HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **HAMILTON (a pseudonym)**
Appellant

and

THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

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

Part II: Statement of issues

2. This appeal raises the following issues:

   i. Where, in a criminal trial involving sexual offences alleged to have been committed against multiple complainants, the evidence of a complainant is not admitted as tendency evidence with respect to the counts concerning the other complainants, or the other counts concerning that complainant, will a direction against tendency reasoning generally be required?

   ii. What is the significance of a failure by defence counsel to seek a particular direction where it is not suggested that there was any forensic advantage to the defence in not seeking the direction?

   iii. Is the significance to be attached to the absence of a request by defence counsel that a particular direction be given affected by the fact that the trial judge did not take responsibility for the content of the summing up, but rather delegated that responsibility to the parties?

Part III: Section 78B Notice

3. The appellant does not consider that notice is required pursuant to s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Citation

4. The judgment below is available on the internet: *Hamilton (a pseudonym) v R* [2020] NSWCCA 80. The decision is not otherwise reported.

Part V: Relevant facts

5. The appellant was tried in the District Court before Williams SC DCJ on an indictment alleging ten counts of indecent assault contrary to s 61M(2) of the *Crimes Act 1900* (NSW) (Core Appeal Book, '**CAB**', 5-7). The offences were alleged to have been committed against three of the appellant's five children between November 2014 and February 2016, and are summarised in the following table:[1]

Counts	Complainant details	Nature of alleged indecent assault
1-3	First Child, a daughter, aged 15 at time of alleged offending	Touching of vagina over clothes
4-8	Fifth Child, a son, aged 6-7 at time of alleged offending	Touching of bare bottom (counts 4, 5, 7) and penis (counts 6 and 8)
9-10	Third Child, a son, aged 11-12 at time of alleged offending	Touching of penis

6. The Third Child and Fourth Child each gave evidence of indecent assaults by the appellant against the Fifth Child. This evidence did not, however, correspond with any of the charged counts. It was admitted as "context" or "relationship" evidence, and not for any tendency purpose. The Second Child did not feature in the trial in any material way.

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[1] The form of identification of the complainants reflects that used by the CCA and is maintained in these submissions. The summary of the alleged offence reflects the summary contained in the "Elements Document" provided to the jury as part of the trial judge's summing up which appears at CAB 62-65.

7. The Crown made application in advance of the trial for the admission of the evidence of the Third Child, the Fourth Child and the Fifth Child as tendency evidence. The application sought that:

   i. the evidence of the Third Child and the Fifth Child with respect to each of the counts against that child be "cross-admissible as tendency evidence for their own counts and for each other"

   ii. the evidence of the Fourth Child be admitted for a tendency purpose in relation to the counts relating to the Fifth Child; and

   iii. the evidence of the Third Child of uncharged acts against the Fifth Child be admitted for a tendency purpose in respect of the counts concerning the Fifth Child.[2]

   The Crown did not advance any other paths of potential tendency reasoning. In particular, the Crown did not seek that the counts relating to the First Child (the appellant's daughter), be admitted as tendency evidence of any kind (either with respect to the other complainants or with respect to the other counts concerning the First Child), or that any other evidence be admitted as tendency evidence in support of the counts relating to the First Child.

8. The appellant objected to the admission of the evidence for a tendency purpose as sought by the Crown. In the absence of an application for separate trials, and with the agreement of the parties, the trial judge deferred ruling on the application. At the conclusion of the complainants' evidence, the trial judged rejected the Crown's application to admit the evidence as tendency evidence (relying on s.s 101 and 135 of the *Evidence Act 1995* (NSW) – see CCA [22], CAB 93). His Honour said, *inter alia*, "[t]he way in which this case has been conducted also fortifies my view that admission of the proposed evidence as tendency evidence, would be such, that its probative value was outweighed by the danger of unfair prejudice to the defendant" (see CCA [22], CAB 93).

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[2] See Court of Criminal Appeal judgment '**CCA**' [19], CAB 92).

9. The defence case at trial disputed the occurrence of the alleged sexual acts. The assertion of a specific (and common) motive to fabricate the allegations was a prominent feature of the defence case. That motive was said to originate with the appellant's ex-wife (the mother of the complainants), with whom the appellant was embroiled in acrimonious family law proceedings (CCA [16], CAB 92). The defence invited the jury reject the allegations of each of the complainants on this basis.

10. During the trial, defence counsel indicated to the trial judge (in the absence of the jury) that a deliberate forensic decision had been made to not seek a separate trial in relation to any of the complainants. The defence sought to exploit inconsistencies in the evidence given by the complainants (and the context witness) to (at least) raise a doubt as to the occurrence of the charged acts. Counsel said "tactically all that evidence can go in, in the trial" because it revealed inconsistencies such that "no reasonable jury … would accept [the evidence]" (CCA [17], CAB 92).

