IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M1 of 2018

BETWEEN:

THE QUEEN

Appellant

v

10

DENNIS BAUER (A PSEUDONYM) (No.2)

Respondent

APPELLANT'S SUBMISSIONS

Part I: Suitability for internet publication

1.1 The appellant certifies that this submission is in a form suitable for publication on the internet.

20

Part II: Statement of issues on appeal

2.1 This appeal raises the following issues for resolution:

(1) What is the meaning to be given to the phrase "willingness of the complainant to give further evidence" in section 381(1)(c) of the Criminal Procedure Act 2009 (Vic) in the context of a prosecutor seeking to tender the recording of evidence of a complainant given in the original trial in lieu of calling the complainant to give viva voce evidence at a re-trial? And, in such circumstances, is a prosecutor required to call evidence from a complainant where instructions given to a prosecutor are conveyed to a trial judge that the complainant has a "strong preference" not to give evidence at the re-trial and where such instructions are not put in issue (either by the trial judge or defence counsel)? **[see ground 1]**

30

(2) What is the correct approach to the admission of tendency evidence in a single complainant sexual offence case where the prosecution seeks to prove the relevant tendency from both the complainant <u>and</u> a source independent of the complainant?

John Cain
Solicitor for Public Prosecutions
565 Lonsdale Street
Melbourne Vic. 3000
DX 21 0290 Melbourne

Date: 2 February 2018
Telephone: 9603 7666
Direct: 9603 7845
Fax: 9603 7460
Ref: 1102771 / L Fluxman

Importantly, does the independent source also require some "special feature" before such evidence can attain "significant probative value" for purposes of section 97 of the Evidence Act 2008 (Vic)? **[see ground 2]**

(3) Is a trial judge required to sever a charge from a multi-count sexual offence indictment so as to avoid prejudice to an accused person (for example, a jury engaging in impermissible tendency reasoning) in circumstances where proof of the relevant charge flows from a source other than the complainant? **[see ground 3]**

10

(4) Is a trial judge required to exclude complaint evidence under either section 66 or 137 of the Evidence Act 2008 (Vic) in circumstances where representations are elicited from a complainant via a "guessing game" with a witness? **[see ground 4]**

Part III: Notice under section 78B of the Judiciary Act 1903 (Cth)

3.1 The appellant certifies that it does not consider that notice is required to be given under section 78B of the Judiciary Act 1903 (Cth) in respect of this appeal.

Part IV: Citation of reasons for judgment of both the primary and the intermediate court

20

4.1 The rulings and reasons for sentence of Judge Sexton (Victorian County Court) are cited as *DPP v Dennis Bauer (A Pseudonym) (No. 2)* [2016] VCC 1506. The unreported decision of the Victorian Court of Appeal is cited as *Dennis Bauer (A Pseudonym) v The Queen (No. 2)* [2017] VSCA 176.

CAB 101-126

CAB 138-193

Part V: Statement of the relevant facts

5.1 The respondent was charged on indictment B11594066.8 with 18 sexual offences against the complainant ("RC"). The respondent pleaded "not guilty".

CAB 1-8

30

5.2 A re-trial proceeded in the County Court before Judge Sexton (the respondent having successfully challenged on appeal the convictions recorded at his original trial).[1]

5.3 On 10 May 2016, the respondent was found guilty by jury verdict on all charges. On 11 October 2016, the respondent was sentenced to a total effective sentence of 9 years 7 months imprisonment with a non-parole period of 7 years imprisonment fixed.[2]

[1] See *Bauer (A Pseudonym) v R* (2015) 46 VR 382

5.4 The respondent appealed against his conviction on 4 grounds. On 30 June 2017 the Court of Appeal allowed the appeal on all grounds and ordered a second re-trial.[3] The appellant now challenges those orders in this appeal.

5.5 The circumstances of the relevant offending are set out at paragraphs [2]-[18] in the Reasons for Sentence of the primary court (County Court - Judge Sexton). An overview and summary of the facts is set out at paragraphs [6]-[22] in the Reasons for Judgment of the intermediate court (Victorian Court of Appeal – Priest, Kyrou & Kaye JJA). **CAB 103-107** **CAB 142-146**

10 5.6 A summary of the relevant circumstances for each respective charge is set out in the following paragraphs of the judgment of the Court of Appeal:

- charge 1 – between 1/1/1988 & 15/1/1989 – indecent assault [placed RC's hand on respondent's penis in lounge room] – see paragraph [7] **CAB 143**
- charge 2 – between 1/1/1990 & 31/12/1992 – indecent assault [placed RC's hand on respondent's penis in bath] – see paragraph [9] **CAB 143-144**
- charges 3 & 4 – between 16/1/1990 & 31/12/1992 – indecent assault [respondent rubbed RC's vagina and placed her hand on his penis in the family van] – see paragraph [10] **CAB 144**
- 20 charges 5 & 6 – between 1/1/1991 & 31/12/1992 – indecent assault & attempted sexual penetration of a child under 10 years [respondent touched RC's vagina and attempted to insert his penis into her vagina in the bedroom] – see paragraph [11] **CAB 144**
- charge 7 – between 1/1/1991 & 31/12/1992 – indecent assault [respondent made RC masturbate his penis until ejaculation in the bedroom] – see paragraph [12] **CAB 144**
- charge 8 – between 16/1/1992 & 15/1/1993 – indecent act with a child under 16 years [respondent rubbed RC's vagina in the bedroom] – see paragraph [13] **CAB 145**
- charge 9 – between 16/1/1992 & 15/1/1994 – indecent act with a child under 16 years [respondent rubbed RC's vagina outside her clothes on the tractor] – see paragraph [14] **CAB 145**
- 30 charges 10, 11, 12 & 13 – between 16/1/1992 & 15/1/1994 – sexual penetration of a child under 16 years [respondent inserted his finger into RC's vagina on 2 separate occasions; inserted his tongue into RC's vagina; and inserted his penis into RC's

