HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. 6 of 2020

BETWEEN: CHARLES WILLIAM DAVIDSON
Applicant

and

10 THE QUEEN
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

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

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Part II: Issues presented by the application

2. The application presents the following issues for consideration:

i) What threshold or standard for admissibility was utilised by the Court of Appeal majority (McMurdo JA; Gotterson JA agreeing), in determining whether the evidence adduced in relation to each count was admissible in proof of the counts on the indictment relating to different complainants?

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ii) Did the Court of Appeal majority err in concluding that no miscarriage of justice resulted from the joinder of each of the counts on the indictment?

Part III: Notice pursuant to Section 78B *Judiciary Act 1903*

3. It is submitted that there is no requirement in this case for the giving of notice in accordance with Section 78B *Judiciary Act 1903*.

Part IV: Material Facts

4. The prosecution proceeded on a twenty-one count indictment alleging eighteen counts of sexual assault and three counts of rape. The charges related to ten adult female complainants.[1] The applicant was convicted after a trial of each of the eighteen counts of sexual assault and one of the counts of rape (count 15). The jury were unable to reach a unanimous verdict on the remaining two counts of rape (counts 16 and 17).[2]

5. The matters referred to at paragraph 7 of the applicant's submissions are accepted.

Part V: Statement of respondent's argument

A) Overview of the respondent's argument

6. It is accepted that in Queensland the admissibility of similar fact evidence is to be determined by the application of the common law.[3]

7. None of the members of the Court of Appeal approached the statements of this Court in *R v Bauer* (2018) 266 CLR 56 as having changed the standard for admissibility of similar fact evidence at common law, or as being a complete statement of the position at common law.

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[1] The "Background" summary of Boddice J in *R v Davidson* [2019] QCA 120 at [33] is incorrect to the extent that it refers to nine complainants, whereas there were ten. Further eight (not seven) of the complainants were alleged to have been offended against in Algester. See CAB at page 213. See also the indictment charges reproduced from CAB at page 6.

[2] *R v Davidson* [2019] QCA 120 at [29]: CAB at page 212.

[3] With the exception of 132A *Evidence Act 1977 (Qld)*.

8. The reasons of McMurdo JA, with whom Gotterson JA agreed, recognised that the degree of probative force required for the admission of such evidence was as previously stated by this Court in decisions involving the application of common law principles.

9. The divergence between the conclusion of the Court of Appeal majority and Boddice J in dissent is attributable to Boddice J having placed too great an emphasis on the specific act the subject of each count and having incorrectly characterised the underlying similarities between the circumstances of the offences as general in nature.

10. The Court of Appeal majority did not err in concluding that no miscarriage of justice arose from the joinder of each of the counts.

B) The applicant's ultimate position

11. The applicant contends that the Court of Appeal majority erred in concluding that no miscarriage of justice arose from the joinder of the three counts of rape (being counts 15, 16 and 17), with the eighteen counts of sexual assault. The parameters of this contention are expanded upon below.

i) The applicant's complaint is about the joinder of charges relating to different complainants

12. The count of rape of which the applicant was convicted (count 15), related to the complainant EB. Counts 6, 13 and 14, of which the jury convicted the applicant, were counts of sexual assault which also related to the complainant EB.

13. The two counts of rape for which the jury did not reach a verdict (counts 16 and 17), related to the complainant HL[4]. Counts 18, 19 and 20, of which the jury convicted the applicant, were counts of sexual assault which also related to the complainant HL.

[4] *R v Davidson* [2019] QCA 120 at [44]: CAB at page 214.

14. The reasons of McMurdo JA[5] articulated, correctly, that the considerations relevant to the admissibility of the evidence of the counts relating to the complainant EB in relation to one another, and the counts relating to the complainant HL in relation to one another were different to the potential basis for admissibility of the evidence of each of the complainants in a consideration of the counts for offending alleged to have been committed against a different complainant.

15. The reasons of Boddice J in dissent do not identify his Honour to have concluded that each of the counts of rape (counts 15, 16 and 17) were not able to be properly joined with counts relating to the same complainant.[6] The focus of his Honour's reasons was the use of the evidence of offences as similar fact evidence for counts relating to different complainants.