11. The trial judge's summing up to the jury was relatively concise. The task of drafting the summing up was largely delegated to counsel such that that the trial judge was described as having "abdicated his responsibility" in this regard: Beech-Jones J at CCA [97], CAB 112; see also Macfarlan JA at CCA [32], CAB 95; Adamson J at CCA [82]-[84], CAB 109. Beech-Jones J observed that the summing up had been "largely, if not wholly, drafted by the Crown, at the trial judge's request" (CCA [32], CAB 95). The participation of defence counsel in the inclusion of specific directions was essentially limited to the need for a '*Murray*' direction (*R v Murray* (1987) 11 NSWLR 12), and a direction relating to potential difficulties with assessing the credit of witnesses who have given evidence via audio-visual link.[3]

12. As part of the summing up, the trial judge provided the jury with a document that set out the elements of each of count, the date range for the alleged offence and the specific physical act relied upon by the Crown for that count (the **elements document**; CAB 62-65). That document did not indicate to the jury the evidence that was admissible in support of the individual counts.

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[3] Referred to in the trial as a "*Wilkie* direction" (*R v Wilkie, R v Burroughs, R v Mainprize* [2005] NSWSC 794 per Howie J at [72]) – see, for example, CAB.34.40.

13. The trial judge directed the jury as to the need to give separate consideration to each of the counts on the indictment. This was done as part of what has become known as a *Markuleski* direction (*R v Markuleski* (2001) 52 NSWLR 82), which addresses the effect a finding of not guilty on any particular count may have on other counts involving that complainant (CCA [35], CAB 96; and CCA [102], CAB 113). The direction did not, however, indicate to the jury that, in giving separate consideration to a count, they could only use the evidence that was admissible for that count (or what that evidence was).

14. The trial judge directed the jury as to the permissible use of the evidence of the Third Child and the Fourth Child of "other acts" against the Fifth Child. His Honour, as part of this direction, directed the jury they could not use that evidence as the basis for any kind of tendency or propensity reasoning (Summing Up ("**SU**") [17], CAB 14.30, reproduced at CCA [34], CAB 96).

15. A similar direction was given in relation to the use of evidence led by the Crown in rebuttal of evidence of good character led by the appellant. This evidence comprised evidence of the appellant's convictions for common assault against the Fifth Child and his ex-wife, and three videos of the appellant that captured him acting in what the Crown said was a violent manner towards his children (CCA [36], CAB 97]).

16. The summing up did not prohibit the use of the evidence led in support of each of the counts on the indictment being used as tendency evidence with respect to each of the other counts on the indictment. The appellant's counsel did not request such a direction. The issue was not raised by the Crown prosecutor or the trial judge.

17. On 1 March 2019, the jury found the appellant guilty of all counts. The trial judge imposed an aggregate sentence[4] of 4 years and 6 months, with a non-parole period of 2 years and 8 months. After passing sentence, on the appellant's application, the trial judge granted the appellant bail pending the determination of his appeal in the CCA.

18. The appellant sought leave to appeal against his convictions in the CCA, including on the basis of a proposed ground of appeal that "the trial miscarried as a result of the jury not being warned as to the unavailability of tendency or propensity reasoning".

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[4] See s 53A *Crimes (Sentencing Procedure) Act 1999* (NSW).

19. On 22 April 2020, by majority, the CCA dismissed the appellant's appeal.[5] Macfarlan JA, in dissent, would have upheld the appeal on the basis that the absence of a direction prohibiting the use of evidence of the charged acts for a tendency purpose occasioned a miscarriage of justice (CCA [79], CAB 109). Beech-Jones J (with whom Adamson J agreed on this ground), held that it was not necessary to give such a direction as the appellant had not established that there was a "real chance", "it was likely that" or there was a "significant risk" (CCA [113]; CAB 117) that the jury might have engaged in tendency reasoning. It followed that the appellant had not established a miscarriage of justice, and on this basis, leave to rely on the ground, which was required pursuant to rule 4 of the *Criminal Appeal Rules,* was refused (CCA [123], CAB 120).

20. Macfarlan JA, in his reasons for dissent, set out four key reasons in support of his finding that there was a significant risk that the jury may have engaged in impermissible tendency reasoning (CCA [40], CAB 98). These included the natural tendency in sexual assault cases for a jury to use a conclusion about one or more charged offences to assist it in deciding other counts; the giving of a direction prohibiting tendency reasoning which was limited to the use of the evidence of uncharged acts and the evidence led to rebut good character evidence (which by inference suggested there was no such prohibition with respect to the use of the charged acts for a tendency purpose); the trial judge's finding that the use of the charged acts as tendency evidence would be unfairly prejudicial to the appellant (and the need to instruct the jury in accordance with that ruling); and the significance of witness credibility in the particular circumstances of the case with the resultant consequence that the opportunity for appellate intervention was limited.

