HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

The Director of Public Prosecutions
Applicant

and

Benjamin Roder (a pseudonym)
Respondent

APPLICANT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ISSUES

2. Evidence of conduct of the respondent is to be admitted at trial in order to prove that the respondent has a tendency to act in a particular way and a tendency to have a particular state of mind. The asserted tendencies are to be relied on in proof of the offences with which the respondent has been charged. Some of the conduct of the respondent that is said to prove the tendencies is also the subject of charges.

3. The *first* issue, corresponding to paragraph (b) of the proposed ground of appeal, is whether s 61 of the *Jury Directions Act 2015* (Vic) (the **JDA**) prohibits the trial judge from directing the jury that the charged acts must be proved beyond reasonable doubt before each of those acts can be used in proof of the asserted tendency. The applicant submits that s 61 unequivocally prohibits such a direction.

4. The *second* issue, corresponding to paragraph (a) of the proposed ground of appeal, is whether, if such a direction is not prohibited by s 61 of the JDA, it is in any event necessary or appropriate for the trial judge to give the direction. The applicant submits that such a direction is neither necessary nor appropriate.

PART III: SECTION 78B NOTICE

5. The applicant does not consider that notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV: DECISIONS BELOW

6. The interlocutory decision of the County Court of Victoria (**CAB 15-20**) has not been reported or published on the internet.

7. The decision of the Court of Appeal of the Supreme Court of Victoria (**CAB 26-39**) has not been reported. The medium-neutral citation is *Director of Public Prosecutions v Roder (a pseudonym)* [2023] VSCA 262.

PART V: MATERIAL FACTS

8. The respondent is to be tried in the County Court of Victoria on an indictment charging him with 27 sexual offences against two sons of his former domestic partner, referred to as "MW" and "EW" (**CAB 5-14**).

9. Pursuant to s 97(1)(a) of the *Evidence Act 2008* (Vic), the prosecution gave notice to the respondent of an intention to adduce evidence to prove that the respondent had (1) a tendency to have an improper sexual interest MW and EW and a willingness to act on that sexual interest by engaging in sexual activity with them, and (2) a tendency to act in particular ways towards them. The tendency notice[1] (**AFM 4-19**) indicated that the prosecution would rely, in proof of the asserted tendencies, on the 27 sexual acts that are the subject of a charge (and the identified circumstances surrounding those acts), and six other instances of sexual misconduct that are not the subject of a charge. The tendency notice stated that the prosecution relied on the asserted tendencies in relation to each charge.[2]

10. At a pre-trial hearing, the respondent conceded that the evidence relating to both the uncharged and charged acts was admissible as tendency evidence in relation to each charge (**CAB 16.5-16.13**). However, the trial judge acceded to a submission made by the respondent and ruled that the jury should be directed that "the charged acts must be proved beyond reasonable doubt" before they could be used as tendency evidence (**CAB 19.12-19.13**).

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1 The relevant tendency notice is an amended notice filed on 12 September 2023 after the severance of charges 1-6 relating to a different complainant, referred to as "CW". The original tendency notice was filed on 28 March 2022.

2 The tendency notice refers to the tendency being relied on in support of "charges 1–33". This is an erroneous carryover from the original tendency notice. The amended tendency notice refers to 27 charges, numbered 7-33. Uncharged acts are labelled "other sexual misconduct A-F".

11. The Court of Appeal refused leave to appeal from the trial judge's decision (**CAB 40**), concluding that the trial judge was correct to decide that "the jury should be directed that every charged act relied upon by the prosecution as tendency evidence must be proved beyond reasonable doubt before it can be so used" (**CAB 39 [34]**).

12. The Court of Appeal reasoned that such a direction should be given because to direct otherwise would risk "undermining" the criminal standard of proof applicable to the charges on the indictment (**CAB 38 [29], 39 [34]**). The position taken by the High Court in *R v Bauer (a pseudonym)*,[3] that juries should not be directed that they must be satisfied of the proof of uncharged acts beyond reasonable doubt before using them to support proof of an asserted tendency, was said not to apply to charged acts (**CAB 38 [28]**). The Court of Appeal also reasoned that the direction was "in conformity with" s 61 of the JDA (**CAB 39 [33]**), which provides that "the only matters" that the trial judge may direct the jury must be proved beyond reasonable doubt are "the elements of the offence charged or an alternative offence" and "the absence of any relevant defence".

PART VI: ARGUMENT

A. SUMMARY

13. The Court of Appeal was wrong to uphold the direction proposed by the trial judge. In summary, that is for the following reasons.

14. *First*, s 61 of the JDA prohibits the proposed direction, regardless of the persuasiveness of any considerations in favour of such a direction that may have commended themselves to the trial judge or the Court of Appeal. A direction that an act must be proved beyond reasonable doubt in order to be used as evidence of a tendency is not a direction that "the elements of the offence charged" be proved beyond reasonable doubt. **See section B below**.

15. *Second*, the Court of Appeal's endorsement of the proposed direction was in any event misplaced. The Court of Appeal's decision leads to an unprincipled inconsistency in the treatment of charged and uncharged acts that are used as tendency evidence. The Court of Appeal's main concern — that the proposed direction was needed in order to avoid "undermining" the criminal standard of proof — was capable of being addressed by other directions, and was not a sufficient reason to superimpose that standard onto a charged

[3] (2018) 266 CLR 56 at 97-98 [86] (the Court).

act insofar as it was relied on as evidence to prove a tendency. The Court of Appeal's approach is also at odds with established approaches to tendency reasoning and to the treatment of evidence in a criminal trial. **See section C below**.