16. The applicant's submissions do not raise any express criticism of this aspect of the reasoning of the members of the Court of Appeal. Therefore, the applicant's complaint as understood, relates only to the finding of the Court of Appeal majority that the evidence of each of the counts of rape (counts 15, 16 and 17) was admissible in a consideration of the counts of sexual assault alleged to have been committed against a *different* complainant to the complainant in each count of rape, and conversely that evidence of the sexual assaults committed against a *different* complainant was admissible in a consideration of each count of rape.

ii) *Factually speaking, the applicant's complaint arises only in relation to the joinder of counts where some degree of penetration is alleged*

17. Before this Court the applicant only contends that the three counts of rape were improperly joined with the other counts.[7] It is not contended that the eighteen counts of sexual assault were improperly joined with one another.

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[5] *R v Davidson* [2019] QCA 120 at [12] and [13]: CAB at page 208-209.
[6] *R v Davidson* [2019] QCA 120 at [233]-[235]: CAB at page 233-234.
[7] To the extent that the applicant's submissions may indicate that the joinder of the three rape counts was the only matter previously litigated (see for example paragraph 8 and 15 of the applicant's submissions), that is not consistent with the record. The position pre-trial is outlined in *R v Davidson* [2019] QCA 120 at [229]: CAB at page 243. In particular, on the applicant's submissions pre-trial, the charges of sexual assault would proceed across (at least) three separate trials. See also the Applicant's submissions filed on the pre-trial application, reproduced in the Applicant's book of further material at page 174, and the transcript of the pre-trial hearing of 29 January 2018 reproduced in the Applicant's book of further material at page 216. Ground 2 of the appeal against conviction was that the learned judge conducting the pre-trial hearing had erred in refusing the application for separate trials. See *R v Davidson* [2019] QCA 120 at [10] and [31]: CAB at pages 208 and 212.

18. The eighteen counts of sexual assault related to all ten complainants and span each of the occasions of offending that the jury were required to consider. The conduct the subject of a number of the counts of sexual assault included acts of touching to or in the area of the vagina, absent penetration, namely:
    - "*touching the outer lips of [the] genitals*" (count 1, complainant MQ)[8];
    - "*touching...the outer labia*" (count 4, complainant FE)[9];
    - "*touching [the] genitals, near the vagina area*" (count 10, complainant KA)[10];
    - "*touching near [the] vagina, along [the] genital area*" (count 13, complainant EB)[11]; and
    - "*touching near the vagina*" (counts 18 and 19, complainant HL)[12].

19. Each of the counts of rape occurred on the same occasion as offending in relation to the same complainant which the applicant accepts was cross-admissible in relation to all other counts on the indictment. Each of the counts of rape related to an allegation of digital penetration of the vagina.[13]

iii) *The applicant's position before this Court is a middle-ground between the conclusions reached by the Court of Appeal majority and those of Boddice J in dissent*

20. While Boddice J concluded that evidence of the counts of rape and evidence of the counts of sexual assault was not cross-admissible, it is submitted that observation does not accurately reflect the overall position reached by Boddice J on the issue of joinder in the present case.

21. His Honour's approach, process of reasoning and conclusions clearly delineated between the counts of sexual assault particularised as involving touching of the vaginal, groin, pubic or buttock areas, and the counts of sexual assault particularised as involving touching or massaging of the breast and nipple areas. This was consistent with his Honour's articulation of the defence position pre-

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[8] *R v Davidson* [2019] QCA 120 at [33]: CAB at page 213.
[9] *R v Davidson* [2019] QCA 120 at [36]: CAB at page 213.
[10] *R v Davidson* [2019] QCA 120 at [40]: CAB at page 213-214.
[11] *R v Davidson* [2019] QCA 120 at [43]: CAB at page 214.
[12] *R v Davidson* [2019] QCA 120 at [45]: CAB at page 214.
[13] *R v Davidson* [2019] QCA 120 at [43] and [44]: CAB at page 214.

trial,[14] which appeared to provide the framework for his Honour's reasons which followed.

