IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY **No. A14 of 2017**

BETWEEN: **STEPHEN JOHN HAMRA**
Appellant

and

THE QUEEN
Respondent

APPELLANT'S ANNOTATED REPLY

I PUBLICATION

1. This submission is suitable for publication on the Internet.

II CONCISE STATEMENT OF ARGUMENTS IN REPLY

Ground 1: no case to answer

2. The appellant will first reply as to the question of principle of what is required to prove a contravention of s 50, before addressing the application of principle to this case.

Proof of contravention of two or more sexual offences

3. The respondent accepts that the conduct which is proscribed by s 50(1) is the same conduct as the conduct proscribed by the relevant constituent sexual offences (RS [16]), but its essential submission is that the way in which the prosecution may **prove** that the conduct occurred is modified for the prosecution of offences against s 50 (RS [19], see also RS [28]). However, once the premise that a contravention of s 50(1) involves the commission of two or more sexual offences is accepted, the question is whether, by express words or necessary intendment, there is a departure from the ordinary incidents of proof beyond reasonable doubt according to the accepted norms of the accusatorial criminal justice system in which the accused is to have a fair trial.

4. It is not for the appellant to identify the source of an "elusive" requirement of proof of distinct occasions (cf. RS [17]) (although the source is addressed below); it is for the respondent to negate the requirement. In an accusatorial criminal justice system in which the power of the State is deployed against an individual accused of crime[1], it is an incident of a fair trial of an offence which proscribes specific conduct (and not a relationship or tendency) that there be a particularity and specificity in the evidence such as to permit it to be related to particular occasions or transactions which are made the subject of the prosecution case. As a feature of a fair trial[2] (a right which engages the principle of legality[3]), any departure from it must be by express words or necessary intendment.

   (1) Save for where a statute proscribes a relationship or tendency, offences which proscribe conduct will be construed as requiring demonstration of a "distinct occasion"[4], or a distinct "transaction"[5]. The very subject matter of an offence is an

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1 *R v Carroll* (2002) 213 CLR 635 at [21] (Gleeson CJ and Hayne J), see also *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [86]-[125] (Hayne and Bell JJ).

2 See, eg, *Lee v NSW Crime Commission* (2013) 251 CLR 196 at [190] (Kiefel J, Bell J agreeing).

3 See, eg, *Momcilovic v The Queen* (2011) 245 CLR 1 at [444] (Heydon J).

4 *Johnson v Miller* (1937) 59 CLR 467 (***Johnson v Miller***) at 484, 490 (Dixon J).

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occasion or transaction. The occasion or transaction is not a mere "particular", in the sense in which a date or location is a particular.

(2) While many of the cases involving that requirement speak in terms of a requirement of "particularity" (with a focus upon the provision of fair notice of the prosecution case), the underlying principles are not so limited. The requirement that evidence be relatable to particular occasions the subject of a charge reflects a more basic underlying concept. As Evatt J said[6]:

> In substance, the prosecutor was trying to convert the court exercising a strictly judicial function – **that of determining guilt or innocence of a single offence** – into an administrative commission of inquiry into the question whether, in respect of the Sunday morning mentioned, when there were thirty possible occasions when an offence *might* have been committed, the defendant could exculpate himself in respect of *all* thirty occasions. ...
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> It is of the **very essence of the administration of criminal justice** that a defendant should, at the very outset of the trial, know what is the specific offence which is being alleged against him. ... **It is inherent because it is an essential and integral part of any system of administering justice according to law.** ...
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> It is an essential part of the concept of justice in criminal cases that not a single piece of evidence should be admitted against a defendant unless he has a right to resist its reception upon the grounds of irrelevance, whereupon the court has both the right and the duty to rule upon such an objection. These fundamental rights cannot be exercised if, through a failure or refusal to specify or particularize the offence charged, neither the court nor the defendant (nor perhaps the prosecutor) is as yet aware of the offence intended to be charged. ...
>
> The court functions for the purpose of determining guilt or innocence in relation to a specific charge, not for the purpose of assisting the prosecutor by ascertaining which of a large number of possible charges holds out to such prosecutor the best chance of a conviction.

(3) The requirement for the prosecution to identify the "transaction" does not exist simply to protect against forensic prejudice to the accused in the sense of the accused knowing, in advance of trial, which specific offence is the subject of the charge. A number of important considerations are involved, including ensuring the certainty of the verdict[7], ensuring jury unanimity[8], avoidance of difficulties of *autrefois acquit*[9], and ensuring the court knows the offence for which the defendant is to be punished[10].

(4) Moreover, the authorities make plain that, approached from the perspective of the evidence, if the prosecution leads evidence of undifferentiated allegations, such that the allegations could be taken as answering the description of an offence or the offences charged, there is a related difficulty[11]. Where evidence is adduced which refers in a generic way to a series of events, with a view to proving one or more particular events, quite apart from the risk in a jury trial of a lack of agreement as to the one or more particular events, there is a more fundamental difficulty. In *S v The Queen,* Dawson J said[12]:

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5 *Johnson v Miller* at 489-491 (Dixon J), *S v The Queen* (1989) 168 CLR 266 (***S v R***) at 282 (Toohey J).