B. SECTION 61 OF THE JDA BARS THE PROPOSED DIRECTION

The statutory scheme

16. The express purposes of the JDA are set out in s 1. They include: reducing the complexity of jury directions; simplifying and clarifying the issues that juries must determine; simplifying and clarifying the duties of the trial judge in giving jury directions; and assisting the trial judge to give jury directions in a manner that is as clear, brief, simple and comprehensible as possible (see s 1(a), (b), (c) and (e)).

17. Those purposes are complemented by s 5, which sets out the "guiding principles" to which regard is to be had when applying and interpreting the provisions of the JDA (s 5(5)).

    (1) Section 5(1)(b) states that the Parliament recognises that "the law of jury directions in criminal trials has become increasingly complex". Section 5(1)(c) states that this development: "has made jury directions increasingly complex, technical and lengthy"; "has made it increasingly difficult for trial judges to comply with the law of jury directions and avoid errors of law"; and "has made it increasingly difficult for jurors to understand and apply jury directions".

    (2) Against that backdrop, s 5(4) provides that the intention of the Parliament is that a trial judge, in giving directions to a jury in a criminal trial, should (a) "give directions on only so much of the law as the jury needs to know to determine the issues in the trial", (b) "avoid using technical legal language wherever possible", and (c) "be as clear, brief, simple and comprehensible as possible".

18. Division 1 of Pt 7 deals with the manner in which a trial judge must direct the jury as to the requirement of proof beyond reasonable doubt. Section 61 ("What must be proved beyond reasonable doubt") relevantly provides:

> Unless an enactment otherwise provides, the only matters that the trial judge may direct the jury must be proved beyond reasonable doubt are—
>
> (a) the elements of the offence charged or an alternative offence; and
>
> (b) the absence of any relevant defence.

19. Section 62 ("Abolition of common law obligation to give certain directions") relevantly provides:

> Any rule of common law under which a trial judge in a criminal trial is required to direct the jury that a matter, other than a matter referred to in section 61, must be proved beyond reasonable doubt is abolished.

20. The notes to s 62 record that the provision abolishes "the rule[s] attributed to" *Shepherd v The Queen*[4] ("that in appropriate cases a jury must be directed that it must be satisfied beyond reasonable doubt of an indispensable intermediate fact") and *R v Sadler*[5] ("that a jury must be directed that it must be satisfied beyond reasonable doubt of uncharged acts that the jury would use as a step in their process of reasoning towards guilt"), as well as "any other rule that requires a jury to be directed that it must be satisfied beyond reasonable doubt of any matter other than a matter referred to in section 61".

The proper construction of s 61 — "elements" and other "matters"

21. The directions to be given in the respondent's pending trial are governed by the JDA, which "applies despite any rule of law or practice to the contrary" (s 4). Accordingly, when determining the directions that can and should be given as to the criminal standard of proof, it is necessary to begin with the text of s 61, read in light of its context and purpose.

22. Other than observations that s 61 of the JDA is framed differently from s 161A of the *Criminal Procedure Act 1986* (NSW) (which has applied to trials in New South Wales since 1 March 2021) (**CAB 36 [21], 39 [33]**), the totality of the Court of Appeal's reasoning on the construction and application of s 61 consisted of the following (**CAB 39 [33]**):

> By its clear terms, s 61 requires a trial judge to direct the jury that "the elements of the offence charged" must be proved beyond reasonable doubt. In the present case, every sexual act alleged in every charge on the indictment is an element of that charge. A direction that any such element must be proved beyond reasonable doubt — no matter the use sought to be made of the evidence — would not offend s 61 of the JDA. Indeed, such a direction would plainly be in conformity with the section.

23. It is correct that s 61 permits, and (in relevant part) *only* permits, a trial judge to direct the jury that "the elements of the offence charged" must be proved beyond reasonable doubt. It is not correct that the direction upheld by the Court of Appeal accords with that statutory

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4 (1990) 170 CLR 573 at 584-585 (Dawson J, with Mason CJ, Toohey and Gaudron JJ agreeing).

5 (2008) 20 VR 69 at 89 [67] (Nettle, Redlich and Dodds-Streeton JJA).

command. The error can be discerned from the Court of Appeal's reliance on the proposition that "any … *element*" must be proved beyond reasonable doubt "no matter the use sought to be made of *the evidence*" (emphasis added). That drift in language is not just an infelicity. The reasoning conflates (1) the "elements" of an offence and (2) the "evidence" that is used to prove the elements or other facts that are probative of them. The Court of Appeal's approach cannot be sustained on the terms of s 61, nor is it supported by the context for the enactment of s 61.

24. Section 61 identifies "the only *matters*" that a trial judge may direct the jury must be proved beyond reasonable doubt: namely, (a) "*the elements* of the offence charged or an alternative offence" and (b) "the absence of any relevant defence" (emphasis added). Section 62 complements s 61 by abolishing any "rule of common law" which requires a trial judge to give a direction that "a matter, other than a matter referred to in section 61" must be proved beyond reasonable doubt.

25. Accordingly, understanding the operation of s 61 requires recognition of the textual distinction between "the elements" of an offence (about which a direction as to proof beyond reasonable doubt may be given) and all other "matters" (about which a direction as to proof beyond reasonable doubt must not be given). That distinction directs attention to the process by which the elements of an offence are established through the fact-finding that occurs in a criminal trial.

