IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY No. M1 of 2018

BETWEEN:

THE QUEEN

Appellant

– v –

DENNIS BAUER (A PSEUDONYM) (NO. 2)

Respondent

RESPONDENT'S SUBMISSIONS

Part I: Suitability for publication on the internet

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

Part II: Concise statement of the relevant issues

2. The respondent broadly agrees that this appeal raises the questions identified by the appellant, save that the assumptions imbedded therein are disputed.

3. Should this Court conclude that the Court below erred in its application of ss 379 and 381 of the *Criminal Procedure Act* 2009 (Vic), it will be necessary to consider whether the learned trial judge reversed the burden of persuasion under s 381.

4. Further, should this Court conclude that the Court below erred in its application of s 97(1)(b) of the *Evidence Act* 2008 (Vic), it will be necessary for this Court to consider (or alternatively to remit to the Court below for consideration) whether the evidence should nevertheless have been excluded pursuant to ss 55, 97(1)(a), 101, 135 or 137 of the *Evidence Act* 2008 (Vic).

5. The application for special leave to cross-appeal raises the question: Does s 276(1) of the *Criminal Procedure Act* 2009 (Vic) create a rebuttable presumption that a retrial will be ordered if there is evidence upon which a reasonable jury could convict; or rather, should the discretion of the court be exercised simply in accordance with the interests of justice in the particular case, having regard to all of the relevant facts and circumstances?

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Part III: Notice under the *Judiciary Act* 1903 (Cth)

6. No notice is required pursuant to s 78B of the *Judiciary Act* 1903 (Cth).

Part IV: Contested material facts, and omissions and errors in appellant's chronology[1]

7. Contrary to the appellant's assertion that TB made her first statement to police in 2010, TB in fact made her first police statement on 10 February 2000. In that first statement, TB denied that she had witnessed any sexual abuse of RC by the respondent. She also revealed that police had spoken to her about RC's allegations of sexual abuse at Port Macquarie, which she specifically denied witnessing.[2] RFM 86-88

8. Complaint witness AF first made a statement to police on 12 February 2000. She signed that same statement in 2012.

9. The assertion that the respondent made a 'no comment' record of interview[3] is misleading. On 10 February 2000, the respondent was formally interviewed by police for a total of almost one hour and, according to a report compiled by the police 18 days later, 'strenuously denied all allegations'. Victoria Police subsequently decided that charges should not be laid. Inexplicably, despite retaining the remainder of the brief, the police lost or destroyed the record of interview.[4] RFM 173-179 & RFM 183-184

10. On 30 August 2008, RC was convicted of making a false report to police. She had telephoned emergency services on 27 September 2007 and falsely alleged that her partner had stabbed her.[5] RFM 46-53 & RFM 58-60

Part V: Respondent's Argument

Ground 1: Use of Complainant's Recorded Evidence from Previous Trial

11. Over objection by defence counsel, an edited recording of RC's evidence from the respondent's first (multi-complainant) trial in 2013 was admitted in evidence at his retrial in 2016. RC was the sole complainant in that trial.[6] AFM 232-236

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[1] Other omissions and errors are addressed in the respondent's chronology.
[2] 1T 427-429 (5 March 2013).
[3] Appellant's Submissions dated 2 February 2018, [5.8].
[4] Evidence was adduced as to the loss of the interview: 7T 87-93 & 101-102 (4 May 2016). No evidence was adduced of a subsequent interview in 2011 (by which time almost 23 years had passed since the commencement of the alleged offences) in which the respondent denied all charges but otherwise exercised his right to silence.
[5] 1T 303-310 & 327-329 (4 March 2013).

12. Pursuant to ss 379 and 381 of the *Criminal Procedure Act* 2009 (Vic), the recording could not be admitted in evidence unless it was in the interests of justice to do so, having regard to a non-exhaustive list of factors. As the Court below recognised, the onus of persuasion rested on the prosecution.[7] One of the factors which was required to be taken into account was 'the availability or willingness of the complainant to give further evidence' ('**the third factor**'). CAB 152

13. The learned prosecutor advised the learned trial judge, variously, that the complainant had expressed a 'desire',[8] a 'preference'[9] or a 'strong preference based on advice from counsellors and others'[10] not to give evidence again, but that she was 'otherwise available'.[11] Defence counsel pointed out that there was no evidence that there would be a risk of further stress or trauma to RC should she be required to give *viva voce* evidence on the retrial, that all her Honour knew was that she would 'prefer' not to give evidence, and that 'I dare say, all complainants would prefer not to give evidence'.[12] RFM 120 AFM 74-75 AFM 74 AFM 74 AFM 78

14. The reasons of the Court below make clear that the learned trial judge erred in admitting the recording for two separate reasons. First, because a preference not to give evidence did not amount to an absence of willingness to do so. Further and in any event, the prosecution had not established an evidentiary basis for its application.[13] Contrary to the appellant's contention, the Court below did not 'transpose' the third factor.[14] The Court referred repeatedly to the 'willingness' of a complainant to give further evidence,[15] using forms of the term 'unwilling' only in two warranted contexts.[16] CAB 146-156 CAB 147-156 CAB 153 & CAB 155-156

15. That one has a 'preference' not to give evidence does not mean that one is not 'willing' to do so. The use of the conjunction 'or' (rather than 'and') in the phrase 'availability or willingness' focuses attention on the ability of the complainant to give evidence, due to factors which are, respectively, external and internal to the complainant. Further,

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[6] Ruling No. 1, *Bauer v The Queen* (County Court of Victoria, 30 March 2016) per Judge Sexton.
[7] *Bauer v The Queen (A Pseudonym) (No. 2)* [2017] VSCA 176, [34].
[8] 2T 2 (16 March 2016).
[9] 2T 24 & 25 (16 March 2016).
[10] 2T 24 (16 March 2016).
[11] 2T 24 (16 March 2016).
[12] 2T 38 (16 March 2016).
[13] *Bauer v The Queen (A Pseudonym) (No. 2)* [2017] VSCA 176, [23]-[42]; see in particular [41].
[14] Appellant's Submissions dated 2 February 2018, [6.7].
[15] *Bauer v The Queen (A Pseudonym) (No. 2)* [2017] VSCA 176, [26], [28], [31], [33], [40], [41] & [42].
[16] At [36], the Court made a general observation in favour of the prosecution regarding the practical application of s 381; and at [41], the Court employed the term to assist in explaining the difference between an absence of willingness to give evidence and a preference not to do so.