22. His Honour firstly observed[15] as concerns the counts of sexual assault relating to touching or massaging of the breast and nipple areas that there was "*an obvious and striking similarly in the acts undertaken by [the applicant] in respect of each of the complainants*". His Honour then went on to conclude[16] that as concerned those counts, the evidence of each was highly probative of the issues to be decided at trial. His Honour then[17] separately considering the counts which related to touching of the vaginal, groin, pubic and buttock areas, expressed that a similar conclusion was open in relation to that group of offending. A reading of his Honour's reasons suggests this compartmentalisation of the offending was purposeful, particularly given the ease with which the offences of sexual assault could otherwise have been addressed, altogether.[18]

23. Relevantly, his Honour did not express any conclusion that the evidence of the counts in each group of sexual assault offences, as his Honour had approached the offences, was of probative value (and therefore admissible) as concerns the counts in the other group.

24. Therefore, while the applicant relies upon the decision of Boddice J as having correctly applied the common law, such application did not result in the outcome the applicant contends before this Court is correct. That is, the applicant's position is a middle-ground between the conclusion reached by the Court of Appeal majority and that expressed in the reasons of Boddice J in dissent.

C) <u>The test applied by the members of the Court of Appeal</u>

25. The applicant contends that the issue which arises for determination on this appeal is whether, in relying upon decisions under Uniform Evidence legislation, the Court

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[14] *R v Davidson* [2019] QCA 120 at [229]: CAB at page 243.
[15] *R v Davidson* [2019] QCA 120 at [230]: CAB at page 243.
[16] *R v Davidson* [2019] QCA 120 at [231]: CAB at page 243.
[17] *R v Davidson* [2019] QCA 120 at [232]: CAB at page 243.
[18] See also *R v Davidson* [2019] QCA 120 at [235] where again his Honour refers to the differing nature of one of the two groups of sexual assault offences, as opposed to the sexual assault offences collectively: CAB at page 244.

of Appeal majority lowered the test at common law for cross-admissibility of the evidence of the rape counts, with the other counts on the indictment.[19]

i) *The reference by the Court of Appeal to decisions considering Uniform Evidence legislation*

26. The judgment of McMurdo JA quoted[20] a passage of the decision of this Court in *R v Bauer* (2018) 266 CLR 56 at [58].[21] Of note, the judgment of Boddice J[22] in dissent also made reference to the same passage from *R v Bauer* when articulating the principles for admissibility of similar fact evidence.

27. The passage in *R v Bauer* at [58] did not constitute part of the ratio in *R v Bauer*, which unlike the case presently under consideration, was a single complainant case. However, the statements by the Court in *R v Bauer* at [58] were directed toward clarifying the correct understanding of aspects of the majority judgment in *R v Hughes* (2017) 263 CLR 338[23] as related to a case involving multiple complainants.

28. The effect of the cited passage in *R v Bauer* at [58] is as follows -

- Ordinarily, the mere fact that an accused has committed an offence against one complainant is not significantly probative of the accused having committed an offence against another complainant; and
- Consistent with the logic of probability reasoning, for the evidence of offending against one complainant to be significantly probative (in a consideration) of the offending alleged against another complainant, there must ordinarily be some feature of or about the offending which links the two together. Where there is some such common feature of or about the offending, it may demonstrate a tendency on the part of the accused to act in a particular way, the proof of which increases the likelihood that the account of the offence under consideration is true.

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[19] Applicant's submissions at paragraphs 2 and 17.
[20] *R v Davidson* [2019] QCA 120 at [13]: CAB at page 209.
[21] Reference was also made to *R v Bauer* (2018) 266 CLR 56 at [51] in a footnote to paragraph [12]: CAB at page 209. However, no criticism is made by the applicant of this part of the reasoning of the majority, as related to the rationale for concluding that evidence of counts committed against the one complainant may be probative of the occurrence of other counts relating to the same complainant.
[22] *R v Davidson* [2019] QCA 120 at [226]: CAB at page 242.
[23] At [57]-[60] per Kiefel CJ, Bell, Keane and Edelman JJ.