    (1) The *elements* of an offence are the legal constituents of the offence, which are to be discerned from the statute that creates the offence or from the common law. It is the elements of the offence which must be proved beyond reasonable doubt in order for the offence to be established.[6] The elements determine, in the context of a particular case, what facts must be found to exist in order to establish that the offence has been committed.

    (2) Behind the facts that themselves establish the elements may be *other facts* from which the existence of those facts can be inferred.[7] The facts that are said to

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6 *HML* (2008) 235 CLR 334 at 360 [29] (Gleeson CJ).

7 *Smith v The Queen* (2001) 206 CLR 650 at 654 [7] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

establish the elements, and any additional intermediate facts which may be relevant to finding those facts, together constitute the "facts in issue" in a trial.[8]

(3) The *evidence* comprises the "information which … will be received by a court for the purpose of deciding [the] issues of fact that arise for its decision".[9]

26. "[T]he legal requirement as to onus and standard of proof is related to the elements of the offence charged".[10] In particular, it is the "essential ingredients of each element" that must be proved beyond reasonable doubt.[11] It is not necessary for the prosecution to prove beyond reasonable doubt "every fact", or "every piece of evidence", relied on to prove an element.[12] Those propositions are subject, under the common law, to the qualification explained in *Shepherd*: namely, where there are intermediate facts which constitute "indispensable links in a chain of reasoning towards an inference of guilt", it is also appropriate to direct the jury that those intermediate facts must be established beyond reasonable doubt before the ultimate inference of guilt is drawn.[13]

27. The JDA was enacted against the backdrop of those understandings. An overarching purpose of the JDA is to simplify the jury directions in a criminal trial, so that directions are confined to "only so much of the law as the jury needs to know to determine the issues in the trial" and are "as clear, brief, simple and comprehensible as possible" (s 5(4)(a) and (c)). The more specific purpose of ss 61 and 62 is to reform directions as to the criminal standard of proof by replacing the common law rules.[14] Reflecting the understanding that the onus and standard of proof ordinarily attach to the elements of an offence, the Attorney-General stated in the second reading speech that "[f]or many years, juries were only required to be satisfied beyond reasonable doubt of the elements of the offence and of the absence of any relevant defences".[15] The Attorney-General went on

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8 *McNamara v The King* (2023) 98 ALJR 1 at 18 [69] (Gageler CJ, Gleeson and Jagot JJ) (referring to the use of that language in s 55(1) of the Uniform Evidence Acts). The terminology of "facts in issue" may also be confined to only those facts that establish the elements, albeit accepting that other facts will be relevant: see *Smith* (2001) 206 CLR 650 at 654 [7] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

9 *HML v The Queen* (2008) 235 CLR 334 at 350 [4] (Gleeson CJ). See generally *Chief Executive Officer of Customs v El Hajje* (2005) 224 CLR 159 at 174 [38] (McHugh, Gummow, Hayne and Heydon JJ).

10 *HML* (2008) 235 CLR 334 at 351 [4] (Gleeson CJ); see also at 490 [477] (Crennan J), cited in *Bauer* (2018) 266 CLR 56 at 98 [86] (the Court).

11 *Shepherd* (1990) 170 CLR 573 at 580 (Dawson J, with Mason CJ, Toohey and Gaudron JJ agreeing).

12 *Shepherd* (1990) 170 CLR 573 at 580 (Dawson J, with Mason CJ, Toohey and Gaudron JJ agreeing).

13 *Shepherd* (1990) 170 CLR 573 at 579 (Dawson J, with Mason CJ, Toohey and Gaudron JJ agreeing).

14 Explanatory Memorandum, Jury Directions Bill 2015 (Vic) at 38.

15 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 2015 at 680 (Mr Pakula, Attorney-General).

to say that the qualification expounded in *Chamberlain v The Queen (No 2)*[16] and *Shepherd* in relation to indispensable intermediate facts had "greatly complicated" the law with respect to jury directions.[17] The objective of ss 61 and 62 was to "return the law to where it was", so that "the jury does not have to consider whether a particular fact is proved beyond reasonable doubt, before they may rely on that fact".[18]

28. The text of ss 61 and 62 gives effect to that objective. Apart from the elements of the offence charged (or an alternative offence) or the absence of a defence, no other "matter" may be the subject of a direction of the trial judge requiring proof beyond reasonable doubt. The word "matter" is obviously and intentionally general. The prohibition on directions that would require proof beyond reasonable doubt of any other "matter" extends to *anything* other than the elements of an offence. It extends to "intermediate" facts that may be relevant to proof of the elements (as the notes under s 62 expressly identify). It also extends to the evidence relied on in relation to any fact in issue, although the trial judge may still "relate" the evidence "to" the elements of an offence in various ways in the course of explaining that the elements are to be proved beyond reasonable doubt (as the examples under s 61 expressly identify).

The proposed direction is prohibited

29. Once s 61 is properly construed, the error of the Court of Appeal in eliding the distinction between "elements" and "evidence" is readily apparent.

30. The direction proposed by the trial judge is not a direction that "the elements of the offence charged" must be proved beyond reasonable doubt. Instead, it is a direction that the criminal standard of proof attaches to a different kind of "matter": namely, *evidence* that is sought to be used in proof of the asserted tendency, being a fact from which a jury is invited to infer an ultimate fact in issue and therefore establish an element of the charged offences.

