IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S296 of 2013

BETWEEN:

PETER VERSI
Applicant

and

THE QUEEN
Respondent

APPLICANT'S REPLY

PART I: SUITABILITY FOR PUBLICATION

1. The applicant certifies that this reply is in a form suitable for publication on the internet.

PART II: REPLY TO THE RESPONDENT'S SUBMISSIONS

2. The applicant joins issue with the respondent upon its submissions of 6 June 2014. In addition, the applicant makes the following general and specific submissions in reply. **Attached** as Annexure A to this reply are three further provisions of the *Evidence Act 1995* (NSW) which were either referred to in the respondent's submissions (s 110) or arise from them (ss 95, 112) and are referred to below.

General submissions in reply

3. *Re the impossibility of quarantining SD1's evidence to count 2.* The respondent has accepted a central premise of the applicant's complaint, that "it was not possible strictly to quarantine SD1's evidence to count 2" (RS [6.51]) (see also RS [6.5]: "SD1's evidence had significance beyond count 2"). But this was exactly what the jury were told to do: "You must not take [SD1]'s evidence into account when you are reasoning in respect of counts 1, 3 and 4". Those directions were a condition of SD1's evidence being admitted under ss 98(1) and 101(2) of the *Evidence Act*. If the trial judge's directions were impossible to follow – as the applicant's counsel submitted at trial (AS [41]) and as the respondent now concedes – then it was incumbent on the Court of Criminal Appeal to consider for itself the interests those directions sought to protect, namely that SD1's evidence only be admitted if it had significant probative value which substantially outweighed its prejudicial effect (AS [38]). Failing which, as the applicant has submitted (AS [38]), ss 98(1) and 101(2) of the *Evidence Act* were not applied.

Dated: 19 June 2014
Filed on behalf of the applicant
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4. *Re notice of contention and 3 new arguments.* The respondent's submissions include a draft notice of contention raising three new arguments. Two of those arguments (i.e. (i) that SD1's evidence was admissible as coincidence evidence on all counts, and (ii) that SD1's evidence was admissible as tendency evidence on all counts) were raised but were not accepted at trial, were not raised by notice of contention in the Court of Criminal Appeal, were not raised before Kiefel and Keane JJ on 11 April 2014 and have been raised for the first time in this Court in the respondent's written submissions. The third argument (i.e. (iii) that SD1's evidence was admissible under s 110 of the *Evidence Act*) appears to depend on the first argument being accepted because s 110 does not apply to coincidence evidence and, by virtue of s 95, cannot render SD1's evidence admissible for all counts unless it is so admissible under the coincidence rule. In that regard, the third argument might not add anything to the first. It might also raise a question whether leave should have been sought under s 112 to cross-examine the applicant on SD1's evidence (which occurred without leave: Transcript, 26.8.11, p 296ff). But in the applicant's submission, the respondent should not be allowed to embark on these new inquiries and arguments in this Court and in the present circumstances, which include that the applicant is incarcerated. The applicant objects to the notice of contention and the arguments contained in them.

5. *Legitimate tendency reasoning v improper treatment of SD1's evidence.* The applicant's submissions have distinguished between "legitimate tendency reasoning about guilt on one of a number of counts on an indictment" and "using SD1's evidence for counts other than count 2, contrary to the trial judge's direction" (AS [33]). The respondent treats that distinction (RS [6.5], [6.54]) as accepting the Court of Criminal Appeal's conclusion that "once it be accepted beyond reasonable doubt that the applicant was guilty of count 2, this demonstrates a sexual interest in the complainant which makes it more likely that her evidence about the other incidents is truthful" (CCA [159]). But in the applicant's submission, neither the jury nor the Court of Criminal Appeal were entitled to draw general conclusions about "sexual interest" from SD1's evidence in relation to count 2 and then apply those conclusions to the other counts. That is what occurred in the Court of Criminal Appeal – SD1's evidence was "decisive" (CCA [157]) – and there is every reason to conclude that the jury reasoned in the same way. In that regard, the trial judge's directions were not followed. As the applicant has submitted (AS [16], [37]-[53]), there are three consequences arising from that, the last of which was a miscarriage of justice.

Specific submissions in reply

6. *Re RS [6.5].* The respondent submits that SD1's evidence "could be used in assessing the complainant's credibility generally", citing the reasons for judgment of Hayne J and Heydon J in *HML v The Queen* (2008) 235 CLR 334 at 395 [156] and 451-452 [336]. But as their Honours made clear in that case and at those citations, "the relevance of the evidence of other sexual conduct or events lies in its proof of demonstrated sexual interest in the complainant" and "[t]he relevance of such evidence in a particular case may or may not be sufficiently captured by describing it as evidence about the nature of the relationship between the complainant and the accused" (Hayne J), and the relevant evidence "was capable of being employed for the other purposes relied on, which were incidental to *and not*

inconsistent with the particular propensity purpose" (Heydon J, emphasis added). In other words, applied here, the jury were entitled to draw certain tendency conclusions if satisfied of guilt on one of a number of the counts on the indictment but SD1's evidence could only be used in accordance with the trial judge's directions, which were made having regard to the relevance of SD1's evidence and the requirements of ss 98(1) and 101(2) of the *Evidence Act*. In the applicant's submission, the Court of Criminal Appeal used SD1's evidence contrary to the trial judge's directions with the ultimate result that there was a miscarriage of justice (see AS [16]).

