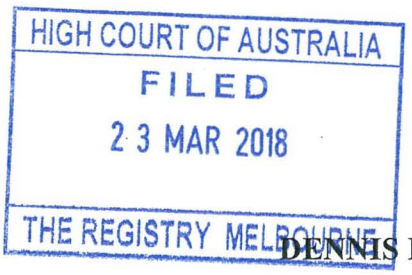
IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY **No. M1 of 2018**

BETWEEN:




**THE QUEEN**

Appellant

**- v-**

**DENNIS BAUER (A PSEUDONYM) (No. 2)**

Respondent

## APPELLANT'S REPLY

### Part I: Suitability for internet publication

1.1 The appellant certifies that this submission is in a form suitable for publication on the internet.

### Part II: Statement of appellant's reply

Respondent's statement of facts & chronology

2.1 In respect of the appellant's chronology, the references to TB's police statements are only intended to refer to her statements made in respect of allegations of offending by the respondent against her. It is accepted that TB made a police statement in February 2000 where she is asked about allegations of sexual abuse made by RC against the respondent.

2.2 In respect of AF, the appellant corrects a typographical error – her statement is signed on 28 February 2012 (and not 2011).

2.3 Finally, the appellant accepts that the respondent denied the offending when first interviewed by police in 2000 (but that interview was subsequently lost) – this is referred to in the judgment of the Court below. However, the respondent when re-interviewed in 2011 made "no comment".

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Respondent's statement of relevant issues

2.4 In respect of ground 1 [use of complainant's evidence from original trial], the respondent contends that if this Court determines that the Court below has erred then it will be necessary to consider whether the trial judge reversed the burden of persuasion under the relevant provision. This argument was pressed by the respondent and implicitly rejected in the Court below.[1] In any event, the appellant submits that the Court's conclusion on this point is undoubtedly correct – there was simply no evidence – thus ruling out a refusal by the trial judge to exercise the discretion in favour of the prosecution.[2] The now impugned comment made by the experienced judge must be seen in its true context – the judge had read the cross-examination of RC from the first trial and concluded that it had been conducted in "a most comprehensive way".[3] Finally, the Court below observed that the "cross-examination at the first trial impressed us as being 'complete' and as having been conducted with conspicuous competence".[4]

CAB 152-155

CAB 154

AFM 235

CAB 154-155

2.5 In respect of ground 2 [tendency evidence in a single complainant sexual case], the respondent contends that if this Court determines that the Court below has erred then it will be necessary to consider whether the evidence should nevertheless be excluded pursuant to sections 55 [relevance], 97(1)(a) [defective tendency notice], 101 [probative value does not substantially outweigh prejudicial effect], 135 [general discretion to exclude] or 137 [exclusion of prejudicial evidence] of the Act.

2.6 As to relevance, the Court below addressed this point without critical comment in its judgment.[5] The appellant submits that the evidence of RC and TB is plainly relevant.

CAB 158-160

2.7 As to the tendency notice, the Court did not proffer an opinion on the respondent's argument that the notice was defective in that it dealt with tendency in a "broad-brush approach".[6] However, the trial judge in her ruling on this topic observed that the prosecutor had identified which charged acts and uncharged acts were cross-admissible at her request (after defence counsel made complaint).[7] Thus, whatever be the merits of the

CAB 180-181

AFM 240-241

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[1] See *Bauer (A Pseudonym) (No. 2) v R* [2017] VSCA 176, at [34]-[39]
[2] See *Bauer (A Pseudonym) (No. 2) v R* [2017] VSCA 176, at [38]
[3] See Ruling No. 1 – Trial Transcript, 30/3/2016 , at 7
[4] See *Bauer (A Pseudonym) (No. 2) v R* [2017] VSCA 176, at [39]
[5] See *Bauer (A Pseudonym) (No. 2) v R* [2017] VSCA 176, at [47]-[50]
[6] See *Bauer (A Pseudonym) (No. 2) v R* [2017] VSCA 176, at [85]-[87]
[7] See Ruling No. 2 – Trial Transcript, 31/3/2016 , at 101-102

respondent's complaint as to the form of the notice, it is submitted that no substantial miscarriage of justice has been occasioned by virtue of what transpired at trial.

2.8 But it now appears that the respondent seeks to advance an argument that the relevant notice did not constitute "reasonable notice in writing" pursuant to section 97(1)(a) of the Act. That argument was not addressed by the trial judge or the Court below. The amended tendency notice is dated 16 March 2016. Defence counsel made submissions in writing and oral submissions were heard on 30 March 2016. The evidence of RC was adduced at trial on 2 May 2016. The respondent conceded in the Court below (in the written submissions) that the amended notice was not "materially different" from the original tendency notice (filed on 12 August 2015). In short, reasonable notice of the intention to adduce tendency evidence has been given by the prosecution in this case.

2.9 As to the prejudicial effect of the tendency evidence flowing from RC, the trial judge concluded that such evidence should not be excluded under sections 101, 135 or 137 of the Act.[8] Likewise, the trial judge ruled that the tendency evidence flowing from TB should not be excluded under the same provisions.[9] The Court below again did not proffer an opinion on such arguments.[10] The appellant submits that the trial judge's conclusions in respect of exclusion under the invoked provisions should be upheld.

