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

BETWEEN: **RICHARD McPHILLAMY**

Appellant

and

THE QUEEN

Respondent

APPELLANT'S REPLY

Part I: Certification

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

Part II: Concise reply

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2. The respondent states at RS [23] that "Meagher JA accepted the appellant's contention that the tendency evidence did not have significant probative value because the tendency evidence 'occurred in a different place and in different circumstances and involved different acts'", citing Meagher JA's judgment at [5] (CAB 106.34). That was a submission made on behalf of the appellant. However, Meagher JA did not state that he accepted it. Meagher JA gave his reasons for concluding the evidence lacked significant probative value at [93]-[119] (CAB 135-143).

3. The respondent relies on the suggested feature of the tendency evidence that "there had been relatively little grooming" (RS [27], [28], [33], [35], [36], [39]). This suggested feature was not relied upon by the Crown at trial nor in the Court of Criminal Appeal. That was for good reason:

(a) As regards the complainant NC, there was alleged conduct which might be characterised as "grooming", in that the appellant discussed masturbation with NC and other boys (AFM 41.12),

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touched NC more than necessary when helping him to dress in his robe (AFM 40.36, 40.45) and asked NC if he had "a girlfriend" or "a boyfriend" (AFM 41.2).

(b) As regards TR, he testified that, prior to the first incident, he had been to the appellant's room with other kids (AFM 198.8). He said that it "was somewhere to go just to get away from everything ..." (AFM 197.49). He could not recall how many times he went to the appellant's room (AFM 196.44).

(c) As regards SL, he testified that he "used to go" to the appellant's room "if I had come back from a visit with my parents and I was experiencing homesickness" (AFM 224.47). SL would be "upset, crying and just very upset and agitated" (AFM 225.4) and the appellant "was always there and so I suppose he was a bit of shoulder to cry on and he would try and comfort – comfort me ..." (AFM 225.7). He could not remember the first of those occasions (AFM 225.24) although he remembered a subsequent occasion when the first offence occurred (AFM 225.27). As the respondent notes at RS fn 35, the acts in respect of SL were preceded by a couple of occasions in which the appellant gave SL a massage (AFM 225.31).

4. The respondent relies on the suggested feature of the tendency evidence that "there was a risk of detection" (RS [27], [28], [33], [35], [36], [39]). This suggested feature was not relied upon by the Crown at trial nor in the Court of Criminal Appeal. That was for good reason:

(a) As regards the complainant NC, the Crown Prosecutor in final address did not suggest there was any particular risk of detection, submitting to the jury that the toilet was "private ... sound proved [sic] and really quite concealed from the sight of other people who might be in the church ..." (AFM 260.46).

(b) As regards TR, the first offence was in the appellant's room, his "permanent room", in the priests' corridor, where he slept (AFM 196.14 ff). Students were not generally permitted to enter the corridor (AFM 198.21). The second offence did occur in the presence of other schoolboys but it was of a nature that could be given an innocent connotation (in contrast with the conduct alleged in respect of the complainant NC).

(c) As regards SL, both offences were committed in the appellant's bedroom. That bedroom was in the priests' corridor which "was deemed as an out-of-bounds area" (AFM 219.19). Students "were prohibited to be in that area basically for any reason at all" (AFM 219.28), although students would sometimes "break the rules and go into that area" (AFM 219.36). However, there was no evidence suggesting that "there was a risk that another person would

inadvertently walk in and see what the appellant was doing" or "notice that the appellant was alone in an inappropriate place with a young male" (RS [33](4)).

5. As the respondent points out at RS [30], the appellant's counsel at his trial did, in final address, suggest that, notwithstanding the toilet cubicle being "private", there was an element of implausibility in the complainant's account (AFM 267). Nevertheless, the tendency evidence did not provide any kind of answer to that argument given that it did not tend to show that the appellant was prepared to engage in criminal behaviour where there was a high risk of detection.

10 6. The respondent has expanded the concept of "risk of detection" to include "by way of complaint" (RS [27], [28], [33], [35], [36]). This suggested feature was not relied upon by the Crown at trial nor in the Court of Criminal Appeal. No doubt that was because that risk exists in almost all cases of child sexual abuse, at least after a first offence is committed. It is not a feature that adds in any significant way to the probative value of the tendency evidence in the present case. In any event, the evidence was that the appellant acted to minimise the risk of complaint by NC and thus reduce the "risk of detection" arising from complaint. NC testified that, "shortly after" the commission of the first offence, the appellant told him that he (NC) "was gay and that, you know, I had to be careful because people would – everybody would turn against me and all that kind of rubbish" (AFM 48.16, AFM 48.40). That was "one of the big
20 reasons" why NC did not complain (AFM 48.18). There were "a few of these kind of conversations" (AFM 48.28). Similar things were said after the second offence, "the usual stuff, you know, we can't tell anybody" (AFM 53.26).