29. The judgment of McMurdo JA[24] also referred in a footnote to passages of the decision of this Court in *McPhillamy v The Queen* (2018) 361 ALR 13.[25] The referenced passages observe that it will usually be necessary to identify some feature of the offending against each of the different individuals which serves to link the two together, and for such link to be sufficient for the evidence to meet the required threshold of probative value in the particular case.

30. It is submitted that no error is evidenced merely by virtue of the members of the Court of Appeal having referred to the statement of this Court in *R v Bauer* (at [58]), and Queensland being a jurisdiction where the common law continues to apply in a consideration of the admissibility of such evidence.

31. The footnote to the statement of this Court in *R v Bauer* at [58][26] cites other decisions of this Court[27] involving the application of common law principles. Earlier within the judgment[28], the Court identified that a decision[29] determined with reference to common law principles may still be of relevance when considering whether evidence is of "*significant probative value*" within the meaning of the *Evidence Act 2008 (Vic)*, notwithstanding the "*less demanding criterion*" under the Act, than at common law.

32. Conversely, it has been observed by the Queensland Court of Appeal that, notwithstanding that the threshold for admissibility of such evidence at common law is higher[30], statements of this Court in *R v Bauer* and other cases involving a consideration of the legislative provisions which exist in other Australian jurisdictions relating to the admission of tendency or coincidence evidence may be considered "*illustrative*"[31] or "*useful in illuminating the applicable logic*"[32] of how evidence may be probative in a particular case. It is submitted that the process of "*probability reasoning*", and related thereto an assessment of "*objective*

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[24] *R v Davidson* [2019] QCA 120 at [13]: CAB at page 209.
[25] At [31] and [33]
[26] *R v Bauer* (2018) 266 CLR 56 at [58], footnote 62.
[27] Including *HML v The Queen* (2008) 235 CLR 334 and *BBH v The Queen* (2012) 245 CLR 499, the latter being an appeal from the Queensland Court of Appeal.
[28] *R v Bauer* (2018) 266 CLR 56 at [52].
[29] Specifically, *HML v The Queen* (2008) 235 CLR 334.
[30] See for example *R v McNeish* [2019] QR 355 at [38] per Sofronoff P and Henry J and at [79] per McMurdo JA.
[31] *R v McNeish* [2019] 2 QR 355 at [79] per McMurdo JA.
[32] *R v McNeish* [2019] 2 QR 355 at [42] per Sofronoff P and McMurdo JA.

improbability"[33], is of potential relevance to the determination of the probative value of evidence at common law, whether such evidence may be labelled admissible as tendency, coincidence, or similar fact evidence, or pursuant to more than one such category[34].

33. The reasons of McMurdo JA[35] in the Court below stated that for evidence to be admissible on such a basis, "*there had to be such a link between the facts and circumstances of one offence and the others that the evidence had a degree of probative force which warranted its admission, notwithstanding its prejudicial effect*". It is submitted that observation is uncontroversial. Consistent with that, Boddice J also referred to "*the need for a common linkage*" and such need having been "*recently reaffirmed*" by the High Court in *R v Bauer*.[36]

34. The term "link" is not itself derived from the *Evidence Act 2008* (Vic). The term may be seen as but another way to express the requirement for the evidence to have (the required) "nexus"[37], "connection" or "bearing". The nature of the link or nexus will depend not only upon the circumstances of each case, but the purpose for which the evidence is sought to be used in the context of the issues at trial.

35. None of the members of the Court of Appeal approached the statements of this Court in *R v Bauer* as having changed the standard for admissibility of the evidence at common law, or as being a complete statement of the position at common law.

ii) *The reference by the Court of Appeal majority to common law principles*

36. The applicant's assertion that McMurdo JA *"relied on R v Bauer"*,[38] while correct to the extent that his Honour did refer to the decision, as outlined above, does not provide a complete picture of his Honour's process of reasoning.

