HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B6 of 2020

BETWEEN:

CHARLES WILLIAM DAVIDSON
Applicant

and

THE QUEEN
Respondent

APPLICANT'S SUBMISSIONS

Part I: Certification

1. I certify that this submission is in a form suitable for publication on the internet.

Part II: Statement of the issues presented by the appeal

2. Did the majority effectively lower the basis for the admission of similar fact evidence at common law by applying *R v Bauer*[1] and requiring "a sufficient link between the rape offences and the other offences as to make the evidence of one offence strongly probative in the proof of another"[2]?

3. Whether a miscarriage of justice was occasioned by the joining of the counts of rape and counts of sexual assault?

Part III: Certification regarding s 78B of the Judiciary Act 1903

4. No notice should be given in compliance with s 78B of the *Judiciary Act 1903*.

Part IV: Citation of earlier decisions

5. *R v Davidson* [2019] QCA 120

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[1] (2018) 266 CLR 56.
[2] *R v Davidson* [2019] QCA 120 at [16]; AB 210.

Part V: Relevant facts

6. The applicant was a qualified remedial massage therapist.[3] He faced trial on a 21 count indictment,[4] comprising of 10 different complainants, who he treated at two different clinics. In total, the indictment alleged 18 counts of sexual assault (1-14 and 18-21) and three counts of rape (15-17).[5]

7. The Queensland Court of Appeal's analysis of evidence set out at [47]-[207] of the judgment is accepted. The detail of each offence is set out below with the relevant paragraphs of the Court of Appeal's judgment noted:

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a. Counts 1-2: on 22 February 2014, two indecent assaults, namely touching MQ on the outer lips of her genitalia (count 1) and on her breasts (count 2) without consent;[6]

b. Count 3: on 24 February 2014, one indecent assault, namely touching LN's breasts including the nipples, without consent;[7]

c. Counts 4-5: on 5 March 2014, two indecent assaults, namely touching FE's outer labia (count 4) and breasts including the nipples (count 5) without consent;[8]

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d. Counts 6 and 13-15: on 28 July 2014, one indecent assault, namely "tweaking" EB's nipples (count 6) without consent; and 17 November 2014, two indecent assaults, namely touching EB near her vagina (count 13) and cupping her breast and placing his mouth on her breast (count 14) without consent; and one rape, namely penetrating EB's vagina with his fingers without consent (count 15);[9]

e. Counts 7-8: on 30 August 2014 and 4 October 2014, two indecent assaults, namely touching/massaging CA's breasts including over her nipples, without consent or with consent obtained by fraud (count 7), and touching/massaging

30 CA's breasts including over her nipples without consent (count 8);[10]

f. Counts 9-10: on 22 October 2014, two indecent assaults, namely touching the bottom of KA's breasts and pubic hair (count 9), and touching her genitals near the vaginal area (count 10) without consent;[11]

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[3] *R v Davidson* [2019] QCA 120 at [35]; AB 213.
[4] AB 6-9.
[5] *R v Davidson* [2019] QCA 120 at [29]; AB 212.
[6] *R v Davidson* [2019] QCA 120 at [47]-[56]; AB 214-216.
[7] *R v Davidson* [2019] QCA 120 at [57]-[61]; AB 216.
[8] *R v Davidson* [2019] QCA 120 at [62]-[72]; AB 216-218.
[9] *R v Davidson* [2019] QCA 120 at [73]-[84]; AB 218-220.
[10] *R v Davidson* [2019] QCA 120 at [85]-[91]; AB 220-221.
[11] *R v Davidson* [2019] QCA 120 at [93]-[105]; AB 221-223.

g. Count 11: on 4 November 2014, one indecent assault, namely touching RJ's buttocks without consent;[12]

h. Count 12: on 10 November 2014, one indecent assault, namely touching/massaging WH's breasts without consent;[13]

i. Counts 16-20: on 4 September 2015, two rapes, namely penetrating HL's vagina with his fingers while massaging from one side of her body (count 16); and penetrating HL's vagina in the same way from the other side of her body (count 17), without consent; and three indecent assaults, namely touching near HL's vagina without consent while massaging from one side of her body (count 18), touching HL near her vagina without consent (count 19), and touching/massaging HL's breasts including her nipples (count 20) without consent;[14]and

j. Count 21: on 14 September 2015, one indecent assault, namely touching/massaging KM's breasts without consent.[15]

8. The applicant applied for separate trials in respect of the rape charges (counts 15, 16 and 17) on the basis that the evidence relied upon as similar fact evidence was not cross-admissible on the other counts of unlawful and indecent assault constituted by touching or massaging of a complainant's breasts, including the nipples and particulars of touching in the vaginal, groin, pubic or buttock areas.[16] The application was refused.[17]

9. The learned Trial Judge directed the jury that "the evidence of each complainant does not stand alone" and that "each complainant is supported by the evidence of the other complainant as to what they say happened to them".[18] And, importantly, that "… there is such a similarity between the acts and the circumstances in which they occurred that it is … highly improbable that the events simply occurred by chance".[19]

