HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S169/2021
File Title:	RC v. The Queen
Registry:	Sydney
Document filed:	Form 23 - Application for leave or special leave to appeal
Filing party:	Applicant
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Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

Attachment E

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

RC
Applicant

and

The Queen
Respondent

APPLICATION FOR SPECIAL LEAVE TO APPEAL

The applicant reapplies for special leave to appeal from the judgment of the NSW Court of Criminal Appeal given on 22 April 2020. An earlier application for special leave dated 12 June 2020 was disallowed. For the reasons set out below, this application seeks the Court's consideration of this second revised application.

This second application arises because of the following factors:

1. The applicant, being unrepresented, had not done full justice to the argument in support of the grant of special leave as set out in Part III of his original application, there being several relevant legal issues that were not properly canvassed stemming from the judgement of the NSW Court of Criminal Appeal.
2. There were anomalies in the application of the High Court Rules in dealing with the original application that, while not necessarily substantively affecting the outcome, created an impression of prejudicial treatment of an unrepresented applicant, thus raising questions about fairness.

The applicant seeks an order that compliance with the time limited by rule 41.02.1 be dispensed with. An affidavit explaining the failure to comply with rule 41.02.1 accompanies this application as required by rule 41.02.2 (b).

Attachment E

Part I:
Proposed Grounds of Appeal

1. The NSW Court of Criminal Appeal did not appropriately or adequately assess whether the evidence was sufficient to establish guilt to the requisite standard of proof.
2. The NSW Court of Criminal Appeal erred in stating that it was open to the jury, "in the sense explained by the High Court in various cases"[1] to accept beyond reasonable doubt the complainant's account of the allegation in count 2.

Orders Sought

1. Compliance with the time limit relating to an application for special leave as set under Rule 41.02.1 of the *High Court Rules 2004* be dispensed with.
2. Special leave to appeal granted.
3. Appeal treated as instituted and heard instanter and allowed.
4. Set aside order 2 of the orders of the Court of Criminal Appeal of New South Wales made on 22 April 2020 and, in its place, order that
   (a) the appeal be allowed; and
   (b) the appellant's conviction be quashed and a judgment of acquittal be entered in its place.

Part II:

The threshold special leave questions are whether the Court could and should accept a second application. The Court has power to reopen an application for special leave.[2] A decision on a special leave application is not res judicata. It is in the nature of an interlocutory order, which may be varied or set aside in appropriate circumstances where the interests of justice so require;[3] but it would need to be shown that exceptional circumstances exist and new circumstances have arisen that require a reopening to prevent a serious miscarriage of justice because an error or fact of law has occurred in the earlier determination of the application, which error demands correction.[4] If some oversight or error of law has occurred, and a relevant change of circumstances can be

[1] RC v R [2020] NSWCCA 76 at 5, referring to, by way of example, M v The Queen [1994] 181 CLR 487 and [1994]HCA 63; SKA v The Queen [2011] 243 CLR 400 and [2011] HCA 13; Pell v The Queen [2020] HCA 12.
[2] Re Sinanovic's Application [2001] HCA 40; (2001) 180 ALR 448 (11 July 2001) at 7.2 per Kirby J; Re Application by David William Kirby [2021] HCAT Trans 081 per Gleeson J
[3] Re Sinanovic's Application [2001] HCA 40; (2001) 180 ALR 448 (11 July 2001) at 7.1 per Kirby J
[4] Ibid. at 7.4

demonstrated, this Court could exceptionally be persuaded to reopen an adverse special leave decision.[5]

In a recent determination by Gleeson J[6] it is said that the discretion to decide whether to grant the leave sought (in effect, to reopen an application for special leave) is to be exercised by reference to the criteria set out in Rule 6.07.1, namely whether the proposed application "appears ... on its face to be an abuse of the process of the Court, to be frivolous or vexatious or to fall outside the jurisdiction of the Court." This application clearly does not fall outside the jurisdiction of the Court, is not frivolous, and does not come within the definitions of a "vexatious proceeding" set out in of paras (b), (c) or (d) under that heading in section 77RL (1) of the Judiciary Act 1903. That leaves the possibility of its being considered an abuse of process (cf. also para (a) in the definition of a "vexatious proceeding"). Gleeson J also said that an example of an abuse of process is an attempt to relitigate a case. The three cases referenced at foot note 2[7] to illustrate this were civil proceedings in which factors were at play that do not exist in the current application, e.g., substantive points of law or process that had been well settled and parties being put at significant, including cost, disadvantage.