Parliament has chosen to enact a statutory presumption that mentally unimpaired adult complainants will give *viva voce* evidence at subsequent trials for alleged sexual offences, despite the fact that most complainants would 'prefer' not to give evidence again. The natural meaning of the statute is confirmed by the relevant statement of compatibility,[17] which states that the presumption 'ensures that it applies only in cases where a complainant is particularly traumatised and unable to give evidence again'.

16. Further and in any event, the Court below was correct to conclude that the Crown had not established an evidentiary basis for its application. Applying the ordinary rules of evidence, evidence 'in proper form' was required, absent a concession from the accused[18] (of which there was none in this case). Contrary to the appellant's contention,[19] this does not presuppose the calling of a complainant to give evidence as to their availability or willingness to give evidence at trial. Rather, depending on the particular case, such evidence may take the form of an affidavit from the complainant, or admissible hearsay evidence from a third party such as a counsellor, family member or police officer. In many cases it will be unnecessary for the complainant to give evidence on the voir dire.

CAB 155-156

17. It was not necessary for the Court below, in light of its other conclusions, to consider counsel's submission that the learned trial judge had reversed the burden of persuasion.[20] That submission is maintained. *Inter alia*, her Honour said:[21]

CAB 150-151
AFM 234

> The situation in this trial is exactly what Division 7 was enacted for. It provides a process to prevent complainants in sexual assault trials from having to give evidence multiple times unless the circumstances will give rise to an unfair trial.

18. The learned trial judge squarely placed the onus on the accused to satisfy the Court both that the playing of the recording as RC's evidence would give rise to an unfair trial, and moreover to establish that it would not be in the interests of justice to play the recording. This reversal of the burden of persuasion was potentially critical in circumstances where, up until the morning of the pre-trial argument, the defence had been led to believe that the prosecution would no longer seek to adduce tendency

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[17] Statement of Compatibility, Criminal Procedure Amendment (Consequential and Transitional Provisions) Bill 2009 (Vic), 17 September 2009, Hansard, p.3374 (Attorney General Robert Hulls).
[18] *Bauer v The Queen (A Pseudonym) (No. 2)* [2017] VSCA 176, [41]-[42].
[19] Appellant's Submissions dated 2 February 2018, [6.8].
[20] *Bauer v The Queen (A Pseudonym) (No. 2)* [2017] VSCA 176, [31].
[21] Ruling No. 1, *Bauer v The Queen* (County Court of Victoria, 30 March 2016) per Judge Sexton, 2T 6.28.

evidence.[22] Thus, trial counsel could not have developed a detailed contamination, concoction and collusion case theory relating to just RC and TB (which would inevitably have been significantly different from that at the first trial, given that trial had involved five connected complainants). RFM 121-122, 132, 134-135 & 139-140

19. It was not necessary for the Court below to consider whether the error on Ground 1 alone would have constituted a substantial miscarriage of justice.[23] It could not be said that the respondent's conviction was inevitable,[24] in circumstances where: (i) RC would have been cross-examined quite differently had she been called to give *viva voce* evidence on the retrial;[25] (ii) there was no forensic evidence; (iii) there was no corroboration of RC's account (and indeed the evidence of her foster mother JW and sister TB contradicted her in many respects); and (iv) there were significant matters affecting the credibility and reliability of both RC and TB.[26] CAB 156 RFM 22 CAB 12-13 RFM 11-13; RFM 73-75; RFM 77-80

Ground 2: Tendency Evidence

20. The indictment contained 18 charges, with the alleged offending spanning some 11 years (1988-1998) during which time RC was aged between 4 and 15. RC gave evidence in relation to charges 1 and 3-18. TB gave evidence in relation to charge 2. There was no charge in relation to which both RC and TB gave evidence. Over objection by defence counsel, the learned trial judge permitted the jury to engage in tendency reasoning as between each and every charge on the indictment, and also as between each of a number of uncharged acts and each and every charge on the indictment.

21. Contrary to the appellant's submission, this Court did not in ***IMM v The Queen***[27] create a separate test for single source cases than that which applies in multi-source cases. To

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[22] 2T 3-4, 14, 16-17 & 21-22 (16 March 2016).
[23] *Bauer v The Queen (A Pseudonym) (No. 2)* [2017] VSCA 176, [42].
[24] *Baini v The Queen* (2012) 246 CLR 469, [25]-[33].
[25] Including, as to a photograph of the family van which, if accepted, rendered impossible RC's account of the presence of an additional female during the alleged incidents giving rise to charges 3 and 4 (1T 227 - 4 March 2013), plus documents which rendered implausible RC's account of having slept at the respondent's feet in the tractor (1T 244 – 4 March 2013); these documents were included in an agreement as to facts. The learned trial judge made a comment to the jury regarding the fact that those matters had not been put to the complainant: 7T 378-379 (6 May 2016).)
[26] In addition to her conviction for making a false report, RC made significant inconsistent statements about matters. For example, in respect of charge 1 she testified that she had was outside by the pool with other family members, when she got into trouble and was sent inside by JW (where the offending allegedly occurred). This was in stark contrast to RC's statement to police, in which she had said that JW had gone out and that no one was home: 1T 202-204 (1 March 2013), 373-375 & 377-380 (5 March 2013).
[27] (2016) 257 CLR 300, [61]-[64].

create a different test would be inconsistent with the structure and the text of the *Evidence Act 2008* (Vic). The test to be applied is derived from that Act. The relevant questions in cases where the prosecution seeks to adduce tendency evidence will always include whether: (i) the evidence, if it were accepted, could rationally affect (either directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding (s 55); (ii) the prosecution has given reasonable notice in writing to each other party of its intention to adduce the evidence (s 97(1)(a)); (iii) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value (s 97(1)(b)); (iv) the probative value of the evidence substantially outweighs any prejudicial effect it may have on the accused (s 101(2)); and (v) any of the exclusionary provisions apply (including ss 135 and 137).

