HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: HAMILTON (A PSEUDONYM)
Appellant
and
THE QUEEN
Respondent

RESPONDENT'S OUTLINE OF ORAL ARGUMENT

10

Part I: The respondent certifies that this submission is in a form suitable for publication on the internet.

Part II:

Test to be applied (RWS at [38] – [44])

1. The majority of the Court of Criminal Appeal ("CCA") correctly found that the appellant had not established that a miscarriage of justice was caused by the failure of the trial judge to instruct the jury that they were prohibited from using the evidence led in support of each count on the indictment as tendency evidence in support of any other count on the indictment ("anti-tendency direction").

20 2. As there was no application for an anti-tendency direction by defence counsel, the trial judge's failure to provide an anti-tendency direction cannot constitute a wrong decision on a question of law within the second limb of s. 6 of the *Criminal Appeal Act* 1912 (NSW). Accordingly, it is necessary for the appellant to demonstrate that a miscarriage of justice has been occasioned within the third limb of s. 6.

3. The question is not whether an anti-tendency direction might have been given out of prudence. Rather, to establish that there has been a miscarriage of justice, it is necessary for the appellant to establish that there was a "real chance" or a "significant risk" that the jury reasoned impermissibly in finding the appellant guilty of the alleged offences. This was the test that was applied by both the majority and the
30 dissent: CCA judgment at [113] (CAB at 117), per Beech Jones J and at [39] (CAB at 98).

4. The appellant does not contend that the majority (or the dissent) identified the wrong test to be applied. Rather, the appellant's contention is that the proper application of the "real chance" test should have resulted in a different outcome in this case. The

Crown submits that the majority of the CCA correctly found that the appellant had not established that a miscarriage of justice has arisen.

Application of the 'real chance' test to the present case

5. It may be accepted that there is a risk that a jury will engage in tendency reasoning wherever a single indictment charges an accused with having committed sexual offences against multiple complainants. However, that risk is not equal in every case. The extent of the risk will depend upon an examination of all of the circumstances of the trial, including how the Crown and defence cases were advanced and the overall effect of the directions when read as a whole, when viewed against the failure of defence counsel to seek the direction at first instance.

The Crown and Defence Cases (RWS at [49] – [54])

6. No part of the Crown case relied upon tendency reasoning. In her closing address, the Crown Prosecutor carefully took the jury separately through the evidence of each individual complainant, and explained why that individual complainant's evidence should be accepted beyond reasonable doubt: RFM at 5 – 41.

7. The defence case did not invite tendency reasoning. In inviting the jury to "join the dots", defence counsel was asking the jury to consider the overall chronology of the allegations and to draw an inference that the timing of the allegations suggested that the allegations had been fabricated: RFM 45 – 46. The defence also dealt with the complainants in a sequential and straightforward manner. Neither of these approaches invited tendency reasoning.

The Directions (RWS at [55] – [65])

8. There are three important aspects of the Summing Up: the context direction, the separate consideration direction and the *Murray* direction.

9. The *context direction* did not convey to the jury that tendency reasoning was permitted with respect to the counts on the indictment; cf ARS at [19]. Whilst the directions were situated within the "topic" of "context evidence" (SU at [16], CAB at 13), the language of the warnings provided by the trial judge was not limited in its terms: SU at [19] – [20] (CAB at 15 – 16).

10. The *separate consideration* direction (SU at [48]; CAB at 26) was adjusted to take into account the defence case of concoction. The *Murray* direction (SU at [24] – [26] (CAB at 39 – 40), which was given on the application of defence counsel, instructed the jury that they had to exercise caution before they could convict the accused on any count, because the Crown case for each count was based "largely or exclusively" on the evidence of a single witness. The reference to considering whether the evidence of each witness was "supported" would have been understood as a reference

to the complaint evidence and the fact that Count 3 was corroborated to some extent by the mother.

11. The anti-tendency direction that the appellant contends should have been given would have instructed the jury that in considering the defence case, the jury was free to consider all of the evidence, but that when considering the prosecution case, the jury were limited to considering the cases sequentially. The effect of the directions that were given achieved this. The separate consideration direction combined with the *Murray* direction confined the jury to separate consideration of each count when reasoning towards guilt, whilst leaving the jury free to consider all of the evidence when considering the defence case of concoction.

Failure of Defence Counsel to Seek the Direction (RWS at [66] – [72])

12. Justice Beech Jones correctly held that the failure of defence counsel to seek an anti-tendency direction was deliberate "in the sense that [defence counsel] did not consider that such a direction was necessary given the Murray direction and the manner in which the defence case was put" (CCA at [119]; CAB at 119), and further, that defence counsel's conduct supports the conclusion that a miscarriage of justice did not arise: CCA at [120] (CAB at 119).

13. The Crown does not submit that the failure of defence counsel to seek an anti-tendency direction with respect to the counts on the indictment is determinative of the question of whether there has been a miscarriage of justice. However, the failure of defence counsel to seek the direction is nonetheless an important aspect of this appeal.

14. As outlined above, to establish that there has been a miscarriage of justice, it is necessary for the appellant to establish that there was a "real chance" that the jury reasoned impermissibly in this case. The fact that defence counsel (who had been active in protecting the interests of his client in the unusual circumstances of the case) did not seek an anti-tendency direction indicates that in atmosphere of the trial, defence counsel did not consider that there was a "real chance" that the jury would reason impermissibly.

Dated: 22 June 2021

H Baker B K Baker

Counsel for the respondent