10. This is consistent with how the prosecution closed its case.[20]

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[12] *R v Davidson* [2019] QCA 120 at [106]-[110]; AB 223-224.
[13] *R v Davidson* [2019] QCA 120 at [112]-[117]; AB 224-225.
[14] *R v Davidson* [2019] QCA 120 at [118]-[129]; AB 225-227.
[15] *R v Davidson* [2019] QCA 120 at [130]-[134]; AB 227-228.
[16] *R v Davidson* [2019] QCA 120 at [229]; AB 243.
[17] *R v Davidson* [2019] QCA 120 at [222] where the reasons of the pre-trial hearing judge were outlined; AB 242. See also Applicant's Book of Further Materials: p 212-233 for the transcript of the pre-trial hearing.
[18] AB 15 L31-36.
[19] AB 15 L37-40.
[20] Applicant's Book of Further Materials: p 43-45.

11. In addition to the complainants, the prosecution called evidence from the investigating police;[21] from Graham Schodde, a registered massage therapist with the Australian Association of Massage Therapists;[22] and from two employees of the Algester Clinic.[23]

12. The applicant gave sworn evidence denying the charges.[24] He called a number of witnesses who spoke about his good reputation.[25]

13. The trial was, therefore, fought on whether the alleged acts occurred in the ways described by the various complainants. In that regard, the prosecution led direct evidence from each complainant and for some of the complaints, preliminary complaint evidence.[26]

14. The applicant was convicted of 18 counts of sexual assault and one count of rape. The jury was unable to reach a verdict on two other counts of rape.[27]

Part VI: Argument

Overview

15. In the Queensland Court of Appeal, the applicant argued that the three counts of rape (counts 15-17) were not cross-admissible with the 18 counts of sexual assault (1-14 and 18-21).[28] The majority judgment of Gotterson and McMurdo JJA held that the evidence was cross-admissible because there was "common features" which demonstrated a "sufficient link" between the offences.[29]

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[21] *R v Davidson* [2019] QCA 120 at [139] and [155]; AB 228-229 and 231.
[22] *R v Davidson* [2019] QCA 120 at [156]-[161]; AB 231-232.
[23] *R v Davidson* [2019] QCA 120 at [162]-[172]; AB 232-234.
[24] *R v Davidson* [2019] QCA 120 at [173]-[206]; AB 234-239. Police also conducted a record of interview with the applicant about two of the complainants which was played to the jury. During that interview, the applicant denied those allegations: see *R v Davidson* [2019] QCA 120 at [140]-[153]; AB 229-231. The interview was in relation to KM (Counts 16-20) and HL (Count 21).
[25] *R v Davidson* [2019] QCA 120 at [207]; AB 239.
[26] See for instance *R v Davidson* [2019] QCA 120 at [55], [60], [71], [102], [111], [128], [135] and [137],
[27] *R v Davidson* [2019] QCA 120 at [29]; AB 212.
[28] Grounds two and three were considered by the majority at [2]-[4] and [7]-[17] and at [218]-[237] by the dissenting judge.
[29] *R v Davidson* [2019] QCA 120 at [16]; AB 210.

16. However, Boddice J, in dissent, found that the evidence was not cross-admissible because there was "obvious and significant differences" which "undermined the formulation of an underlying pattern of conduct".[30]

17. The issue which arises for determination is whether the majority, in relying on decisions under the Uniform Evidence Legislation,[31] erred and lowered the test for the rape evidence to be cross-admissible at common law.

The footing for the admission of similar fact evidence is different under the Uniform Evidence Legislation

18. Recent decisions in relation to the admission of propensity evidence under the Uniform Evidence Legislation[32] have not altered the standard for admission of similar fact evidence at common law in Queensland. As was noted in *R v Bauer,*[33] the common law rule of admissibility is:

> "…propounded in *Hoch v The Queen*[34] and confirmed in *Pfennig v The Queen*[35] that evidence of an accused's commission of discreditable acts other than those the subject of a charge may be admitted as tendency evidence only where it supports the inference that the accused is guilty of the offence charged and permits of no other innocent explanation. Under s 97 of the *Evidence Act*, the Hoch test of admissibility has been superseded by the less demanding criterion of significant probative value".[36]

19. The issue in *R v Bauer*[37] was decided having regard to the "less demanding [statutory] criterion of significant probative value". The less demanding criterion was, as Spigelman CJ observed in *R v Ellis*,[38] "… intended to lay down a set of principles to cover the relevant field to the exclusion of the common law principles previously