22. The Court below did not replace the tests provided for by the provisions of the *Evidence Act* 2008 (Vic), informed by cases including ***IMM*** and ***Hughes v The Queen***,[28] with some other test. The Court set out the correct legal principles, and the relevant case law that informed the application of those principles, at length. It did not mistake or overlook any of the relevant authorities. The Court was clearly conscious of the guidance given by this Court in ***Hughes***, and its judgment confirms that it applied that guidance. Whilst the term 'special features' was used in ***IMM*** in the context of a single source case, the factors that led to this Court concluding that tendency evidence was admissible in ***Hughes*** might well be described as 'special features'. Due to the cognitive bias[29] which tendency evidence promotes, our law has always required – at common law and now under the *Evidence Act* 2008 (Vic) – that proposed tendency evidence surmount a high hurdle (that is not to say the same hurdle) in order to be admissible. To say that there must be something 'special' about evidence in order for it to be admissible as tendency evidence is to say no more than that it must have significant probative value. The Court's use of the expression 'special feature' did not reflect a misunderstanding of the nature of that evidence; it did not reflect that the Court considered the case before it to be a single source case. (In any event, TB's evidence was so inherently weak that this was effectively a single source case.)

23. In 2000, TB made a police statement denying that she had ever witnessed the respondent sexual assaulting RC, or that she had herself been abused. In 2010, after her female partner

[28] (2017) 92 ALJR 52.
[29] See *Hughes v The Queen* (2017) 92 ALJR 52, [73]-[74] per Gageler J.

HL alleged that the respondent had indecently assaulted her at work,[30] TB made a police statement alleging that she too had been assaulted and that she had witnessed RC being assaulted. TB suffered from a cognitive impairment, described by her mother as an intellectual disability, and bipolar disorder. She had experienced psychiatric difficulties.

24. As the Court below identified, the events recounted by TB at trial were vague and isolated. In relation to charge 2, TB testified[31] that she had seen the respondent place RC's hand on his penis in the bathroom 25 years previously. TB said she was 'probably about four' (meaning RC was 5-6). TB was washing the respondent's back; her view was therefore impeded. It was unclear whether the respondent's penis was covered with the wash cloth at the time of the alleged touching. It was unclear whether his penis was erect. TB gave no evidence as to duration. RC gave no evidence in relation to this alleged incident at all. AFM 12-13 & 26

25. The sixth uncharged act[32] was said to have occurred 2-3 years later, some 22-23 years before TB recorded her evidence. TB's evidence[33] about that event was similarly vague. She said she (TB) was 'no older than six or seven'. Her view was so limited that she was not even able to see the respondent; she said she only knew it was him because of his voice and because JW was out. The little detail she did give only emerged upon significant prodding by the learned prosecutor. RC gave no evidence in relation to this alleged incident at all. AFM 61 AFM 13-16

26. Taken at its highest, TB's evidence regarding charge 2 and the sixth uncharged act did not, either by itself or having regard to other evidence, have significant probative value in relation to any of the charges.

27. RC gave evidence in relation to charges 1 and 3-18, as well as the remainder of the uncharged acts.[34] The wooden box found at the respondent's home in 2000 (in the voluntary search during his interview) did not provide 'confirmatory support' for RC's evidence. RC had lived in the house and so naturally would have been able to identify some of the items inside. Notably, the wooden box did not contain any pornography, as alleged by RC in relation to charge 7. Further, JW gave evidence that at the relevant time AFM 69-72

[30] No evidence was adduced at trial in relation to HL and TB's own allegations.
[31] 1T 420-421 (5 March 2013) & 481 (6 March 2013).
[32] Particular 1 in Table B of the Further Amended Tendency Notice dated 16 March 2016.
[33] 1T 421-424 (5 March 2013).
[34] Particulars 19-24 in Table C of the Further Amended Tendency Notice dated 16 March 2016.

(1991-1992) there had not even been a cupboard next to the master bed,[35] and that the box had not been kept in the master bedroom on her side of the bed (which contradicted RC's evidence that the respondent had retrieved the box from on top of a cupboard next to JW's side of the bed[36]). RFM 108-109 RFM 16-17

28. TB's evidence about Port Macquarie was not included in the further amended tendency notice, and the jury was specifically directed they could not use it as tendency evidence. TB's evidence about Port Macquarie did not support RC's evidence of the uncharged act at Port Macquarie; in fact, it contradicted her account.[37] In any event, in 2000 (when TB made a statement denying any knowledge of the respondent sexually abusing RC), police spoke to TB about RC's allegation of an incident in Port Macquarie.[38] That circumstance deprived TB's subsequent evidence about that matter of any possible supportive value. RFM 29 AFM 20-21 & 33-35; RFM 31-32; AFM 20-23; RFM 31 RFM 86-87; AFM 28-29

29. Even if the matters raised by the appellant did provide support for the complainant's account, the vice in the case remains. As ***Hughes*** makes clear, a trial judge must consider the admissibility of the proposed tendency evidence in relation to each charge.[39] However, in the present case, each and every charged and uncharged act was admitted as tendency evidence, in relation to each and every other charged and uncharged act, from every possible starting point and in every possible direction, and with no specified standard of proof, irrespective of: (i) whether the jury accepted TB's evidence; (ii) whether there was independent support for the charge; (iii) whether the alleged incident occurred in 1988 when RC was 4 years old, or in 1998 when she was aged 15; (iv) the conduct alleged – for example, be it a brushing of the breast or attempted penile/vaginal penetration; and (v) the