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16 (1984) 153 CLR 521.

17 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 2015 at 680-681. See also Victoria, Department of Justice and Regulation, Criminal Law Review, *Jury Directions: A Jury-Centric Approach* (March 2015) at 117-118. See generally JDA, s 5(1)(b) (stating that the Parliament recognises that "in recent decades", the law of jury directions in criminal trials has become increasingly complex).

18 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 2015 at 681. In this regard, the JDA departed from recommendations in the 2012 report of the Simplification of Jury Directions Project. That report expressly rejected the option of returning the law to the state it was in before *Chamberlain (No 2)*, and instead recommended a statutory clarification and modification of the approach in *Shepherd*: Weinberg et al, *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group* (August 2012) at 141-145 [3.134]-[3.151].

31. More particularly, when evidence of a person's conduct is used to prove the existence of an asserted tendency on the part of the person (whether or not the conduct is the subject of a charge) the evidence is not used to, and does not, establish an "element". Rather, the evidence is a piece of information that is adduced in support of another fact, being the asserted tendency. To attach the standard of proof beyond reasonable doubt to the evidence being used in proof of the tendency (which also need not be proved beyond reasonable doubt) is to adopt a practice that s 61 prohibits. Using the language in the second reading speech, the proposed direction wrongly requires the jury to "consider whether a particular fact is proved beyond reasonable doubt, before they may rely on that fact" in evaluating whether the asserted tendency is established.[19]

32. It may be accepted that, where evidence of a person's conduct is admitted for a tendency purpose and the conduct is also the subject of a charge, the evidence will be significant in the trial in more than one way. That dual significance does not make it accurate to say that, when the prosecution seeks to use the evidence to prove that the accused has a tendency, it is using the evidence to establish "an element of the offence charged". Rather, as was observed by Beech-Jones CJ at CL (with whom Button J agreed) in *Decision restricted*, a jury invited to consider evidence of conduct that is the subject of a charge as tendency evidence "will be undertaking each consideration" of the conduct "at different stages of its deliberations with a different onus of proof *and for a different purpose*".[20]

33. The Court of Appeal and the trial judge were evidently concerned that the dual significance of evidence of conduct in the trial might confuse the jury (**CAB 38 [29], 39 [34]**) or involve "sophistry" (**CAB 28 [7]**). Such concerns do not justify departing from the plain meaning and purpose of s 61. It is enough to say that these concerns about the effect of s 61, and the emphasis that ss 61 and 62 give to the distinction between "elements" (about which a direction as to the criminal standard of proof may be given) and all other "matters" (about which such a direction is prohibited), are to be addressed by the trial judge formulating directions that adequately bring home to the jury the need to be satisfied of the *elements* of each offence beyond reasonable doubt in order to convict. Such directions must also conform with the requirements of s 27(2) of the JDA,

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19 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 2015 at 681.

20 [2023] NSWCCA 119 at [9] (emphasis added).

which sets out the matters a trial judge must address in a direction relating to "other misconduct evidence", which is defined to include tendency evidence.[21]

34. Further, and in any event, the Court of Appeal did not grapple with the likelihood that its novel approach would *itself* confuse the jury or unduly complicate the jury's deliberations. Those consequences are discussed in detail in paragraphs 5252 to 5858 below. They would patently be at odds with the legislative objective of *simplifying* jury directions, thus underscoring the implausibility of the Court of Appeal's approach.

35. For those reasons, the direction proposed by the trial judge is prohibited by s 61 of the JDA. Further, and for completeness, to the extent that the Court of Appeal's decision is understood as laying down a "rule of common law" requiring such a direction to be made, such a rule is abolished by s 62.[22]

The Court of Appeal's reasoning in Dempsey *is of no assistance*

36. Finally, the earlier decision of the Court of Appeal in *Dempsey (a pseudonym) v The Queen*[23] — which was purportedly "followed" by the Court below (**CAB 39 [33]**) — takes the matter no further. *Dempsey* concerned an indictment which relevantly charged the accused with armed robbery (charge 1) and murder (charge 2). The prosecution contended that the accused had a tendency to lure potential victims to a particular address in a certain way, and sought to rely on the tendency to prove the accused's identity on charge 1 and the accused's intention on charge 2. The trial judge ruled that the evidence in relation to each charge was cross-admissible as tendency evidence in respect of the other charge. In the course of considering an application for leave to appeal against that ruling, the Court of Appeal stated:[24]

> As a preliminary observation, plainly the prosecution would not be able to use the evidence on charge 1, to prove the relevant intention of the applicant on charge 2, unless the jury is first satisfied that the applicant is the person who committed the armed robbery that is the subject of charge 1. Strictly, under s 61 of [the JDA], it might not be necessary for the prosecution to prove that fact beyond reasonable doubt for that purpose. However, if directions were given to the jury, regarding the use that might be made of the evidence on charge 1 as coincidence or tendency evidence on charge 2, by reference to a standard of proof lower than the criminal standard, that would confuse, and would be calculated to undermine, the criminal

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21 JDA, s 26.

22 See *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 at 549 [23] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

23 [2019] VSCA 224.

24 *Dempsey* [2019] VSCA 224 at [76] (Beach, Kaye and Ashley JJA) (footnote omitted).

