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:

TL
Appellant

and

THE QUEEN
Respondent

APPELLANT'S OUTLINE OF ORAL PROPOSITIONS

Part I: Certification for publication on the internet

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

Part II: Outline of propositions to be advanced in oral argument

2 On the correct application of the principle articulated in *Hughes v The Queen* (2017) 263 CLR 338 (***Hughes***) at [39], which requires "close similarity" between the tendency alleged and the offence charged where the tendency evidence is adduced to prove the identity of an offender, the tendency evidence in this case (summarised at AS [11] to [13]; RS [19] to [26]) lacked significant probative value because:

(a) There is no dispute that the admissibility of tendency evidence under s 97 is not conditioned upon the existence of similarity, or close similarity, as a *statutory* requirement. However, the ultimate issue of whether the evidence has significant probative value for the purposes of s 97(1)(b) of the *Evidence Act 1995* (NSW) depends on what is it adduced to prove (see AS [19]).

(b) Where it is adduced to prove the identity of the offender for a known offence, "close similarity", or a cognate formulation, is a *logical* requirement of s 97. This is because close similarity is necessary for establishing a significant logical connection between the tendency alleged and the offence charged where the fact in issue is the identity of the offender (see AS [26]).

(c) The strength of the logical connection, and therefore the probative value, depends on the ability of the tendency evidence to engage tendency reasoning as a step to "identify[ing] a person as a particular offender" (*Bryant v R* (2011) 205 A Crim R 531 at [79]). In order to have "significant probative value" the tendency evidence in this case must be capable of specifically identifying the

appellant as the perpetrator (as against the two others with opportunity) to a high degree of probability (see AS [23]-[30]).

(d) None of the tendency evidence in this case could engage tendency reasoning to identify the appellant to a significant extent as it did not support proof of a tendency to act in particular way or to have a particular state of mind which was closely similar to the charged offence. By contrast, the charged offence involved significant injury and intent to inflict grievous bodily harm or to kill.

3 The tendency notice (RFM 5-7), which alleged a tendency to "deliberately inflict physical harm on" the victim, lacked the sufficient particularity necessary to give the tendency evidence significant probative value to prove identity. The generalised tendency alleged in the notice could not have significant probative value because:

(a) Even if proven, it could not engage tendency reasoning to identify the appellant as the "particular offender" as against the other two persons with opportunity. A tendency to "deliberately inflict physical harm", in the circumstances of this case, is not sufficiently peculiar or particular so as to exculpate the other potential perpetrators to a significant degree or to inculpate the appellant specifically to a significant extent by reference to a tendency to act in a *particular* way or to have a *particular* state of mind.

(b) This is even more so where there was evidence that the appellant "never physically disciplined the child but that he saw, on one or two occasions, that MW might smack her on the leg or thereabouts" (SU 42; CAB 59). Therefore, there was evidence which might be said to support the same alleged tendency to "deliberately inflict physical harm" on the part of MW.

4 The evidence of the hearsay statements lacked significant probative value because it did not exhibit close similarity, and upon the proper application of the principle in *IMM v The Queen* (2016) 257 CLR 300 at [40] and [50] (see AS [41]-[49]):

(a) The hearsay statements did not lack significant probative value because of credibility or reliability issues, but because of the circumstances surrounding the evidence of those statements (see AS [13]) and the purpose of that tendency evidence as deployed to prove the identity of the offender.

(b) The alleged tendency at least required strong evidence of a state of mind going to "deliberateness" and to acts amounting to "harm". The hearsay statement, for example, of the "punch" said to have been demonstrated by the child during play could not strongly establish deliberateness or harm (see AS [47]).

5 The proviso in s 6(1) of the *Criminal Appeal Act 1912* (NSW) cannot apply in this case. This is because:

(a) The appellant was denied a fair trial by an error that was fundamental. The tendency evidence was highly prejudicial and lacked significant probative value (*AK v Western Australia* (2008) 232 CLR 438 at [23]).

10 (b) The prejudicial nature of the tendency evidence meant that the appellant was denied a meaningful (and not fanciful) opportunity of acquittal or the alternative verdict of manslaughter. This is especially so where the tendency evidence was used to prove identity and intent for the purposes of the charge of murder (*Weiss v The Queen* (2005) 224 CLR 300 at [41]).

(c) The fundamental nature of the error, and the unfairness which flowed from it, is also evident from the sentencing proceeding in this case. The trial judge in sentencing the appellant relied on the tendency evidence to find that the appellant "was responsible for assaulting the child on three occasions" and that he "deliberately placed the child in scalding water": *R v TL* [2017] 20 NSWSC 715 at [6] (CAB 85). At [16], the trial judge stated that "[t]he commission of these previous assaults affects the assessment of the objective gravity of the offence of murder" (CAB 88). The CCA affirmed this at [372].

Dated: 16 August 2022

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