In Re Golding, to which Gleeson J also referred, Nettle J commented that the order refusing the first application has long been conceived of as a final curial act and in the absence of a compelling explanation or circumstance, the practice of this court is to regard a subsequent application for special leave traversing substantially the same subject matter as an earlier application as an abuse of process.[8] In support of that conclusion, he cites fourteen special leave dispositions. However, eleven of these involve multiple attempts through multiple jurisdictions to achieve the outcome; nine relate to visa refusals. In all these cases, the issues were recurring unchanged and considered in several forums. The remaining three failed on the grounds of no new aspects or, in addition, in the case of two of them, new issues were not explained or regarded as not convincing. None of these dispositions has any parallel with the situation or issues of this

[5] Ibid. at 7.6
[6] Application by David William Kirby [2021] HCATrans 081
[7] Ibid.
[8] [2020] HCA 38 [11]

application and, therefore, an inferral that the dispositions reflect an abuse of process, while justified in their circumstances, is not applicable to this current application.

The reopening application in *Re Sinanovic's Application* was refused because none of the stated grounds was present and there were no new circumstances. This differs from this application where there are new issues that were not included in the original application, which are outlined in more detail in Part III; and anomalies in the application of the high Court rules to the processing of the original application that, at the very least, raise perceptions of disadvantage to the applicant that may be seen as affecting the judgment of the Court on it. It is only by a reopening of the application that oversights, errors and/or perceptions of unfairness can be rectified and a serious miscarriage of justice prevented.

The reason for any oversights or errors stems from the applicant's failure to sufficiently detail the arguments behind his statement of reasons for his application when first filed. This was an error of inexperienced judgement by an applicant who did not enjoy the counsel of legal representation. The disallowing of the application was, therefore, based on information that omitted crucial elements that support granting the application. Although this could be seen to be an omission that could have been rectified at the time, this should not be a fatal flaw in seeking a reopening of the application. While Kirby J in *Re Sinanovic's Application* states that fault on the part of those seeking reopening would be a discretionary reason for refusing to entertain the request,[9] the fact that he describes such a reason as "discretionary" means there could still be sound reasons for entertaining the request. In dealing with the matter in Sinanovic, Kirby J alluded to comments he had made in an earlier judgment,[10] where he set out "considerations that may tend to favour the extension of an indulgence to a party applying [for intervention]." These included its being the only way in which the true issues and the real merits, factual and legal, can be litigated, that the oversight which occurred is adequately explained, that the oversight was wholly accidental, that it was simply the product of unavoidable human error or, possibly, the outcome of the application to the case of fresh legal minds who perceived an important new point.[11] These comments support the contention that the discretionary

[9] Re Sinanovic's Application [2001] HCA 40; (2001) 180 ALR 448 (11 July 2001) at 7.2 per Kirby J
[10] Queensland v JL Holdings Pty Ltd [1997]189 CLR
[11] Queensland v JL Holdings Pty Ltd [1997]189 CLR at 169-170

judgment of the court, in this case, should allow the reopening of the application notwithstanding the original oversight by the applicant.

In addition to the issue of new and substantive issues of law (cf. Part III), there are also perceptions created by inconsistencies and anomalies that occurred in the processing of the original application. Even if they might not have had a substantive effect on the disposition of the initial application, they have created a perception that the Court Rules were applied to the disadvantage of an unrepresented applicant. The failure in dealing with the original application to apply Rule 41.04 as set out in the Rules, even when attention was drawn to this misstep at the time, at the very least created an impression
10 that the rules were not being adhered to when an unrepresented applicant was involved. These issues may of themselves warrant a reopening of the application in the face of concern that they might have had a substantive effect on the process, but even if not, at least the adverse perception created well warrants correction; and this can be done by a reopening and conduct of the application process strictly in accord with the rules.

