IN THE HIGH COURT OF AUSTRALIA

SYDNEY OFFICE OF THE REGISTRY **No. S 296 of 2013**

B E T W E E N: **PETER VERSI**

Applicant

and

THE QUEEN

Respondent

10 **RESPONDENT'S SUBMISSIONS**

Part I: Publication

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

Part II: Concise statement of issues

1. Whether, on charges that the applicant had sexually assaulted his stepdaughter, evidence that he had sexually assaulted his previous stepdaughter was admissible.

2. Whether the CCA could have regard to the evidence of the previous stepdaughter in determining the reasonableness of the verdict on both counts
20 when the trial judge had directed that the evidence was admissible on only one count.

3. Whether the verdicts were unreasonable.

Part III: Section 78B of the Judiciary Act

This appeal does not raise any constitutional question. The respondent has considered whether any notice should be given in compliance with s78B of the *Judiciary Act 1903 (Cth)*. No such notice is required.

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Part IV: Statement of contested material facts

4. 1 The respondent does not contest the outline of facts in Part V of the Applicant's submissions except the reference in paragraph [12] to a prior inconsistent statement by SD1 to her mother. That statement is also referred to in paragraph [40] of the argument. That statement was not in evidence and was not put to SD1.

4. 2 In addition to restricting SD1's to count 2 (AWS at [13]) SD1's evidence was said to be useable only if it was accepted beyond reasonable doubt:

> *"You must be satisfied that the conduct alleged by [SD1] occurred and be satisfied beyond reasonable doubt before in your reasoning it can assist you in deciding whether or not acts or the conduct alleged in Count 2 in the indictment occurred."* (SU 26.10).

PART V: Applicable Legislative provisions

The respondent agrees with the appellant's list of legislative provisions.

PART VI: Statement of Argument

6. 1 The applicant was charged with sexually assaulting his stepdaughter when she was aged between 7 – 14 in the years 1981 – 1987.

6. 2 His stepdaughter from a previous marriage, SD1, said he also sexually assaulted her when she was aged 13 in 1979.

6. 3 Despite these correspondences, the applicant submits that SD1's evidence was not admissible because there was no "striking or uncanny" similarity in the conduct described.

6. 4 The applicant submits there was a miscarriage of justice because the CCA wrongly took SD1's evidence into account in assessing the reasonableness of the verdict on count 3 when the trial judge had directed it could only be used on count 2 (AWS at [42] – [50]).

6. 5 The CCA did not use the evidence in that way, although if it had it would not have been an error because it was fairly obvious, and not contentious that, once admitted, SD1's evidence had significance beyond count 2. One obvious

significance was that it could be used in assessing the complainant's credibility generally[1], in which respect, its possible use extended to all the counts. It was also accepted at the trial (Judgment on Admissibility 22/8/11 at p3.42), and on appeal, that SD1's evidence may be taken into account in proof of count 2, and if that count was established, that could be used to find that the applicant had a sexual interest in the complainant and that tendency could be used in relation to the other counts.

6. 6 In addition to these uses, SD1's evidence was admissible more generally, as evidence of coincidence and tendency and to rebut good character.

Coincidence Evidence

6. 7 SD1 said the applicant asked her to hold his penis while he "sort of grind[ed] his hips against my hand" (T267.25). His penis was erect. This occurred in 1979 when she was aged 13.

6. 8 The applicant submits that SD1's evidence was not admissible on count 2, or at all, because there were no "striking or uncanny" similarities (AWS at [30(b)], [39]) between the acts described by SD1 and the complainant. The probative value of the evidence is also said not to outweigh its prejudicial effect (AWS at [40] – [43]). One "point of difference" said to warrant exclusion was that the applicant's penis was erect when SD1 touched it but not erect when the complainant touched it (Applicant's Summary of Argument on Special Leave at [17]).

6. 9 Such "striking similarity" between the acts is not a necessary condition for the admission of coincidence evidence. Section 98(1) of the *Evidence Act* provides that regard should be had to any "similarities in the events or the circumstances in which they occurred"[2] such that the evidence will have "significant probative value" (s 98(1)(b)). It is "significant probative value", having regard to similarities in the events or circumstances, which determines admission.

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[1] ***HML v The Queen*** (2008) 235 CLR 334 at [156] per Hayne J, at [336] per Heydon J.