---

[2] See *DPP v Dennis Bauer (A Pseudonym) (No. 2)* [2016] VCC 1506
[3] See *Bauer (A Pseudonym) (No. 2) v R* [2017] VSCA 176

mouth and ejaculated into her mouth; all incidents occurring in the work truck – see paragraph [15] **CAB 145**

- charges 14 & 15 – between 16/1/1991 & 15/1/1993 – indecent assault & sexual penetration of a child under 10 years [respondent licked RC's vagina and inserted his penis into RC's mouth in bedroom] – see paragraph [16] **CAB 145**
- charge 16 – between 16/1/1994 & 15/1/1995 – indecent act with a child under 16 years [respondent rubbed his penis between lips of RC's vagina and ejaculated on her stomach] – see paragraph [17] **CAB 145-145a**
- charge 17 – between 16/1/1996 & 15/1/1997 – sexual penetration of a child under the age of 16 years [respondent inserted his finger into RC's vagina in spare room] – see paragraph [18] **CAB 145a**
- charge 18 – between 15/12/1998 & 17/12/1998 – sexual penetration of a child under the age of 16 years [respondent touched RC's vagina over her clothing] – see paragraph [19]. **CAB 145a**

10

5.7 In brief compass, the prosecution case involved a course of sexual offending committed by the respondent against RC over a period of some 11 years (from 1988 to 1998). During this period RC was aged between 4 to 15 years and the respondent was aged between 42 to 53 years. RC was the foster child of the respondent.

20

5.8 The respondent made a "no comment" record of interview in respect of the allegations made by RC. At the re-trial, the respondent did not give evidence – however, the defence advanced before the jury was that the conduct did not occur.

Part VI: Statement of appellant's argument

Ground 1 – Use of complainant's evidence from original trial

30

6.1 Ground 1 of the appeal is framed as follows:

The Court of Appeal of the Supreme Court of Victoria erred in holding that the trial judge erred in permitting the previously recorded evidence of the complainant to be tendered as evidence at the re-trial.

6.2 In March 2013, RC gave evidence at the respondent's original trial (indictment involving 5 complainants including RC). At the re-trial, the prosecution gave the requisite notice that it intended to rely on a recording of RC's evidence from the original trial to be led as her evidence before the jury. Over objection, the trial judge ruled that the prosecution be

permitted to rely on the recording of RC's evidence – the relevant ruling is extracted at paragraph [30] of the Court's judgment.[4]

CAB 149-150

AFM 232-236

6.3 The recording of RC's evidence from the original trial was rendered admissible at the re-trial by virtue of section 379, Criminal Procedure Act 2009 (Vic).[5] Importantly, section 379 is subject to section 381 of the Act. The importance of these provisions is made clear by section 385(1) of the Act – that section provides that if a recording of the evidence of the complainant is admitted into evidence, the complainant cannot be cross-examined without leave of the court.

10

6.4 Section 381 sets out the governing test for the admission of a recording. It reads:

> (1) The court may admit a recording of the evidence of the complainant if it is in the interests of justice to do so, having regard to –
>
> (a) whether the complainant's recorded evidence is complete, including cross-examination and re-examination;
> (b) the effect of editing any inadmissible evidence from the recording;
> (c) the availability or willingness of the complainant to give further evidence;
> (d) whether the accused would be unfairly disadvantaged by the admission of the recording;
> (e) any other matter that the court considers relevant.
>
> (2) The court may admit the whole or any part of the contents of a recording and may direct that the recording be edited or altered to delete any part of it that is inadmissible.

20

6.5 In the Court below, the respondent advanced a number of arguments in support of a complaint that the trial judge erred in permitting the recorded evidence of RC to be tendered as evidence in the re-trial.[6] The Court below rejected all arguments except an argument as to the unwillingness of the complainant to give further evidence". Importantly, before doing so, the Court stated in its judgment that the cross-examination of RC at the original trial was "complete" and had been conducted with "conspicuous competence" – and that further, the respondent had not been "unfairly disadvantaged" by its admission.[7]

30

CAB 150-151

CAB 154-155

6.6 Pursuant to section 381(1)(c) of the Act, a trial judge must have regard to "*the availability or willingness of the complainant to give further evidence*" in determining

---

[4] See Ruling No. 1 – Trial Transcript, 30/3/2016, at 5-8

[5] Section 379 provides: Subject to section 381, a recording is admissible in evidence as if its contents were the direct testimony of the complainant – (a) in the proceeding; and (b) unless the relevant court otherwise orders, in – (i) any new trial of … the proceeding …

[6] See *Bauer (A Pseudonym) (No. 2) v R* [2017] VSCA 176, at [31]-[32]

[7] See *Bauer (A Pseudonym) (No. 2) v R* [2017] VSCA 176, at [39]

whether to admit a recording. The submission made before the trial judge was that the prosecutor had conferred with the complainant and that she had expressed a "strong preference" not to give evidence at the re-trial. Further, the prosecutor raised the possibility of calling evidence on the topic but that invitation was not taken up by either defence counsel or the trial judge.[8]

AFM 74-75

6.7 The Court below concluded that "a 'preference' not to give evidence is not unwillingness to do so".[9] In so concluding, the appellant submits that the Court has transposed the legal test and thus erred. The statutory language talks of a "willingness" of a complainant to give evidence and not of an "unwillingness" to do so. This statutory factor admits of a complainant who insists on giving evidence (thus very willing) at one end of spectrum to a complainant who is adamant that he/she does not wish to give evidence (thus not willing) at the other end of the spectrum. Here the complainant had expressed a "strong preference" not to give evidence (based on advice from her counsellors and others) and thus this lack of willingness to give evidence was a proper matter for consideration by the judge. Importantly, an entirely reasonable basis for the unwillingness had been proffered.