> standard of proof that must be applied by the jury for it to convict the applicant on charge 1. Accordingly, in order that the evidence on charge 1 be admissible in proof of the intention of the applicant to commit the offence which is the subject of charge 2, it would be necessary for the jury, first, to be satisfied beyond reasonable doubt of the guilt of the applicant on charge 1.

37. Those remarks were couched as "preliminary observation[s]" in the context of a dispute over the admissibility of the tendency evidence (in contrast to the present case, which concerns the appropriate directions for tendency evidence that is conceded to be admissible). It is therefore unsurprising that the Court of Appeal did not undertake a considered analysis of s 61 or express a concluded view about how it operated. In any event, insofar as *Dempsey* supports the approach of the Court of Appeal below, it also cannot stand with the proper construction of s 61. It may be observed that the second sentence in the above passage does not fully engage with the terms of s 61: the section *prohibits*, rather than merely making "[un]necessary", a direction that a matter other than the elements of the offence charged must be proved beyond reasonable doubt.

C. THE PROPOSED DIRECTION IS ALSO WRONG IN PRINCIPLE

38. In any event, for reasons that have been carefully and persuasively articulated by the New South Wales Court of Criminal Appeal in a series of recent cases,[25] the Court of Appeal was wrong to endorse the direction proposed by the trial judge, irrespective of whether it could be reconciled with s 61 of the JDA.

No principled distinction between approaches to "charged" and "uncharged" acts

39. In *Bauer*, this Court explained that it was not erroneous for a trial judge not to warn the jury that they needed to be satisfied of uncharged acts used in proof of a tendency beyond reasonable doubt.[26] Rather, addressing the directions "ordinarily to be given to a jury in a single complainant sexual offences case where the Crown is permitted to adduce evidence of uncharged acts as evidence of the accused", the Court stated:[27]

> Contrary to the practice which has operated for some time in New South Wales, trial judges in that State should not ordinarily direct a jury that, before they may act on evidence of uncharged acts, they must be satisfied of the proof of the uncharged acts beyond reasonable doubt. Such a direction should not be necessary or desirable unless it is apprehended that, in the particular circumstances of the case, there is a significant possibility of the jury treating the uncharged acts as an indispensable link

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25 *JS* [2022] NSWCCA 145; *Gardiner v The King* [2023] NSWCCA 89; *Decision restricted* [2023] NSWCCA 119.

26 (2018) 266 CLR 56 at 96 [80].

27 *Bauer* (2018) 266 CLR 56 at 98 [86] (footnotes omitted).

> in their chain of reasoning to guilt. And, as explained earlier in these reasons, a trial judge is precluded from giving such a direction in Victoria.

The Court in *Bauer* did not address the question of whether any different approach is warranted where the tendency evidence includes charged acts.

40. The question was taken up by the New South Wales Court of Criminal Appeal in *JS v The Queen*,[28] which involved a challenge to directions concerning tendency evidence consisting of charged and uncharged acts. It was contended that the trial judge erred in giving directions that did not require the jury to be satisfied beyond reasonable doubt of proof of the charged acts. Basten AJA (with whom Hamill and Dhanji JJ agreed) noted that the remarks in *Bauer* were limited to tendency evidence consisting of uncharged acts.[29] However, his Honour also noted that the principle underlying those remarks was derived from the reasoning in *Shepherd*, and that the Court had derived support from the reasons of Gleeson CJ in *HML v The Queen*.[30] Gleeson CJ had stated in *HML* that "the law as to standard of proof applies to the elements of the offence, not particular facts", and trial judges "commonly, and appropriately, direct juries in terms of their possible satisfaction of particular matters" without referring to a standard of proof: "[t]o do otherwise would risk error".[31] Basten AJA concluded:[32]

> *In principle, the same reasoning applies to cross-admissible evidence of charged acts.* It is not easy to envisage a circumstance in which the commission of one offence against a victim will be an indispensable step in the reasoning that the other offence was committed. Accordingly, in principle it will usually be correct (and was correct in the present case) to say that, in assessing one charge, the jury could take into account the evidence of the activity said to constitute the other charge, without being satisfied at that point that it was proved beyond reasonable doubt. *If* Bauer *were to be distinguished in the manner submitted by the applicant it would produce the odd result that the Crown could choose between making its case stronger on one count by not charging another act, or pursuing convictions on both acts.*

41. In the decision below, the Court of Appeal acknowledged that the approach to directions where charged acts are relied on as tendency evidence had been the subject of judicial consideration in New South Wales, but framed the New South Wales decisions as affected by "the regime created by the terms of s 161A of the *Criminal Procedure Act 1986*

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28 [2022] NSWCCA 145.

29 *JS* [2022] NSWCCA 145 at [37]-[38].

30 (2008) 235 CLR 334 at 360-361 [31]-[32].

31 (2008) 235 CLR 334 at 360 [29], quoted in *JS* [2022] NSWCCA 145 at [38] (Basten AJA).

32 *JS* [2022] NSWCCA 145 at [39] (emphasis added, footnote omitted).

(NSW)" (**CAB 38 [32]; see also 36 [21] fn 19**).[33] While there is no doubt that s 161A is different from the relevant provisions of the JDA, the Court of Appeal did not identify just how s 161A had any impact on the analysis in the above passage in *JS*, or the later approval of that reasoning in *Gardiner v The King*[34] and *Decision restricted*.[35]

42. Contrary to what the Court of Appeal assumed (**CAB 36 [21], 38-39 [32]-[33]**), the reasoning and conclusion in *JS* — that the approach in *Bauer* should apply to cross-admissible evidence of charged acts — did not turn on s 161A of the *Criminal Procedure Act* or any other legislative provisions peculiar to New South Wales. To the contrary, Basten AJA considered that s 161A merely confirmed what was correct as a matter of principle: that "the reasoning in *Bauer* did not cover the field" and that the same approach ought to be taken to charged acts.[36] Indeed, it was his Honour's conclusion of principle which informed his construction of s 161A.