6 *Johnson v Miller* at 495-499 (Evatt J), referred to in *S v R* at 286 (Gaudron and McHugh JJ), *Patel v The Queen* (2012) 247 CLR 531 at [168] (Heydon J).

7 *S v R* at 276 (Dawson J), 288 (Gaudron and McHugh JJ).

8 *S v R* at 276 (Dawson J), 287 (Gaudron and McHugh JJ).

9 *S v R* at 284 (Gaudron and McHugh JJ).

10 *S v R* at 284 (Gaudron and McHugh JJ).

11 *S v R* at 285 (Gaudron and McHugh JJ).

12 *S v R* at 276 (Dawson J).

> [Lack of unanimity], of course, would be unacceptable, but it is more likely that the jury reached their verdict without identifying **any particular occasion.** Indeed, that is virtually inevitable because no means were afforded the jury whereby they could identify specific occasions. As I have indicated, such a result is tantamount to their having convicted the applicant, not in relation to identifiable offences, but only upon the basis of a general disposition on his part to commit offences of the kind charged.

Gaudron and McHugh JJ said[13]:

> Indeed, in view of the way the matter was left to the jury, it might even be possible that, in relation to one or all of the counts, individual jurors had no specific act in mind, but simply reasoned from the evidence as to frequency that the applicant committed one such act within each of the specified periods.

(5) It is against this background that the plurality said, in *KBT v The Queen*, in a context distinct from the difficulties attending unanimity in a trial by jury[14]:

> It should be noted that, quite apart from any question of fairness to the accused, evidence of a general course of sexual misconduct or of a general pattern of sexual misbehaviour **is not necessarily evidence** of the doing of 'an act defined to constitute an offence of a sexual nature ... on 3 or more occasions' for the purposes of s 229B(1A).

(6) The authorities therefore support the proposition that unless the statutory provision proscribes a relationship or tendency, proof of constituent offences requires proof of particular transactions (they need not be "peculiar", but they must be identifiable as distinct from one another). Further, quite apart from considerations of fairness and forensic prejudice, generalised assertions of offending are insufficient to prove distinct transactions[15]. To give evidence which is tantamount to an assertion that because something happened many times it *would have* happened on some particular occasion is not to give evidence capable of establishing the elements of a constituent offence on a particular occasion. Far from being an "astonishing proposition" (cf. RS [41]), it is submitted this is the orthodox position. It reflects that what is sought to be proved must always be a distinct transaction and occasion.

5. Turning back to the question whether the language of s 50(2) or s 50(4) alters or abrogates the position, this must be undertaken with an acknowledgment of the many policy considerations which inform the common law position[16]. The question becomes whether the provisions respecting particularisation **in the Information** alter the nature of what is fundamentally required in an accusatorial criminal trial to prove two or more distinct sexual offences. The requisite intention to depart from those fundamental requirements is not evident from the legislative scheme.

6. Further, there is no incongruity in concluding that, whatever may be the requirements of particularisation in the Information[17], there is no case to answer if the evidence does

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13 *S v R* at 287-288 (Gaudron and McHugh JJ).

14 *KBT v The Queen* (1997) 191 CLR 417 at 423 (Brennan CJ, Toohey, Gaudron and Gummow JJ).

15 See also *KRM v The Queen* (2001) 206 CLR 221 at [14] (McHugh J) (Peek J at CCA [83] AB237).

16 While it is acknowledged that the concern regarding double jeopardy is partly addressed by s 50(5), in *S v R*, a similar provision (s 17 of the *Criminal Code* (WA)) did not alter Toohey J's analysis.

17 The respondent's reliance upon the observation by Dixon J in *Johnson v Miller* (RS [34]) is misconceived. The point being made was that *Parker v Sutherland* (1917) 116 LT 820; 86 LJ KB 1052 could not be distinguished on the footing that it involved the quashing of a conviction as distinct from a complaint respecting particulars. In doing so, Dixon J was rejecting the notion that there was *generally* some higher degree of specificity required in the conviction than had to appear in an information or complaint.

not descend to a level of particularity where the trier of fact can conclude beyond reasonable doubt that identifiable transactions occurred during the relevant time frame.

7. On the respondent's argument, while the *actus reus* of s 50 involves the commission of two or more sexual offences, a trier of fact can conclude guilt beyond reasonable doubt without being satisfied of any actual distinct transaction or occasion on which a sexual offence was committed. It will be sufficient to conclude that because there was a pattern of sexual offending, there must have been multiple occasions separated by the requisite period. But that involves proving a relationship or a tendency from which a deduction of distinct offences is made, rather than proof of distinct offences. The distinction, whilst subtle, is fundamental. The question is whether despite Parliament defining the composite offence by reference to constituent offences, the provisions regarding the level of detail to be included in the Information can be taken to have dissolved the distinction.

Specificity in the present case?