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[33] See for example the discussion in *Pfennig v The Queen* (1995) 182 CLR 461 at 481-2 and 483.
[34] Such categories of propensity evidence as may be identified are neither exhaustive nor necessarily mutually exclusive: *Pfennig v The Queen* (1995) 182 CLR 461 at 464-465.
[35] *R v Davidson* [2019] QCA 120 at [14]: CAB at page 209.
[36] *R v Davidson* [2019] QCA 120 at [226]: CAB at page 242.
[37] See for example *Hoch v The Queen* (1988) 165 CLR 292 at 301 and *Phillips v The Queen* (2006) 225 CLR 303 at 320-321.
[38] See the applicant's submissions at paragraph 26.

37. It is submitted that to the extent the members of the Court of Appeal – both the majority, and Boddice J in dissent - referred to the case of *R v Bauer*, and to a lesser extent *McPhillamy v The Queen*, it was to acknowledge the recent general statements of principle of this Court regarding when evidence of sexual offending committed against one complainant may be probative in a consideration of an allegation of sexual offending against another complainant. That is distinct from such statements prescribing the degree to which such evidence need be probative, or what standard or threshold must be met before such evidence would be sufficiently probative at common law to be admitted in this, or a particular case.

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38. It is apparent on the face of the judgment of McMurdo JA that his Honour was alive to this distinction and mindful of the threshold for admissibility at common law, as applied in Queensland. After referring[39] to the need for the link between the facts and circumstances of each offence to have "*a degree of probative force which warranted its admission, notwithstanding its prejudicial effect*", his Honour immediately proceeded to speak to what "*that degree of probative force*" required was. His Honour identified it to be that as stated by this Court in *Phillips v The Queen* (2006) 225 CLR 303[40].

20 39. The passage from *Phillips v The Queen* (2006) 225 CLR 303[41] extracted by his Honour within his reasons, expressly stated the following legal propositions –

- The admission of similar fact evidence is exceptional;
- To be admitted the evidence requires a strong degree of probative force. It is not enough that the evidence merely have some probative value of the requisite kind;
- To be admitted the evidence must have a really material bearing on the issues to be decided. It is necessary to find a sufficient nexus between the primary evidence on a particular charge and the similar fact evidence. The evidence sought to be admitted as similar fact evidence must have some specific

30 connection with or relation to the issues for decision in the subject case; and

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[39] *R v Davidson* [2019] QCA 120 at [14]: CAB at page 209-210.
[40] At 320-321.
[41] At 320-321.

- To be admitted the probative value of the evidence must clearly transcend its prejudicial effect. The probative force must be sufficiently great to make it just to admit the evidence, notwithstanding its prejudicial effect to the accused.

40. This passage from *Phillips v The Queen* itself referred to several other decisions of this Court where the admissibility of the evidence in question was determined with reference to common law principles.[42]

41. Having informed himself as to the applicable threshold for admissibility of the evidence at law, consistent with the principles enunciated his Honour turned to consider the way in which, as per the directions given to the jury, the prosecution had sought to utilise the similar fact evidence with reference to the issues at trial.[43] The passage of the learned trial judge's summing up set out within his Honour's reasons also articulated the similarities or common features said to arise on the evidence of each complainant which were relied upon by the prosecution. His Honour concluded that the common features of the offending as related to each complainant, demonstrated "*a sufficient link*" to make the evidence of one offence "*strongly probative*" in the proof of whether the conduct alleged on another count occurred. In so concluding, his Honour referred to the offences of rape being more serious than the offences of sexual assault, (and implicitly, the prejudice that may thereby arise), but nonetheless concluded the evidence satisfied the standard required for admission.[44]

42. Contrary to the respondent's submissions as to what would be understood on the face of the judgment to be his Honour's line of reasoning,[45] the applicant contends that his Honour's conclusion that "*the evidence had the degree of force described in Phillips v The Queen…was premised on the finding of a "link" between the offending*".[46] The required enquiry, as stated at paragraph 38 of the applicant's submissions was "*…not merely whether there was a link or common feature, but*

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[42] *Markby v The Queen* (1978) 140 CLR 107; *Perry v The Queen* (1982) 150 CLR 58; *Sutton v The Queen* (1984) 152 CLR 528; *Hoch v The Queen* (1988) 165 CLR 292; *Harriman v The Queen* (1989) 167 CLR 590; *Pfennig v the Queen* (1995) 182 CLR 461. The authorities cited by McMurdo JA at *R v* Davidson [2019] QCA 120 at [11] are also cases which were determined with reference to common law principles.