43. Basten AJA was correct to reason that there was no principled distinction between charged and uncharged acts relied on as tendency evidence, for the purposes of formulating directions to the jury as to the standard of proof. In particular, his Honour was correct to reason that requiring charged acts to be proved beyond reasonable doubt insofar as they are relied on as tendency evidence would mean that the prosecution could increase the forensic force of the tendency evidence and thereby strengthen its case by electing not to charge other acts. Logically, and all other things being equal, a prosecutorial decision as to whether to charge an act can have no bearing on the extent to which evidence of that act rationally supports an asserted tendency relied on in proof of another charge. The "odd result" that his Honour identified could only be justified if it were a necessary consequence of some other, compelling justification for the proposed direction. For the reasons that follow, that is not so.

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33 Section 161A(1) of the *Criminal Procedure Act* provides that "[a] jury must not be directed that evidence needs to be proved beyond reasonable doubt to the extent that it is adduced as tendency evidence or coincidence evidence". As to the rationale for the enactment of s 161A, see *Decision restricted* [2023] NSWCCA 119 at [102]-[103] (Hamill J).

34 [2023] NSWCCA 89 at [193]-[195] (Adamson JA, with Button and McNaughton JJ agreeing).

35 [2023] NSWCCA 119 at [12] (Beech-Jones CJ at CL), [16] (Button J), [123] (Hamill J).

36 *JS* [2022] NSWCCA 145 at [47]. See also *Gardiner* [2023] NSWCCA 89 at [196], where Adamson JA (with Button and McNaughton JJ agreeing) described Basten AJA as having concluded that s 161A was "to the same effect as the conclusion to which his Honour came".

Using charged acts as tendency evidence does not invite "circular reasoning" or "undermine" the criminal standard of proof

44. The principal rationale for the Court of Appeal's decision was that, where tendency evidence includes acts that are also the subject of a charge, a direction that those acts need to be proved beyond reasonable doubt is necessary to prevent the jury from engaging in "an impermissible circular reasoning process" or applying "a less rigorous standard of proof to the charges on the indictment" (**CAB 39 [34]; see also 38-39 [32]**). That is not a sound basis for the proposed direction.

45. As a matter of principle and logic, the use of a charged act as an item of tendency evidence does not invite "circular reasoning". In particular, the use of such evidence in proof of a tendency, without requiring proof beyond reasonable doubt, does not relieve the jury of the need to consider whether an element is proved beyond reasonable doubt for the purposes of deciding the question of guilt of an offence. As Beech-Jones CJ at CL (with whom Button J agreed) explained in *Decision restricted*:[37]

> the applicant's argument that using evidence that directly supports a charged count as tendency evidence necessarily invites circular reasoning falls away when regard is had to the nature of tendency evidence and that a tendency need not be established beyond reasonable doubt[.] …
>
> So far as the onus of proof is concerned, it is not circular reasoning for the jury to first consider whether, based on all the evidence adduced in support of the tendency, including the evidence adduced in support of the counts on the indictment, the asserted tendency is established and then consider whether each of the counts on the indictment is proven beyond reasonable doubt including by reference to the asserted tendency if the jury considers it to be established. This may involve the jury reconsidering the evidence on each count but if it does it will be undertaking each consideration at different stages of its deliberations with a different onus of proof and for a different purpose.

46. In the decision below, the Court of Appeal referred to his Honour's explanation, but apparently regarded it as being of little assistance because it was made "against the backdrop of the regime created by the terms of s 161A" of the *Criminal Procedure Act* (**CAB 38 [31]-[32]**). It is difficult to understand what the Court of Appeal was intending thereby to convey. The passage contains an accurate and generally applicable explanation of the process of reasoning that a jury is "invited" to adopt, and may permissibly undertake, where evidence of charged acts is cross-admissible for a tendency purpose.

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37 [2023] NSWCCA 119 at [6], [9].

Like the reasoning of Basten AJA in *JS*, the above passage does not turn on any peculiarities in the legislative scheme in New South Wales.

47. It appears that the Court of Appeal was primarily concerned that *in practice* a jury might fail to apply the criminal standard of proof to the offences charged, thereby "undermining" that standard (**CAB 38 [29], 39 [34]**). That is, having been satisfied that the accused engaged in particular conduct for the purposes of evaluating whether an asserted tendency is established, the jury might later fail to apply the criminal standard of proof when evaluating the guilt of the accused on the corresponding charge.[38] That risk is capable of being addressed by appropriate directions that emphasise the importance of the jury being satisfied beyond reasonable doubt of the elements of any offence charged, not by superimposing a new standard of proof on particular items of tendency evidence. While the risk may call for "some care in formulating directions[,] it does not undermine the general principle".[39] Three points should be made in that regard.