Part III:

The NSW Court of Criminal Appeal (CCA) set out the criteria for appellate courts based on *Pell v The Queen* 2020 HCA 12 at 39 and *The Queen v Baden-Clay* 2016 HCA 35 at 66. However, the CCA erred first in the approach it took to applying those criteria and secondly in concluding that "the verdict returned by the jury as properly open on the
20 evidence."[12] As to the first error, the judgement of the CCA on several issues sought to defend, safeguard and shore up the jury verdict, at times by speculation and hypotheses as to what the jury might have been thinking, rather than undertake a proper examination of the evidence to ascertain whether the jury ought to have entertained a reasonable doubt. In taking this approach, the CCA failed to appropriately assess whether the evidence objectively should have raised doubts with the jury in the manner required by the High Court's judgements in Pell and Baden-Clay. As to the second error, the CAA did not give proper weight to inadequacies in the evidence of the complainant or take into account in a reasonable way other evidence, namely, of the applicant; and, in both

[12] RCvR; RvRC [2020] NSWCCA 76 at 162 (also 163-164)

these aspects, failed to adequately and properly assess whether the jury ought to have entertained a reasonable doubt as to proof of guilt.

Illustrative of the first error in the CCA judgement is the judgement's justification of penetration taking place when the complainant was seated in the bath. The judgment speculates that "doubtless, the jury also concluded that it would be an easy thing for an older, stronger individual to slide a hand under a seated naked child and digitally penetrate the child's anus."[13] Such a conclusion belies the far more realistic alternative of the complaint's standing up, which the appellant in his evidence said he did; the more realistic alternative of a normal washing process for a small child in the bath of having the child stand up to wash parts of the child's body that would otherwise be under the water (inevitably bottom and crotch); and the unlikelihood of the scenario speculatively attributed to the jury.

In this vein also is the CCA's take on the complainant's evidence that "grandpa's finger went in my bottom and I could feel it in my tummy." The judgement speculates "the complainant's assertion that he could feel what was done to him in his tummy may well have struck the jury as startlingly consistent with how a child penetrated in that way would likely experience the sensation."[14] However, it is more likely that the complainant's comment is entirely consistent with a spontaneous reaction of unpleasant surprise or shock at feeling the appellant's hand washing between his cheeks. It is natural for an experience of unpleasant surprise or shock to bring on butterflies in the stomach. There is an abundance of literature attesting to "nervous stomach" brought on by something stressful happening or even about to happen. While mature people would likely appreciate the reasons behind "nervous stomach" it is unlikely that a six-year-old would do so, thus making all the more dangerous the judgement's hypothesis that feeling it in his tummy may well have struck the jury as "startingly consistent with how a child penetrated in that way would likely experience the sensation." This speculation also takes as a given that the offence took place rather than assessing the evidence to judge whether the jury should have entertained a reasonable doubt about it.

[13] Ibid. at 160.
[14] Ibid. at 139

Regarding the second error in the CCA judgement, the variation of descriptions by the claimant should have given rise to doubts by the jury about the safety of a guilty verdict on count 2. The claimant throughout interviews and at the prerecord frequently used ambiguous descriptions such as he touched my privates; grandpa putting his finger up my privates; he hadn't liked grandpa washing him because he didn't want him to touch his privates; as well as his more specific descriptions. The jury and the CCA should have seen these comments as raising doubts about the reliability of the complainant's evidence in relation to count 2, notwithstanding that the complainant might have been honestly trying to convey that he felt something unexpected and uncomfortable. The movement of the applicant's hand up and down the bottom area (as testified by the applicant) is not inconsistent with the contention of the complainant saying, in his words, that the applicant put his finger in his bottom, pulled it out and put it in again, particularly when on several occasions he had referred simply to his privates.

In analysing the inconsistency of his expressions, a relevant factor is the complainant's attitude and aversion to anyone's touching his privates imbued in him by his mother. Both his mother and the complainant gave evidence to the effect that he had been told that no one was allowed to touch his private parts; and that not even his parents washed his private parts; he did that himself. It was therefore not surprising that he would have an adverse reaction when he felt the applicant wash him. The evidence of the complainant's mother should also have led to doubts on the part of the jury about the reliability of the complainant's evidence. From the moment the complainant told his mother about the bathing, she said grandpa should not have done that. Some short time later, she asked the complaint to describe again what happened, said he was a good boy for telling her, reminded him that people shouldn't touch him in his private parts and repeated that grandpa should not have touched you. The handling of the situation by the complainant's mother gave no scope for contemplating or exploring any option other than taking what the complainant said in its most literal sense. This would also have reinforced in the complainant's mind that grandpa had done something bad simply by washing his privates. The complainant's evidence is consistent with over-reacting to having his privates washed and having been "programmed" against that happening,

particularly when some of his descriptions precisely reflect no more than touching. These factors should have raised doubts about the reliability of the complainant's evidence.