7. The respondent's reference to factors not relied upon at the trial should not obscure the fact that, at the trial, the tendency evidence was relied upon by the prosecution to prove a tendency stated at a level of generality (the appellant "had a tendency to act in a particular way, that is, by his conduct, demonstrate a sexual interest in male children in their early teenage years who were under his supervision": AFM 189.38, CAB 27.40).

30 8. The respondent's reliance on *R v Cox* (RS [42] and [45]) is misplaced. Under s 101(1)(d) of the *Criminal Justice Act 2003* (UK), all that is required for admissibility is that the "evidence of the defendant's bad character ... is relevant to an important matter in issue between the defendant and the prosecution" (see *Cox* at [16]). The Court of Appeal applied that test to hold

at [29] that a demonstrated "sexual interest in a pubescent girl of 12", even where there was a large time gap, was relevant. Relevance is not an issue in these proceedings.

9. As to RS [43], the appellant submits that the evidence of Professor Quadrio should be disregarded. The appellant's primary submission is that the use of the evidence for tendency reasoning was prohibited by s 97 (and s 95). The focus is on the use of the evidence in the trial, not the ruling on admissibility at the beginning of the trial. Given that, evidence admitted on the voir dire but not in the trial should be disregarded. In any event, even if the appellant's sexual *interests* remained stable over a decade or more, it is an entirely different matter to infer a continuing tendency *to act on* those sexual interests by committing serious sexual offences.

10. As to RS [48], it was the Crown in the Court of Criminal Appeal that sought to support a finding of significant probative value by pointing to similarities between the charged conduct and the tendency conduct (CAB 141 [113]). Meagher JA was not satisfied of this. Meagher JA did not make the error of holding that close similarity between the charged conduct and the tendency conduct was always required.

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11. As to RS [55], the four matters[1] referred to by Meagher JA at [121] are relied upon by the appellant as considerations relevant to the assessment of the degree of potential prejudicial effect and, in particular, to the degree of danger of the jury being affected by an adverse emotional response to the tendency evidence.

12. As to RS [57]-[58], the ALRC recommendations in this area were not adopted, so that any submission based on the ALRC reports should be approached with caution. The appellant places primary reliance on the recognition by the courts over more than a century that tendency evidence "has a prejudicial capacity of a high order": *Pfennig v The Queen* (1995) 182 CLR 461 at 483.1; see also *Perry v The Queen* (1978) 150 CLR 580 at 586, 593-4, 604, 609; *Sutton v The Queen* (1984) 152 CLR 528 at 545-7, 563-5; *HML v The Queen* (2008) 235 CLR 334 at

[1] Preying on homesick boarders (AFM 200.46-201.2; 218.20; 224.44-225.17, 228); attempted fellatio of SL while asleep (AFM 230-231); caning of TR after complaint (AFM 202.46-203.18); connection with the notorious child sexual abuse at St Stanislaus school (AFM 193.22, 215.9).

[12], [57], [487]; Wigmore[2] at para 57. The statute itself necessarily contemplates that the danger of prejudice may be so great as to outweigh probative value assessed as "significant".

13. The study referred to at RS [60] has been the subject of published expert criticism.[3] The requirements of s 144 of the *Evidence Act 1995* (NSW) are not met: see *Aytugrul v The Queen* (2012) 247 CLR 170 at 183 [21]. The reference at RS [61] to low conviction rates for child sexual assault offences generally does not assist without more specific evidence regarding conviction rates in those cases in which tendency evidence was admitted.

14. With respect to the respondent's submissions at RS [4] and [65], the appellant does not suggest that it will always be appropriate to apply the *Pfennig* test. Nor did Spigelman CJ suggest this in *R v Ellis* (2003) 58 NSWLR 700. Rather, the point being made by Spigelman CJ was that there may be cases where the potential prejudicial effect of the evidence is so high that s 101(2) will not be satisfied unless the evidence is so probative that it bears no reasonable explanation other than guilt of the offence charged. The present is a case where the potential prejudicial effect of the evidence was high. In those circumstances, only where the tendency evidence is so probative that it bears no reasonable explanation other than guilt of the offence charged would it be sufficiently probative to substantially outweigh that potential prejudicial effect.

Dated: 27 July 2018

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[2] J.H. Wigmore, *A Treatise on the Anglo-American System of Evidence*, 3rd edn, Little Brown & Co, Boston, 1940.

[3] J. Hunter and R. Kemp, "Proposed Changes to the Tendency Rule: A Note of Caution", (2017) 41 *Crim LJ* 253 at 257-260; P. Robinson, "Joint Trials and Prejudice: A Review and Critique of the Report to the Royal Commission into Institutional Child Sex Abuse", (2018) 43 *Monash University Law Review* 723.