**AFM 252-253**
**AFM 259-260**
**CAB 180**

2.10 The appellant disputes the contention that the jury would have been overwhelmed by the number of charged and uncharged acts in determining their verdict. Otherwise the appellant joins issue with the contention that the reception of tendency evidence in this case was prejudicial within any of the relevant exclusionary provisions of the Act.

Respondent's argument – ground 1

2.11 The appellant joins issue with all arguments advanced in respect of ground 1 [use of complainant's evidence from original trial]. Otherwise as to the concession by the respondent that it would be sufficient for a court to receive evidence of the complainant's unwillingness to give evidence by means of "admissible hearsay evidence", it must follow that the prosecutor in this case could have filed such an affidavit.

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[8] See Ruling No. 2 – Trial Transcript, 31/3/2016 , at 113-114
[9] See Ruling No. 3 – Trial Transcript, 31/3/2016 , at 158-159
[10] See *Bauer (A Pseudonym) (No. 2) v R* [2017] VSCA 176, at [84]

Respondent's argument – ground 2

2.12 The appellant joins issue with all arguments advanced in respect of ground 2 [use of complainant's evidence from original trial]. Otherwise, the appellant has not contended in its submissions that there are different legal tests for the reception of tendency evidence in sexual offence cases. Furthermore, the appellant contests the proposition that there is an inherent "vice" in the admission of the tendency evidence – each relevant act was sufficient of itself to demonstrate the relevant tendency. The appellant disputes the proposition that the reception of the evidence resulted in "bootstrap reasoning".

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2.13 Complaint is now taken as to lack of direction as to standard of proof. No exception was taken on this point in relation to the charge. It was not the basis of any complaint in the Court below. The appellant submits that the argument now pressed is quite untenable in light of section 61 of the Jury Directions Act 2015 (Vic).[11]

2.14 Finally, as to a complaint as to contamination, concoction or collusion, the Court below opined that there was "thin support" for the proposition that RC's evidence was so infected.[12] And in her ruling on the topic, the trial judge concluded that in respect of TB there was "no real possibility" of relevant infection – the judge noted the dissimilarities both as to timing of the respective complaints and the nature of the allegations.[13] **CAB 180** **AFM 258-259**

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Respondent's argument – ground 3

2.15 The appellant joins issue with arguments advanced in respect of ground 3 [severance].

Respondent's argument – ground 4

2.16 The appellant joins issue with arguments advanced in respect of ground 4 [complaint evidence].

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2.17 Whilst the trial judge did direct jury as to the possible uses of complaint evidence, the judge also reminded the jury that the prosecutor relied upon the relevant evidence only as potential "supporting" evidence.[14] **CAB 36**

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[11] Section 61 of the Act provides – Unless an enactment otherwise provides, the only matters that the trial judge may direct the jury must be proved beyond reasonable doubt are – (a) the elements of the offence charged or an alternative offence; and (b) the absence of any relevant defence.
[12] See *Bauer (A Pseudonym) (No. 2) v R* [2017] VSCA 176, at [84]
[13] See Ruling No. 3 – Trial Transcript, 31/3/2016, at 157-158
[14] See Charge – Trial Transcript, 6/5/2016, at 402

Cross-appeal by respondent

2.18 The respondent seeks leave to cross-appeal on the ground that the Court below erred in ordering a re-trial in lieu of entering a judgment of acquittal. After allowing the appeal against conviction, the Court below concluded, albeit with some hesitation, that a new trial should be ordered. The orders that the Court below could make after a successful appeal against conviction are set out in section 277(1) of the Criminal Procedure Act 2009 (Vic) (including the ordering of a new trial and entering a judgment of acquittal).

2.19 The Court below referred to the governing test as set out by the Court in *DPP (Nauru) v Fowler*[15] and provided cogent reasons for the exercise of the power to order a new trial. In so concluding, the Court did not err. Contrary to the contention now advanced by the respondent, the Court did not apply any "rebuttable presumption" as to the ordering of a new trial – that this is so is amply demonstrated by the Court's statement that in "exercising the discretion whether to direct a new trial or to order an acquittal, the interests of the community as well as the interests of the accused need to be brought into balance" (and citing *Fowler* as authority for that proposition).[16] In short, the Court below has correctly applied the *Fowler* discretionary test – indeed, a reference to "balancing the various competing factors" immediately precedes the Court's ultimate conclusion.[17]

**CAB 192**

**CAB 192-193**

Costs on appeal

2.20 The respondent seeks an order as to costs irrespective of the outcome of the appeal. The appellant resists the making of such an order on the basis of lack of exceptionality.

Dated: 23 March 2018

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[15] (1984) 154 CLR 627
[16] See *Bauer (A Pseudonym) (No. 2) v R* [2017] VSCA 176, at [120]
[17] See *Bauer (A Pseudonym) (No. 2) v R* [2017] VSCA 176, at [121]