CAB 154-155

10

6.8 Further, the Court below held that the prosecutor's assertion as to the complainant's degree of willingness to give evidence was not sufficient to satisfy the statutory factor. In short, the Court stated that formal evidence was required – and that of course involves the calling of the complainant to give such evidence. Testing that proposition further, it is difficult to see how defence counsel could successfully cross-examine a complainant on her/his expressed preference not to give further evidence; and furthermore , it is inevitable that counsel would need to press a complainant as to the reasons for such a preference which potentially could cause distress to a complainant.

20

6.9 Importantly, the prosecutor stated he had conferenced the complainant and had conveyed his instructions to the trial judge – at no stage did defence counsel seek to challenge or even question those instructions. Both were senior counsel and extremely experienced in the conduct of criminal trials – and it cannot be contended that any real "unfairness" (or indeed miscarriage of justice) arose as a result of the procedure that was adopted in this matter. In short, the appellant submits that evidence is <u>not</u> required to be called on this statutory factor unless the matter is clearly put in issue – and here it was not.

30

[8] See Trial Transcript, 16/3/2016, at 24-25

[9] See *Bauer (A Pseudonym) (No. 2) v R* [2017] VSCA 176, at [39]

6.10 But there is a more fundamental objection. As the Court below correctly observed in its judgment, section 381 involves the exercise of a discretion.[10] The "willingness" of the complainant to give further evidence was not raised in legal argument before the trial judge, and yet the Court has impugned the exercise of a discretionary judgment on this basis. The primary argument pressed by defence counsel related to the quality of the cross-examination of the complainant at the original trial (for example, lack of direct puttage) – and such submissions were directed to the question of whether the accused would be "unfairly disadvantaged by the admission of the recording" under section 381(1)(d) of the Act.[11] In fact, the trial judge in her ruling described this submission as the "real question" to be determined.[12] A secondary argument also pressed by defence counsel involved a submission as to a change in the prosecution case and this was said to be relevant to the "any other matter" consideration under section 381(e) of the Act.[13]

CAB 148

AFM 76-81, 82, 83-105

10

AFM 233-234

AFM 106-110

6.11 The appellant submits that defence counsel did not take the relevant point for sound reasons – it would be hardly surprising that a complainant may be reluctant (or unwilling) to undergo further cross-examination in respect of a course of sexual abuse which spanned over 10 years (and particularly so where she was still undergoing counselling). Thus, the failure to take the point is to be properly viewed as a rational forensic decision made by experienced defence counsel.[14]

20

6.12 Finally, in light of the Court's observations as to the quality of the cross-examination conducted at the original trial [see paragraph 6.5 above], no substantial miscarriage of justice could be occasioned even if this ground was upheld.

Ground 2 – Tendency evidence in a single complainant sexual case

6.13 Ground 2 of the appeal is framed as follows:

The Court of Appeal of the Supreme Court of Victoria erred in holding that a substantial miscarriage of justice had been occasioned by the admission of tendency evidence at the re-trial.

30

6.14 The prosecution sought to rely upon tendency evidence at the re-trial. The amended tendency notice was framed in the form that the respondent had a tendency to act in a

[10] See *Bauer (A Pseudonym) (No. 2) v R* [2017] VSCA 176, at [28]
[11] See Trial Transcript, 16/3/2016, at 36-41, 54, 57-79
[12] See Ruling No. 1 – Trial Transcript, 30/3/2016, at 5-6
[13] See Trial Transcript, 16/3/2016, at 82-86
[14] See *De Jesus v The Queen* (1987) 61 ALJR 1; *Suresh v The Queen* (1998) 72 ALJR 769; *TKWJ v The Queen* (2002) 212 CLR 124; *Ali v The Queen* (2005) 79 ALJR 662; *Nudd v The Queen* (2006) ALJR 614; *Patel v The Queen* (2012) 247 CLR 531

particular way, namely *"to have a sexual interest in his foster daughter [RC] and a willingness to act on that sexual interest in respect of [RC]"*.[15] Framed in this way, the notice was in conventional form for a single complainant sexual offence case – the notice particularised 18 charged acts and 7 uncharged acts as constituting the relevant tendency. However, the notice was different in one important manner – the prosecution relied on both RC and TB (independent witness) to prove the relevant particularised acts.[16] The appellant rejects the complaint made by the respondent in the Court below as to defective form of the notice – it is noted that the Court did not address any of these criticisms.[17]

AFM 57-72

AFM 111-114; 116-129, 170-173, 213-225

CAB 180-181

10

6.15 The respondent objected to the admission of tendency evidence at his re-trial.[18] The trial judge refused to exclude the tendency evidence, ruling that that evidence from RC as to both charged and uncharged acts was admissible in respect of all indictment charges.[19] Further, the trial judge ruled that the evidence from TB in proof of charge 2 and another uncharged act was admissible as tendency evidence in respect of all other indictment charges.[20] The trial judge was asked to revisit her ruling in light of this Court's decision in *IMM v The Queen* (judgment delivered after the ruling), but after hearing submissions the trial judge affirmed the two previous rulings.[21]

AFM 50-56; 130-169, 173, 195-213, 225-231

AFM 237-253

AFM 254-260

AFM 333-344; 261-265; 266-330; 332

6.16 The Court below referred to this Court's recent decision in *Hughes v The Queen* and then

20

sought to summarise the relevant principles in respect of tendency evidence.[22] However, as the Court noted, the tendency in this case flowed principally from a single source, namely RC. After acknowledging that earlier decisions had sanctioned the reception of tendency evidence in such cases, the Court concluded as follows:[23]

CAB 168-169

CAB 169

> We similarly are unattracted to the view that tendency evidence may be said to possess significant probative value when its source is a single complainant.