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[35] 1T 540-541 (6 March 2013).
[36] 1T 213-214 (1 March 2013).
[37] (i) RC gave evidence that in the midst of the alleged assault, TB came into the room and asked RC if she was having sex with Dad (1T 261 – 4 March 2013). TB did not give any evidence of seeing or hearing anything which might suggest that RC and the respondent were engaged in sexual activity, or indeed of going into RC's room at all. She simply testified that, from the room she was in with JW, at an unknown time, she heard the mumbling voices of RC and a deeper voice in RC's room (an unremarkable event given the respondent was RC's foster father, and there was no dispute that they had gone to Port Macquarie on a family holiday) (1T 452-453 & 488-490 - 6 March 2013).
(ii) Further, RC testified that, the next morning, her foster mother JW told RC that she had heard (from TB) that RC had been having sex with Dad (1T 263-264 – 4 March 2013). In her testimony, TB denied speaking to JW about RC having sex with the respondent at Port Macquarie (1T 452-455 – 6 March 2013). (JW also denied that either conversation took place.)
(iii) Further, RC testified that she (RC) spoke to TB that afternoon in the laundry, that RC asked TB why she'd said that she'd told JW that she (RC) had sex with Dad, and that RC said ''well you did, didn't you?' (1T 263 – 4 March 2013 & 1T 362-363 – 5 March 2013). TB denied that any such conversation took place (1T 483-484 - 6 March 2013).
[38] 1T 427-428 (5 March 2013).
[39] *Hughes v The Queen* (2017) 92 ALJR 52, [40].

context in which the offence was said to have been committed – for example, whether or not others were said to be in the vicinity. Further, due to the unconstrained way in which the tendency evidence was admitted, the jury was permitted to engage in bootstrap reasoning regarding the acts in relation to which (only) RC gave unsupported evidence. Moreover, the lack of any direction about the standard of proof[40] for the purposes of tendency reasoning meant that the jury was permitted to engage in bootstrap reasoning to conclude that the respondent was guilty of all charges, without otherwise needing to be satisfied beyond reasonable doubt that he was guilty of even one.

30. The Court below examined the evidence closely and gave cogent reasons for concluding that the evidence did not have significant probative value. Those reasons are comprehensive and consistent with the authorities of this Court. Further and in any event, the proposed tendency evidence was inadmissible due to the operation of ss 55, 97(1)(b), 101, 135 or 137 of the *Evidence Act* 2008.

31. Defective Notice – s 97(1)(a): The respondent maintains his submission that the proposed tendency evidence was not admissible because one of the preconditions to admissibility – 'reasonable notice in writing' – was not satisfied. Firstly, the further amended tendency notice was filed on the day which had been set down for pre-trial argument, in circumstances where the defence had been led to believe that the prosecution would not seek to rely upon tendency reasoning.[41] Secondly, according to the body of the notice, the first particular in Table B (the sixth uncharged act) was the only alleged conduct relied upon in support of the respondent's supposed sexual interest in RC, while only the alleged conduct the subject of charges 1-14 was relied upon in support of the respondent's purported willingness to act on his sexual interest in RC. Footnote 1 completely contradicted that position. The learned prosecutor attempted to remedy this inconsistency in his oral submissions. This did not constitute 'reasonable notice in writing'. Thirdly, in addition to six specific uncharged acts identified in its further amended notice, the prosecution also included, at particular 24, a catch-all category of 'other occasions of sexual abuse happed [sic] on a frequent basis', with an unknown date, time and place. There were no references to RC's recorded evidence from the trial. This did not comply with reg 7(1)(b) of the *Evidence Regulations* 2009 (Vic), which requires that the notice state 'the date, time and place at and the circumstances in which the conduct occurred'.

AFM 57-72

RFM 121

[40] See footnote 49 below.
[41] See 2T 3 (16 March 2016). The defence had filed written submissions in relation to an earlier notice.

32. Tendency evidence is, *prima facie*, inadmissible. It is inherently prejudicial and potentially very damaging evidence. If the prosecution intends to apply to rely upon tendency evidence, an accused is entitled to proper written notice. Trial judges are also entitled to proper assistance. It is regrettable that the prosecution did not comply with its obligations in this case. That non-compliance is determinative, in circumstances where the requirement for reasonable notice in writing was not dispensed with.[42]

33. Sections 55, 101, 135 & 137: The defence submissions (at trial and in the Court below) as to TB's evidence not having significant probative value also led to a conclusion that her evidence did not even meet the threshold requirement of relevance.[43] Further, the respondent maintains his submission that all of the proposed tendency evidence was inadmissible because it did not surpass the s 101 hurdle, and in event should have been excluded pursuant to ss 135 or 137. It was not necessary for the Court below to consider these matters given its conclusion that the evidence lacked significant probative value.

34. In neither ***IMM*** nor ***Hughes*** did this Court have occasion to consider the operation of s 101, or indeed the manner in which matters pertaining to reliability and credibility may affect the 'prejudice' side of the ledger in ss 101, 135 and 137. Notably, however, in ***IMM***[44] the majority referred without criticism to the observation of Basten JA in ***R v XY***[45] that 'the unreliability of the evidence was a factor to be weighed on the other side of the scale [in s 137], together with the likely effectiveness of warnings about the nature of such unreliability'. In any event, matters of credibility and reliability must be taken into account under s 135, when the assessment must be made as to whether the evidence might cause or result in 'undue waste of time'.[46] The matters below demonstrate that the proposed tendency evidence should have been excluded pursuant to ss 101, 135 or 137.

35. There was the risk that the jury would be overwhelmed by the nature and number of allegations, and may fail to pay sufficient regard to the real questions of credibility and reliability that arose. There was the risk that jury may accord undue weight to TB's evidence, including because they saw an adult TB give the evidence, not the 4-year-old or 6-7 year-old girl she had been 22-25 years before. There was the prejudice occasioned by

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[42] See, generally, *Andelman v The Queen* (2013) 38 VR 659, [72]-[75], and the cases referred to therein.
[43] *IMM v The Queen* (2016) 257 CLR 300, [58].
[44] *IMM v The Queen* (2016) 257 CLR 300, [57].
[45] (2013) NSWLR 363, [48].
[46] *IMM v The Queen* (2016) 257 CLR 300, [58].