7. *Re RS [6.10]-[6.14]*. The respondent submits that *DPP v P* [1991] 2 AC 447 is authority that a father-daughter relationship with an allegation of sexual abuse is sufficient for the evidence of those allegations to be admissible as coincidence evidence. But in the applicant's submission, *DPP v P* suggests against SD1's evidence being admissible. In *DPP v P*, evidence was given by two daughters about alleged conduct which was charged in both cases and involved "a prolonged course of conduct in relation to each of them" where "force was used", "[t]here was a general domination of the girls with threats against them", "[t]he defendant seemed to have an obsession for keeping the girls to himself, for himself", "[t]here was also evidence that the defendant was involved in regard to payment for the abortions in respect of both girls" and "these circumstances taken together gave strong probative force to the evidence of each of the girls in relation to the incidents involving the other" (at 461D-E). By contrast, in the present case SD1's evidence was of one event, brought after 32 years without any substantiation, corroboration, report or charge. It does not have the probative value of the evidence in *DPP v P* or as required by s 98(1) of the *Evidence Act* (see further AS [39]-[40]).

8. *Re RS [6.15]-[6.17]*. The respondent submits that SD1's evidence was relevant to at least counts 2 and 3 (and possibly 4 also) because in each case the applicant is said to have attempted to "normalise" the alleged sexual conduct by "making it seem to have an innocent purpose". But as noted above, the applicant objects to the respondent's submissions that SD1's evidence was admissible in respect of counts other than count 2. And as for its relevance to count 2, an "innocent purpose" theory was not the basis for SD1's evidence being admitted as coincidence evidence. As set out in AS [29], SD1's evidence was admitted because it was said to be "strikingly similar" to count 2 on account of the stepfather relationship, the ages of the stepdaughters and the fact that both incidents involved "a spurious medical reason" or a "ruse or a trick". The applicant's submissions on why SD1's evidence did not meet the significant probative value test of s 98(1) are set out in AS [39]-[40].

9. *Re RS [6.35], [6.40]*. In submissions on prejudice the respondent points to the fact that the jury did not convict the applicant on counts 1 or 4 and submits that the jury may be taken to have been able to put SD1's evidence out of their minds for counts 1, 3 and 4 and thus were not tainted by SD1's evidence. But two things can be said against those submissions. *First*, as noted above, the respondent accepts elsewhere that "it was not possible strictly to quarantine SD1's evidence to count 2" (RS [6.51]) and that "SD1's evidence had significance beyond count 2" (RS [6.5]). In the applicant's submission, it would be naïve to assume that the jury could put SD1's evidence out of their minds. Their deliberations were tainted. And

secondly, for counts 1 and 4 the evidence tended to favour the applicant and there was not the same "calculus of assertion and denial" (CCA [159]) that existed for counts 2 and 3, such that SD1's evidence could prove decisive. Counts 1 and 4 are discussed at CCA [49] and [150] respectively.

10. *Re RS [6.53]-[6.54]*. The respondent submits that "[i]t was quite clear that the finding of sexual interest was not based on SD1's evidence but on the finding of guilt on count 2". But Adams J said that "the decisive matter which I have found convincing is the evidence of SD1" (CCA [157]). This was not, contrary to the respondent's submission, "the very tendency reasoning the applicant submits the jury were entitled to engage in" (RS [6.54]) – the key difference, in the applicant's submission, is that rather than engaging in legitimate tendency reasoning about guilt on one of a number of counts on an indictment, the Court of Criminal Appeal used SD1's evidence for counts other than count 2, contrary to the trial judge's direction. Having done so, there were three consequences as set out in the applicant's submissions, the last of which was a miscarriage of justice (see AS [16], [37]-[53]).

11. *Re RS [6.58]*. The respondent refers to a "finding" by the Court of Criminal Appeal that "it should be concluded beyond reasonable doubt that the complainant's evidence in respect of count 2 is truthful and reliable and that of the applicant cannot be accepted" (CCA [141]). But the preceding words to that quotation were, in the applicant's submission, all-important. Adams J said immediately beforehand: "I conclude that the *coincidence between the two complaints* is such that it should be concluded ..." (emphasis added) (CCA [141]). In other words, SD1's evidence was being applied to draw the conclusion. SD1's evidence was proving "decisive" (to use Adams J's later language at CCA [157]). The Court of Criminal Appeal's reasons here support the applicant's submissions about the importance and prejudicial effect of SD1's evidence, and why it should have been held to be inadmissible under s 101(2) of the *Evidence Act* (see AS [50]).