6.17 In short, the Court below preferred to follow an isolated strand of reasoning in an earlier judgment of Priest JA in *Murdoch (A Pseudonym) v R*[24] rather than the settled authority

---

[15] See Notice: Tendency Evidence - Further Amended dated 16 March 2016
[16] See Submission In Support dated 18 March 2016; Trial Transcript, 30/3/2016 & 31/3/2016, at 11-24, 67-70, 133-145
[17] See *Bauer (A Pseudonym) (No. 2) v R* [2017] VSCA 176, at [85]-[87]
[18] See Defence Submissions dated 19 October 2015; Trial Transcript, 31/3/2016, at 27-66, 70, 115-133, 145-151
[19] See Ruling No. 2 – Trial Transcript, 31/3/2016, at 99-114
[20] See Ruling No. 3 – Trial Transcript, 31/3/2016, at 154-159
[21] See Ruling No. 4 – Trial Transcript, 28/4/2016, at 1-11; Supplementary Defence Submissions dated 27 April 2016; Trial Transcript, 27/4/2016, at 1-64 (as to legal argument); 28/4/2016, at 70 (as to ruling)
[22] See *Bauer (A Pseudonym) (No. 2) v R* [2017] VSCA 176, at [61]-[62]
[23] See *Bauer (A Pseudonym) (No. 2) v R* [2017] VSCA 176, at [64]
[24] (2013) 40 VR 451

of *JLS v R*.[25] In ruling that the tendency evidence was admissible, the trial judge applied the principles set down in *JLS*. The trial judge appeared to be on sound ground – as *JLS* had been affirmed in a number of subsequent Victorian decisions.[26]

6.18 The Court below justified its departure from the line of authority established by *JLS* by reference to statement of the plurality in *IMM*.[27] In that decision, the prosecution was permitted by the trial judge to adduce tendency evidence from the complainant in relation to a single uncharged act in proof of charged sexual offences (such evidence seeking to demonstrate that the accused had a sexual interest in the complainant). On appeal, a
10 majority of this Court held that such evidence was not admissible as it did not possess significant probative value for purposes of section 97(1) of the Act. In a joint judgment, French CJ, Keifel, Bell and Keane JJ stated:[28]

> In a case of this kind, the probative value of this evidence lies in its capacity to support the credibility of a complainant's account. <u>In cases where there is evidence from a source independent of the complainant, the requisite degree of probative value is more likely to be met</u>. That is not to say that a complainant's unsupported evidence can never meet that test. It is possible that there may be some special features of a complainant's account of an uncharged incident which give it significant probative value. But without more, it is difficult to see how a
> 20 complainant's evidence of conduct of a sexual kind from an occasion other than the charged acts can be regarded as having the requisite degree of probative value. [emphasis added]

6.19 As already noted, the tendency evidence in this case consisted of evidence flowing from both RC [as to charged and uncharged acts] and TB [as to charge 2 and an uncharged act]. That is the important <u>distinction</u> in this case – on the one hand, there are those cases where the tendency evidence sought to be proved flows directly from the complainant alone and, on the other hand, there are those cases where the tendency evidence sought to be proved flows from an independent source (or indeed a combination of the complainant and an independent source as is the case here). And in the latter category, the requisite
30 degree of probative value is more likely to be satisfied (as observed in *IMM*).

6.20 This same point was made by the appellant in the Court below but was rejected.[29] **CAB 177** However, with respect, the Court appeared to address the facts as if it fell exclusively

---

[25] (2010) 28 VR 328; see also *Gipp v The Queen* (1998) 194 CLR 106; *HML v The Queen* (2008) 235 CLR 335
[26] See, for example, *MR v R* [2011] VSCA 39; *PCR v R* (2013) 279 FLR 257; *Velkoski v R* (2014) 45 VR 680; *Gentry (A Pseudonym) v DPP* (2014) 244 A Crim R 106 ; *Clark (A Pseudonym) v R* [2015] VSCA 297
[27] (2016) 257 CLR 300
[28] Ibid, at 318, [62] – Gageler J agreeing on this point (at 327 [101]); Nettle and Gordon JJ disagreeing on this point (at 353 [181])
[29] See *Bauer (A Pseudonym) (No. 2) v R* [2017] VSCA 176, at [76]

within the first category of case rather than the second category – that this erroneous approach was adopted is exemplified by the following conclusions of the Court below:[30] **CAB 179-180**

RC's evidence concerning charged (and uncharged) acts lack any special feature making it cross-admissible. Without any special feature, in light of *IMM* and *Hughes*, RC's evidence going to tendency could not be considered to possess significant probative value.

Furthermore, TB's evidence lacked any special feature. The alleged offending in this case occurred over the course of a decade. RC was aged four or five years at the start of that period and 15 at the end of it. TB's evidence was that on an occasion in 1990, when RC was aged about six or seven years, the applicant placed RC's hand on his penis. TB also gave evidence that in 1992 or 1993 she got out of bed to go to the toilet, and, when she stepped into RC's room, she saw the applicant in RC's bed under the blankets on top of RC moving up and down. RC gave no evidence of either of these alleged events. In our view, whether considered by itself or in combination with the evidence of RC, TB's evidence did not possess significant probative value. The single event in 1990 when the applicant was said to have placed RC's hand on his penis was too isolated to establish the relevant tendency, even when considered with the other evidence; and the evidence of what TB allegedly saw in RC's bedroom in 1992 or 1993 was too vague to establish the tendency alleged, either alone or in combination. Certainly there is no unusual feature (as there was in *Hughes*) which would take TB's evidence beyond that of mere propensity or disposition. [emphasis added]

6.21 However, in assessing the probative value of the purported tendency evidence, it is important to consider the totality of the evidence.[31] This point was made forcefully by Basten JA in *R v Versi* (see below):[32] **CAB 25-28**

It was not necessary for the jury to consider the evidence of the complainant and SD1 [source independent to complainant] independently before considering the cumulative effect.

