IN THE HIGH COURT OF AUSTRALIA **No. S 121 of 2018**
SYDNEY REGISTRY

BETWEEN: **RICHARD JOHN McPHILLAMY**
Appellant

and

THE QUEEN
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. It is certified that this outline is in a form suitable for publication on the Internet.

Part II: Outline

1. Because of the absence of reasons for the ruling on admissibility, the focus in the CCA and in this Court is not on the ruling but on the use in the trial of the evidence of TR and SL to prove that the appellant had a tendency to act in a particular way: s 97(1)(b), s 101(2), Dictionary definition of "tendency evidence", s 95.

2. The jury were invited to use the evidence to show that the appellant had a tendency *to act* stated at a level of generality: AFM 189.40, CAB 27.40; see also AFM 257.23.

3. The evidence was relevant (compare *R v Cox*) but it did not, for the reasons given by Meagher JA, particularly at CAB 137 [102] to 143 [118], have significant probative value in respect of any of the counts on the indictment.

4. The weight of authority favours the view that an appellate court does not apply *House v The King* principles when considering the test of admissibility in s 97(1)(b), but the correctness of that view need not be determined when the question is whether a miscarriage of justice resulted from a prohibited use of evidence.

5. The evidence was relied upon to prove a tendency to act stated at a level of generality. While such evidence may well be influential to a jury in a trial of alleged child sexual offences, that generality meant that the evidence did not have significant probative value on

the basis of reasoning that, having offended ten years before, it was likely that he took the opportunity to offend again: compare *Hughes* at [58], [60], [64], [111], [157]-[159], [202], [218]. As Meagher JA explained, the evidence did not strongly support the existence of the alleged tendency in 1995-6 nor did that tendency strongly support proof of a fact in issue. Contrary to the analysis of Harrison and Hulme JJ at CAB 145 [127], being in a "position of responsibility" and taking advantage of being alone with the complainants does not alter that conclusion: Meagher JA at [118], AS p.8.30 – p.9.10.

6. The respondent's reliance on sources indicating that paedophilic *interest* "generally" persists does not assist where the tendency sought to be established was *to act on that interest*.

7. The suggested features of the tendency evidence relied upon by the respondent ("relatively little grooming", "risk of detection") were not relied upon by the Crown at trial or in the Court of Criminal Appeal, for good reason: see AR at [3]-[6].

8. While it could be (and was) argued that the complainant's account was implausible, the tendency evidence did not provide any answer (in contrast with the position in *Hughes*): see AR at [5].

9. The evidence did not strongly support the credibility of the complainant on the basis that it was improbable that he would advance a substantially similar account to TR and SL unless it were true (particularly given that NC had some knowledge at the time of first complaint of the charges brought against the appellant in respect of TR and SL: AFM 65, 176). In any event, such reasoning would be subject to the coincidence rule in s 98.

10. Turning to s 101(2), a court may consider the application of that provision without first applying s 97. This Court would not be satisfied that the probative value of the tendency evidence substantially outweighed any prejudicial effect it may have on the appellant (see para 4 above). Even if it were concluded that the s 97(1)(b) test was satisfied, it should still be concluded that the s 101(2) test was not.

11. Harrison and Hulme JJ did not provide any reasons as to why the test was satisfied (see AS [26]-[27]).

12. For the reasons advanced in respect of the s 97 argument, the probative value of the tendency evidence adduced from TR and SL was not high.

13. There was a real danger of the tendency evidence being "given disproportionate weight": *Hughes* at [17], [71]-[72]; *Perry* at 586.5; *Pfennig* at 487.9-488.2, 512.5; *Sutton* at 545.5; *HML* at [12], [487]; *Sokolowskyj* at [48], [50]; ALRC 26 at [799] (JBA 595-596).

14. There was a real danger of the tendency evidence clouding the jury's assessment of whether the prosecution had discharged its onus of proof by generating an adverse emotional response: *Hughes* at [17]; *Perry* at 593.9-594.2; *Sokolowskyj* at [48]; ALRC 26 at [799] (JBA 597-598). See also Wigmore at para 57 (JBA 647.4). That emotional response would have been increased by the four matters relied on by the appellant in the CCA (AR fn 1).

15. The requirements of s 144 are not met with respect to the Royal Commission study: *Aytugrul* at 183 [21]. Generalisations about conviction rates in respect of child sexual offences do not assist.

16. It should not be assumed that the directions given to the jury were completely effective (AS [33]-[34]).

17. Section 101(2) should be contrasted with s 137 and s 135. The onus is on the prosecution. The word "substantially" conveys that, in a close case, a cautious approach prioritising the minimising of the risk of wrongful conviction should be taken. The limited value of the tendency evidence in this case did not justify taking the risk of an unfair trial (McHugh J in *Pfennig* at 528-529). The prejudicial dangers were so high that the s 101(2) test would not be satisfied unless the evidence was so probative that there was no rational view of the tendency evidence consistent with innocence: *Ellis* at [96]; *Pfennig* at 531-532.

Dated: 9 August 2018

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