact of his conduct suggests, if anything, to the contrary): RS[21.3-.4], [22].

10. Further, the respondent points to limitations in the "expert" evidence that was tendered: RS[31].[2] The limitations of Exhibits D and E tell against the respondent's case at trial. The respondent's submissions in this respect again reveal a failure to give full effect to the presumption and burden. The suggestion from the exhibits that the appellant may have been molested (considered together with the charged acts), as well as doubts as to his mental capacity as a young man, emphasised the need for cogent evidence rebutting the presumption. The reports also demonstrated the need to set aside any assumption of normality. Assuming that the appellant had a typical, unmolested upbringing "undermines the presumption of *doli incapax* itself": *C v DPP* [1996] AC 1, 32H and AS[39].

11. Similarly the evidence of the condom is to be seen in the context of the burden of proof. It is not clear how use of the condom gives rise to an "equally available" inference that the appellant appreciated the difference between right and wrong: cf. RS[32], CCA[55]. Even if this evidence was capable of multiple interpretations, the fact that one of those interpretations gave rise to (on its own or with other evidence) a hypothesis consistent with innocence means that the Crown has – without more – failed to prove guilt beyond reasonable doubt: cf. *Barca v The Queen* (1975) 133 CLR 82, 105; *Bayden-Clay* [2016] HCA 35, [62]. *Lithgow City Council v Jackson* (2011) 244 CLR 352, [25]-[26], referred to at RS[31.1], does not deal with the question of whether a hypothesis consistent with innocence is open on the evidence in a criminal case.

12. There was no evidence as to the appellant's development or the "normality" of his childhood. To the contrary, the evidence of the acts charged and of the appellant's

---

[1] As the respondent observed at RS[5.5], the appellant covered the complainant's mouth before the act of intercourse, suggesting a desire to silence the complainant who was already "going off" (ExA Q226), out of anger, annoyance, discipline or a desire that he not alert others.

[2] To the extent that the respondent seeks to downplay the significance of this evidence by drawing comfort from the reference to "mild" or "borderline" developmental disability, see *Muldrock v The Queen* (2011) 244 CLR 120 at [50].

intellectual capacity as a young man, was, if anything, supportive of the presumption reflecting the reality. Additionally, in the present case, the seriousness of the act (given the adult values involved) was of little assistance in assessing whether the appellant appreciated its serious wrongness. Indeed, it may be easier to prove knowledge of serious wrongness of lesser offences, such as stealing, than in respect of offences which incorporate complex notions like consent or conduct appropriate for children, or long term consequences for victims. The respondent's submissions, it is respectfully submitted, fail to deal with the evidence in the context of the onus it bore.

Other aspects of the respondent's argument

13. The respondent does not appear to take issue with the appellant's submissions that:
    a. in applying the test, adult value judgments must be eschewed: AS[23];
    b. proof beyond reasonable doubt cannot be a matter of "impression": AS[52];
    c. evidence necessary to discharge the burden must be "strong and clear beyond all doubt or contradiction": AS[55]; and
    d. the correct approach to an unreasonable verdict ground is as put at AS[67]-[71].

14. The appellant maintains the Court is able, if it sees fit, to have regard to non-doctrinal scholarship or "legislative facts" supportive of a robust common law presumption, and demonstrative of the dangers of taking judicial notice of typical childhood development or behaviour in finding the presumption rebutted beyond reasonable doubt: cf RS[29].[3]

15. Ultimately, the respondent submits that the evidence "is well capable of supporting a finding that the appellant knew that what he was doing was causing great distress to another human being and as such was seriously wrong": RS[25]. This echoes the reasoning of the primary judge (CCA[143]) and of Hodgson JA in *BP*. In the circumstances of this case, however, proof that the appellant knew he was causing distress to another could not (of itself) prove that he knew what he was doing was seriously wrong. In this regard it is noted the respondent has not addressed the appellant's submissions as to what might safely be drawn from the appellant's, or any child's, awareness of the distress of another child, having regard to the routine distress caused to children by adults and in the course of roughhousing or experimentation with adult behaviour: AS[35]-[36], [41]-[44]. The reality is that, in this case, the Crown at trial suffered from a lack of cogent evidence capable of rebutting the presumption. The respondent now relies not on cogent evidence, but on assumptions and, implicitly, the inherent abhorrence (to adult minds) of the acts themselves.