6.22 The practical starting point in this case was of course the evidence of TB – that involved a source of evidence independent of the complainant. The testimony in question involved TB observing the respondent placing RC's hand on his penis whilst in the bath on one occasion (see charge 2); and observing the respondent in RC's bed under the blankets on top of RC with movement near RC's vaginal area on another occasion sometime in 1992 or 1993 – and TB complained the next day to her foster mother that the respondent was having sex with RC (uncharged act).[33] Importantly, TB maintained her evidence notwithstanding extensive cross-examination. **AFM 11-16; 18-19, 22-24, 25, 26**

6.23 If such evidence was accepted, not only was charge 2 proved, but such evidence was plainly capable of demonstrating the respondent's tendency to act towards RC in a particular way (namely to have a sexual interest in the complainant and act upon that

[30] See *Bauer (A Pseudonym) (No. 2) v R* [2017] VSCA 176, at [81]-[82]
[31] The trial judge directed the jury in accordance with this approach – see Charge Transcript, 6/5/2016, at 391-394
[32] [2013] NSWCCA 206, at [17]
[33] See Trial Transcript, 5/3/2013, at 420-424; 6/3/2013, at 450-451, 454-456, 480, 481

interest by engaging in sexual acts). In short, such tendency on the part of the respondent was highly relevant in assessing the credibility of the otherwise largely uncorroborated account of RC.

6.24 With respect, the appellant submits that the conclusion of the Court below in respect of TB's testimony is extraordinary. Each act is obviously distinctive and incapable of any innocent explanation – it involves a direct observation by a witness as to sexual activity between the respondent and RC on one occasion and an observation which provided the foundation for an almost irresistible inference as to sexual activity on a second occasion (which is later confirmed by TB in her statement to her foster mother the next day).

10

6.25 But, in any event, the Court below has applied the wrong test in respect of TB's evidence – *IMM* does not require TB's to evidence possess some "special" feature as the evidence is not flowing from the complainant – rather the evidence possesses the requisite probative value because it is an independent eyewitness account of sexual activity between the respondent and RC.

6.26 Furthermore, the Court below has also erred in assessing the evidence of RC as such evidence did involve "special" features. The "special" features consisted of 2 different strands – first, there was some confirmatory support for some of the charges; and second, TB's evidence provided confirmatory support as to the existence of a sexual relationship between the respondent and RC.

20

6.27 For example, in respect of charge 7, this involved the respondent making RC masturbate his penis until ejaculation. RC was able to give evidence that the incident occurred in the respondent's bedroom and that RC was shown some pornographic pictures at the time which had been taken from a wooden box. Evidence was given by investigating police that when the respondent's house was searched, a wooden box was located in the respondent's bedroom.[34] In short, such evidence provided confirmatory support for RC's account; and, in turn, imbuing the account given by RC on this particular charge with significant probative value.

AFM 346

30

6.28 Again, in respect of the uncharged act said to have occurred at Port Macquarie, RC gave evidence that the respondent was in bed with her late at night and that he hid when TB

[34] See Trial Transcript, 4/5/2016, at 89

entered the room and asked who she was talking to. After TB left the room, the respondent began sexually abusing her. On this topic, TB gave evidence that she heard mumbling voices in RC's bedroom which she described as RC's voice and another deeper voice.[35] Likewise, this confirmatory support for RC's account of this uncharged act gave it significant probative value (and thus demonstrating an ongoing sexual interest by the respondent in RC). Somewhat unusually, this analysis appears in the trial judge's charge to the jury but not in the judgment of the Court below.[36]

AFM 20, 28-29, 33-35

CAB 30-32, 55

6.29 That the approach adopted by the Court below as to the resolution of this ground is erroneous is fortified by reference to the decision of the NSW Court of Criminal Appeal in *R v Versi* and the recent Victorian Court of Appeal decision in *Thu v R*.

6.30 In *R v Versi*,[37] the accused was presented on a 4 count indictment which involved sexual misconduct against his stepdaughter then under the age of 16 years. The accused was convicted by a jury of count 2 (indecent act upon a child under the age of 16 years) and count 3 (sexual intercourse with a child age between 10 and 16 years under authority). In respect of the charged offences, the prosecution had sought to rely upon tendency evidence in that the accused had a sexual interest in the complainant and a willingness to act upon it. In addition, the trial judge admitted the evidence of another stepdaughter ("SD1") as evidence of coincidence relevant to count 2. In respect of that count, the complainant's evidence was that the accused had asked her to come into his bedroom and assist him with putting cream on his penis and testicles. On a separate occasion, SD1 stated that the accused had called her into the bathroom and asked her to hold his erect penis whilst he fixed his hernia (uncharged act). The accused appealed against his conviction. On appeal, it was contended that the evidence of SD1 should not have been admitted as it was too prejudicial under section 101 of the Act. This complaint was rejected – thus, the jury was entitled to consider SD1's evidence in assessing whether the complainant's evidence in respect of charge 2 was to be accepted.

6.31 Furthermore, the prosecution had sought to rely upon tendency evidence flowing from the complainant in respect of all charges on the indictment. This process of reasoning was expressly accepted by the NSW Court of Criminal Appeal, with Adams J stating:[38]

[35] See Trial Transcript, 6/3/2013, at 452, 483-484, 488-490
[36] See Charge Transcript, 6/5/2016, at 396-398, 421
[37] [2013] NSWCCA 206 – this decision was applied in *Gentry (A Pseudonym) v DPP* [2014] VSCA 211
[38] Ibid, at [128], [133]

> If it were correct (and it must be) that a determination of the applicant's guilt of any one, two, or three of the counts in the indictment established that the applicant had a sexual interest in the complainant, then that evidence could be used as supporting the Crown case on the remaining count or counts as one of the circumstantial facts which the jury was entitled to take into account....
>
> Accordingly, the trial judge was, with respect, correct to allow the evidence of SD1 to be tendered as evidence of such similarity as to lend substantial support to the evidence of the complainant. Since, if the jury were satisfied that count 2 were proved beyond reasonable doubt, they were entitled to use that finding as establishing the existence of a sexual interest in the complainant, that resulting circumstantial fact could be used in its consideration of whether the applicant had committed the other charges, there was no merit in the objection to its admissibility.

