

***R v Maiolo (No 2)* [2013] SASCFC 36 (16 May 2013) – South Australia Supreme Court (Full Court)**

‘Directions and warnings for/to jury’ – ‘Evidence of discreditable conduct’ – ‘Evidence of initial complaint’ – ‘Indecent assault’ – ‘Physical violence and harm’ – ‘Propensity evidence’ – ‘Relationship evidence’ – ‘Sexual and reproductive abuse’ – ‘Unlawful sexual intercourse’

Charge/s: Indecent assault (five counts), Unlawful sexual intercourse (four counts).

Appeal Type: Appeal against conviction.

Facts: Three of the complainants were sisters. The fourth complainant was the appellant’s daughter. The appellant’s partner was the elder sister of the three complainants but was not a complainant.

Issue/s: Some of the issues concerned -

1. Whether the evidence of one of the sisters established an initial complainant within the meaning of s 34M(6) of the *Evidence Act 1929*.
2. Whether evidence of previous ‘uncharged acts’ constituted relationship evidence, and whether the trial judge correctly directed the jury in relation to the permissible use of such evidence.

Decision and Reasoning: The appeal was upheld.

1. At trial, there was evidence that one of the sisters had a conversation with police and a counsellor regarding allegations of sexual misbehaviour by the appellant. The content of these conversations were unclear and it was not clear whether the sister was referring to sexual offending against herself or other persons. The trial judge directed the jury to the effect that they could use this evidence to assess (and possibly bolster) her evidence as well as the evidence of the other complainants. This was an error of law – the complaint was not sufficiently clear. The complaint did not make clear who the subject of the offending was. It was also unclear which particular incident it referred to. The convictions were set aside.
2. Evidence of prior ‘uncharged acts’ were admitted under s 34P of the *Evidence Act 1929* as relationship evidence. See at [50]-[52] where Peek J, (with whom Kourakis CJ and Stanley J agreed) outlined the operation of s 34P in its common law context. Section 34R required the judge to (among other things) explain the purpose for which such evidence can and cannot be used. The trial judge, in her directions to the jury, referred to the evidence in question throwing light on the ‘nature of the relationship’ or providing ‘context’ (see at [110]). She did not elaborate further on the purpose of the evidence. Peek J found that these directions were deficient. See at [111] - *‘With respect, the use of vague words such as “context” or “relationship” without specific elaboration and guidance to the jury was rightly criticised by Doyle CJ in R v Nieterink [1999] SASC 560 where his Honour made the important point that while evidence of uncharged acts may be admissible under heads of relevance which tend to recur in various cases that come before the courts, it is crucial that the Judge, first, positively determines that the particular evidence of discreditable conduct does satisfy a head of relevance in the particular case and, second, gives very clear directions as to how such evidence may, and may not, be used.’* See also at [54]-[57], where his Honour commented on the construction of s 34P and specifically how to determine whether

the probative value of the evidence substantially outweighs its potentially prejudicial effect on the accused.