[2] Section 98 provides also that similarities in *both* the events and circumstances may be taken into account.

6. 10 The degree of similarity required of another step-daughter's evidence in sexual assault cases was specifically addressed in the stated questions in ***DPP v P***[3]: "*1. Where a father or stepfather is charged with sexually abusing a young daughter of the family, is evidence that he also similarly abused other young children of the family admissible (assuming there to be no collusion) in support of such charge in the absence of any other 'striking similarities'?*".

6. 11 The answer given was that no other "striking similarities" were required. Admissibility was held to depend on the probative force of the evidence and that probative force depended on the issue for which the evidence was adduced. The approach in ***DPP v P*** has been approved by this Court in ***Pfennig v The Queen*** (1995) 182 CLR 461 at 478 - 9, ***Phillips v The Queen*** (2006) 225 CLR 303 at [54] and ***HML v The Queen*** (2008) 235 CLR 334 per Gleeson CJ at [17], per Crennan J at [444] – 445], per Kiefel J [489].

6. 12 Where the evidence is adduced to establish the identity of the perpetrator some distinctive hallmark or signature may be necessary but such features are not necessarily required where identity is not in issue:

> *"As this matter has been left in **Reg. v. Boardman**, I am of the opinion that it is not appropriate to single out `striking similarity' as an essential element in every case in allowing evidence of an offence against one victim to be heard in connection with an allegation against another. Obviously, in cases where the identity of the offender is in issue, evidence of a character sufficiently special reasonably to identify the perpetrator is required and the discussion which follows in Lord Salmon's speech on the passage which I have quoted indicates that he had that type of case in mind.*
>
> *From all that was said by the House in **Reg. v. Boardman** I would deduce the essential feature of evidence which is to be admitted is that its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another*

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[3] ***DPP v P*** [1991] 2 AC 447 at 452.

crime... ... . But restricting the circumstances in which there is sufficient probative force to overcome prejudice of evidence relating to another crime to cases in which there is some striking similarity between them is to restrict the operation of the principle in a way which gives too much effect to a particular manner of stating it and is not justified in principle."[4]

6. 13 In ***DPP v P*** the sufficient connection was held to be that the girls were the accused's daughters, both under 13, and he used his authority over them to sexually assault them in their own home, features common to "the paederasts's or the incestuous father's stock in trade"[5].

10 6. 14 This is not to say that striking similarities in the conduct or circumstances may not contribute to the inherent improbability of coincidental allegations by stepdaughters[6]. This will be a matter of degree in each case[7], but such features are not essential to admission[8]. As the House of Lords held: *To transpose this requirement to other situations where the question is whether a crime has been committed, rather than who did commit it, is to impose an unnecessary and improper restriction upon the application of the principle.*"[9].

6. 15 In the present case, the "similarities in the events or the circumstances in which they occurred" provided by 98(1) were that in both cases the applicant had engaged in sexual conduct with a young stepdaughter under the age of about
20 14. In both cases the applicant did not threaten the girls nor try to enjoin them to secrecy, as in cases such as ***DPP v P***. Rather, in both instances, the sexual conduct was performed in the context of another activity, and in this way, the applicant attempted to normalise the sexual conduct by making it seem to have an innocent purpose. In the case of SD1, he got her to hold his penis saying it would help him with his hernia. In the complainant's case, he told her to rub cream on his genitals to help with a rash (count 2), and he massaged her vagina saying it would help her with problems in getting to sleep (T 39.30).

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[4] ***DPP v P*** [1991] 2 AC 447 at 460D.
[5] ***DPP v P*** [1991] 2 AC 447 at 453F.
[6] ***DPP v P*** [1991] 2 AC 447 at 460F.
[7] ***DPP v P*** [1991] 2 AC 447 at 461A - B.
[8] ***DPP v P*** [1991] 2 AC 447 at 461C.
[9] ***DPP v P*** [1991] 2 AC 447 at 462F.

6. 16 The trial judge ruled the evidence admissible on count 2 alone because of the "striking similarity" in "both the circumstances and the acts themselves" (Judgment on Admissibility 22/8/11 at p3.30), namely, that both SD1 and the complainant in count 2 referred to the use of a medical ruse to get her to hold his penis (Judgment on Admissibility 22/8/11 at p3.28). On this view, the strikingly similar act was the holding of the penis, the strikingly similar circumstance was the medical ruse. The fact that there was no medical aspect to the pretence used to massage the complainant's vagina and that the act did not involve her holding his penis were the differences which made the evidence inadmissible other than on count 2.

