HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 20 Jul 2022 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S61/2022
File Title:	TL v. The Queen
Registry:	Sydney
Document filed:	Form 27E - Reply
Filing party:	Appellant
Date filed:	20 Jul 2022

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

TL
Appellant

and

THE QUEEN
Respondent

APPELLANT'S REPLY

Part I: Certification for publication on the internet

1 These submissions are in a form suitable for publication on the internet.

Part II: Reply

2 The essential proposition in the respondent's submissions (**RS**) is that the Crown had such an overwhelming circumstantial case against the appellant that, even without the impugned tendency evidence, the appellant's guilt was proved beyond reasonable doubt. The respondent's arguments concerning the principled approach to assessing whether tendency evidence adduced to prove the identity of an offender has significant probative value are effectively subsidiary to that core proposition. Indeed, contrary to how the trial proceeded and the way the jury was directed, the respondent appears to suggest that the main issue at trial was not the identity of the perpetrator, and that this Court should be satisfied that the accused is guilty (RS [18], [33], [37], [43], [67]). For the following reasons, this Court should not accept these contentions.

3 First, the respondent's reference to the nature of the victim's injuries (at RS [5]-[7]), only highlight the significant dissimilarity between the charged offence and the acts said to comprise the tendency (contrary to the requirement for "close similarity" as stated in *Hughes v The Queen* (2017) 263 CLR 338 (***Hughes***) at [39]). Moreover, the respondent's references to the statements abouts acts concerning a punch and bruise (at RS [22]-[26], [46]-[48]) are unavoidably less precise than the evidence about the burns. The imprecision of the description of those purported acts, even taking the evidence at its highest, demonstrates why the evidence of statements about acts could not be used to infer that the appellant *deliberately* inflicted physical harm on the child and thereby prove the identity of the offender for the charged offence. It follows that those pieces of evidence could not have significant probative value.

4 Further, insofar as the respondent appears to suggest that this case was not about the identification of the perpetrator (RS [8]-[18]), that contention should be rejected. Any such suggestion disregards the uncontroversial but fundamental premise, as the trial judge noted in summing up (CAB 33), that "the critical issue in this trial" was that "the accused maintains that both DM and MW had the opportunity to harm the child on the evening of 20 April 2014 and that the Crown cannot exclude the possibility that either of them did so". In view of that premise, the respondent correctly accepts (at RS [30]-[31]) that, at the very least, there was a factual basis available to the jury to establish that MW and DM each had a window of opportunity. This means that the present case is inescapably one that is concerned with proof of the identity of the offender for a known offence in the sense contemplated in *Hughes* at [39].

5 The factual matters asserted by the respondent, as the trial judge indicated (CAB 39), were all contested issues of evidence for the jury to consider "in combination" (CAB 34, 35, 39). Indeed, depending on the jury's assessment of the evidence "in combination", it would have been open to it to find that the other two potential perpetrators had greater periods of opportunity than the accepted windows (at RS [30]-[31]). For example, the finding recorded by the CCA (at [140]) that the "applicant could not recall MW going into the deceased's bedroom before or after going to KFC" does not exclude the possibility that MW did go into TM's bedroom at some point after returning from KFC.

6 Ultimately, the respondent's submissions overlook the fact that the jury's assessment of these contested matters of evidence would inevitably have been influenced by the tendency evidence which the appellant contends was improperly admitted. That is the effect of the trial judge telling the jury to consider the evidence "in combination" and also (at CAB 45-46) that the "specific purpose" of the tendency evidence was that, if accepted, "then you may use the fact of that tendency in addition to the evidence of the events of 20 April in determining whether you are satisfied beyond reasonable doubt that the accused inflicted the fatal injuries on 20 April" (CAB 47-48).

7 Secondly, the articulation of the "specific purpose" of the tendency evidence in the trial judge's summing up gainsays the respondent's submission (at RS [34]) that the tendency evidence was also adduced for the purposes of "demonstrating the nature of the relationship that existed between the appellant and the victim at the time of her

death" and "to rebut the possibility that the injuries to TM were occasioned accidentally". Ultimately, the Crown did not dispute the proposition put in her Honour's summing up at CAB 47-48 (as quoted above). And the probative value of the tendency evidence in this case cannot be assessed on the basis of another purpose which did not in substance arise and did not engage tendency reasoning, consistently with the majority's statement in *Hughes* at [20].

8 Thirdly, the respondent (at RS [35]) contends that the intermediate appellate authorities referred to in the appellant's submissions do not apply to require "close similarity" because in those cases "the identity of the perpetrator was at large". This is not a relevant basis to distinguish the cases. As Edelman J, with respect, correctly observed during the hearing of the special leave application (*TL v The Queen* [2022] HCATrans 69) in this matter:

> …why does the number of people matter? I mean, if there is a situation where there is only two people that could possibly have committed it, and yet both of them have extremely strong tendencies, then that would presumably be a much weaker tendency case than one where there were a 100 people, of which 99 had very little prospect or tendency to have committed the offence.