8. It is important to appreciate that although the prosecution case was run on the footing that there were four "lots" of alleged offending: those in "Bedroom 3", "Bedroom 2", when the parents went to Fiji, and at Kurralta Park, there was no evidence as to the timing of Kurralta Park, and the evidence regarding the Fiji trip was incapable of excluding the possibility that it occurred after the relevant time period (AS [41]).

9. In relation to the "Bedroom 3" and "Bedroom 2" lots, the allegations were of undifferentiated offending within those two lots[18]. Further, contrary to RS [8] (which suggests the Bedroom 3 offending started when B was "about 12, maybe 13"), it was an agreed fact that the appellant graduated from his teaching studies in 1978 and did not start teaching until 1979 (during which year B turned **14**), and that B's family only met the appellant after he had finished his teaching studies[19].

10. Further, whereas B gave evidence of a first occasion in which the respondent got into his bed, there was no alleged offending on this occasion, and there was no identification of any specific subsequent occasion[20]. The inconsistency between B's time lines and the agreed facts, combined with his concession that his time frames were not 100% accurate[21], explains why it was not open to conclude beyond reasonable doubt that the subsequent "Bedroom 2" lots, which on B's own evidence may have continued into he was "probably 17, nearly 18", occurred before B turned 17. Accordingly, even if identifying one transaction within each of the two "lots" was permissible, the evidence at its highest was incapable of proving beyond reasonable doubt that there were the requisite occasions while B was under the prescribed age.

11. The appellant's primary submission, however, is that the evidence did not identify distinct occasions or transactions within the "lots". The trial judge was correct to find there was no case to answer with respect to any two or more identifiable transactions because the evidence relating to Bedrooms 3 and 2 was not of distinct occasions or transactions.

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18 TJ [17] AB197. The evidence was to the effect of describing things that the appellant "would" do: see, eg, Tr 133.23 AB24, Tr 134.10 AB25, Tr 136.1 AB27, Tr 137.10 AB28, Tr 138.12 AB29.

19 TJ [17] AB197, Tr 183.3 AB94, Tr 208 AB132, see also Tr 201.34 AB119.

20 Tr 130.37 AB22, Tr 132.18 AB23.

21 *S v R* at 287-288 (Gaudron and McHugh JJ).

Ground 2: permission to appeal

12. The trial, and the no case submission, was conducted on the basis that *Johnson* supplied the relevant test and that accordingly there was a degree of specificity required in the evidence such as to permit a delineation between the constituent offences[22]. The prosecutor submitted that, because there were various "lots" of offending, delineation was possible[23].

13. The judge ruled on the no case submission on that footing, and it was therefore unnecessary for him to consider whether he would in any event acquit based on the evidence, the submissions regarding reliability and the inconsistencies between the evidence of B and his parents. It was quite possible, as Peek J acknowledged, that he might alternatively have accepted a not proven submission (CCA [131] AB255).

14. These circumstances[24], combined with the fact the prosecution declined an invitation to refer a question of law, and the important considerations of double jeopardy, gave rise to substantial questions as to whether permission to appeal was justified. In effect, the Crown declined an opportunity to contend for an approach other than that suggested by *Johnson* but, following the acquittal, sought permission to appeal and in the course of so doing contends that the respondent should now be placed in jeopardy a second time by reference to a different approach.

15. The respondent's submission is to the effect that there was no obligation to address and detail "each factor" identified by the parties, and the respondent seeks to characterise the failure as being merely one of failing to address the submission of "one party" (by inference, the losing "party") (RS [54]). With respect, that is an inapt characterisation of what occurred. There is simply no reasoning in the lead judgment on the issue of permission. The basis for the "discretionary decision" is said to have been "apparent from the published reasons" (RS [55]), but the respondent then goes on to advance lengthy submissions (RS [56]-[68]) which are notably absent from the Court's judgment below, to the effect that the trial judge's error "amounted to or at least approached jurisdictional error" (RS [60]), and that the considerations including double jeopardy raised by the appellant were, in this case, "entirely subordinated" to the "fundamental and compromising nature of the error" (RS [68]).

16. The respondent's approach seriously understates two related[25] considerations: the exceptional nature of the power to grant permission to appeal to the Crown[26], and the various purposes served by the requirement to give reasons[27].

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22 See, eg, Tr 239-241 AB165-167.

23 It was acknowledged that if B's evidence was confined to saying, "it was bedroom 3 where I was touched on my genitals over and underneath my clothing", that would arguably fall foul of *Johnson*: Tr 240.5 AB166.

24 As to the significance of the conduct of the case, and the taking of new points on appeal, see *Crampton v The Queen* (2000) 206 CLR 161 at [150], *Fingleton v The Queen* (2005) 227 CLR 166 at [147]-[148].

25 The necessity for and extent of required reasons may be informed by the nature and importance of the issue being decided: *Wainohu v New South Wales* (2011) 243 CLR 181 at [56] (French CJ and Kiefel J).

26 *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573 at [8]-[21], *Momcilovic v The Queen* (2011) 245 CLR 1 at [444] (Heydon J).

27 Gleeson, "Judicial Accountability" (1995) 2 *The Judicial Review* 117 at 122, cited in *AK v Western Australia* (2008) 232 CLR 438 at [89] (Heydon J).