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[30] *R v Davidson* [2019] QCA 120 at [233]; AB 243.
[31] In particular, *R v Bauer* (2018) 266 CLR 56.
[32] *Hughes v The Queen* (2017) 263 CLR 338, *R v Bauer* (2018) 266 CLR 56 and *McPhillamy v The Queen* (2018) 92 ALJR 1045.
[33] (2018) 266 CLR 56.
[34] *Hoch v The Queen* (1988) 165 CLR 292 at 294-295; 62 ALJR 582 per Mason CJ, Wilson and Gaudron JJ; at 302-303 per Brennan and Dawson JJ. See also *Sutton v The Queen* (1984) 152 CLR 528 at 564-565; 58 ALJR 60 per Dawson J.
[35] *Pfennig v The Queen* (1995) 182 CLR 461 at 481-482; 69 ALJR 147 per Mason CJ, Deane and Dawson JJ. See also *Harriman v The Queen* (1989) 167 CLR 590 at 602; 63 ALJR 694 per Dawson J.
[36] (2018) 92 ALJR 846 at 863 [52] (emphasis added).
[37] (2018) 92 ALJR 846.
[38] (2003) 58 NSWLR 700.

applicable".[39] The legislature has therefore provided for different terminology and tests for the admission of 'tendency evidence' in section 97,[40] 'coincidence evidence' in section 98;[41] and a specific definition of 'probative value'.[42] Most strikingly, the "no rational explanation test"[43] does not apply under sections 97[44] or 101(2)[45] of the Uniform Evidence Legislation.

20. The "no rational explanation test"[46] was developed at common law to guard against the inevitable prejudice of the admission of similar fact evidence, because, in part, the admission of such evidence is considered exceptional.[47] The common law rule, subject to certain exemptions, requires the exclusion of evidence not because it is irrelevant, but because it is likely to be unfairly prejudicial to the accused".[48] That is, if evidence does no more than tend to show the accused to be of a bad disposition, it is likely to have a very prejudicial effect and should not be admitted unless its probative force exceeds that prejudicial effect.[49] As was observed in *Pfennig v The Queen*:[50]

> "[b]ecause propensity is a special class of circumstantial evidence, its probative force is to be gauged in light of its character as such. But because it has a prejudicial capacity of a high order, the trial judge must apply the same test as a jury must apply in dealing with circumstantial evidence and ask whether there is a rational view of the evidence that is consistent with the innocence of the accused".[51]

21. In this case, notwithstanding the critical differences identified by his Honour Justice Boddice,[52] the majority judgment, in effect, adopted "the less demanding criterion of

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[39] (2003) 58 NSWLR 700 at 716 [74] with whom Sully and O'Keefe JJ; Hidden and Buddin JJ appear to disagree on this aspect.
[40] (2003) 58 NSWLR 700 at 716 [75] with whom Sully, O'Keefe, Hidden and Buddin J agreed on this aspect.
[41] (2003) 58 NSWLR 700 at 716 [75].
[42] (2003) 58 NSWLR 700 at 716 [78] with whom Sully, O'Keefe, Hidden and Buddin J agreed on this aspect.
[43] The phrase is borrowed from McHugh J, in dissent, in *Pfennig v The Queen* (1995) 182 CLR 461.
[44] *R v Bauer* (2018) 266 CLR 56 at 84 [52].
[45] (2003) 58 NSWLR 700 at 716 [74] with whom Sully and O'Keefe JJ; Hidden and Buddin JJ appear to disagree on this aspect.
[46] The phrase is borrowed from McHugh J, in dissent, in *Pfennig v The Queen* (1995) 182 CLR 461.
[47] *Phillips v The Queen* (2006) 225 CLR 303 at 321-322 [54]-[55] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ.
[48] *Perry v The Queen* (1982) 150 CLR 580 at 585 per Gibbs CJ.
[49] *Pfennig v The Queen* (1995) 182 CLR 46 at 484-485 per Mason CJ, Deane and Dawson JJ.
[50] (1995) 182 CLR 461.
[51] (1995) 182 CLR 461 at 482-483 per Mason CJ, Deane and Dawson JJ.
[52] *R v Davidson* [2019] QCA 120 at [233]; AB 243.

significant probative value" from *R v Bauer* to find the cross-admissibilty of the rape counts. This was an error.

The majority's approach was not consistent with the common law

22. The majority judgment comprised of separate reasons. Gotterson JA provided reasons,[53] which focused on distinguishing the evidence[54] in this case to that of *R v Nibigira*.[55] His Honour otherwise concurred with the reasons of McMurdo JA.[56]

10 23. McMurdo JA appropriately dealt with grounds two and three together.[57] His Honour observed that each ground involved essentially the one question: "whether the evidence of each complainant on a charge of sexual assault was admissible for each of the charges of rape, and vice versa, because the rules for the reception of similar fact evidence were satisfied".[58] His Honour then said that, "If the evidence of an offence was admissible on the other charges, then there was a sufficient connection to make all of the charges a series of alleged offences within the meaning of s 567. However, if the evidence was not admissible, then there was not such a series, and there was unacceptable prejudice within the meaning of s 597A".[59]

20 24. In Queensland, the joinder of more than one charge against the same person is permissible pursuant to section 567 of the *Criminal Code* if, inter alia, "those charges are founded on … a series of offences of the same or similar character."[60] The charges in the present matter were prima facie joinable on that basis.