[43] *R v Davidson* [2019] QCA 120 at [15]; CAB at page 210 - referring to summing of the learned trial judge from CAB at page 18 lines 17-39.

[44] *R v Davidson* [2019] QCA 210 at [16] and [17]: CAB at page 210.

[45] See also *R v WBN* [2020] QCA 203 at [110] per Philippides JA referred to at paragraph 31 of the applicant's submissions.

[46] Applicant's submissions at paragraph 31.

whether the evidence of one alleged offence is sufficiently probative of the accused's guilt of that other offence". The applicant's submission must therefore be understood to be that his Honour did not in truth consider and apply the principles in *Phillips v The Queen*, but proceeded on the basis that the finding of a link or common features was enough, without further consideration of the degree of probative value of such evidence.

43. It is submitted that such a contention is without merit. It fails to consider his Honour's course of reasoning[47], and in particular that such analysis did focus upon whether the evidence of each alleged offence was sufficiently probative of the commission of each other alleged offence. His Honour's reasoning was in fact consistent with that which the applicant attributes[48] as demonstrating that Boddice J (in dissent) "*ultimately applied the correct common law principles*".

44. It is submitted that the applicant's submissions misapprehend the significance of McMurdo JA's identification of there being a "sufficient" link between the offending. That expression in context is directed toward describing the link to be sufficient for the evidence to satisfy the degree of probative force required for admission, whereas, if there were less of a link between the offending, it may not have been open to conclude the evidence held the required degree of probative force.[49] The expression would not be understood to suggest that his Honour proceeded on the basis that the mere identification of a link between the offending was sufficient for admissibility.

45. The Court of Appeal majority did not erroneously adopt a less demanding test for admission of the evidence based on statements of this Court in *R v Bauer*.

iii) *The judgment of Boddice J, in dissent*

46. It is submitted that reliance on the dissenting judgment of Boddice J is of limited assistance to the applicant, given the applicant's position before this Court that the

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[47] As outlined above at paragraphs 38 to 42.
[48] Applicant's submissions at paragraph 57 and 58.
[49] *R v Davidson* [2019] QCA 210 at [16]: CAB at page 210.

correct conclusion from the application of accepted legal principles in this case is itself different from that which was reached by his Honour.[50]

47. The applicant nonetheless submits that Boddice J was correct to observe that there were "*critical*"[51] and "*obvious and significant differences*" which "*undermined the formulation of an underlying pattern of conduct*"[52] in the present case. The judgment of Boddice J did not expressly articulate what the obvious and significant differences were as between the counts of rape, or as between the counts of rape and the counts of sexual assault involving other complainants.

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48. The applicant submits that "*the obvious and significant differences*" between the allegations of rape and the other charges included that the rape counts involved penetration, and also what the defence case "may be" in relation to the different types of offences – for example, the applicant suggests, denial, consent or accident.[53]

49. There are several difficulties with the submission that the obvious and significant differences to which Boddice J was referring included what the defence case may be as concerns the different types of offences.

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50. Firstly, what the defence case may be in relation to a number of counts relating to different complainants would not properly be categorised as a "difference" (or for that matter a similarity), going to whether an underlying pattern of conduct could be identified as concerned the allegations, (although such may be relevant to a consideration of the probative value or cogency of the evidence in a determination of the issues in the particular case).

51. Secondly, the applicant's contention that the nature of the possible defence case was here of significance cannot readily be reconciled with the applicant's

30 acceptance that the other counts on the indictment were properly joined other than where some degree of penetration was alleged. The legal elements of an offence of sexual assault and an offence of rape do not otherwise generally give rise to

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[50] See paragraphs 20 to 24 above.
[51] Applicant's submissions at paragraph 21. This term is not utilised by Boddice J.
[52] Applicant's submissions at paragraph 48, citing *R v Davidson* [2019] QCA 120 at [233]; CAB at page 243.
[53] Applicant's submissions at paragraph 61.

different issues for determination, beyond whether penetration is established to have occurred.

