



## HIGH COURT OF AUSTRALIA

3 November 2021

### HAMILTON (A PSEUDONYM) v THE QUEEN [2021] HCA 33

Today, the High Court dismissed an appeal from a judgment of the Court of Criminal Appeal of the Supreme Court of New South Wales. The appellant was convicted of ten counts of aggravated indecent assault contrary to s 61M(2) of the *Crimes Act 1900* (NSW), which were alleged to have been committed on separate occasions against three of his five children. The appeal to this Court concerned whether the trial of the appellant miscarried because the trial judge did not give the jury an "anti-tendency direction", namely, that the jury must not reason, from a finding that the appellant was guilty of one charged offence, to conclude that he was guilty in respect of other charged offences because he was the kind of person who engaged in that kind of misconduct.

At trial, the defence had not sought to have the counts tried separately. Rather, the defence embraced the opportunity to have all ten counts tried together as part of a strategy of inviting the jury to consider the evidence of all the complainants on all counts and, from a consideration of the totality of the evidence, to conclude that the children fabricated their allegations against him at the urging of their mother, the appellant's former wife. Defence counsel had not sought an anti-tendency direction. Defence counsel did, however, secure a direction from the trial judge that the jury could not convict the appellant on any count unless they were satisfied beyond a reasonable doubt that the evidence of each child was honest and reliable in relation to each of the counts concerning that child (a "*Murray* direction"). The trial judge also relevantly directed the jury that they were required to give separate consideration to each count.

The majority of the High Court held that, on the issues tendered by the parties to the jury in this case, an anti-tendency direction was not necessary to ensure that the jury did not reason to guilt by reliance on impermissible tendency reasoning. The issue of credibility as between the appellant on the one hand, and each of the complainants and their mother on the other hand, was overwhelmingly likely to be decisive of the appellant's guilt on any count. Confronted with that stark contest of credibility, and in circumstances where the jury had been instructed to consider each count separately and had been given a *Murray* direction, the jury would have no occasion to resort to tendency reasoning. The jury's satisfaction that each complainant was honest and reliable would lead directly to guilty verdicts. The circumstance that the Crown was scrupulous to put its case to the jury with the evidence of each complainant, and the arguments in favour of accepting that evidence as honest and reliable, summarised separately as to each complainant and as to each count, made the risk of the jury engaging in tendency reasoning even more remote. That view was confirmed by the failure of the defence counsel to seek an anti-tendency direction. Counsel's decision can be seen to have been a deliberate decision based on the circumstance that he did not consider that such a direction was necessary to ensure a fair trial of the appellant. The majority held that the Court of Criminal Appeal was correct in concluding that there was no miscarriage of justice at trial.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*