6. 17 The probative force of SD1's evidence did not solely depend on these two features. The probative force arose from the improbability that two adult women would, independently and without collusion, allege sexual conduct by their stepfather when they were children many years apart. It was a remarkable coincidence that more than 25 years after the events two women alleged sexual abuse by their stepfather when they were children. These circumstances provided sufficient connection to warrant admission as coincidence evidence on counts 2 and 3.

6. 18 The probative force depended on the allegations not being explicable by collusion or confabulation. This issue did not arise as it was never suggested that SD1 and the complainant had ever met. The evidence was that SD1 stopped seeing the applicant in 1980. The applicant married the complainant's mother in 1981. The complainant was seven at that time.

6. 19 The trial judge directed the jury that they could only use SD1's evidence in proof of count 2 if they were satisfied of her allegations beyond reasonable doubt. If they were satisfied that the conduct described by SD1 occurred, then that may "assist you in deciding" whether count 2 was established (SU 26.19). The CCA considered that this direction invited the jury "to move directly" from being satisfied of SD1's allegations to consequential guilt on count 2. The correct reasoning was held to be that if the jury found that the unusual features of the two allegations made it very unlikely that they were fabricated then the jury may regard the coincidental accounts as capable of supporting the truthfulness of the complainant's account (CCA at [134]).

6. 20 The earlier directions made it clear that the Crown had to prove the elements of the offence and that the evidence to prove the offences was that of the complainant. In the section on coincidence evidence, his Honour directed that, although the evidence of SD1 indicated inappropriate conduct on another occasion, the issue was guilt of the offence charged and the evidence on that issue was that of the complainant: "*You have before you evidence that the Crown relies upon as establishing that he committed the offences. That is accused (sic) complainant.*" (SU 24.40). The similarities between the act described in count 2 and by SD1 was said to be "touching the stepfather's penis" and the similar circumstance was said to be the "spurious medical reason" (SU 27.15).

6. 21 From the directions as a whole, it would have been clear to the jury that SD1's evidence did not establish count 2. It was support for the complainant's evidence on count 2 on the basis that the jury were satisfied of the improbability that the two allegations were made coincidentally given the similar events and circumstances described.

6. 22 The CCA held that this direction was favourable to the applicant to the extent that it required that SD1's evidence be accepted beyond reasonable doubt. The direction also instructed that SD1's evidence, if accepted, might support the complainant's evidence but not that the complainant's evidence could also be seen as supporting SD1's account (CCA at [17], [134]).

Tendency Evidence

6. 23 The Crown also sought to adduce SD1's evidence as tendency evidence on all counts. The relevant tendency to act "in a particular way" as required by s 97(1) was that the applicant had a sexual interest in his young stepdaughters and a willingness to act upon it.

6. 24 The trial judge considered SD1's evidence was "best characterised as coincidence evidence" and gave no reasons why it was not admissible as tendency evidence (Judgment on Admissibility 22/8/11 at p 3.47).

6. 25 The trial judge directed the jury that SD1's evidence should not be used on the other counts: "*You mustn't take [SD1's] evidence into account when you are*

reasoning in respect of Counts, 1, 3 and 4 and if during your discussions it drifts into that then you should correct the position." (SU 25.35).

6. 26 Although that portion of the directions restricted the use of SD1's evidence to count 2, it was accepted that tendency reasoning was available (Judgment on Admissibility 22/8/11 at p 3.43), on the basis that if any one count was established beyond reasonable doubt, that could support a finding that the applicant had the relevant tendency towards this complainant and that tendency could then be used on the other counts.

6. 27 In accordance with the ruling on the admissibility of SD1's evidence, the Crown Prosecutor put it to the jury that if they accepted SD1's evidence beyond reasonable doubt, they could use it to determine whether count 2 was established. If it was accepted that count 2 was proved beyond reasonable doubt, the jury could use that to find that the applicant had a sexual interest in the complainant and that sexual interest was a matter they could take into account in considering the other counts (T 29/08/11 p 419.40).