52. Thirdly, the defence case as was positively before the jury was known. Whether the joinder resulted in a miscarriage of justice fell to be considered in the context of the evidence at trial.

53. As concerns each of the rape counts, the applicant denied the conduct occurring.[54] In considering a ground of appeal that the verdict was unreasonable and could not be supported having regard to the evidence, Boddice J[55] approached the task for the jury as one primarily involving a consideration of whether the conduct occurred, and related to that, whether the evidence of each complainant in respect of each act the subject of a count of the indictment, was sufficiently reliable and accurate to satisfy the jury beyond a reasonable doubt of the guilt of the applicant. Consistent with that view of the issues at trial, where his Honour found counts of sexual assault to have been permissibly joined, his Honour identified the probative value of that evidence to be that it went to whether the conduct in fact took place, and the improbability of similar lies being told by different complainants in respect of whom there was no evidence of prior connection.[56]

54. It is submitted therefore that of the obvious and significant differences suggested by the applicant[57] as being determinative of the position reached by Boddice J, the only factor that is consistent with his Honour's reasons is whether or not the offence involved an allegation of and required proof of penetration having occurred.

55. Both the content and structure of the reasons of Boddice J evidence a heavy focus on the mechanics or operative features constituting each count.[58] His Honour found that there was "*an obvious and striking similarity in the acts undertaken*" where the allegation was one of "*conduct constituting [sexual] assault by reason of touching or massaging the breast and nipple areas*". His Honour then stated that a similar

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[54] In relation to the complainant HL see *R v Davidson* [2019] QCA 120 at [146]-[154], in particular at [152]: CAB at page 230-231. See *R v Davidson* [2019] QCA 120 at [199]: CAB at page 238 in relation to the complainant EB.
[55] *R v Davidson* [2019] QCA 120 at [213] to [217]: CAB at page 240-241.
[56] *R v Davidson* [2019] QCA 120 at [231] and [232]: CAB at page 243. See also the applicant's submissions at paragraph 13.
[57] Applicant's submissions at paragraph 61.
[58] See in particular *R v Davidson* [2019] QCA 120 at [230] to [233]: CAB at page 243.

conclusion was open "*in relation to the counts of unlawful and indecent assault relying upon particulars of touching in the vaginal, groin, pubic and buttock areas*". His Honour then referred, without further extrapolation to the "*obvious and significant differences in the appellant's alleged conduct involving the rape[s]*".

56. It is submitted that the only differences to which his Honour may be understood to be referring would be differences in the mechanics of the offences of sexual assault, and, as concerns the rape counts, the occurrence of penetration. That view of his Honour's reasons is also consistent with his Honour's separate consideration of the similarities in the "*circumstances*" of the offending more broadly.[59]

57. His Honour's reasons were also otherwise silent as to what the significant differences were which led his Honour to conclude that the evidence of the rape of EB was not cross-admissible with the evidence of the rapes of HL. Nor do the applicant's submissions identify any specific circumstances in support of this conclusion. Of note, the issues which the jury were required to consider at trial were the same as concerns each of the three counts of rape.

D) <u>The conclusion of the majority was correct</u>

58. The divergence in the views of the Court of Appeal majority and Boddice J in dissent was not as the applicant contends the result of the majority having applied incorrect reasoning that was contrary to common law principles.[60]

59. It is submitted that the conclusion reached by Boddice J is attributable to two matters. Firstly, his Honour placed too great an emphasis on the differences in the mechanics of the acts constituting each of the offences.[61] Secondly his Honour incorrectly characterised the identified underlying similarities (beyond the mechanics of the acts) as "*general in nature*" and therefore insufficient to support the admission of the evidence, notwithstanding his Honour's acceptance that such

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[59] *R v Davidson* [2019] QCA 120 at [234]: CAB at page 244.
[60] For the reasons discussed above at paragraphs 38 to 45.
[61] See paragraphs 55 to 57, above.