requiring the respondent to answer a raft of uncharged conduct stretching back decades. This prejudice was all the more unfair given the respondent had, in 2000, made strenuous denials to having abused RC in an interview which the police had lost or destroyed. There was the significant prejudice occasioned by the risk that the jury may fail to allow that even if the respondent did have the alleged tendency, that he did not have that state of mind, or act upon his sexual interest, on the occasion in issue. That was a particular risk in this case, given the number of allegations and the significant period (when RC was aged 4-15) over which the offending was said to have occurred. Related to this, the evidence was confusing and had the potential to divert the jury from its true task.[47] Her Honour's directions regarding tendency illuminates how confusing this issue must have been for the jury.[48] There was also a risk of the jury too readily concluding that the respondent had the asserted tendency, in circumstances where they were <u>not</u> directed that they had to be satisfied beyond reasonable doubt that any charged or uncharged act occurred in order to rely upon that act as proof of the relevant tendency, due to the learned trial judge's understanding of s 61 of the *Jury Directions Act* 2015 (Vic).[49] Further, the defence could not provide the jury with a complete picture of the risk of contamination, concoction and collusion without introducing highly prejudicial material relating to allegations by other complainants; for example, the jury did not know that TB reported to police that she had witnessed the respondent sexual assaulting RC only after her partner HL revealed that she had been indecently assaulted by the respondent at work.

CAB 89-91; CAB 93

CAB 15, 24-32, 55 & 66

36. Indeed, either by itself or in combination with the above matters, the real possibility that RC's and/or TB's evidence was the product of contamination, concoction or collusion meant that it was not admissible as tendency evidence, due to ss 55, 97, 101, 135 or 137.[50] It was not necessary for the Court below to determine these questions, although the Court did assert in *obiter dictum* that the evidence provided 'thin support…for the proposition

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[47] Notably, the jury asked during their deliberations whether RC had given evidence about being in the bathroom with TB and the respondent (7T 453-455 – 9 May 2016), even though it had been made abundantly clear to them throughout the trial that RC had given no evidence in relation to charge 2. They subsequently asked to watch TB's evidence again (7T 457 – 9 May 2016).

[48] 7T 381, 390-398, 421 & 430 (6 & 9 May 2016).

[49] It is doubtful that this interpretation is correct. On one view, s 61 prohibits a direction that the jury must be satisfied beyond reasonable doubt of a particular matter *in order to return a verdict of guilty* (i.e. rendering that matter a 'link in the chain' to a finding of guilt), but does not prohibit a direction that that the jury must be satisfied beyond reasonable doubt that any charged or uncharged act occurred *in order to rely upon that act as proof of a purported tendency* (i.e. as a 'strand in the cable'). On this view, the latter direction does not amount to a direction that the jury 'must be satisfied beyond reasonable doubt' of a matter, as the jury may still reach a verdict of guilty without engaging in tendency reasoning.

[50] In *IMM v The Queen* (2016) 257 CLR 300, [59], this Court left open the question of how the possibility of joint concoction affected the admissibility of proposed tendency evidence.

that RC's evidence was the product of contamination, concoction or collusion'.[51] The Court below made no comment in relation to the possibility of TB's evidence being the product of contamination, concoction or collusion, a matter put both at first instance and in the Court below.

37. The primary matters giving rise to the real possibility that RC and/or TB's evidence was so infected included:[52] (i) In 1995, foster worker FLG had several sessions with RC 'to attempt to gain a disclosure if there has been any abuse' by the respondent, following allegations by JW's sister GP; FLG 'got absolutely no suggestion or indication that there had been any abuse of [RC]';[53] (ii) In January 2000, TB was questioned for 1.5 hours about RC's allegations by Department of Human Services workers, before the police were involved;[54] (iii) In her first police statement in February 2000, TB denied knowing anything about the respondent sexually abusing RC. She also indicated that police had told her that RC had alleged that the respondent had sexually abused her (RC) in Port Macquarie in 1995. TB said that they did go to Port Macquarie in 1995, but that she did not witness her father doing anything to RC;[55] (iv) Also in 2000, the police told RC that the case would be stronger if more people came forward against the respondent;[56] (v) After the police investigation, TB called RC and asked why she was making up lies about the respondent;[57] (vi) In 2000, TB told her psychiatrist that she was worried that RC was going to keep telling lies about the respondent;[58] (vii) In October 2000, TB received abusive telephone calls from RC in which RC accused her of lying;[59] (viii) Around 2005, TB and RC discussed the police investigation (including RC's allegations, purportedly not in detail) in Geelong; (ix) On 31 March 2009, after an extended family dinner at the Shepparton Club, TB's partner HL disclosed to TB that the respondent had indecently assaulted her at work; (x) TB subsequently telephoned JW and alleged that she (TB) had

RFM 2-9
RFM 36-40; 209-211 & 213-214
RFM 88
RFM 86-87
RFM 197-200
RFM 92

[51] This overlooked the fact that foster worker FLG had spoken to RC about GP's allegations in 1995, prior to RC's complaint to police in 2000.
[52] Many of these matters were included in Attachment A to the respondent's tendency submissions. Some of those matters were edited out of the recordings before the jury on the retrial, but nevertheless formed the basis of the defence submissions in pre-trial argument. The accuracy of Attachment A was not disputed either before the trial judge or in the Court below and formed the basis of arguments.
[53] 1T 686-688 & 703-704 (13 March 2013). See also 1T 292-296 (4 March 2013).
[54] 1T 429 (5 March 2013).
[55] 1T 427-428 (5 March 2013).
[56] 1T 351-352 (deleted from edited recording played to the jury on the retrial) (5 March 2013).
[57] 1T 363 (5 March 2013).
[58] 1T 459-460 (deleted from edited recording played to the jury on the retrial) (6 March 2013).
[59] 1T 461 (6 March 2013).

been sexually abused by the respondent;[60] (xi) Numerous conversations between the family members continued; and (xii) On 11 June 2010, JW (accompanied by TB and HL) reported the allegations of WC, GP, KP, RC and TB to police (JW not having witnessed any abuse). RFM 205