6.32 On application for special leave, this Court noted that there was no objection at trial that the evidence of the complainant was admissible as tendency evidence (namely a tendency to have a sexual interest in the complainant).[39] Furthermore, the admissibility of the evidence of SD1 as coincidence evidence was not considered to be in error. As Bell J observed in argument during the hearing:[40]

> But given the acceptance that the evidence in support of each count was admissible in considering the balance of counts because it answered the description of tendency in the sense of the tendency to be sexually interested in the complainant, what was wrong with reasoning, if the jury were to conclude that guilt was established on count 2, including taking into account, if need be, SD1's evidence that might support a process of reasoning that the applicant was sexually attracted to his stepdaughter, making more plausible her account that he had acted on that attraction on the occasion charged in count 3?

6.33 This Court refused special leave concluding that the applicant had not demonstrated, having regard to the appropriate use of tendency reasoning from a finding on count 2 to a finding on count 3, that there was a danger of unfair prejudice giving rise to a miscarriage of justice. Even though a concession as to the admissibility of tendency evidence had been made in this case, the appellant notes that the concession was made by experienced senior counsel and not the subject of any critical comment in the hearing.

6.34 In *Thu v R*,[41] the trial judge admitted statements, telephone calls and text messages made or sent by the accused to the complainant ("AA") as tendency evidence in a single complainant sexual offence trial. The jury convicted the accused. On appeal, the accused challenged the admissibility of the tendency evidence on the basis that it did not possess significant probative value; and, in particular, submitted that this Court's decision in *IMM* rendered the evidence inadmissible.

[39] See *Versi v The Queen* [2014] HCA Trans 163
[40] Ibid, at 7
[41] [2017] VSCA 28

6.35 In dismissing the appeal, the Victorian Court of Appeal held:[42]

> So far as *IMM* is concerned, we accept the Crown's submissions that what was said by the plurality in the passage relied upon by the applicant does not mean that AA's evidence of multiple contacts and texts (some of which texts were proved independently of AA) were incapable of being used in the way they were used at trial. It is one thing to say that a complainant's evidence of one additional episode of misconduct might not generally be capable of rationally affecting the probability of that complainant's evidence about a series of other acts being true, it is another to say that evidence from a complainant of multiple dealings and contacts could not be significantly probative on the question whether evidence from the same complainant about a particular charged act should be accepted. In any event, the passage relied upon by the applicant in *IMM* is distinguishable from the present case because, unlike the facts in *IMM*, in the present case there was evidence external to the complainant, AA, that demonstrated the applicant's inappropriate sexual interest and willingness to act on that specific sexual interest (the captured text messages).

6.36 In conclusion on this ground, the appellant submits that the evidence of TB was admissible as tendency evidence in support of RC's account on the charged acts. The evidence of RC was also admissible as tendency evidence in support of the charged acts as such evidence possessed the special feature of confirmatory support from both TB and other evidence. Further, once any charged or uncharged act had been proved to the requisite standard, this permitted the jury to taken into account the respondent's sexual interest in RC in assessing the credibility of her account on all outstanding charges.

6.37 Importantly, the text of section 97(1)(b) of the Act supports this approach – in determining whether the relevant evidence has significant probative value, a court may have regard to the evidence "itself" and any "other evidence" adduced. The appellant submits that it is this "other evidence" which plainly distinguishes this case from the facts in *IMM* – thus avoiding what Gageler J described in *IMM* as "uncorroborated" testimony (as to tendency) being led to support the uncorroborated complainant's account.[43]

Ground 3 – Severance

6.38 Ground 3 of the appeal is framed as follows:

> *The Court of Appeal of the Supreme Court of Victoria erred in holding that a substantial miscarriage of justice had been occasioned by the trial judge failing to order severance in respect of charge 2 on the indictment.*

6.39 As the Court below noted, the evidence called by the prosecution in support of charge 2 flowed from TB rather than the complainant. Whilst this may be somewhat unusual in a sexual offence case where there are few charged offences, it is hardly surprising in a case

[42] Ibid, at [38]
[43] See *IMM v The Queen* (2016) 257 CLR 300, at 328-329 [107]

where the complainant in her statement speaks of a large number of sexual acts committed over a very long period of time.

6.40 Joinder of charges is governed by clause 5(1) of Schedule 1, Criminal Procedure Act 2009 (Vic). The Court below held that charge 2 was properly joined on the indictment as it was a "related offence".[44] However, section 193(1) of the Act permits a court to order severance of a charge from an indictment. In making such an order, sections 193(3)(a) & (c) provide respectively that a court may make such an order if the accused may suffer prejudice because of the relevant charge or for any other reason it is appropriate to do so.

CAB 182

10

6.41 Importantly, section 193 of the Act is subject to section 194 which provides as follows:

...

> (2) Despite section 193 and any rule to the contrary ... if in accordance with this Act 2 or more charges for sexual offences are joined in the same indictment, it is presumed that those charges are to be tried together.
>
> (3) The presumption created by subsection (2) is not rebutted merely because evidence on one charge is inadmissible on another charge.