6. 28 In the summing up the trial judge directed that tendency reasoning was available in the way the Crown Prosecutor had set out in her closing address (SU 26.30). However, the directions that purported to follow that approach were in slightly different terms. The trial judge's directions were that the conduct in counts 1, 3 and 4 demonstrated a sexual interest in the complainant and a willingness to act upon it (SU26.40) and if the jury accepted that tendency it could be used in considering whether the applicant had committed the offences charged (SU 27.30).

6. 29 This appeared to exclude the conduct in count 2 as a matter to be considered to demonstrate the sexual interest. This was probably an oversight and would likely have been understood as meaning that the conduct described by the complainant was to be taken into account in the way the Crown had outlined.

6. 30 In the following paragraph the trial judge directed that in deciding whether a particular act was committed the jury should not consider each of the acts in isolation but should "*consider all the evidence and ask yourself whether you are satisfied that a particular act relied upon actually occurred.*" (SU 26.50).

6. 31 That direction was correct for the jury were entitled to take all the evidence into account. The trial judge further directed that if the jury found any act or acts proved they could conclude that the applicant had a sexual interest in the complainant and was willing to act upon it. But they could only use such tendency if they were satisfied beyond reasonable doubt that the applicant had that tendency, otherwise they must put such reasoning aside (SU 27.25). That was the basis on which tendency reasoning was permitted, however, it was available on a broader basis.

6. 32 Section 97 provides that the evidence demonstrate a tendency "to act in a particular way, or to have a particular state of mind". In the present case, the trial judge appears to have accepted that evidence of a sexual attraction to the complainant was a sufficiently "particular" tendency to be used on the other counts but evidence of a sexual attraction to his young stepdaughters was not. On this approach, SD1's evidence was admissible to prove indirectly that the applicant had a sexual interest in the complainant but not admissible to prove that he had a sexual interest in his young stepdaughters.

6. 33 In ***HML*** the particularity, or "special probative value"[10] of the tendency was said to arise from the identity of the parties. As Gleeson CJ expressed it, a father's sexual attraction to his child is "*a certain kind of propensity, a kind of propensity that jurors may regard as bearing upon the probability that the testimony of the child as to a particular act is true.*"[11] A sexual attraction to young stepdaughters is also a particular kind of propensity which bears on the probability that the evidence of a particular stepdaughter is true.

6. 34 The tendency demonstrated by SD1's evidence was that the respondent was sexually attracted to his young stepdaughters and willing to use them as the objects of gratification of that interest. Her evidence, together with the evidence of the complainant, was capable of establishing that the applicant had such a tendency which was highly probative in assessing the likelihood of whether the individual allegations should be accepted. The CCA noted in passing that

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[10] ***HML v The Queen*** (2008) 235 CLR 334 per Hayne J at [178].
[11] ***HML v The Queen*** (2008) 235 CLR 334 per Gleeson CJ at [8], per Kiefel J at [510].

SD1's evidence was perhaps evidence of tendency but did not pursue the issue (CCA at [136]).

Prejudicial Effect

6. 35 Contrary to the applicant's contention that SD1's evidence "tainted" the jury (AWS at [46]), and thus could not be contained to only one count (AWS at [46], [52]), the result plainly demonstrated otherwise. The jury returned different verdicts on the 4 counts and were clearly able to assess each count separately despite SD1's evidence. The failure to agree on two of the counts was readily explicable on the basis that those two counts were charges where the complainant's evidence was unsupported.

6. 36 The failure to agree on count 1 reflected the "somewhat uncertain" (CCA at [49]) evidence as to the timing of this offence. Count 4 was said to have been committed within a day or two of count 3 but the evidence on this count was not as strong as count 3 (CCA at [150]).

6. 37 The complainant's evidence on counts 2 and 3 was supported by the evidence of early complaint to her brother and her best friend. The complainant disclosed being made to rub cream on the applicant's penis (count 2) to her brother [NW] in about 1986 (T153.20). She also disclosed the incident where the applicant massaged her vagina (count 3) to her best friend [PR] in 1986 (T 135.15). Both [PR] and the [NW] gave evidence confirming these disclosures. The occurrence of these two incidents was also supported to some extent by the evidence of the applicant and Mrs Versi.

6. 38 The applicant and Mrs Versi each gave evidence of an incident where the applicant was playing tennis in the street with the complainant and her brother but had to come inside to put cream on his inner thigh because of a rash. The children came in and asked him to come back and play but he could not because of the rash (T 240.50, 293.50). This was very similar to the complainant's description of the event, except of course the applicant denied

that the complainant came into his bedroom and he asked her to rub cream on his genitals[12].