Ground 3: Severance

38. TB gave the only evidence in relation to charge 2, said to have occurred approximately 25 years earlier when TB was 4 years old, and RC was therefore 5-6 years old.[61] The Court below carefully considered all of the relevant factors in concluding that the presumption in s 194 of the *Criminal Procedure Act* 2009 (Vic) was rebutted, and that charge 2 should have been severed, including: (i) the lack of any probative value of the evidence, in circumstances where, absent tendency reasoning, the evidence on charge 2 was not admissible in proof of any of the other charges (a point conceded by the learned prosecutor);[62] (ii) the unacceptable prejudice to the respondent given the strong possibility (if not likelihood) that the jury would engage in illegitimate tendency or propensity reasoning, or otherwise use the evidence in an impermissible way;[63] and (iii) the fact that a separate trial on charge 2 was 'unlikely to add much to court time or public expense, or to add much in the way of an additional burden upon the two principal witnesses''.[64] CAB 185 CAB 185 CAB 185

39. The appellant's criticism of the Court's confinement of this ground to charge 2 is without merit. Severing other charges would have required RC to fragment her evidence, an issue that did not affect charge 2 (as she gave no evidence in relation to that charge). Moreover, trial counsel did not argue that any other charge should be severed, nor was such an argument made on appeal. The decision of the Court below was delivered in the context of the arguments made before it.

Ground 4: Complaint Evidence

40. RC's representations to her school friend AF were hearsay and therefore *prima facie* inadmissible pursuant to s 59 of the *Evidence Act* 2008 (Vic). The Court below was correct to hold that the evidence did not establish that the occurrence of the asserted

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[60] 1T 475 (deleted from edited recording played to the jury on the retrial) (6 March 2013).
[61] Whilst insufficient to justify severance in and of itself, a lack of cross-admissibility remains an important factor in deciding whether charges should be tried together: see pages 193-194 of the Legislative Guide to the *Criminal Procedure Act* 2009.
[62] *Bauer (A Pseudonym) (No. 2) v The Queen* [2017] VSCA 176, [100].
[63] *Bauer (A Pseudonym) (No. 2) v The Queen* [2017] VSCA 176, [99].
[64] *Bauer (A Pseudonym) (No. 2) v The Queen* [2017] VSCA 176, [99].

facts were 'fresh in the memory' of RC at the time she made the representations (and that accordingly it was not admissible hearsay pursuant to s 66 of the *Evidence Act* 2008 (Vic)).

41. As the Court below recognised:[65] CAB 190

> [T]here was no evidence in this case that the occurrence of any relevant asserted fact was 'fresh in the memory' of RC at the time that she made the previous representations upon which the prosecution sought to rely. Any representation that [RC] made was generic and non-specific as to activity, surrounding circumstances, date or time, and was made in response to suggestions made to her in the course of AF's questioning.

10 42. Indeed, the vagueness of the complaint, not to mention the imprecision regarding the timing of the complaint itself, meant that it was not possible to determine the period of time between the occurrence of the asserted facts and RC's representations. On any view of the evidence, however, the delay was significant.[66] RFM 55-56; AFM 8-10

43. The manner in which the representations were extracted – being part of a 'guessing game' in which RC responded to AF's suggestions[67] – provided no assistance to the prosecution in establishing that the asserted facts were fresh in RC's memory. Further, RC gave no evidence as to the state of her memory at the time of making the representation, and nor did AF give evidence of RC saying anything at the time which indicated that the asserted facts were fresh in her memory. AFM 42

20 44. The inconsistencies in RC's complaint to AF with other evidence in the case also belied any finding that the asserted facts were fresh in RC's memory. For example, RC denied to AF that the respondent had 'fingered' her;[68] yet many of her allegations at trial were that he had touched and penetrated her vagina with his finger[69] – including on the occasions giving rise to the final two charges. Further, RC said to AF that she was the AFM 39

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[65] *Bauer (A Pseudonym) (No. 2) v The Queen* [2017] VSCA 176, [112].

[66] RC testified that she 'think[s]' she complained to AF in 1998 (1T 269-271 & 312-313 – 4 March 2013). AF gave evidence that RC moved in with her family in December 1997 or January 1998, and that the disclosure occurred 'a matter of months' later (1T 572 - 7 March 2013). Subsequently, she gave evidence that the disclosure occurred about a year prior to RC's complaint to police (which took place in January 2000) (T 581 - 7 March 2013). This was 10-11 years after the alleged offending commenced in 1988-1989 (when RC was 4-5 years old), and 2-3 years after the alleged conduct the subject of charge 17 (said to have occurred on a visit by RC to Shepparton between 16 January 1996 and 15 January 1997). The evidence did not establish whether the conduct the subject of charge 18 (said to have occurred between 15 and 17 December 1998) allegedly occurred before or after the relevant conversation.

[67] 1T 586 (7 March 2013).

[68] 1T 574 (7 March 2013).

[69] Charges 1, 3, 5, 8, 9, 10, 12, 17 and 18, as well as a number of uncharged acts.

first person she had told about the abuse; yet RC testified that she had already told another friend and that friend's mother about the abuse when she was 12 years old.[70] AFM 45

45. The appellant's assertion that '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'[71] is inherently flawed (quite apart from the fact that the above matters belied a finding that the asserted facts were fresh in RC's memory). The jury was invited to use the complaint evidence as supporting each and every one of RC's allegations, including that said to have occurred 10-11 years prior when RC was 4-5 years old. In any event, as the Court below recognised, all of the matters, when taken into account, led to a conclusion that the prosecution had not established that the asserted facts were fresh in RC's memory at the time of her representation to AF. The Crown therefore did not satisfy the test in s 66 of the *Evidence Act* 2008 (Vic).

46. Further and in any event, the Court below properly concluded that the evidence of complaint should have been excluded pursuant to s 137 of the *Evidence Act* 2008 (Vic).[72] The Court carefully considered the evidence in the case, including the fact that the representations were elicited as a part of a 'guessing game', involving AF making suggestions to RC as to what might have happened. That matter, together with the vagueness of the allegations and the fact that the complaint was made only two years before RC's complaint to police, meant the evidence had very little legitimate probative value. By contrast, there was a real danger that the jury would accord too much weight to the evidence, or wrongly use it as supporting RC's credibility in circumstances where the manner of extraction was such that the evidence could not properly be used for that purpose. Further, due to the fact that the disclosure had occurred about 15 years prior to her evidence being recorded, AF's memory of the disclosure was hazy.[73] She was not able to answer defence counsel's questions regarding other things said by RC in the same conversation,[74] and was essentially recounting what she had said in her statement in 2000.[75] This was especially unfair to the respondent given the loss of his record of interview from that same period.