25. Cross-admissibility, however, is not a precondition to joinder of a series of offences of the same or similar character. Rather, section 597A(1) of the *Code* allows a court to order a separate trial of a count that is properly joined under section 567 but in

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[53] *R v Davidson* [2019] QCA 120 at [1]-[5]; AB 206-207.
[54] *R v Davidson* [2019] QCA 120 at [2]-[4]; AB 207.
[55] [2018] QCA 115.
[56] *R v Davidson* [2019] QCA 120 at [1]; AB 206.
[57] *R v Davidson* [2019] QCA 120 at [11]; AB 208.
[58] *R v Davidson* [2019] QCA 120 at [11]; AB 208 Boddice J, in dissent, similarly: [218]; AB 241.
[59] *R v Davidson* [2019] QCA 120 at [11]; AB 206 citing *Phillips v The Queen* (2006) CLR 303 at 307 [7] and *De Jesus v The Queen* (1986) 61 ALJR 1 at 2-3 [4] and [8] and *Sutton v The Queen* (1984) 152 CLR 528 at 531 per Gibbs CJ and 541-542 per Brennan J.
[60] Joinder may also occur under section 568 of the *Code* for certain property and dishonesty offences listed in the section.

respect of which the accused person may be prejudiced in his/her defence by reason of the joinder, for example because the evidence is not cross-admissible.

26. In this case, when considering the basis for the cross-admissibility of the evidence of the rape charges on the trials of the indecent assault charges, and vice versa, McMurdo JA relied on *R v Bauer*.[61] While *R v Bauer* considered 'tendency evidence' in respect of a single complainant under section 97 of the *Evidence Act* 2008 (Vic), the passage to which his Honour referred[62] was directed at 'tendency evidence' in multiple complainant cases.[63]

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27. At [14] McMurdo JA observed that for the rape evidence "[t]o be admissible on this basis, there had to be such a "link" between the facts and circumstances of one offence and the others that the evidence had a degree of probative force which warranted its admission, notwithstanding its potential prejudicial effect".[64]

28. McMurdo JA also referred to the joint judgment of *Phillips v The Queen*[65] in relation to the degree of probative force required, and the requirement to focus upon whether there is "some specific connection with or in relation to the issues for discussion in the subject case"[66] or a "specific connection with the commission of the offence

20 charged"[67]. No issue is taken with his Honour's reference to this test.

29. His Honour then outlined the Trial Judge's summing up which captured the prosecution case on the use of the similar fact evidence.[68] The Trial Judge told the jury that:

> "[T]he alleged offending conduct occurred during a massage under the guise of having some therapeutic benefit, … each of the complainants were female, … on all occasions the alleged offending conduct occurred in a room on a table, … when

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[61] (2018) 266 CLR 56 at 87 [58].
[62] *R v Davidson* [2019] QCA 120 at [13]; AB 209.
[63] It is also noted that in *R v Davidson* [2019] QCA 120 at [13] McMurdo JA cited *McPhillamy v The Queen* [2018] HCA 52 at 1051 [31] and [33] which was another decision concerning 'tendency evidence' under section 97(1) of the *Evidence Act* 1995 (NSW) and which approved *Hughes v The Queen* (2017) 263 CLR 338 and *R v Bauer* (2018) 266 CLR 56.
[64] *R v Davidson* [2019] QCA 120 at [14] (Emphasis added); AB 209-210.
[65] (2006) 225 CLR 303 at 320-321 [54] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ.
[66] *Phillips v The Queen* (2006) 225 CLR 303 at 320-321 [54] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ.
[67] *Phillips v The Queen* (2006) 225 CLR 303 at 320-321 [54] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ.
[68] *R v Davidson* [2019] QCA 120 at [15]; AB 210.

> it occurred there was no one else in the room apart from the complainant and defendant, … for each complainant the breasts were exposed with little or no warning, … the offending conduct was frequently accompanied by suggestive or inappropriate comments or statements by the defendant, … there was some behaviour for a number of them regarding the removal or wearing of certain types of underwear, that five of the 10 women had their vaginal, or genital area, touched in one way or another, … each of the complainants were in a position of vulnerability because of their state of undress and the location and lack of other people, [and] no written consent was obtained in circumstances where it might be expected.
>
> And in respect of counts 6 and 20, that's Ms EB and Ms HL, that relating to those two particulars – those two charges in particular but may also be relevant to the others – that there was the – for want of a better word – tweaking of nipples followed by the comment that their reactions were good, or words to that effect.
>
> Now, the prosecution argues that the facts proved to you are so similar that when judged by common sense and experience that they must be true, and that you can use the evidence of the complainants in combination. They argued that with the absence of collusion it is objectively improbable that complainant A would complain in such similar circumstances of offending against the defendant as to the alleged offending against complainant B, unless the offending against complainant A actually occurred."[69]

30. Justice McMurdo then said that:

> "It must be acknowledged that the offences of rape were more serious than the other offences. In my view, however, there was a sufficient link between the rape offences and the other offences as to make the evidence of one offence strongly probative in the proof of another. The common features, as argued by the prosecution and set out in the above passage, demonstrated a sufficient link between the offences. All were committed in relevantly identical circumstances, against an unsuspecting and vulnerable complainant, and with the apparent belief by the appellant that the victim would find the experience to be agreeable, or at least would not complain."[70]