6. 39 The applicant and Mrs Versi also remembered the incident the subject of count 3 where the complainant could not sleep and went to their bedroom during the night. The applicant said he took her back to her room and helped settle her. Both the applicant and Mrs Versi said he was only gone for a short time, a matter of one – two minutes and the applicant denied that he ever massaged the complainant's genitals or inserted his fingers in her vagina (T 294.23).

6. 40 It was clear, therefore, that the risk of prejudice had not materialised. SD1's evidence had not led the jury to reason that as the applicant had sexually assaulted SD1 he was the sort of person who must have been guilty of all the charges. The jury were able to distinguish guilt on the two counts which the complainant had disclosed at about the time they occurred and in respect of which there was limited support from the applicant and Mrs Versi.

Rebuttal of good character

6. 41 SD1's evidence was also admissible under s110 of the *Evidence Act* to rebut the evidence of good character once such evidence was adduced.

6. 42 The applicant called eight character witnesses. They were each asked whether they knew of the allegations made by SD1 and the complainant and whether they considered the applicant capable of such conduct. Each of the witnesses said they knew of the allegations and did not consider the applicant capable of committing the acts alleged.

6. 43 The jury were directed that the evidence of good character could be used in two ways. Firstly, it supported the credit of the applicant and secondly it bore on the unlikelihood of the applicant committing the offences charged (SU 40.20). The jury were not directed on the relevance of SD1's evidence to the issue of character.

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[12] There was some disagreement between the applicant and Mrs Versi about the timing of this incident. The applicant could not remember but he thought it was before the twins were born (T308.35) whereas Mrs Versi said it was after the twins were born (T 241.17), i.e. after 15/11/95 (T 179.15) which was consistent with the time indicated by the complainant.

6. 44 Section 110 clearly provides that if evidence of good character is adduced, the tendency rule does not apply to evidence tendered in rebuttal. SD1's evidence was thus allowed to be used to rebut good character. This appears to have been overlooked at the trial and in the CCA.

6. 45 However, that did not mean that, as a matter of law, the CCA was prevented from taking the evidence into account for that purpose in relation to counts 2 and 3[13].

Draft Notice of Contention

6. 46 In the event that this Court were minded to grant Special Leave in this matter the respondent seeks to rely on the attached Draft Notice of Contention.

6. 47 The Notice of Contention may not strictly be necessary in this matter. The respondent does not intend the Notice to be a cross-appeal in the true sense. The CCA did not discuss the possible additional bases of admissibility of SD1's evidence canvassed above. These additional bases are not now put forward as alternatives to the CCA's approach.

6. 48 In advancing these additional bases the respondent does not seek to alter the prosecution case as presented at trial nor to improve its position. It is acknowledged that the Crown tendered SD1's as coincidence evidence on count 2 and, to that extent, the trial judge's decision reflected the Crown's position at trial. The evidence was also tendered as tendency evidence and no reasons were given for its exclusion on that basis.

6. 49 The respondent's submission remains that it was correct to admit SD1's evidence, and once admitted, the CCA was correct in the way it took it into account in assessing the reasonableness of the verdict on count 3.

Unreasonable verdict

6. 50 The applicant contends that the CCA was wrong to take SD1's evidence into account in determining the reasonableness of the verdict on count 3 because the trial judge had directed that it could not be used in relation to that count.

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[13] ***SKA v The Queen*** (2011) 243 CLR 400 at [22].

6. 51 For the reasons given above, it was not possible strictly to quarantine SD1's evidence to count 2 given its obvious significance beyond that count. The applicant acknowledges that tendency reasoning was available but contends that the CCA went beyond that "legitimate" tendency reasoning by drawing general conclusions about sexual interest from SD1's evidence and then applying those conclusions to count 3 (AWS at [33]).

6. 52 Essentially, SD1's evidence is said to have "tainted" the deliberations (AWS at [52]) and led the CCA to allow her evidence to be "decisive" in dispelling the "significant doubts" remaining on counts 2 and 3 without her evidence (AWS at [48]). The applicant appears to regard the CCA's comment that SD1's evidence was "decisive" as tantamount to a finding that counts 2 and 3 were established by SD1's evidence. In this way, the applicant submits that it was "clear" that "the only reason" the sexual interest had been demonstrated was SD1's evidence (AWS at [48]).

