HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN:

HAMILTON (a pseudonym)

Appellant

and

THE QUEEN

Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

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Part I: Certification

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

Part II: Submissions

2. To a jury of laypersons, an immediately striking aspect of the indictment was that the appellant was alleged to have committed sexual offences against three different complaints, each of whom was his child. However, the evidence of each count was not admitted, and therefore could not be used, for a tendency purpose: s95, *Evidence Act 1995* (NSW).
3. This Court has long recognised the natural inclination towards tendency reasoning in cases with multiple complainants alleging sexual offending by the same accused {AS [22]ff}. In
20 *BRS v The Queen* (1997) 191 CLR 275, McHugh J (at 308, **JBA 59**) observed "criminal courts take it as axiomatic that, where the evidence reveals the criminal convictions or propensity of the accused, there is a real risk that the jury will reason towards guilt by using the conviction or propensity" {AS [21]}. The influence may be conscious or unconscious: *De Jesus v The Queen* (1986) 61 ALJR 1 at 2G-3A, **JBA 258** {AS [22]}. The evidence of other offending is "apt to engender" antipathy for the accused, which "may unjustly erode the presumption of innocence which protects an accused person at his trial": *Sutton v The Queen* (1984) 152 CLR 528 at 545, **JBA 189** {AS [23]}.
4. Accordingly, the importance of proper directions "should not be underestimated"; it is necessary "that a trial judge give a clear and comprehensible warning about the misuse of
30 the evidence for that purpose and explain the purpose for which it is tendered": *Roach v The Queen* (2011) 242 CLR 610; [2011] HCA 12, [47], **JBA 165** {AS [20]}; see also *De Jesus v The Queen* (1986) 61 ALJR 1 at 3F, **JBA 257- 258**. The respondent concedes that,

despite this requirement, "there was no direction which expressly instructed the jury they could not utilise tendency reasoning in respect of the counts on the indictment" {RS [57]}.

5. The determination as to the admissibility of evidence for a tendency purpose was not made until all the complainants had given their evidence. No directions were given limiting the use of the evidence prior to, or immediately following, it being given. This increased the importance of clear directions in the summing up to the jury.

The reasoning of the CCA and the argument of the respondent

6. Beech-Jones J proceeded from a foundation that "there is neither a requirement [n]or even a presumption … an anti-tendency direction" should be given in cases such as the present": CCA [113], **CAB 117**. This starting point infected his Honour's subsequent assessment of the efficacy of the directions that were given.

7. Tendency reasoning did not require an invitation {cf RS [51], see also RFM 5.28, 5.40, 40.20} or a "loophole": RS [51]. It was a rational mode of reasoning in the present case. The jury was told to "bring to the jury room [their] common sense" (SU [5], CAB 10; see also SU [3], CAB 9). Neither the 'separate consideration' direction, nor the '*Murray'* direction satisfied the need for an appropriate warning.

8. The 'separate consideration' direction did not require the jury to consider an individual count only by reference to the evidence admissible to that count: SU [48], **CAB 26**. Nor did it instruct the jury as to what the evidence for each count was: *R v Mitchell* (Unreported NSWCCA, 5 April 1995) per Gleeson CJ, **JBA 270.26**. The '*Murray'* direction, similarly, did not limit the evidence to be considered in determining if a particular complainant was "honest and reliable": SU [24]-[25], **CAB 39-40**. If anything, the direction encouraged the jury to look beyond the individual complainant for support for her or his evidence.

9. The respondent relies on the directions against tendency reasoning given in relation to the evidence led to rebut good character and the evidence admitted as "context evidence" {RS [56(i), (ii)]}. Neither of these directions attempted to dissuade the jury from the natural inclination to use evidence of the other counts for a tendency purpose. As Macfarlan JA noted, the inference to be drawn was that tendency reasoning was otherwise permissible: CCA [40]; **CAB 99.**

10. A positive defence case could not change the need warn the jury to avoid an impermissible path of reasoning *towards* guilt (as opposed to a path of reasoning that might create a reasonable doubt). Beech-Jones J's postulated paths of reasoning (CCA [120], **CAB 119**)

do not exclude tendency reasoning {AS [45]}. The respondent has not submitted to the contrary.

The failure to seek a direction

11. Beech-Jones J rejected the contention that any forensic advantage was gained by not requesting a direction against tendency reasoning: CCA [122], **CAB 120**. Even if there was, potentially, a forensic advantage, it would not, in a case such as the present, deny the existence of miscarriage: *TKWJ v The Queen* (2002) 212 CLR 124 at [28], **JBA 223**; {AS [56]}.

12. Beech-Jones J found that the failure to request the direction was "deliberate in the sense that [defence counsel] did not consider that such a direction was necessary" (CCA [119], **CAB 118-119)**. There was no sound basis for this finding. In any event, if this was defence counsel's opinion, it was objectively wrong. Beech-Jones J failed to consider that, in the context of the trial judge having abdicated his responsibility for the summing up, there was additional danger in placing weight on the inferred approach of trial counsel {AS [57]}.

13. Defence counsel argued against the availability of tendency reasoning and was clearly concerned that tendency reasoning would be damaging to his case.

14. Miscarriage in this case is not dependent on an explanation for the failure to request a direction: *KRM v The Queen* (2001) 206 CLR 221 at [101], **CAB 138-9** {AS [51]}. It is noted that the judgment rejecting the application to rely on tendency reasoning did not expressly refer to cross-admissibility for tendency purposes relating to the counts on the indictment for tendency purposes: CCA [23], **CAB 93**; {RS [21]}. The directions given to the jury repeat the same omission.

15. Directions prohibiting a mode of reasoning towards guilt could not have adversely affected the appellant's case: cf {RS [70]}; *BRS v The Queen* (at 303 and 310, **JBA 54 and 61**).

21 June 2021

Hament Dhanji **David Randle**

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