31. It has since been observed by the Queensland Court of Appeal that McMurdo JA "observed that to be admissible on that basis, a link was required between the facts and circumstances of one offence and other such that the evidence had the degree of probative force described in *Phillips*"[71]. With respect, while his Honour's conclusion was that the evidence had the degree of force described in *Phillips v The Queen*,[72]

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[69] *R v Davidson* [2019] QCA 120 at [15]; AB 210.
[70] *R v Davidson* [2019] QCA 120 at [16] (Emphasis added); AB 210.
[71] *R v WBN* [2020] QCA 203 at [110] per Phillipides JA, albeit, in dissent.
[72] (2006) 225 CLR 303.

that finding was premised on the finding of a "link" between the offending. That is, McMurdo JA found that the circumstances of the applicant's offending were relevantly identical and the "common features" demonstrated a "sufficient link" between the offending.[73]

32. In *R v Bauer* the expressions "link"[74]and "common features" were directed at the statutory imperatives of section 97 of the *Evidence Act.*[75] Those standards are insufficient to satisfy the degree of probative force required at common law.[76]

33. In *Hughes v The Queen*, the majority observed that in tendency cases "the *Velkoski*[77] analysis proceeds upon the assumption that, regardless of the fact in issue, the probative value of tendency evidence lies in the degree of similarity of "operative features" of the acts that prove the tendency".[78] In rejecting that analysis, the majority in *Hughes v The Queen* described it as "an analysis that treats tendency evidence as if it were confined to a tendency to perform a particular act".[79]

34. Importantly, however, the majority in *Hughes v The Queen*[80] held that:

> "An inclination on the part of a mature adult to engage in sexual conduct with underage girls and a willingness to act upon that inclination are unusual as a matter of ordinary human experience. Often, evidence of such an inclination will include evidence of grooming of potential victims so as to reveal a "pattern of conduct" or a "modus operandi" which would qualify the evidence as admissible at common law. But significant probative value may be demonstrated in other ways…"[81]

35. In *R v Bauer*, the High Court made clear that, "a complainant's evidence of an accused's uncharged acts in relation to him or her (including acts which, although not themselves necessarily criminal offences, are probative of the existence of the accused having had a sexual interest in the complainant on which the accused has acted) may be admissible as tendency evidence in proof of sexual offences which the accused is alleged to have committed against that complainant whether or not the

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[73] *R v Davidson* [2019] QCA 120 at [16]-[17]; AB 210.
[74] Or as McMurdo JA said a "sufficient link": *R v Davidson* [2019] QCA 120 at [16]; AB 210.
[75] (2018) 266 CLR 56 at 87 [58].
[76] (2018) 266 CLR 56 at 84 [52].
[77] *Velkoski v The Queen* (2014) 45 VR 680.
[78] (2017) 263 CLR 338 at 355 [37] per Kiefel CJ, Bell, Keane and Edelman JJ.
[79] (2017) 263 CLR 338 at 355 [37] per Kiefel CJ, Bell, Keane and Edelman JJ.
[80] (2017) 263 CLR 338.
[81] (2017) 263 CLR 338 at 361 [57] per Kiefel CJ, Bell, Keane and Edelman JJ.

uncharged acts have about them some special feature of the kind mentioned in *IMM* or exhibit a special, particular or unusual feature of the kind described in *Hughes*."[82]

36. The position in relation to multiple complainant cases was contrasted in *R v Bauer* at [57]-[59] by reference to *Hughes v The Queen*.[83] In *R v Bauer* the court noted that "the logic of probability reasoning dictates that, for evidence of the offending against one complainant to be significantly probative of the offending against the other, there must ordinarily be some feature of or about the offending which links the two together."[84]

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37. In this case, as already noted, the evidence was said to be probative on a probability basis.[85]

38. The question, however, is not merely whether there was link or common feature, but whether the evidence of one alleged offence is sufficiently "probative of the accused's guilt"[86] of that other offence.

39. *Makin v Attorney-General for New South Wales*[87] has been described as the "classic example" of a "similar fact case" which involves "... evidence... admitted for the

20 reason that the association of the accused with so many similar deaths, injuries or losses, as the case may be, makes it highly improbable that there is innocent explanation for the accused's involvement in the matter". [88] The evidence of an offence is not admissible in proof of another offence merely because of some link of common feature of the allegation, but because it is sufficient probative of the accused guilt of that other offence by the logic of probability reasoning.