20

6.42 The trial judge refused severance on charge 2 on the basis that TB's testimony was admissible as tendency evidence upon which the prosecution could rely in proof of the other charges on the indictment. The Court below ruled that TB's evidence could not be properly so used (see ground 2 above) and thus the trial judge's discretion under section 193 miscarried.[45]

CAB 184

6.43 The appellant challenges this conclusion on two bases. First, charge 2 should not have been severed as the trial judge was correct in ruling that TB's evidence was admissible as tendency evidence. And second, even if TB's evidence was not admissible as tendency evidence on charge 2, a strong judicial warning would have ensured that the respondent did not suffer any prejudice – given that charge 2 was only 1 of 18 sexual acts charged, it is difficult to see why a jury would not have followed such a warning particularly as charge 2 did not involve an act that would have aroused strong emotion in a jury.[46]

30

6.44 Testing the above proposition in another manner, it was not suggested on appeal that the jury would have failed to heed the "separate consideration" direction in respect of the

[44] See *Bauer (A Pseudonym) (No. 2) v R* [2017] VSCA 176, at [91]
[45] See *Bauer (A Pseudonym) (No. 2) v R* [2017] VSCA 176, at [97]
[46] See *Gilbert v The Queen* (2000) 201 CLR 414; *KRA v R* (1998) 2 VR 708, at 716 [22]

charges on the indictment, yet such charges involved several penetrative offences committed against a young complainant in often quite brazen circumstances. However, the Court below has concluded that severance of charge 2 was required because no jury direction could have alleviated against the risk (said to be a strong possibility or even likelihood) that the jury would have engaged in tendency reasoning if TB was to give evidence in support of charge 2 which involved an allegation of indecent assault.[47] With respect, it is difficult to reconcile this inconsistent approach by the Court below.

CAB 185

Ground 4 – Complaint evidence

10

6.45 Ground 4 of the appeal is framed as follows:

> *The Court of Appeal of the Supreme Court of Victoria erred in holding that a substantial miscarriage of justice had been occasioned by the trial judge admitting a previous statement of complaint (made by the complainant to another) as evidence at the re-trial.*

6.46 The evidence of witness "AF" was admitted as "complaint evidence" under section 66 of the Evidence Act 2008 (Vic).[48] AF had a conversation with RC sometime in 1998 in which AF suggested certain sexual acts and RC agreed or disagreed that they had occurred.[49] RC also volunteered the watching of pornographic movies with the respondent and then engaging in the depicted acts with the respondent. The indictment charges spanned from 1 January 1988 to 17 December 1998 and thus the conversation occurred towards the end of the relevant offending period.

CAB 187-188

20

AFM 8-10; 37-40, 41-44, 48-49

6.47 Counsel for the respondent objected to the admission of this evidence at trial. A number of arguments were advanced including the nature of the conversation between RC and AF (not volunteered by RC but rather suggestions from AF), the generality or vagueness of the complaint made, that the complaint was not of an ongoing nature (thus charge 18 was not captured by the complaint) and whether the representations were indeed fresh in the memory of RC.[50]

30

AFM 174-185, 192-194

6.48 The prosecutor contended that the evidence was admissible under section 66:[51]

AFM 186

> And this is a case ... where the prosecution would submit is at the tail end of period of time when a child has been in custody of ... her foster parents and who, within a short time – relatively short

[47] See *Bauer (A Pseudonym) (No. 2) v R* [2017] VSCA 176, at [99]
[48] The text of section 66 is reproduced at para [107] of the Court's judgment
[49] See Trial Transcript, 4/3/2013, at 269-271 (in respect of RC's recounting of complaint to AF); Trial Transcript, 7/3/2013, at 572- 575, 585-588, 592-593 (in respect of AF's recounting of complaint made by RC)
[50] See Trial Transcript, 30/3/2016, at 76-87, 94-96
[51] See Trial Transcript, 30/3/2016, at 88

time of leaving that place - ...told a girl of similar age of the events. And so, in my submission, that is classically the sort of evidence that is intended to be covered when dealing with the question of fresh.

6.49 Further, the prosecutor contended that the evidence should not be the subject of discretionary exclusion:[52]

AFM 191

In my submission, there's nothing unfair about this prejudice, it goes to the question of what weight the jury will give to the complainant's evidence and in circumstances where there is substantial, support for a part of the eversion ...

10

6.50 Importantly, the prosecutor relied on the evidence not as direct proof of the offences but in the more limited manner as general support of the complainant's credibility.[53] The trial judge repeated this particular line of argument by the prosecutor in her charge to the jury.[54] No exception was taken to the relevant direction at trial or on appeal.

AFM 188, 189-190, 191

CAB 36-37

6.51 The trial judge ruled against the respondent (but did not provide a formal ruling).[55]

AFM 253

6.52 In respect of section 66 of the Act, the Court below correctly summarised the effect of the provision:[56]

20

CAB 188

The effect of s 66 is that the hearsay rule does not apply to a representation made by the person if the occurrence of the asserted fact was 'fresh in the memory' of the person who made the representation at the time that the representation was made. In determining whether the occurrence of the asserted fact was fresh in the memory, the court may take into account all relevant matters, including the age and health of the person making the representation; the nature of the event concerned; and the period that has elapsed between the occurrence of the asserted fact and the making of the representation.

30

6.53 A note appearing in the Act states that sub-section (2A) was inserted as a response to this Court's decision in *Graham v The Queen*.[57] In that case, evidence was admitted of a complaint made by the complainant to a friend that she had been sexually assaulted by the accused (her father). The complaint had been made six years after the last of the alleged acts. In allowing an appeal, this Court held that the evidence of prior complaint was not admissible under section 66. The word "fresh" imported a close temporal relationship between the occurrence of the asserted fact and the time of making the representation (per Gaudron, Gummow and Hayne JJ) and that contemporaneity is the

---

[52] See Trial Transcript, 30/3/2016, at 93
[53] See Trial Transcript, 30/3/2016, at 90, 91-92, 93
[54] See Charge Transcript, 6/5/2016, at 403
[55] See Trial Transcript, 31/3/2016, at 114
[56] See *Bauer (A Pseudonym) (No. 2) v R* [2017] VSCA 176, at [108]
[57] (1998) 195 CLR 606

most important consideration in any assessment (per Callinan J with Gleeson CJ agreeing). However, and importantly, Callinan J stated that "it cannot be doubted that the quality or vividness of a recollection will generally be relevant in any assessment of …freshness".[58]

6.54 In determining whether the occurrence of the asserted fact was fresh in the memory of a person, a court may take into account all matters it considers relevant to the question. Undoubtedly, section 66(2A) has broadened the concept of "freshness" – whilst the time between the occurrence of the asserted fact and the making of the representation is always a relevant consideration, the phrase "fresh in the mind" does not impose a determinative temporal limitation.[59] In *Clay (a Pseudonym) v R*, the Victorian Court of Appeal observed that it was not clear what were the boundaries for the period of time in which evidence would be "fresh in the memory" of a witness.[60]