Part VI: Argument

21. Section 95 of the *Evidence Act 1995* (NSW), to which Beech-Jones J did not refer, expressly prohibits the use of evidence as tendency evidence where the evidence is not admitted for that purpose. The result of the s 95 prohibition is that, where evidence of other criminal acts is admitted for a purpose other than to establish a tendency on the part of the accused, it will (consistent with the common law), in most cases, be necessary

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[5] The appellant's sentence, as imposed by the trial judge, was adjusted to commence on that date.

to warn the jury against engaging in tendency reasoning. The appellant submits that Macfarlan JA was correct to observe that whilst there is "no universal rule that … an anti-tendency direction … should be given", where there are "multiple complainants and separate trials are not ordered, a tendency warning will "almost certainly be required" (CCA [39], CAB 98).[6] His Honour was, it is respectfully submitted, right to conclude it was required in this case.

The natural inclination to engage in tendency reasoning

22. The necessity for specific directions that warn against tendency reasoning in the context of multiple complainant sexual assault trials has long been recognised. In *De Jesus v The Queen* (1986) 61 ALJR 1; [1986] HCA 65, Gibbs CJ (at 2F) referred with approval to the speech of Lord Cross of Chelsea in *Reg. v. Boardman* (1975) AC 421 at 459, where his Lordship said, "if the charges are tried together it is inevitable that jurors will be influenced, consciously or unconsciously …". Mason and Deane JJ referred (at 5A-B) to the reasons of Brennan J in *Sutton v The Queen* (1984) 152 CLR 528; [1984] HCA 5, where his Honour said (at 542), that where the evidence is not cross-admissible:

> "…some step must be taken to protect the accused against the risk of impermissible prejudice. Sometimes a direction to the jury is sufficient to guard against such a risk; sometimes it is not. Where a direction to the jury is not sufficient to guard against such a risk, an application for separate trials should generally be granted."

23. In *Sutton v The Queen,* Gibbs CJ observed (at 545), that "the antipathy which evidence of another offence is apt to engender may unjustly erode the presumption of innocence which protects an accused person at his trial".

24. In *Roach v The Queen* (2011) 242 CLR 610; [2011] HCA 12, French CJ, Hayne, Crennan and Kiefel JJ (as her Honour then was) said at [47], 625:

> "The importance of directions in cases where evidence may show propensity should not be underestimated. It is necessary in such a case that a trial judge give a clear and

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[6] Quoting from *KRM v The Queen* (2001) 206 CLR 221; [2001] HCA 11 per McHugh J at [38]; see also at [72], [114]-[116], [119], [131]-[134]

comprehensible warning about the misuse of the evidence for that purpose and explain the purpose for which it is tendered."

25. Similarly emphatic statements appear in *BRS v The Queen* (1997) 191 CLR 275; [1997] HCA 47, where McHugh J said (at 308), "criminal courts take it as axiomatic that, where the evidence reveals the criminal convictions or propensity of the accused, there is a real risk that the jury will reason towards guilt by using the conviction or propensity".[7]

26. In contrast with the statements of this Court referred to above, Beech-Jones concluded that "there is neither a requirement or even a presumption … an anti-tendency direction" should be given in cases such as the present (CCA [113], CAB 117). No reference was made to the above authorities in reaching this conclusion.[8] His Honour (at [106], CAB 114) did refer to a passage in the reasons of McHugh J in *KRM v The Queen* (2001) 206 CLR 221; [2001] HCA 11, (upon which the appellant relied) where his Honour said (at [38], 235), that where there is a single trial involving multiple complainants due to a separate trial being refused on the basis that the convenience of a single trial outweighs the likely prejudice, or "more usually because a separate trial is not sought", … "a propensity warning will almost certainly be required".

27. Beech-Jones J, however, observed that, as *KRM v The Queen* was a case involving a single complainant, the above observations were *obiter dicta* (CCA [107], CAB 115). His Honour then referred to the reasons of Gummow and Callinan JJ in the same case, where their Honours stated that "[n]o universal rule should, or indeed, may be laid down" and to the similar views of Kirby and Hayne JJ, with respect to the need to warn a jury against tendency reasoning. The absence of a "universal rule" can be acknowledged (as Macfarlan JA did at CCA [39], CAB 98). There is, however, some distance between that observation and Beech-Jones J's conclusion that there is "no presumption" as to the need for a warning against propensity reasoning in a multiple

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[7] See also per Toohey J at 295, Gaudron J at 301, Kirby J at 332.