40. *Hoch v The Queen*[89] is a similar fact case that concerned "probability reasoning and not "propensity reasoning",[90] and was cited favourably in *Pfennig v The Queen*:[91]

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[82] (2018) 266 CLR 56 at 82 [48].
[83] (2017) 263 CLR 338 at 361 [57] per Kiefel CJ, Bell, Keane and Edelman JJ.
[84] (2018) 266 CLR 56 at 87 [58].
[85] *R v Davidson* [2019] QCA 120 at [15]; AB 210.
[86] (2017) 263 CLR 338 at 361 [57] per Kiefel CJ, Bell, Keane and Edelman JJ.
[87] [1894] AC 57.
[88] *Pfennig v The Queen* (1995) 182 CLR 461 at 530-531 per McHugh J, albeit, in dissent.
[89] *Hoch v The Queen* (1988) 165 CLR 292.
[90] *Pfennig v The Queen* (1995) 182 CLR 461 at 520 per McHugh J, albeit, in dissent.
[91] (1995) 182 CLR 461 at 481-482 per Mason CJ, Deane and Dawson JJ.

> "Where the propensity or similar fact evidence is in dispute, it is still relevant to prove the commission of the acts charged. The probative value of the evidence lies in the improbability of witnesses giving accounts of happenings having the degree of similarity unless the events occurred. Obviously, the probative value of disputed similar facts is less than the probative value those facts would have if they were not disputed. But the prejudicial effect of those facts may not be significantly reduced because the prejudicial effect that the law is concerned to guard against is the possibility that the jury will treat the similar facts as establishing an inference of guilt where neither logic nor experience would necessitate the conclusion that it clearly points to the guilt of the accused."[92]

41. The requirement to focus the assessment of probative value upon the "the improbability of witnesses giving accounts of happenings having the degree of similarity unless the events occurred" compels an assessment of whether differences in the evidence are more prejudicial than probative. In this case, the weight of sexual assault evidence was not sufficiently probative of whether any of the three alleged rapes occurred but was plainly prejudicial, as was the rape evidence in relation to the sexual assault counts.

42. In dissent, Boddice J focussed upon that conflict. His Honour found that the evidence in respect of sexual assault counts was, in respect of similar counts:

> "… highly probative of the issues to be decided at trial. That probative force went not only to whether the conduct took place in fact. It included the probative value of the improbability of similar lies being told by different complainants in respect of whom there was no evidence of a prior connection."[93]

43. His Honour maintained that focus when considering the cross-admissibility of the evidence of the three counts of rape. At [234] Justice Boddice observed that the so called 'common features' or "… similarities, cogent as they may be to the improbability of the complaints being false, properly are to be characterised as general in nature".[94]

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[92] (1995) 182 CLR 461 at 482 to 483 per Mason CJ, Deane and Dawson JJ.
[93] *R v Davidson* [2019] QCA 120 at [231]; AB 243.
[94] *R v Davidson* [2019] QCA 120 at [234]; AB 244.

44. In such cases, as McHugh J said in *Pfennig v The Queen*[95] "[t]he risk of prejudice in true similar fact cases is not from propensity reasoning but from the fact… that [c]ommon assumptions about improbability of sequences are often wrong".[96] As Justice McHugh then observed a jury may therefore "…wrongly give the similar fact evidence far more weight than it deserves".[97]

45. In *Phillips v The Queen*,[98] the Court noted the "need for similar fact evidence to possess some particular probative quality" and listed various examples.[99] Across those many formulations, the requirement at common law is that "the evidence of propensity needs to have a specific connection with the commission of the offence charged."[100] The question is not merely one of connection to the allegation, but to proof of the commission of the alleged offence.

46. In *IMM v The Queen*[101] it was observed by Nettle and Gordon JJ, that:

> "At common law, the criterion of similar fact evidence coincidence or tendency evidence was that its probative force clearly transcended its prejudicial effect. It was considered that evidence of that kind had probative value only if it bore no rational explanation other than the happening of the events in issue."[102]

47. In *R v Ellis*,[103] Spigelman CJ said that "[t]he no rational explanation test focuses on one only of the two matters to be balanced – by requiring a high test of probative value – thereby averting any balancing process".[104]

48. In this case, in considering the cross-admissibility of the rape evidence, Boddice J considered that the "obvious and significant differences" in the allegations "undermine the formulation of an underlying pattern of conduct".[105]

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[95] (1995) 182 CLR 461.
[96] (1995) 182 CLR 461 at 531 per McHugh J, albeit, in dissent, citing Dawson J in *Perry v The Queen* (1982) 150 CLR 580 at 594.
[97] (1995) 182 CLR 461 at 531 per McHugh J, albeit, in dissent, citing Dawson J in *Perry v The Queen* (1982) 150 CLR 580 at 594.
[98] (2006) 225 CLR.
[99] (2006) 225 CLR 303 at 320-321 [54] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ.
[100] *Pfennig v The Queen* (1995) 182 CLR 461 at 485 per Mason CJ, Deane and Dawson J
[101] (2016) 257 CLR 300.
[102] (2016) 257 CLR 300 at 348 [166].
[103] (2003) 58 NSWLR 700.
[104] (2003) 58 NSWLR 700 at 718 [95] with whom Sully, O'Keefe, Hidden and Buddin J agreed on this aspect.
[105] *R v Davidson* [2019] QCA 120 at [233]; AB 243.