6. 53 It 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. That finding of guilt was plainly not based "only" on SD1's evidence, nor could it have been, for only the complainant gave evidence of count 2. The finding of sexual interest was based on all the evidence, but particularly the complainant's evidence: "*Moreover, 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 at [159]).

6. 54 This was the very tendency reasoning the applicant submits the jury were entitled to engage in if they were satisfied of guilt on any one of the counts (AWS at [33]).

6. 55 The applicant interprets the CCA's comment that "leaving aside the evidence of SD1"... ... "significant doubts" remained about the complainant's evidence on counts 2 and 3 (CCA at [156]) to mean that SD1's evidence was the "only 'decisive'" evidence for count 3 (AWS at [50]) yet the point being made in that portion of the CCA's reasoning was that the verdicts on counts 2 and 3 were not unreasonable, even without SD1's evidence.

6. 56 Having found the verdicts not unreasonable even without SD1's evidence (CCA at [156]), the CCA then considered counts 2 and 3 separately and hypothesised that even if the problems with the complainant's evidence had been underestimated, the "convincing" support provided by SD1's evidence clearly established count 2 (CCA at [157]).

6. 57 Firstly, that was not an error. SD1's evidence was plainly significant. On any view, if accepted, it provided powerful support for the complainant's allegations. Secondly, that comment was not a finding that the problems with the complainant's evidence had actually been underestimated, it merely made the point that the complainant's evidence was not the only evidence on count 2: *"Accepting that I may have underestimated the problems with the complainant's evidence, the decisive matter which I have found convincing is the evidence of SD1."* (CCA at [157]).

6. 58 It was correct that when all the evidence on count 2 was taken as a whole, count 2 was clearly established. That finding had been made earlier in the reasons: "*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 at [141] and these two findings needed to be read together.

6. 59 Having found count 2 established, the CCA then posited the consequences of the finding of guilt on count 2. One consequence was that it demonstrated a tendency which could be used in relation to count 3 (CCA [159]). Another consequence was that it demonstrated that the applicant's denials were false and Mrs Versi's evidence, to the extent that it supported him on this issue was unreliable or perhaps irrelevant which affected the credibility of their account on count 3 (CCA at [159]).

6. 60 An additional consequence, not referred to by the CCA, was that the jury must have rejected the evidence of the eight character witnesses who said the applicant was not capable of such conduct.

6. 61 This reasoning did not rely "only" on SD1's evidence, on the contrary, it demonstrated that the finding on count 3 was based on a number of factors other than SD1's evidence.

6. 62 This portion of the CCA's reasons separated SD1's evidence from the rest of the evidence, considered each count separately, and assumed that the jury began with count 2. This device was used to illustrate the strength of the Crown case. It could not be taken to prescribe any form of reasoning or logical sequence. The jury were not required to start with count 2 nor were they to leave any portion of the evidence aside in assessing the whole.

6. 63 The correct approach, as the CCA made clear in the quotation from this Court's decision in ***SKA*** was "to make an independent assessment of the whole of the evidence, to determine whether the verdicts of guilty could be supported." (CCA at [152]).

6. 64 The CCA accepted that there were inconsistencies in the complainant's evidence although the significance of those inconsistencies should not be overstated.

6. 65 Much of the criticism of the complainant's evidence concerned errors in the timing of the background details. For example, the complainant said that count 2 occurred in late 1985 or early 1986, on an afternoon after school when her mother was away. The defence called evidence that Mrs Versi went to the Tresillian Centre for five days between 18 – 23 January 1986 at which time the complainant would not have been in school (T 239.40). The complainant explained that the incident may not have occurred during those five days. She knew it was late 1985, early 1986, and that her mother was not in the house that afternoon but she did not know where she was (T 74.30, 75.35, 76.10). Her mother's attendance at Tresillian was not, for the complainant, an essential element in the timing of the event. Mrs Versi also attended Tresillian for shorter stays of about two hours until about April 1986 (T 215.10, 240.10).

6. 66 This inconsistency, if it was an inconsistency, was inconsequential because the timing was confirmed by the evidence of the complainant's brother [NW]. The complainant said she told her brother of this incident in 1986. Her brother gave evidence confirming that she told him that she had been made to rub cream on the applicant's penis. He thought he was 11 or 12 at the time (T 153.35, 154.20). [NW] was born in 1975 so that meant the event must have occurred in about 1986 or 1987.

