HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	B6/2020
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Important Information

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BETWEEN: CHARLES WILLIAM DAVIDSON
Applicant

and

THE QUEEN
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Outline of propositions to be advanced in oral argument

The test applied by the members of the Court of Appeal

2. No error is evidenced merely by virtue of the members of the Court of Appeal having referred to a statement of this Court in *R v Bauer* (2018) 266 CLR 56 (at [58]).

3. While the legislative framework enacted under the *Uniform Evidence legislation* must be considered, the use of evidence for the purposes for which "coincidence" or "tendency" evidence may be adduced, is not itself new. To that end, the judgment of this Court in *R v Bauer* referred to earlier decisions of the Court[1] involving the application of common law principles, in support of the subject statement at [58]. Earlier within the judgment[2] the Court also identified that a decision[3] determined with reference to common law principles may still be of relevance when considering whether evidence is of "*significant probative value*" within the meaning of the *Evidence Act*

[1] *HML v The Queen* (2008) 235 CLR 334 and *BBH v The Queen* (2012) 245 CLR 499, the latter being an appeal from the Queensland Court of Appeal.
[2] *R v Bauer* (2018) 266 CLR 56 at [52].
[3] Specifically, *HML v The Queen* (2008) 235 CLR 334.

2008 (Vic), notwithstanding the "*less demanding criterion*" under the Act, than at common law.

4. Conversely, as has been observed by the Queensland Court of Appeal[4], statements of this Court in *R v Bauer* and other cases involving a consideration of equivalent legislative provisions which exist in other Australian jurisdictions may be considered "*illustrative*"[5] or "*useful in illuminating the applicable logic*"[6] of how evidence may be probative in a particular case.

10 5. The applicant's submission places undue significance on McMurdo JA having utilised the term "link". The term "link" is not itself derived from the *Evidence Act 2008* (Vic). The use of the term here may be seen as but another way to express the requirement for the evidence to have (the required) "nexus"[7], in order to be probative. Consistent with that, Boddice J also referred[8] to "*the need for a common linkage*" and such need as having been "*recently reaffirmed*" by the High Court in *R v Bauer*.

6. Further, the applicant's assertion that McMurdo JA "*relied on R v Bauer*",[9] does not provide a complete picture of his Honour's process of reasoning. After referring to the need for the link between the facts and circumstances of each offence to have "*a degree*
20 *of probative force which warranted its admission, notwithstanding its prejudicial effect*"[10], his Honour proceeded to speak to what "*that degree of probative force*" required was, identifying it to be that as prescribed by this Court in *Phillips v The Queen* (2006) 225 CLR 303[11]. He then turned to consider the probative value of the evidence with reference to the issues at trial.[12] His Honour's reasoning was in that way actually consistent with that which the applicant attributes[13] as demonstrating that Boddice J (in dissent) "*ultimately applied the correct common law principles*".

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[4] See for example *R v McNeish* [2019] QR 355 at [38] per Sofronoff P and Henry J and at [79] per McMurdo JA.
[5] *R v McNeish* [2019] 2 QR 355 at [79] per McMurdo JA.
[6] *R v McNeish* [2019] 2 QR 355 at [42] per Sofronoff P and Henry J.
[7] See for example *Hoch v The Queen* (1988) 165 CLR 292 at 301 and *Phillips v The Queen* (2006) 225 CLR 303 at 320-321.
[8] *R v Davidson* [2019] QCA 120 at [226]: CAB at page 242.
[9] See the applicant's submissions at paragraph 26.
[10] *R v Davidson* [2019] QCA 120 at [14]: CAB at page 209-210.
[11] At 320-321.
[12] *R v Davidson* [2019] QCA 120 at [15]: CAB at page 210 - referring to the summing of the learned trial judge from CAB at page 18 lines 17-39.
[13] Applicant's submissions at paragraph 57 and 58.

The conclusion of the majority was correct; no miscarriage of justice occurred

7. The unifying feature of each of the offences having been committed upon a female complainant attending the applicant for professional therapeutic massage services is not a matter that may properly be described as "general in nature". The majority were correct to conclude that the common features of the offending, committed in near identical circumstances meant that in the context of the issues at trial, the evidence of each offence was strongly probative in the proof of one another, and no miscarriage of justice arose from the jury being allowed to so use the evidence.[14]

8. To focus on the suggested differences in the mechanics of the acts of rape, as compared to the offences of sexual assault, as it is submitted the applicant's argument requires, is to ignore that the probative force of the evidence is to be assessed in conjunction with the whole of the evidence.[15] It was not necessary that the particular acts that constituted each of the offences sought to be led in proof of one another were of the same kind, for such evidence to be admissible. The fact that the applicant's alleged sexual offending against one massage client (complainant) may not have on that occasion progressed, for example, from touching of the labia to penetration of the vagina with the finger, did not materially affect the assessment of the improbability of similar lies being told by not only that complainant but the others in relation to whom the sexual touching may have progressed further.

Dated: 2 February 2021

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[14] *R v Davidson* [2019] QCA 120 at [15]-[17] per McMurdo JA: CAB at page 10.
[15] *Pfennig v The Queen* (1995) 182 CLR 461 at 482-483.