CAB 190-191

RFM 114; AFM 37 & 39

RFM 114

AFM 38

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[70] 1T 589 (7 March 2013); 1T 286-287 (4 March 2013). Those two persons were not called as witnesses.
[71] Appellant's Submissions dated 2 February 2018, [6.58].
[72] *Bauer (A Pseudonym) (No. 2) v The Queen* [2017] VSCA 176, [113].
[73] See, for example, 1T 572.13, 574.30, 581.3 & 581.25 (7 March 2013).
[74] 1T 581.3 (7 March 2013).
[75] See, in particular, 1T 573.26 (7 March 2013).

47. Finally, and contrary to the implication of the appellant's submissions,[76] the jury was invited to use the complaint evidence both as to its truth and as to RC's credit.[77] In any event, the learned prosecutor did not specify to the jury how the complaint evidence could be used as a matter of law,[78] other than – quite wrongly, with respect – telling the jury that the tendency evidence in the case could be used not only when assessing the individual charges, but also when considering the complaint evidence to AF.[79] In any event, the appellant has not argued in this Court – and did not argue in the Court below – that a substantial miscarriage of justice did not occur if the complaint evidence was wrongly admitted.

CAB 33-34

RFM 194-195

RFM 195

10 **Part VI: Cross-Appeal**[80]

48. The Court below allowed the appeal, having decided that all four grounds were made out. Pursuant to s 276(1) of the *Criminal Procedure Act* 2009 (Vic), the Court was therefore required to set aside each conviction and either (a) order a new trial; or (b) enter a judgment of acquittal.[81]

CAB 191

49. In oral submissions before the Court, the respondent referred the Court to the judgment of Murphy J in ***King v The Queen***,[82] in which his Honour adopted the following observations by Everett J in ***Cheatley v The Queen***:[83]

> My conclusion is that there is no presumption in favour of a second trial being ordered where an appeal succeeds, and that the discretion of the court must be exercised on a
20 consideration of all the relevant facts and circumstances. The accused should be accorded neither more nor less personal consideration than the overall justice of the case requires in recognition of the public interest in the fair and impartial administration of criminal justice. I do not accept the counter argument on behalf of the prosecution that 'the ordinary course should apply'. I do not consider, for reasons I have expressed, that there should be any 'ordinary' course. Each case is individual and should be determined on the basis of the facts of the case and all the relevant considerations which apply to it – not to a different case. It is a negation of the wide discretion vested by statute in the Tasmanian Court of Criminal Appeal to suppose that a common mould exists and that all cases should be judged within its framework.

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[76] Appellant's Submissions dated 2 February 2018, [6.50].
[77] 7T 399-400 (6 May 2016).
[78] 7T 241-242 (5 May 2016).
[79] 7T 242 (5 May 2016).
[80] To avoid confusion, these submissions will continue to refer to the accused as the respondent, and the Crown as the appellant.
[81] The parties were in agreement that sub-paragraphs (c) to (f) had no possible application in the present case. See *Bauer (A Pseudonym) (No. 2) v The Queen* [2017] VSCA 176, [115].
[82] (1986) 161 CLR 423.
[83] [1981] Tas SR 123, 137-138. The wording of the relevant statute – s 8(1) off the *Criminal Appeal Act* 1912 (NSW) – differed from that which applies in the present case, but not so as to alter the correctness of the approach endorsed by Murphy J.

50. The Court below did not refer in its judgment to either of the above cases. Rather, the Court cited the following passage from ***R v Bartlett***[84] with approval:

> In normal circumstances it would be proper to direct a new trial if there is evidence upon which a reasonable jury could, assuming a trial in accordance with law, convict. However the court has a discretion not to order a retrial if there are circumstances which would render it unjust to require the applicant to stand his trial again.

51. The above passage embodies a presumption that a new trial will be ordered where there is evidence upon which a reasonable jury could convict, with that presumption being rebutted where the circumstances would render it unjust to order a retrial. With respect, neither the wording of the statute, nor this Court's decision in ***DPP (Nauru) v Fowler***[85] (cited immediately after the passage in ***Bartlett*** excerpted above, and also by the Court below), suggests the existence of any such presumption. Indeed, the approach adopted by Murphy J in ***King*** is entirely consistent with the approach his Honour had adopted as part of the unanimity in ***Fowler***. Regrettably, the passage from ***Fowler*** was misinterpreted in ***Bartlett***, an error that informed the decision of the Court below to order a retrial. This was potentially critical given the Court reached its conclusion to order a retrial 'not without hesitation'.[86]

CAB 191-192

CAB 192-193; CAB 142

52. Applying the correct approach adopted by Murphy J in ***King***, not commencing with any presumption as to the 'normal course', the overall justice of the case (taking into account all of the relevant facts and circumstances) leads to a conclusion that acquittals should be entered.

53. First, the respondent's ability to put a full defence to the allegations, and therefore his ability to have a fair trial, has been severely compromised. The offences are alleged to have occurred up to 30 years ago. The respondent's formal police interview from 2000, in which he made strenuous denials,[87] has been lost or destroyed. There were no records of what was (or was not) found during the (voluntary) search of the respondent's home during a suspension of the interview, beyond an empty wooden box. This unfairness was compounded by the fact that RC and AF were able to refresh their memories from their statements made in 2000. Further, evidence has been lost

RFM 178

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[84] [1996] 2 VR 687, 698.
[85] (1984) 154 CLR 627, 630 (referred to by the Court below at *Bauer v The Queen (A Pseudonym) (No. 2)* [2017] VSCA 176, [118]-[119]).
[86] *Bauer v The Queen (A Pseudonym) (No. 2)* [2017] VSCA 176, [121]; see also [5].
[87] Evidence of Detective Sergeant Noel Jacobs, T 92 (4 May 2016). The interview ran from 1.28 to 2.11 pm, and 2.48 to 3.02 pm.