48. *First*, it is a "fundamental" assumption that the jury in a criminal trial will "act on the evidence and in accordance with the directions of the trial judge".[40] As a matter of principle, there is no reason to proceed on the basis that a jury is incapable of following or is inherently likely to disregard directions which make clear that: (1) the jury should consider whether it is satisfied, based on all the admissible evidence relied on in proof of an asserted tendency, that the tendency has been established; but (2) the jury cannot find the accused guilty of any offence charged unless it is satisfied that the elements of the offence are proved beyond reasonable doubt.

49. *Second*, the use of charged acts as tendency evidence does not present any unique legal conundrum insofar as the jury is required to consider evidence of a person's conduct in different ways for different purposes in the same criminal trial. The need for "express and careful directions" routinely arises, for example, where the admissibility or forensic significance of the evidence differs as between co-accused in a joint trial.[41]

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38 *Decision restricted* [2023] NSWCCA 119 at [78], [90], [104] (Hamill J). See **CAB 36-37 [23]-[25]**.

39 *JS* [2022] NSWCCA 145 at [40] (Basten AJA).

40 *Gilbert v The Queen* (2000) 201 CLR 414 at 425 [31] (McHugh J), cited in *HCF v The Queen* (2023) 97 ALJR 978 at 993 [62] (Gageler CJ, Gleeson and Jagot JJ), 997 [88] (Edelman and Steward JJ).

41 *Webb v The Queen* (1994) 181 CLR 41 at 89 (Toohey J); *McNamara* (2023) 98 ALJR 1 at 12-13 [42] (Gageler CJ, Gleeson and Jagot JJ). See also *Huxley v The Queen* (2023) 98 ALJR 62 at 67 [17], 70 [30]-[31] (Gageler CJ and Jagot JJ), where their Honours rejected the trial judge's suggestion that it would be "madness" or "gibberish" to direct the jury: (1) that evidence of a witness could only be used against one co-accused if it was satisfied beyond reasonable doubt that the evidence was truthful, accurate and reliable; but (2) that this threshold did not apply in relation to the other co-accused.

50. *Third*, what is suggested by principle is confirmed in practice. The reasoning expressed by the trial judge and the Court of Appeal is substantively identical to arguments that were made on behalf of accused persons in *JS* and *Decision restricted*. In those cases, directions which did not require charged acts to be proved beyond reasonable doubt insofar as they were relied on as tendency evidence were attacked on the basis that they undermined the criminal standard of proof on the charges.[42] Tellingly, none of the directions impugned in those cases were found to have been inadequate to ameliorate the risks that troubled the trial judge or the Court of Appeal.[43]

51. The same can also be said of the directions considered in *Bauer*, in which both charged and uncharged acts were relied on in proof of the asserted tendencies and the trial judge did not give a direction requiring that the jury be satisfied of the charged acts beyond reasonable doubt insofar as they were relied on as tendency evidence. This Court stated:[44]

> The trial judge several times specifically directed [the jury] that they could not convict the respondent of any charged act unless satisfied beyond reasonable doubt of the commission of that act, and further specifically directed them that they could not substitute evidence of other charged acts or other alleged uncharged acts, or a conclusion that the respondent had a sexual interest in RC, for what was alleged in the particular charge. There is no reason to doubt that the jury heeded those directions.

Departure from established modes of reasoning

52. Further, the Court of Appeal's decision would require the jury to depart from established modes of tendency reasoning. Indeed, contrary to the assumption that such a direction was necessary to avoid confusing the jury, the approach endorsed by the Court of Appeal may itself require the jury to adopt a convoluted and confusing mode of reasoning when proceeding through the counts on an indictment.

53. The way in which a jury is entitled to use tendency evidence in sexual offence cases (and generally) is well established. It is a form of circumstantial evidence from which the jury is invited to infer that the accused had an asserted tendency. If the jury is satisfied that the accused had the asserted tendency, the jury may then use that fact to infer that the accused was more likely to act in accordance with the asserted tendency or to have the

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42 *JS* [2022] NSWCCA 145 at [35] (Basten AJA, with Hamill and Dhanji JJ agreeing); *Decision restricted* [2023] NSWCCA 119 at [90] (Hamill J, with Beech-Jones CJ at CL and Button J agreeing).

43 *JS* [2022] NSWCCA 145 at [50] (Basten AJA, with Hamill and Dhanji JJ agreeing); *Decision restricted* [2023] NSWCCA 119 at [120]-[122] (Hamill J, with Beech-Jones CJ at CL and Button J agreeing).

44 (2018) 266 CLR 56 at 94 [74]; see also at 96 [80].

same state of mind as the asserted tendency on the occasion that is the subject of a given charge. Just how that process is to be carried out — and the consequences for the directions to be given to the jury — was explained as follows by Basten AJA in *JS*,[45] in a passage approved by Beech-Jones CJ at CL in *Decision restricted*:[46]

> It is the tendency that is relied on as circumstantial evidence in proof of the charge on the indictment. The proper approach is to have regard to *all the evidence … relied on in proof of the tendency as evidence of the tendency alleged*. To the extent that the jury is satisfied of the existence of the tendency, the tendency may be relied on in proof of the charge. *Given this process, it is preferable not to direct a jury to make findings as to the conduct relied on in proof of a charge. Rather the jury should be directed with respect to finding the alleged tendency.*

54. That approach is a particular outworking of the more general understanding that evidence relied on in proof of the facts in issue in a criminal trial may have cumulative significance, and that it is incumbent on the jury to consider the evidence accordingly. As Dawson J stated in *Shepherd*, "the probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately".[47]