6. 67 There was also said to be a significant inconsistency about the timing of counts 3 and 4. The complainant said that count 3 (and 4) occurred in 1986, when she was in year 7 at the Queenwood School. She also thought it occurred after the renovations to the applicant's bedroom. The evidence was that the renovations were finished in 1989 so if the offence occurred in 1986, the complainant was mistaken about the renovations.

6. 68 This was an inconsequential error as well because the renovations took place over a number of years and it was understandable that the complainant may have been confused about which of the three stages of renovations had been completed at the time of these events. There was an initial renovation to the bathroom soon after they moved into the house in 1983 (T 181.1). Later, there was a renovation to the existing house which involved replacing doors and skirting and painting (T181.35). Then there was the addition of a new section to the house, which included a new master bedroom which was completed in 1989 (T 182.1, 241.45, 279.40). Ultimately, there was little doubt that count 3 occurred in 1986 as the complainant disclosed the offence to her best friend, [PR], in 1986 (T 134.40) which meant it must have occurred at or before that time.

6. 69 The criticisms of the complainant's evidence were largely based on the fact that her account was contradicted in a number of respects by the evidence of Mrs Versi. Mrs Versi's evidence was of considerable significance in the trial because it showed that the complainant's own mother did not believe her.

6. 70 The CCA observed that there was nothing in the evidence of the applicant and Mrs Versi which demonstrated significant inconsistencies or implausibilites (CCA at [155]) nor that "on the important issues" their evidence was not "truthful or reliable". There were however two inconsistencies, evident from the transcript, which did affect the reliability and perhaps the truthfulness of Mrs Versi.

6. 71 One was as to whether the applicant he had ever gone into the complainant's bedroom alone at night such that he could have committed the offence in count 3. Mrs Versi's initial evidence was that he never went into the complainant's bedroom at night without her being present nor did she recall an incident when

the complainant came to her bedroom in the middle of the night upset or nervous as recounted in relation to count 3 (T188.35):

Q. Do you say Peter never went into [the complainant's] bedroom of a night?

A. No. Not unless I would've said so, yes. He wouldn't have. If he'd go into her bedroom he would've been with me and we would've kissed her goodnight.

Q. Do you ever recall whether he ever went into her bedroom in the middle of the night?

A. No.

Q. When you say no, in fairness to you, do you say no you don't recall, or no it didn't happen, I'm just not clear?

A. I don't believe it happened.

Q. Do you ever recall [the complainant] coming to you in the middle of the night when you were asleep, with the lights out, and indicating that she was upset or nervous?

A. No, I don't."

6. 72 And again at T 215.45:

Q. Do you accept that there were times that Peter might go to [the complainant's] bedroom when [the complainant] was feeling unwell?

A. Only with me around.

Q. Well, did Peter ever go to [the complainant's] bedroom without you when [the complainant] was in there?

A. No. [The complainant] was my responsibility.

6. 73 This was inconsistent with Mrs Versi's statement and the Crown Prosecutor applied to cross-examine Mrs Versi (T198 – 208). When the relevant portion of her statement was read to her Mrs Versi changed her evidence and said "I remember this night particularly" and agreed that the applicant did go into the complainant's bedroom that night (T216.50). The tenor of the evidence that followed was that she remembered this incident very well: "I recall the night because it was a very difficult night." (T 242.25), and that was the reason she was so sure that the applicant was only in the bedroom for "a minute or so" (T243.33) and nowhere near the 15 minutes the complainant alleged.

6. 74 This was a stark reversal of the evidence first given and a significant inconsistency in Mrs Versi's evidence. The applicant's evidence was also that he recalled this incident (T 294.20). He said it only happened once (T 295.15).

6. 75 The more significant inconsistency in Mrs Versi's evidence was about her reason for not believing the complainant.

6. 76 Mrs Versi said that when the complainant disclosed these allegations to her at the end of 1989 at the time of their consultation with Dr Towndrow she "soul searched" (T 249.13) and decided to seek help from another counsellor, Janet Alexander in 1990. There were a number of sessions with Janet Alexander in 1990 with the complainant during which "all the issues" to do with the complainant's allegations were discussed (T 189.50). The matter was finally "resolved" because the complainant was asked whether the applicant had touched her inappropriately and the complainant admitted that "nothing like that" had occurred (T190.12, 210.40, 230.10).