The reasoning of the CCA

16. The appellant maintains that the reasoning in *Shepherd v The Queen* (1990) 170 CLR 573 and *R v Hillier* (2007) 228 CLR 618 (whether directly or by analogy) does not have the effect, in this case, of elevating cumulatively equivocal evidence to an unequivocal conclusion: AS[76], cf. RS[34]-[35]. The respondent's argument that the conduct was kept from other children, for the reasons given above, does not assist.

---

[3] See *Aytugrul v The Queen* (2012) 247 CLR 170 (***Aytugrul***) per Heydon J at [71], where his Honour cited numerous examples of legislative facts taken into account in this way by the Court, cf. French CJ, Hayne, Crennan and Bell JJ at [20]-[22]; and see *Yorta Yorta v Victoria* (2002) 214 CLR 422 per Gleeson CJ, Gummow and Hayne JJ at [39]-[45] and *Thomas v Mowbray* (2007) 233 CLR 307 per Heydon J at [619], [635]-[636].

17. While the respondent accepts that the CCA was required to consider the evidence for itself, the submission that Davies J did so (specifically as to the evidence of the condom), cannot be accepted. His Honour's reasons in this regard are unequivocal:

> 55. A further issue is then raised about what evidence can be examined by this Court to ascertain if the finding was open...
> (...)
> 65. The proper approach to the task of assessing whether the finding was unreasonable is likely to mean that evidence expressly disregarded by the Trial Judge should similarly be ignored by this Court. That evidence concerns the Applicant's use of the condom. A jury would have been told to ignore that evidence. The Judge has expressly done so.
> 66. The position might have been different if there was evidence that was simply not mentioned by the Judge in his reasons. An enquiry whether on all of the evidence a verdict was unreasonable or could not be supported must entail a consideration of all the evidence that was before the trier of fact. However, where evidence has been expressly disregarded by the Trial Judge this Court would be substituting its own view for that of the Trial Judge by considering evidence that he has effectively excluded.

18. Considering the evidence and substituting his own view for that of the trial judge if necessary was precisely what his Honour was required to do. These reasons do not permit of the interpretation urged by the respondent: cf. RS[33]. The appellant maintains his submissions at AS[61]-[62] and [64]-[68].

Ground 2

19. In respect of ground 2, if Davies J's reasoning can be characterised as the respondent suggests at RS[39]-[40], it is submitted his Honour erred in this regard. In any event, it was not the reasoning of a majority of the Court: contra RS[41]. Johnson J expressly held, in respect of the trial judge's approach to determining guilt on counts 3 and 4, that it was not appropriate to "apply some automatic consequence, the approach accepted in the District Court": CCA[5]. Hamill J held that this approach was "erroneous in both fact and law... each count required individual and separate consideration": CCA[143], [145]. Thus, a majority in the CCA found error and it was therefore incumbent to consider whether the appellant had been denied a fair trial such that no question of the proviso arose, or to consider the proviso. Moreover, Davies J's own "individual and separate" analysis of the facts and manner in which count 2 could be taken into account on count 3 demonstrate that he was not purporting to uphold the approach of the trial judge, but was in fact engaged in his own reasoning to guilt based upon fresh submissions of the Crown on the appeal: CCA[76], [78], cf. [79] and see CCA[23].

20. The appellant maintains that the failure to make an independent assessment of guilt on counts 3-4 was such that he was denied a fair trial and no question of the proviso arose: AS[84]-[85]. In the alternative, the reasoning of Hamill J at CCA[151]-[155] demonstrates that the proviso would also not be engaged having regard to the evidence.

Dated 14 September 2016

Hament Dhanji
Forbes Chambers
Ph: (02) 9390 7777, Fax (02) 8988 8568
hdhanji@forbeschambers.com.au

Julia Roy
Sixth Floor Selborne Chambers
Ph: 02 8915 2672, Fax (02) 9232 1069
jroy@sixthfloor.com.au