12. *Re RS [6.61]*. The respondent submits that the Court of Criminal Appeal's reasoning did not "only" rely on SD1's evidence. But SD1's evidence was "decisive" (CCA [157]). Adams J noted that the applicant's denials were "otherwise apparently believable" (CCA [159]). Applying SD1's decisive evidence, his Honour concluded that the applicant had "a sexual interest in the complainant which makes it more likely that her evidence about the other incidents is truthful" (CCA [159]). In the applicant's submission, this amounted to using SD1's evidence contrary to the trial judge's directions and the *Evidence Act* provisions those directions were seeking to apply (AS [36]) with three consequences, the last of which was a miscarriage of justice (AS [16], [37]-[53]).

13. *Re RS [6.71]-[6.74]*. The respondent submits there was a "stark reversal" and "significant inconsistency" in the evidence of the applicant's wife about whether the applicant would have gone into the complainant's bedroom (counts 3 and 4). But the applicant makes two submissions in reply. *First*, from the transcript extracts which the respondent has provided, there is an answer from the applicant's wife of "No. Not unless I would've said so, yes" (RS [6.71]). It is not clear that the applicant's wife was giving a blanket denial and it is also possible that she misapprehended the question and was talking about what would usually be the

case. The Court of Criminal Appeal appears to have accepted the applicant's wife's evidence on this matter: "[i]n relation to count 3, the jury must have accepted that the applicant had gone to the complainant's bedroom at the instance of Mrs Versi" (CCA [150]). This is consistent with the applicant's wife's statement of "[n]ot unless I would've said so" and her evidence as summarised at CCA [87]. And *secondly*, in any event, what is clear in the applicant's submission is that SD1's evidence was decisive to the findings of guilt on counts 2 and 3 and it is the admissibility of that evidence, and those findings of guilt, which are at issue in this Court.

14. *Re RS [6.75]-[6.85]*. The respondent submits that there was a "more significant inconsistency" in the applicant's wife's evidence in relation to whether there was an appointment with Ms Alexander in 1990 where the complainant denied being touched inappropriately ("Nothing like that") (CCA [90]). Ms Alexander "believed that 1994 was the first time she met either the complainant or her mother" and "conceded that, in retrospect, she had possibly encountered the complainant's mother socially but definitely had no real awareness of her until 1994" (CCA [75]). But in the applicant's submission, this is not an "emphatic" inconsistency (RS [6.81]) nor does it mean that the applicant's wife's "basis for disbelieving the complainant and continuing to support the applicant was false" (RS [6.85]). The complainant's evidence was that she had recanted (albeit under duress) to Dr Margeson-Towndrow in 1988 or 1989 ("It didn't happen") (CCA [66]). The applicant's wife's evidence was that she was "hysterical" at that time, she was not aware that the complainant had recanted to Dr Margeson-Towndrow and her recollection was that the complainant recanted to Ms Alexander in 1990 (CCA [89]-[90]). In the applicant's submission, this is not a significant factual matter worth raising in this Court. It did not trouble the Court of Criminal Appeal or prove decisive for that Court's reasoning. Instead, as Adams J said, "the decisive matter which I have found convincing is the evidence of SD1" (CCA [157]). In the applicant's submission, it was that evidence which effected a miscarriage of justice.

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ANNEXURE A

FURTHER LEGISLATIVE PROVSIONS

1. The following further legislative provisions were in existence at all relevant times and remain in force as at the date of making this reply.

2. For completeness, it is noted that the current language of s 112 was introduced in 2007 by Sched 1 [52] of the *Evidence Amendment Act 2007* (NSW). That amending Act substituted "must not be" for "is not to be". In the applicant's submission, that amendment is of no effect in relation to the present case.

Evidence Act 1995 (NSW), ss 110 and 112

"95 Use of evidence for other purposes

(1) Evidence that under this Part [3.6 – Tendency and coincidence] is not admissible to prove a particular matter must not be used to prove that matter even if it is relevant for another purpose.

(2) Evidence that under this Part cannot be used against a party to prove a particular matter must not be used against the party to prove that matter even if it is relevant for another purpose.

...

110 Evidence about character of accused persons

(1) The hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced by a defendant to prove (directly or by implication) that the defendant is, either generally or in a particular respect, a person of good character.

(2) If evidence adduced to prove (directly or by implication) that a defendant is generally a person of good character has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not generally a person of good character.

(3) If evidence adduced to prove (directly or by implication) that a defendant is a person of good character in a particular respect has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not a person of good character in that respect.

...

112 Leave required to cross-examine about character of accused or co-accused

A defendant must not be cross-examined about matters arising out of evidence of a kind referred to in this Part [3.8 – Character] unless the court gives leave."