HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY No. B6 of 2020

BETWEEN: CHARLES WILLIAM DAVIDSON

Applicant

and

10 THE QUEEN

Respondent

APPLICANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

20 ### Part II: Outline

2. The common law rule of admissibility for similar fact coincidence evidence[1] applicable in Queensland is that which was propounded in *Hoch v The Queen*[2] and confirmed in *Pfennig v The Queen*[3], namely that such evidence may be admitted "only where it supports the inference that the accused is guilty of the offence charged and permits of no other, innocent explanation"[4].

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[1] The jury was permitted to engage in probability reasoning: AB17 L31-36.
[2] *Hoch v The Queen* (1988) 165 CLR 292 at 294-295 per Mason CJ, Wilson and Gaudron JJ; at 302-303 per Brennan and Dawson JJ.
[3] *Pfennig v The Queen* (1995) 182 CLR 461 at 481-482 per Mason CJ, Deane and Dawson JJ.
[4] *R v Bauer* (2018) 266 CLR 56 at [52] per Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ.

3. In contrast, under s.97 of the *Evidence Act* (NSW) and the corresponding provision in Victoria, "the *Hoch* test of admissibility has been superseded by the less demanding criterion of significant probative value"[5].

4. The majority of the Court of Appeal in this case did not correctly apply the common law test, but proceeded by reference to aspects[6] of the "less demanding" statutory test considered by this Court in *McPhillamy v The Queen*[7], *R v Bauer*[8], *and Hughes v The Queen*[9].

10 5. The majority's reliance upon those decisions, led to a determination based upon whether the similar fact evidence presented a "link"[10], or "sufficient link"[11], as required for the statutory test[12]; and did not demonstrate a finding on whether the evidence "supports the inference that the accused is guilty of the offence charged and permits of no other, innocent explanation"[13].

6. In doing so, the majority wrongly found that features of the similar fact evidence were such that it "had a degree of probative force which warranted its admission"[14].

7. In dissent, Boddice J, correctly identified that some features of the similar fact evidence
20 constituted "obvious and significant differences"[15], which "undermine the formulation of an underlying pattern of conduct by the appellant" [16], while other features of the similar fact evidence "properly are to be characterised as general in nature" [17]. Consequently, his Honour correctly found that the evidence on the rape counts was not cross-admissible with the evidence on the sexual assault counts[18].

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[5] *R v Bauer* (2018) 266 CLR 56 at [52] per Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ.
[6] *R v Davidson* [2019] QCA 120 at [13]-[16] per McMurdo JA.
[7] *McPhillamy v The Queen* (2018) 92 ALJR 1045 at 1051 [31] per Kiefel CJ, Bell, Keane and Nettle JJ, and [33] per Edelman J.
[8] *R v Bauer* (2018) 266 CLR 56 at [52] per Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ.
[9] *Hughes v The Queen* (2017) 263 CLR 338.
[10] *R v Davidson* [2019] QCA 120 at [13] and [14] per McMurdo JA.
[11] *R v Davidson* [2019] QCA 120 at [16] per McMurdo JA.
[12] *R v Bauer* (2018) 266 CLR 56 at [52] per Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ.
[13] *R v Bauer* (2018) 266 CLR 56 at [52] per Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ.
[14] *R v Davidson* [2019] QCA 120 at [14]-[16] per McMurdo JA.
[15] *R v Davidson* [2019] QCA 120 at [233] per Boddice J.
[16] *R v Davidson* [2019] QCA 120 at [233] per Boddice J.
[17] *R v Davidson* [2019] QCA 120 at [234] per Boddice J.
[18] *R v Davidson* [2019] QCA 120 at [235] per Boddice J.

8. Having reached that view, Boddice J was not required to proceed to a finding that the similar fact evidence did not satisfy the requirement that it bear "no reasonable explanation other than the inculpation of the accused person in the offence charged"[19]. That finding was implicit in his Honour's conclusion that the evidence undermined "the formation of an underlying pattern of conduct"[20] and was not cross-admissible[21].

9. Inadmissible evidence having been left to the jury in support of the sexual assault counts and the rape counts, a miscarriage of justice has occurred and retrials should be ordered.

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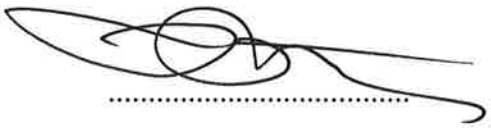
Dated: 2 February 2021



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[19] *Hoch v The Queen* (1988) 165 CLR 292 at 294 per Mason CJ, Wilson and Gaudron JJ.
[20] *R v Davidson* [2019] QCA 120 at [233] per Boddice J.
[21] *R v Davidson* [2019] QCA 120 at [234] per Boddice J.