6. 77 Mrs Versi explained that this retraction and resolution was the reason "the family would be able to go on as a family." (T190.1, 229.45). She said if there had not been a retraction she would not have remained married to the applicant, she would have reported the matter to DOCS and to the complainant's father (T 227.20 - .45). However, a resolution was effected and, after these sessions, "life resumed normality" and the complainant "lived in our house happily" until she moved out in 1993 (T229.45).

6. 78 Mrs Versi said that, contrary to the complainant's version, the disclosures made to Dr Towndrow were not 'brushed under the carpet' (T 231.10), they were taken seriously and addressed soon after. Mrs Versi was definite that she saw Ms Alexander in 1990: "Yes. Definitely" (T 190.20) and not in 1994: "Absolutely not" (T190.40, 210.20). The consultations occurred while the complainant was still in school and before her Higher School Certificate (T 245.40).

6. 79 The applicant gave a similar version. He said that after the lack of progress with the first counsellor, Dr Towndrow in 1989, it was decided to consult another counsellor "to try and help".. ... ... "in whatever way to resolve this thing." (T 329.1). He was definite that they saw Janet Alexander in 1990, maybe 1991, but not 1994 (T 331.40). It was while the complainant was still at school

(T331.5). He said the complainant retracted the allegations saying "nothing like that" had happened (T329.20, 330.15).

6. 80 The credibility of this account depended on the counselling with Janet Alexander occurring in 1990, when the complainant was 16 and still living at home and on the complainant having retracted the allegations at that time. The problem was that this was flatly contradicted by Janet Alexander.

6. 81 Ms Alexander was emphatic that the first time she saw the family was in 1994 and there was no mention of any retraction or resolution in her notes of the sessions.

6. 82 Ms Alexander was very clear that she did not see the family in 1990. The first time she saw them was in 1994. Ms Alexander gave two reasons why she was certain that the first time she met the complainant or her mother was in 1994 not 1990 (T 287.48). Firstly, she started the file in 1994 with the referral note from the GP which she would not have done if she had seen them before and had a file on them. Secondly, she remembered the telephone call from the referring GP asking her whether she would take the case. She said this referral "stuck in her memory" because the family were said to be "well known"(T 289.25). Ms Alexander also remembered the family coming to her the first time and she did not know who they were: "*I remember them coming and thinking I've never heard of these people before. So they weren't well known to me at that time.*" (T 288.5).

6. 83 The fact that she started a file in 1994 with the initial referral and recorded the details as if she were encountering the family for the first time was sought to be explained by the possibility that she had misplaced the previous file when she changed addresses in 1993. Ms Alexander was emphatic that did not occur: "No I didn't lose any files." (T288.40). The suggestion of a misplaced file seemed to ignore Ms Alexander's evidence that she had an actual recall of the family being referred to her and of their first meeting in 1994.

6. 84 Ms Alexander had little independent recollection of what was said during the sessions. Although she had recorded some of what the complainant had said there was nothing in her notes about a resolution: "There's no indication in my notes that anything particularly was resolved." (T171.25).

6. 85 The significance of this evidence was that Ms Alexander was an independent witness with no reason to lie about the counselling sessions that had occurred 17 years earlier. Her evidence directly contradicted Mrs Versi and the applicant as to the timing of the consultations and as to what was said. If the jury accepted that Mrs Versi did not consult with Ms Alexander until 1994 it meant that Mrs Versi's evidence, (and that of the applicant) that she stayed with the applicant because she had satisfied herself that the offences had not occurred was false. It showed that she had let the matter go for five years until the complainant was 20 and had left home. It also meant that her basis for disbelieving the complainant and continuing to support the applicant was false.

6. 86 The issue of the admissibility of SD1's evidence is a matter of general importance but the evidence was properly admitted in this case albeit on a very narrow basis which was unduly favourable to the applicant. The CCA did not take the additional possible uses of the evidence into account in assessing the reasonableness of the verdicts. The issue of the reasonableness of the verdicts depends on the particular circumstances of this case and raises no issue of general importance warranting the grant of special leave. Nor do the interests of justice in this case require the grant of leave. Special leave should be refused.

PART VIII: Time Estimate

It is estimated that oral argument will take 1 hour.

Dated: 6 June 2014

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