similarities were otherwise "*cogent...to the improbability of the complaints being false*".[62]

60. Whilst Boddice J did conclude that the offences of sexual assault, when viewed within two distinct groups, were "strikingly similar" with the other offences within that designated group, striking similarity is not an essential pre-requisite for the admission of similar fact evidence in every case.[63]

61. Further, it is not necessary that the particular acts that constitute the offences sought to be led in proof of one another be of the same kind, for such evidence to be cogent and admissible. That observation is of particular significance in the present case where the distinction in fact between an offence of sexual assault particularised as an act of touching on the labia with the finger, and an offence of rape particularized as an act of penetration of the vagina by the finger, is on one view, but a matter of degree.

62. The underlying feature in the present case of each of the offences having been committed upon a female complainant attending the applicant for therapeutic massage services is not a matter that would properly be described as "general in nature". When considered with the additional similarities on which the prosecution relied[64], the present situation is readily distinguishable from that in *Phillips v The Queen* where the conduct, collectively, was determined to be no more than the unremarkable behaviours of a male teenager.[65] The majority were correct to conclude that the common features of the offending, committed in near identical circumstances meant that the evidence of each offence was strongly probative in the proof of another.

63. It is submitted that the fact that the applicant's alleged sexual offending against one massage client (complainant) may not have on that occasion progressed to touching of the vagina, or to penetration of the vagina did not materially affect the assessment of the improbability of similar lies being told by that complainant and others where the sexual touching may have progressed further. To focus on the

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[62] *R v Davidson* [2019] QCA 120 at [234]: CAB at page 244.
[63] *Pfennig v The Queen* (1995) 182 CLR 461 at 482.
[64] *R v Davidson* [2019] QCA 120 at [15]-[17] per McMurdo JA: CAB at page 10; *R v Davidson* [2019] QCA 120 at [234] per Boddice J: CAB at page 244.
[65] *Phillips v The Queen* (2006) 225 CLR 303 at [56].

suggested differences in the mechanics of the acts committed, as the applicant's argument requires, is to ignore that the probative force of the evidence is to be assessed in conjunction with the whole of the evidence.[66]

64. It is submitted that when viewed in context there was no reasonable view of the evidence consistent with innocence, and therefore requiring the exclusion of the evidence.[67]

65. The Court of Appeal majority did not err in concluding that no miscarriage of justice arose from the joinder of each of the counts.

E) The question of special leave

66. A grant of special leave is yet to be given. On 11 September 2020 Kiefel CJ and Nettle J referred the application for special leave, including the application for an extension of time in which to bring the application, to the Full Court.

67. The judgment of the Court of Appeal was delivered on 18 June 2019. The application for special leave to appeal was filed on 17 January 2020 – a day shy of six months out of time.

68. There is a legitimate public interest in finality of litigation and in parties being required to act in accordance with the time limitations prescribed by the Court in furtherance of that interest. In considering whether the interests of justice require an order be made dispensing with the prescribed time limits, this Court will have regard to the history of the proceedings, the nature of the litigation, the consequences for the parties should the application be refused, and the prospects of success on the proposed appeal (should special leave be granted).[68]

69. If the Court were to conclude, contrary to the submissions of the respondent, that the Court of Appeal erred in finding that no miscarriage of justice had been occasioned, it is accepted that it would be in the interest of justice for the Court to

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[66] *Pfennig v The Queen* (1995) 182 CLR 461 at 482-483.
[67] *Phillips v The Queen* (2006) 225 CLR 303 at 323-324 referring to *Pfennig v The Queen* (1995) 182 CLR 461.
[68] *Gallo v Dawson* (1990) 93 ALR 479 at 480.

make an order dispensing with the timeframe for filing of the application for special leave, and grant special leave to appeal. The making of either order is otherwise opposed.

Part VI: Notice of contention

67 No notice of contention has been filed.

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Part VII: Estimate of time required for the presentation of oral argument

68 The respondent estimates that 1-1.5 hours will be required for presentation of the respondent's oral argument.

Dated: 27 November 2020

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