55. The approach to the use of tendency evidence that the Court of Appeal's decision requires does not accord with these established approaches. Instead of the jury being able to have regard to "all the evidence" that has been admitted in support of an asserted tendency, the proposed direction upheld by the Court of Appeal in effect requires the jury to disregard some of the evidence if it relates to a charge that has not already been proved beyond reasonable doubt. Put another way, whichever charge happens to be considered first in the jury's deliberations, the jury would at that stage need to disregard any evidence of conduct that is also the subject of a charge on the indictment when evaluating whether the asserted tendency is made out. As was explained by Adamson JA (with whom Button and McNaughton JJ agreed) in *Gardiner*, such an approach — described as proceeding "crab-like" through the counts — would thereby "deprive tendency evidence of the forensic force which long-standing authority has established that it has".[48]

56. The problems are only compounded if one contemplates that the jury might, later in its deliberations, be persuaded of the proof of a given charge beyond reasonable doubt and

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45 [2022] NSWCCA 145 at [43] (with Hamill and Dhanji JJ agreeing) (emphasis added).

46 [2023] NSWCCA 119 at [7]-[8] (with Button J agreeing).

47 (1990) 170 CLR 573 at 580 (with Mason CJ, Toohey and Gaudron JJ agreeing), citing *Chamberlain (No 2)* (1985) 153 CLR 521 at 535 (Gibbs CJ and Mason J).

48 [2023] NSWCCA 89 at [190], [192]. As to the forensic force of tendency evidence, see *Hughes v The Queen* (2017) 263 CLR 338 at 356 [40] (Kiefel CJ, Bell, Keane and Edelman JJ).

then be expected to return iteratively to every earlier charge in order to give renewed consideration to the asserted tendency in relation to that charge. Such a process of reasoning clearly carries the risk of confusing the jury and unduly complicating its task, especially where there is a large number of counts on the indictment. The present case — in which the indictment charges the accused with 27 offences and the asserted tendencies are relied on in relation to each offence (**CAB 5; AFM 5 [5])** — brings that difficulty into sharp relief.

57. The only part of the Court of Appeal's reasoning that engaged with how the jury would need to reason in light of the proposed direction consisted of a statement that "the judge *will not need to direct* the jury 'sequentially', so long as it is made clear that none of the charged conduct may be used by the jury for the purposes of tendency reasoning unless the particular conduct has been proved to the jury's satisfaction beyond reasonable doubt" (emphasis added) (**CAB 39 [34]**). That statement was evidently made in reference to the following passage of the trial judge's ruling (**CAB 19.30-20.19**):

> I have determined the jury will be instructed sequentially as follows: firstly, I would recommend to the jury, not that I can determine how and what they do, when they are in the jury room, that they decide firstly as to whether they are satisfied that the six acts of sexual misconduct occurred. I would not suggest to them that there is any standard involved in that consideration. In particular, I would not charge them that they must be satisfied as to the civil standard.
>
> Secondly, when they come to Charge 1, I would tell them that they can take account of the principles of tendency and probability reasoning as put in the prosecution case, as I would explain to them what that means, based upon the number of the six acts of sexual misconduct that they are satisfied occurred.
>
> When we then come to Charge 2, I will direct them that they can take into account the principles of tendency and probability reasoning as put in the prosecution case upon the number of the six acts of sexual misconduct which they find occurred and Charge 1 if proved beyond reasonable doubt, and so on, sequentially.

58. While the Court of Appeal stated that it was not necessary to *direct* the jury to adopt such an approach, it is difficult to see how the jury could proceed otherwise. The result would be to require the jury to proceed in precisely the manner that was correctly rejected in *Gardiner*, returning repeatedly to every earlier count to re-evaluate the asserted tendency after the consideration of each charge.

Conclusion

59. For those reasons, in addition to the reasons given in section B above, the Court of Appeal was wrong to uphold the direction proposed by the trial judge.

60. The matters set out in this section also reinforce why the Court of Appeal's approach to the construction of s 61 of the JDA was misplaced. Insofar as the Court of Appeal's approach was based on an available construction of s 61 — which the applicant submits it was not — the considerations just canvassed illustrate why that course should not have been taken. The approach adopted by the Court of Appeal was not justified by principled or practical considerations, and would impede the deliberations of the jury in manner that is contrary to the legislative intention to reduce complexity and make jury directions "as clear, brief, simple and comprehensible as possible" (s 1(e)).

PART VII: ORDERS SOUGHT

61. The applicant seeks the following orders:

(1) Special leave to appeal granted.

(2) Appeal treated as instituted and heard instanter and allowed.

(3) Set aside the order of the Court of Appeal of the Supreme Court of Victoria made on 31 October 2023 and, in its place, order that:

(a) leave to appeal be granted and the appeal be allowed; and

(b) the interlocutory decision of the County Court of Victoria made on 12 September 2023 be set aside.

PART VIII: ESTIMATE OF TIME

62. It is estimated that the applicant will require up to 2.5 hours for oral submissions.

Dated: 22 January 2024

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

The Director of Public Prosecutions
Applicant

and

Benjamin Roder (a pseudonym)
Respondent

ANNEXURE TO THE APPLICANT'S SUBMISSIONS

Pursuant to Practice Direction No 1 of 2019, the Applicant sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
1.	*Jury Directions Act 2015* (Vic)	Current	ss 1, 4, 5, 26, 27, 61, 62
2.	*Criminal Procedure Act 1986* (NSW)	Current	s 161A