49. A similar expression was adopted in *R v MAP*.[106] In *R v MAP*, Keane JA (as his Honour then was) referred to *Phillips v The Queen*,[107] which:

> "… emphasised the continuing necessity for a 'strong degree of probative force' if the exclusionary rule is to be displaced and that 'striking similarity' will usually be necessary if the evidence of similar facts is to have a sufficiently strong degree of probative force to displace the exclusionary rule".

50. His Honour concluded that:

> "… the dissimilarities in the present case are relevant to this assessment. Especially strong in this regard are the circumstances that Ms S and the appellant had been drinking heavily, the appellant's alleged misconduct with Ms S was associated with an invitation to "come outside" and that the appellant physically threatened that safety of Ms W. In these circumstances, it is not possible to sustain the conclusion that there was an underlying pattern to the appellant's alleged attack on each of the Ms S and Ms W".[108]

51. In this case, while the majority had regard to whether there were "common features" which demonstrated a "sufficient link" between the offences,[109] Boddice J had regard to the differences between the alleged 'acts' that were particularised as the offending conduct.[110]

52. Given the issues at trial, namely whether the alleged conduct occurred and whether the sexual assaults were intentional and without consent, the assessment of the probative force of the similar fact evidence should have focussed upon whether the evidence of each alleged offence was sufficiently probative of the commission of each other alleged offence.[111]

53. In *Hoch v The Queen*,[112] it was observed by Mason CJ, Wilson and Gaudron JJ, that:

> "…[s]imilar fact evidence which does not raise a question of improbability lacks the requisite probative value that renders it admissible. When the happenings which are said to bear to each other the requisite degree of similarity are themselves in issue the central question is that of the improbability of similar lies".[113]

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[106] *R v MAP* [2006] QCA 220 at [40]-[45] per Keane JA, with whom McMurdo P and Jones J agreed.
[107] *Phillips v The Queen* (2006) 225 CLR 303 at 321 [56] per Gleeson CJ, Kirby, Hayne and Heydon JJ.
[108] *R v MAP* [2006] QCA 220 at [45] (Emphasis added).
[109] *R v Davidson* [2019] QCA 120 at [16]; AB 210.
[110] *R v Davidson* [2019] QCA 120 at [233]; AB 243.
[111] *Phillips v The Queen* (2006) 225 CLR 303 at 311 [26] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ.
[112] (1988) 165 CLR 292.
[113] (1988) 165 CLR 292 at 295 per Mason CJ, Wilson and Gaudron JJ.

54. The majority also observed in *Hoch v The Queen*[114] that:

> "… the strength of the probative force lies in the fact that the evidence reveals "striking similarities", "unusual features", "underlying unity", "system" or "pattern" such that the evidence raises, as a matter of common sense and experience, the objective improbability of some event having occurred other than as alleged by the prosecution." [115]

55. While those expressions are not essential,[116] as was said in *Hoch v The Queen*,[117] the basis for the admission of similar fact evidence:

> "… lies in its possessing a particular probative value or cogency by reason that it reveals a pattern of activity such that, if accepted, it bears no reasonable explanation other than the inculpation of the accused person in the offence charged."[118]

56. In other words, evidence that does not reveal a "pattern of activity" that bears no other reasonable explanation other than the commission of the alleged offence will lack the probative value or cogency required for admission.

The dissenting judgement applied the common law

57. In the dissenting judgement in this matter, Justice Boddice referred to the same passage from *R v Bauer*[119] cited by the majority[120] and said that "[t]he need for a common linkage was recently re-affirmed by the High Court in *R v Bauer*".[121] However, the balance of his Honour's reasons reveal that he ultimately applied the correct common law principles.

58. In particular, at [227] his Honour cited *Pfennig v The Queen*[122] for the proposition that "[t]o be admissible, similar fact evidence must have a specific connection to the issue to be decided at trial".[123] As his Honour observed, "[w]hether that specific connection is met in a particular case requires an assessment of the similarities in the

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[114] (1988) 165 CLR 292.
[115] (1988) 165 CLR 292 at 294-295 per Mason CJ, Wilson and Gaudron JJ.
[116] *Pfennig v The Queen* (1995) 182 CLR 461 at 484 per Mason CJ, Deane and Dawson JJ.
[117] (1988) 165 CLR 292.
[118] (1988) 165 CLR 292 at 294 per Mason CJ, Wilson and Gaudron JJ.
[119] (2018) 266 CLR 56.
[120] (2018) 266 CLR 56 at 87 [58].
[121] *R v Davidson* [2019] QCA 120 at [226]; AB 242.
[122] (1995) 182 CLR 461.
[123] *R v Davidson* [2019] QCA 120 at [227] citing *Pfennig v The Queen* (1995) 182 CLR 461 at 485; AB 243.

evidence".[124] His Honour then applied *Phillips v The Queen*[125] "in undertaking that assessment".[126]