6.55 In *R v XY*, the New South Wales Court of Criminal Appeal accorded great weight to the nature of the event, rather than the time lapse between the event and the making of the complaint. In so doing, the Court emphasised the vividness of the asserted memory of the event, and noted that the level of detail and any striking or unusual aspects of the memory would be significant when considering the question of admissibility.[61]

6.56 In *LMD v R*, the Victorian Court of Appeal held that a complaint made 10 years after the alleged sexual abuse was fresh in the complainant's memory because of her reaction to the approaches made by her boyfriend when sexual intercourse between them was contemplated.[62] The complainant experienced difficulty in having sexual intercourse with her boyfriend because her mind turned to what had happened years before with the accused and she tended to "freeze" – and it was in this context that she told her boyfriend about the accused's earlier abuse. In this case, the Court was not concerned that the complainant did not provide her boyfriend with any details of the offending, noting that the events to which the complainant referred when she said that she had been "molested" were inherently likely to remain firmly in her mind, if not as to detail, then as to the general nature of the behaviour to which she says she was subjected.[63]

[58] Ibid, at 614
[59] See *ISJ v R* [2012] VSCA 321, at [48]
[60] [2014] VSCA 269 at [50]
[61] (2010) 79 NSWLR 629
[62] [2012] VSCA 164
[63] Ibid, at [24]

6.57 In ruling that the representations were not "fresh in the memory" of RC (the representations made were generic and non-specific as to activity, surrounding circumstances, date or time, and made in response to suggestions made to her in the course of AF's questioning), the Court below referred to the Victorian decision of *Pate (A Pseudonym) v R* in support of its conclusion. However, with respect, that decision is not particularly helpful as the representations in that case had been made some 12 years after the alleged sexual offending had ceased.[64]

CAB 190

6.58 Importantly, that is <u>not</u> this case – RC was speaking about sexual offending which had commenced some 10 years earlier but, more importantly, had largely ceased only a short time prior to the making of the representations to AF. With respect, given that it was a long course of conduct involving sexual abuse, it would be quite remarkable if the relevant events were anything but fresh in the memory of RC. Indeed, a particular of the tendency evidence (uncharged acts) involved RC stating in evidence that the respondent on numerous occasions (happened so many times over 10 years that RC could not even give an approximate) would put pornographic videos on and have RC copy the acts (such as RC performing oral sex upon the respondent, and the respondent digitally and licking RC's vagina).[65] The appellant submits that the vividness of the representations would not have been diluted by time as each act would only have reminded RC as to the abusive nature of the relationship between the respondent and herself. RC stated in evidence that she always knew that the relevant conduct was wrong, and felt only able to complain when she was feeling safe in a new environment away from the respondent.[66]

AFM 2-6

AFM 8

6.59 Further, the Court below ruled that such evidence should have been excluded under section 137, <u>Evidence Act</u> 2008 (Vic) on the basis that the probative value of such evidence was outweighed by the risk of unfair prejudice. The Court held that the probative value of the evidence was "slight" on the basis that the representations were elicited as part of a "guessing game" between AF and RC.[67]

CAB 186

6.60 With respect, it is difficult to see why the method of elicitation diminished either the probative value of such evidence or would lead a jury to misuse such evidence – after all, RC was only aged 14-15 years old and was speaking to AF (who was a friend she had

---

[64] See *Bauer (A Pseudonym) (No. 2) v R* [2017] VSCA 176, at [112]
[65] See Trial Transcript, 1/3/2013, at 207-211
[66] See Trial Transcript, 4/3/2013, at 269
[67] See *Bauer (A Pseudonym) (No. 2) v R* [2017] VSCA 176, at [103]

only known for a relatively short period of time) about a serious course of sexual abuse involving her foster father. AF stated in evidence that RC was distraught at the time of disclosure.[68] Of course, what was of central importance here was that RC first divulged that the respondent had done "something" to her before the "guessing game" took place. The responses were unvarnished in the sense that RC was able to agree or disagree with various suggestions made to her and she volunteered the watching of pornographic videos with the respondent and then engaging in depicted acts.[69]

AFM 38

AFM 39, 48-49

6.61 In short, the appellant submits that the Court below has erred in ruling that the evidence of AF should have been excluded under either section 66 or 137 of the Act.

10

Part VII: Orders sought by appellant

7.1 The appellant seeks the following orders in this appeal:

(a) that the appeal be allowed; and

(b) that the order of the Court of Appeal of the Supreme Court of Victoria made on 30 June 2017 allowing the respondent's appeal to that Court be set aside, and in lieu of that order, that the application for leave to appeal against conviction to that Court be refused (or alternatively that the appeal against conviction be dismissed).

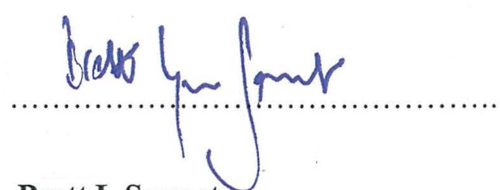
20

Part VIII: Time required for presentation of appellant's oral argument

8.1 The appellant estimates 2.5 hours are required for presentation of its oral argument.

Dated: 2 February 2018

30



Brendan F. Kissane QC

Senior Crown Prosecutor (Victoria)
Telephone: 9603 7886
Facsimile: 9603 7460
Email: brendan.kissane@opp.vic.gov.au

Brett L Sonnet

Crown Prosecutor (Victoria)
Telephone: 9603 7566
Facsimile: 9603 7460
Email: brett.sonnet@opp.vic.gov.au

[68] See Trial Transcript, 7/3/2013, at 573
[69] See Trial Transcript, 7/3/2013, at 574, 592-593