Another factor supporting the second error of the CCA stems from the issue of the need for a sexual connotation for count 1 but not for count 2. In finding a not-guilty verdict for count 1, the jury accepted that there was no sexual motive to the touching of his penis, thereby, in effect, taking the view that the action was simply part of the washing process without any ulterior motive. It would have been logical and consistent to regard having the applicant's hand moving along the crack of his bottom, as attested by the applicant, as also simply part of the washing process. The different verdicts by the jury for counts 1 and 2 are not fully or satisfactorily explained solely by the need for (and lack of) a sexual gratification aspect for count 1 and the absence of any such need for count 2. Even though there did not have to be a sexual gratification aspect to count 2, it is totally inconsistent with their approach to count 1 to accept that the applicant deliberately digitally penetrated the complainant's anus, which would have to have been completely outside the parameters of the normal washing process. The precedents referred to by the CCA[15] to shore up the reality that such penetration can take place without a sexual gratification aspect are misplaced as there were clearly in those cases other factors or motives (e.g., influence of drugs, anger, punishment) which were totally absent in this case, as evidence by the complainant's continuing after the bath to ride his bike over jumps and asking the applicant to come and video him and the birthday celebrations that followed. In these circumstances, the jury should have had doubts about the literal accuracy of the complainant's language and, therefore, about the act of penetration of the anus, for which there would have to have been some ulterior motive for it to have taken place deliberately; and there was no such motive speculated or supported by any evidence.

The situation is further complicated by the jury verdict of not guilty to count 3. In other words, the jury rejected the complainant's evidence that the applicant pulled his finger out and put it in again. If the jury had reasonable doubt about the veracity of the complainant's evidence that it happened a second time, they should logically have had similar doubts about its happening the first time. The only evidentiary difference relating

[15] Quoted in RCvR; RvRC [2020] NSWCCA 76 at 132

to counts 2 and 3 was that the complainant did not specify a second time on every occasion he spoke about the events, including when he first told his mother and when speaking with the doctor. However, on several occasions the complainant was insistent that it happened twice, including, when asked why it made him feel angry, replying "because he did it twice." The CCA defended the difference of verdicts on the basis of the jury's being directed that it could use a complaint by the complainant (e.g., to his mother and the doctor) as "some evidence" independent of the complainant's evidence; speculating that the complaint and the circumstances of it may properly have been regarded by the jury as highly significant; and postulating that, because the complainant on those two occasions had not specifically referred to it happening twice, this evidence applied to count 2 but not to count 3, and is sufficient to provide a proper basis upon which the jury could acquit the appellant of count 3 but convict him of count 2. On this basis, the CCA deduced that it is reasonable to conclude that, "given the stronger case advanced by the Crown in support of count 2, the evidence for that count alone satisfied the jury of the appellant's guilt to the very high standard of proof beyond reasonable doubt."[16] This is a *non sequitur* and a very unsafe conclusion, given that it depends solely on not specifying twice on a couple of occasions. On this aspect, the jury's attention was drawn by the trial judge to specific points as to why there might be differences in a complainant's account of a sexual offence,[17] which would readily explain a situation in which the complainant might not describe everything every time.

The trial judge also directed the jury that they should ask themselves did the complainant act in the way you would expect him to act if he had been assaulted as he said he was…on the other hand, if the complainant has not acted in the way you would have expected someone to have acted after being assaulted as he described, then that may indicate that the allegation is false.[18] The CCA, in response to points made at the appeal about the complainant's normality on the evening of 10 October 2017,[19] made some general comments about avoiding stereotypical assumptions and the complainant's conduct was a matter for the jury to assess. It did not address the substance of the many aspects that

[16] Ibid. at 140-141.
[17] Ibid. at 136.(quote from the trial judge)
[18] do
[19] Ibid. at 150-154.

