



HIGH COURT OF AUSTRALIA

7 August 2024

COOK (A PSEUDONYM) v THE KING
[2024] HCA 26

Today, a majority of the High Court allowed an appeal in part from a judgment of the Court of Criminal Appeal of New South Wales. The appeal concerned whether evidence relating to prior sexual offending committed against the complainant by another person ("the Queensland conduct"), could be admitted in the appellant's trial pursuant to an exception to s 293(3) of the *Criminal Procedure Act 1986* (NSW). Section 293(3) (as it then was, now s 294CB) made inadmissible evidence of a complainant's sexual experience or sexual activity.

Following trial in the District Court of New South Wales, the appellant was convicted of multiple sexual offences. Prior to the alleged offences, the complainant had allegedly disclosed the Queensland conduct to the appellant. The appellant applied for a pre-trial ruling that evidence relating to the Queensland conduct was admissible under the exception to s 293(3) contained in s 293(4)(b). Section 293(4)(b) permitted admission of evidence that "relates to a relationship that was existing or recent at the time of the commission of the alleged prescribed sexual offence, being a relationship between the accused person and the complainant". While accepting the evidence was "significantly probative", the trial judge found that the exception in s 293(4)(b) did not apply. The trial judge nonetheless permitted the appellant to cross-examine the complainant on the basis that the Queensland conduct would be referred to as "physical assaults". The appellant successfully appealed his conviction on grounds unrelated to s 293. The Court of Criminal Appeal held that a new trial should be ordered, but a majority of the Court found that evidence relating to the Queensland conduct was not admissible under either exception in s 293(4)(a) or (b). Section 293(4)(a) relevantly permitted the admission of evidence that: "(i) is of the complainant's sexual experience ... or of sexual activity ... taken part in by the complainant, at or about the time of the commission of the alleged prescribed sexual offences"; and "(ii) is of events ... alleged to form part of a connected set of circumstances in which the alleged sexual offences [were] committed".

The High Court unanimously held that the exception in s 293(4)(a) did not apply, given that the exception was limited to contemporaneous or near-contemporaneous events that are sufficiently integrated with the alleged offending so that the events are part of the circumstances of the alleged sexual offence itself. A majority of the Court found that the exception in s 293(4)(b) was potentially applicable and allowed the appeal on that basis. In the absence of sufficient material to identify the nature and scope of the relationship between the complainant and the appellant, the Court could not determine whether s 293(4)(b) could apply to evidence relating to the Queensland conduct. This was a matter for the trial judge to consider at the appellant's re-trial.

The appellant relied on two alternative arguments: that permitting reference to the Queensland conduct as "physical assaults" misled the jury by excluding the possibility that the assaults were also sexual; and, for that reason, or due to the unfairness to the appellant of excluding evidence about the Queensland conduct, that an order for his acquittal should be made. These arguments were unanimously rejected by the High Court. The description of the Queensland conduct as "physical assaults" did not exclude the possibility that the assaults were sexual. Further, permitting reference to the Queensland conduct as "physical assaults" removed much of the forensic disadvantage suffered by the appellant as a result of s 293, and any remaining disadvantage could not amount to such unfairness as to require an order that the appellant be acquitted.

This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.