proving that RC effectively denied being abused by the respondent to FLG in 1995.[88] In addition, evidence that RC was prepared to make (unsubstantiated) allegations – in 1986 and 1992 – that her stepfather GS was sexually assaulting her has been ruled inadmissible pursuant to s 342 of the *Criminal Procedure Act* 2009 (Vic) (a ruling affirmed on appeal). The respondent is therefore precluded from negating RC's explanation that she lied about the respondent not abusing her in 1995 (to the extent that she admitted it) 'to protect [herself] from having to confront everything'.[89] RFM 40

54. The second primary reason why the interests of justice require that acquittals be entered rather than a retrial ordered is that the respondent's liberty has already been severely restricted. Beyond the 1176 days' imprisonment he has formally served in relation to this matter (being almost half of the seven-year non-parole period imposed by the learned trial judge), the matter has been hanging over his head since RC's allegations were first raised in 2000 (with that stress being particularly acute since the investigation was re-opened in 2010). He was bailed from 2 March 2012 until he was incarcerated upon his initial conviction on 22 March 2013. He was again bailed on 16 April 2015 after his first appeal was allowed, then gaoled again on 10 May 2016 after the seventh trial (in which he was convicted in respect of RC's allegations). He was bailed again on 11 July 2017 following the decision of the Court below. *Inter alia*, the respondent's bail conditions have always required that he reside at a certain address (which is some 90 minutes' drive from the home of his elderly mother, with whom he is very close) and that he not leave Victoria.

55. Moreover – astonishingly – the respondent has, since 2013, faced nine jury trials, two plea hearings, two sentences, one interlocutory appeal, two appeals, one special leave application, and now a Crown appeal in this Court. In addition, the respondent's retrial relating to RC's allegations was listed for three days in the reserve list, but was ultimately adjourned and relisted more than five months later due to there being no judge available to hear the trial. Of the nine trials that did proceed before juries, four related to the complainant RC (with the first also relating to four other complainants): two of those juries were discharged through no fault of the respondent's. Of the other five jury trials (which related to the complainants TB and KP), three juries were

[88] See paragraph 37 above. FLG had no memory of the sessions by 2013, and the author of the note (DL) had not been present at them.
[89] 1T 296 (4 March 2013).

discharged (again through no fault of the respondent's), and the other two trials resulted in acquittals. The respondent was not sentenced until five months after the guilty verdicts regarding RC's allegations (and three months after his acquittals in the ninth trial).

56. The third matter leading to the conclusion that a retrial should not be ordered is that the respondent is 72 years old. The respondent's age is relevant to a consideration of the impact on him of proceedings to date and of a further retrial. Notably, there have been no allegations of further offending since the investigation was reopened in 2010, despite the respondent being on bail for a significant portion of that time. Other than the indictment relating to HL (to which he pleaded guilty), the respondent has no criminal record at all.

57. A fourth matter not specifically relied upon in the Court below, but which should be taken into account were this Court to conclude that the Court below erred in the exercise of its discretion,[90] is the respondent's ill health. As is apparent from the sentencing remarks of the learned trial judge,[91] he was diagnosed with prostate cancer in February 2010, not long before the police investigation was re-opened, and underwent radical surgery for removal of the prostate gland, leading to ongoing incontinence. In November 2013 he was diagnosed with acute pancreatitis with pancreatic necrosis, leading to the removal of his gallbladder. The subsequent development of septicaemia led to the removal of half of his pancreas and the insertion of draining and feeding tubes between November 2013 and January 2014. CAB 109-110

58. Taking into account all of the circumstances, including the seriousness of the allegations, it is contrary to the interests of justice to order that the respondent stand trial in relation to RC's allegations for a fifth time, not including a further occasion where his trial was not reached. Acquittals should be entered.

Part VIII: Presentation of oral argument

59. The presentation of the respondent's oral argument will take approximately three hours.

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[90] *R v Carroll* [1991] 2 VR 509.
[91] *DPP v Dennis Bauer (a pseudonym) No. 2* [2016] VCC, [26]-[28].

Costs

60. While this Court has jurisdiction to award costs in all matters brought before the Court,[92] and the discretion conferred in that regard is general and unfettered,[93] as a matter of practice, costs are ordered in criminal cases only where the circumstances of the case are exceptional.[94] Exceptional circumstances exist in this case to warrant an order that, irrespective of the outcome of the appeal,[95] the appellant pay either the entirety or a proportion of the respondent's costs of the hearings in this Court.

61. The very nature of this appeal renders the proceedings exceptional. In ***The Queen v Whitworth***,[96] this Court made an observation which must extend to Crown appeals:[97]

> Although there is jurisdiction to award costs against the Crown in a criminal case, it is a longstanding practice not to award costs when a convicted person successfully applies for special leave to appeal or succeeds on appeal. However, an application for special leave to appeal by the Crown is an exceptional proceeding and there is no reason why the jurisdiction should not be exercised in appropriate cases.

62. This appeal would not have been brought but for the reasoning of the Court below regarding Ground 2. On the special leave application Senior Counsel for the appellant explained that 'the reason we are here is in relation to the tendency argument', and agreed that Ground 4 would not in itself warrant a grant of special leave. The respondent should not bear the financial burden of providing a vehicle for the clarification of the law on tendency evidence, particularly in circumstances where, due to his liberty being at stake, he has no choice but to respond to the Crown's appeal.

Dated this 2nd day of March 2018

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[92] Pursuant to s 26 of the *Judicary Act* 1903 (Cth); the traditional rule that costs are not awarded against the Crown has thereby been abrogated by statute: see *Latoudis v Casey* (1990) 170 CLR 534, 542.
[93] Rule 50.01 of the High Court Rules 2004.
[94] *Momcilovic v The Queen* (2011) 245 CLR 1, [279], [501] and [658].
[95] *Oshlack v Richmond River Council* (1998) 193 CLR 72.
[96] (1988) 164 CLR 500.
[97] *The Queen v Whitworth* (1988) 164 CLR 500, [3].