59. At [229] his Honour found that there was an "underlying pattern to the [applicant's] conduct towards the complainants in the conduct constituting unlawful and indecent assault by reason of touching or massaging the breast and nipple areas", and that consequently the evidence on those charges was cross-admissible.[127] His Honour found similarly with respect to the counts of "unlawful and indecent assault relying upon particulars of touching in the vaginal, groin, pubic and buttock areas, notwithstanding that they involved different complainants".[128]

60. However, Boddice J found that the evidence of the alleged rapes was not cross-admissible with the other counts because:

> "… there were obvious and significant differences in the [applicant's] alleged conduct involving the rape of EB (Count 15) and HL (Counts 16 and 17). Those differences were stark and undermine the formulation of an underlying pattern of conduct by the [applicant]. Without that underlying pattern of conduct, the evidence of the rape of EB was not admissible as similar fact evidence, in the proof of the rape by the appellant of HL or of the acts of unlawful and indecent assault against the other complainants."[129]

61. The "obvious and significant differences" between the allegations of rape and the other charges included that the rape counts involved penetration, but also what the defence case may be in relation to the different types of offences. In particular, denial on one hand versus issues of consent and accident on the other.

62. In addition, as Boddice J observed, the so called "common features" or "… similarities, cogent as they may be to the improbability of the complaints being false, properly are to be characterised as general in nature".[130] The "common features" features included that:

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[124] *R v Davidson* [2019] QCA 120 at [227]; AB 243.
[125] (2006) 225 CLR 303.
[126] *R v Davidson* [2019] QCA 120 at [228] citing *Phillips v The Queen* (2006) 225 CLR 303 at 327-328 [79]; AB 243.
[127] *R v Davidson* [2019] QCA 120 at [229]; AB 243.
[128] *R v Davidson* [2019] QCA 120 at [230]; AB 243.
[129] *R v Davidson* [2019] QCA 120 at [233] (Emphasis added).
[130] *R v Davidson* [2019] QCA 120 at [234]; AB 244.

> "... all the offences are alleged to have occurred when the appellant was providing massage services to members of the public, that each offence occurred when the complainant was alone with the appellant and that offending conduct purported to be part of the provision of normal massage services...".[131]

63. The rapes, however, could not be described as conduct that "purported to be part of the provision of normal massage services". The remaining "common features" also did not constitute the necessary "specific connection" with or in relation to the issues for discussion in each rape case [132], or a with the commission of each of those alleged offences[133]. Neither was there scope for the evidence on the sexual assault counts to have particular probative value arising from an improbability of similar lies.

Conclusion

64. In this case, the approach taken by Boddice J in dissent, in requiring a "pattern of conduct"[134], was a proper application of the common law requirement to demonstrate "a specific connection with the commission of the offence charged."[135] His Honour was correct to conclude that:

> "The lack of cross admissibility of the evidence of the alleged rapes of EB and HL, together with the differing nature of the appellant's conduct in respect of the touching of the vaginal, groin, pubic and buttock areas of MQ, FE, KA, RJ and EB, means there was admitted into evidence at the joint trial, highly prejudicial material".[136]

65. A miscarriage of justice has occurred as a result and retrials should be ordered.

Part VII: Orders sought

66. The Court dispense with compliance with the time limit in rule 41.02.1.

67. Special leave to appeal be granted.

68. The Appeal be treated as instituted and heard instanter and allowed.

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[131] *R v Davidson* [2019] QCA 120 at [15] and [234]; AB 210.
[132] *Phillips v The Queen* (2006) 225 CLR 303 at 320-321 [54] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ.
[133] *Phillips v The Queen* (2006) 225 CLR 303 at 320-321 [54] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ.
[134] *R v Davidson* [2019] QCA 120 at [233]; AB 243.
[135] *Pfennig v The Queen* (1995) 182 CLR 461 at 485 per Mason CJ, Deane and Dawson J.
[136] *R v Davidson* [2019] QCA 120 at [235] per Boddice J; AB 244.

69. The orders of the Court of Appeal be set aside and in lieu thereof:

    a. the applicant's appeal to that Court be allowed;

    b. the applicant's convictions on counts 1-15 and 18-21 be quashed; and

    c. a new trial be had on each count.

Part VIII: Time estimate for presentation of the appellant's case

70. The appellant estimates that two (2) hours are required for the presentation of the appellant's oral argument.

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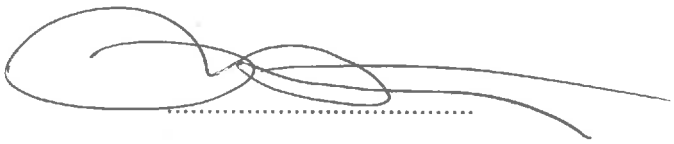
Dated: 30 October 2020



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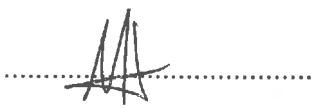

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IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

No. B6 of 2020

BETWEEN:

CHARLES WILLIAM DAVIDSON
Applicant

and

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THE QUEEN
Respondent

ANNEXURE

LIST OF STATUTES REFERRED TO IN WRITTEN SUBMISSIONS

1. *Criminal Code Act 1899* (Qld) ss 567 and 597A.