9 Indeed, Edelman J's observation highlights that the danger of admitting and using tendency evidence for identifying an offender is potentially greater in the circumstances of this case where the pool of perpetrators comprised only three persons in a familial setting and where the asserted tendency was so generalised that it could have plausibly existed amongst the other potential perpetrators. These circumstances give rise to the precise risks identified by the majority in *Hughes* at [17] that "the jury may underestimate the number of persons who share the tendency to have that state of mind or to act in that way" and, therefore, "the tendency evidence may be given disproportionate weight."

10 These risks do not depend on whether the identification of an offender is "at large" or confined to a defined pool of persons. The risks arise simply as a result of the use of tendency reasoning to prove identity in circumstances where the tendencies of other people are unknown or uncertain – as it was in this case – and where the asserted tendency is not specific or distinctive enough to clearly separate a particular person as the offender to a logically significant degree. In effect, the distinction the respondent seeks to draw at RS [37] along with the submission at RS [39] would give

tendency reasoning no real work to do whenever the Crown has a strong circumstantial case involving other evidence that was relevant to identity.

11 Fourthly, at RS [41], the respondent contends that "it is neither necessary nor desirable to attempt to lay down a universal rule". This argument does not address the submission advanced at AS [21] which sought to highlight the growing divergence in principle and approach to the assessment of the significant probative value of tendency evidence adduced to prove the identity of an offender. Moreover, the respondent's submission (insofar as it suggests that this Court should not state a clear principle but rather defer to the "infinite variety of circumstances") discounts the important function of this Court as the apex court in the Australian judicial hierarchy. As Dawson J said in *Morris v the Queen* (1987) 163 CLR 454 at 475, this Court has a duty "to develop and clarify the law and to maintain procedural regularity in the courts below." (See also *R v Bauer* (2018) 266 CLR 56 at [47]).

12 Sixthly, the effect of the respondent's submissions at RS [51] is that the "unique circumstances" of this case should mean that the tendency evidence did not need to exhibit close similarity, and that it was enough that "the charged offence and the incidents the subject of the tendency evidence shared several similarities". At RS [52], the respondent then contends that there was close similarity merely because the "appellant had previously harmed the same person." This Court should reject these submissions, which would have the consequence that where tendency evidence is adduced to prove the identity of an offender, that evidence could have significant probative value merely if it involves conduct towards the same person. That is not "close similarity" in the sense used by the majority in *Hughes* at [39], and it ignores the dangers referred to at [17] of the majority judgment. Moreover, several of the cases referred to at AS [21] demonstrate that the CCA's holding in this case is not being treated as limited to the "unique circumstances" of the case.

13 Finally, as to the respondent's submissions concerning the application of the proviso to s 6(1) of the *Criminal Appeal Act 1912* (NSW), the missing but critical proposition is that the appellate court must independently be satisfied that "the accused was proved beyond reasonable doubt to be *guilty of the offence on which the jury returned its verdict of guilty*" (*Weiss v The Queen* (2005) 224 CLR 300 at [41], emphasis added). In circumstances where the respondent accepts that no reliance can be placed

on the verdict of guilty because of the risk that the jury considered the improperly admitted evidence, and where that evidence was deployed to prove the mental element of the charged offence of murder, this Court should find that the proviso cannot apply. Even if the other evidence in this case could establish that the appellant inflicted the trauma, the absence of the tendency evidence gives rise to a real possibility that the jury could find the mental element for murder not proved beyond reasonable doubt. This is particularly where manslaughter was left open (CAB 54) and where, by day 4 of the summing up and jury deliberation, the trial judge decided to "give a Black direction" and "repeat again" the "distinction between murder and manslaughter" following requests for clarification from the jury (CAB 77).

14 In any event, the improper admission of the prejudicial tendency evidence in this case falls into the category of errors that "are so fundamental, or involve such a departure from the essential requirements of a fair trial that they exclude the operation of the proviso, irrespective of the strength of the prosecution case" (*AK v Western Australia* (2008) 232 CLR 438 at [23]). The imprecision of the pleaded tendency and the lack of significant probative value in the tendency evidence combined with its considerable prejudicial effect deprived the appellant of a fair trial on the "critical issue" (CAB 33). In those circumstances, "it is neither necessary nor appropriate to adjudge the strength of the Crown case in any substantive way" (*La Rocca v The Queen* [2021] NSWCCA 116 at [145]).

Dated: 20 July 2022

James Glissan QC
H B Higgins Chambers
T: (02) 9223 3655
E: glissan@glissan.com

Thomas Liu
7 Wentworth Selborne
T: (02) 8224 3054
E: tliu@7thfloor.com.au