could cogently point to behaviour that would not reasonably be expected by someone that had been assaulted as described. Notwithstanding that the jury's attention was drawn to many aspects through video and photos that were taken and descriptions of behaviour, the CCA's approach to the issue did not adequately address whether the conduct of the complainant should have raised doubts on the part of the jury as to proof of guilt. Had there been digital penetration of the anus – even once and more so if twice – then it would be expected that the trauma of such an event would have a discernible impact on both his activity and attitude. But nothing of this nature was evident. To the contrary, he happily returned to demonstrating his cycle riding feats calling the applicant out to watch and video him. He had a full-on happy birthday celebration. He spontaneously hopped into bed with the applicant next morning to watch YouTube motorcycle videos. When asked why he hadn't said something or yelled out at the time, he responded at different times with totally different stories, none of which was consistent with the reality of the situation (relating to who was at home, where they were or what they were doing). It's a very big jump to explain his behaviour on the basis of children acting in different ways, as did the CCA. Two other factors are also relevant to this assessment. According to his mother's evidence about the complainant's telling her what happened, there was considerable lead-in before he said, "grandpa's finger went into my bottom and I could feel it in my tummy." His first comments were "when grandpa washed me it hurt me;" and when asked what he meant, he responded "it hurt me in my tummy;" then on further questioning, his mother reported his saying that he didn't know whether he could scream or cry because it was his grandpa, then he repeated "I could feel it in my belly, in my tummy;" and only then after being further questioned did he say "grandpa's finger went in my bottom and I could feel it in my tummy." He then added "he was also hard on me when he washed me fast." This account is far more consistent with a scenario of having had his privates washed unexpectedly and with the reactions on his part described at page 7 lines 11-29 than that of having been assaulted as per count 2. Secondly, after being interviewed by the police officer, he was asked by a Family and Community Services officer to nominate "safe people" and he had included the applicant in his list.[20] While anyone of these factors could have raised doubts about the accuracy

[20] Ibid. at 91.

and reliability of the language used by the complainant, taken together, they amount to a cogent array of evidence that should have generated reasonable doubt on the part of the jury.

The CCA spent considerable time rehearsing key elements of the applicant's evidence. However, at no stage did it offer any assessment of it; nor did it attempt to compare or contrast it with the complainant's evidence. Implicitly, therefore, the CCA merely dismissed it without reason.

The applicant's evidence provided details of how he washed the complainant and referred to his stated practice of "bathing a kid which he's done so many times."[21] This
10 evidence may not be precisely equivalent to Justice Keane's comments during the Pell v The Queen High Court hearing that practice is usually regarded as powerful evidence,[22] but there's certainly a common underlying principle. At the very least, the combination of the count 1 not guilty verdict (on the basis of being considered part of the normal washing process) and the applicant's evidence in relation to counts 2 (and 3) constitute sound grounds for concluding that washing the complainant's bottom was no more than as stated by the applicant; and did not involve penetration of the complainant's anus, least of all deliberately. Neither was there – nor any grounds for inferring the jury thought there was – any suggestion of the sort of perverse motivation or behaviour alluded to in the cases cited in the judgement (as at footnote 15 on page 8).

20 This set of circumstances provides a sound basis for the CCA to have concluded (and it should have done so) that "the court is satisfied that the jury, acting rationally, ought none the less, to have entertained a reasonable doubt as to proof of guilt."

Part IV:

The circumstances of this case are such that the applicant is seriously disadvantaged relative to the respondent. The applicant's resources are limited and already seriously depleted to the point where he would not be able to pay for possible health needs and

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[21] Ibid. at 84

[22] Video of High Court hearing, 12 March 2020 @ 1:32:19: https://www.hcourt.gov.au/cases/cases-av/av-2020-03-12

already falling short of being able to assist other family members in their needs of financial assistance.

Even in the event that the application might be refused or in the event of an adverse judgement, the grounds for the appeal underpinning the application are thoroughly reasonable and credible, thus justifying making the application. This would eliminate any suggestion that the application was not warranted or was an unreasonable call on the respondent's considerable resources.

Part V:

RC v R [2020] NSWCCA 76 at 1-165

Pell v The Queen [2020] HCA 12 esp at 39

M v The Queen [1994] 181 CLR 487 at 492-494 and [1994] HCA 63

SKA v The Queen [2011] 243 CLR 400 and [2011] HCA 13 at 20 et seq

The Queen v Baden-Clay [2016] HCA 35 at 65-66

Application by David William Kirby [2021] HCATrans 081

Re Sinanovic's Application [2001] HCA 40 and 180 ALR 448 at 7

Queensland v JL Holdings P/L [1997] 189

Re Golding [2020] HCA 38 at 11

Part VI: N/A

Dated 11 October 2021

To: The Respondent
Solicitor for Public Prosecutions
175 Liverpool St
Sydney NSW 2000

Attachment E

TAKE NOTICE: Before taking any step in the proceedings you must, within **14 DAYS** after service of this application, enter an appearance and serve a copy on the applicant.

The applicant is self-represented.