[8] While his Honour did refer to *BRS v The Queen* (at [109], AB115.55 and [113] AB 117.23) this was limited to test to be applied with respect to the risk of miscarriage and not the danger of that risk in circumstances such as the present. Macfarlan JA, in contrast, made reference to *Roach v The Queen* (at AB 99; CCA [40](1)); *Sutton v The Queen* and *De Jesus v The Queen* (AB 99, CCA [42]).

complainant sexual assault case. That conclusion does not sit well with the entrenched line of authority in this Court as to the general need for such a warning.

28. Having distinguished *KRM v The Queen*, Beech-Jones J referred to a number of other authorities in support of the absence of any presumption as to the need to warn a jury against tendency reasoning in a case such as the present. Quite apart from the status of those decisions as decisions of an intermediate court of appeal, those authorities were, for reasons developed below inapposite to the circumstances of this case.

29. Beech-Jones J relied on the CCA decisions of *Toalepai* [2009] NSWCCA 270, *Jiang* [2010] NSWCCA 277 and *Erohin* [2006] NSWCCA 102 (at [108]-[112], CAB 115-117). Those decisions all involved single complainants. The only multiple complainant case cited in support by Beech-Jones J, was the CCA's decision in *Lyndon v R* [2014] NSWCCA 112 (referred to at CCA [111], CAB 116). While involving two complainants, that case was, effectively, about a single incident. The acts were alleged to have been committed on two complainants, in each other's presence, at essentially the same time. Indeed, the circumstances in *Lyndon v R* might be regarded as an example as to why there can be no "universal rule".

30. Thus, none of the cases relied on by Beech-Jones J in support of his conclusion that "notwithstanding the statements of McHugh J in *KRM v The Queen*, there is neither a requirement or even a presumption" that an anti-tendency direction be given, either supported the conclusion in the context of a multiple complainant case, or, more pertinently, were apposite to the determination of a need for such a direction in the present case (see CCA [113], CAB 117).

31. Ultimately, while, as pointed out by Beech-Jones J (at CCA [107], CAB 115), McHugh J's observation as to the general need for a warning in the case of separate complainants in *KRM v The Queen* was *obiter dicta,* this mattered little given that it reflected a long line of authority in this Court, before and since, dealing with multiple complainant cases. As a result, the starting point for his Honour's reasoning process was, it is respectfully submitted, erroneous.

32. Following his conclusion that that there is no presumed risk of tendency reasoning in a case such as the present, Beech-Jones J went on to consider whether, despite the absence of any presumed risk, a warning was nonetheless required in the circumstances of the

case. In considering this question his Honour had regard to four particular matters: the giving of a 'separate consideration' direction; the giving of a *Murray* direction; the nature of the defence case; and the absence of a request for the direction. His Honour found that "in the light of the separate evidence direction and the *Murray* direction, I consider that the potential for [tendency] reasoning to have been engaged in was much diminished (CCA [115], CAB 117). His Honour further found that the approach of defence counsel supported his conclusion that the risk of the jury engaging in tendency reasoning was "remote" (CCA [120], CAB 119). Based on the combination of these matters, Beech-Jones J concluded that a direction prohibiting the use of the charged acts as evidence of a tendency on the part of the appellant to act in a particular way was not required. Each of these three matters is considered, in turn, below.

The separate consideration / Markuleski direction

33. The direction that the CCA referred to as the 'separate consideration' direction was given as part of a *Markuleski* direction. The trial judge instructed the jury in the following terms (SU [48]; CAB 26):

> As I said to you at the start [of the trial], there are ten separate trials being conducted here. There are ten counts. The trials are being heard together for convenience, because there are a number of common parties, in relation to the complainants and the accused, but you must give separate consideration to each count. That means you are entitled to bring in verdicts of guilty on some counts and not guilty on some other counts, if there is a logical reason for that outcome. If you were to find the accused not guilty on any count, particularly if that was because you have had doubts about the reliability of the evidence of one or all of the complainants then you would have to consider how that conclusion affected your consideration of the remaining counts in relation to that complainant.

34. Unlike the direction actually given, a 'separate consideration' direction, as commonly understood, contains two distinct but related components. It requires the jury to consider each count separately but also "to consider that count only by reference to the evidence that applies to it": *KRM v The Queen* per McHugh J at [4] (224), [36] (234); see also per Hayne J at [132] (263-4). At no time was the jury directed in respect of the latter

component. The significance given to the direction by Beech-Jones J was, as a result, misplaced (see CCA [107], CAB 115).

35. Even if a complete 'separate consideration' direction had been given, encompassing the need to have regard only to the evidence applicable to the particular count under consideration, there would remain, in any event, a need for a direction delineating the evidence that was admissible with respect to each particular count. As Gleeson CJ observed in allowing the appeal in *R v Mitchell* (Unreported, NSWCCA, 5 April 1995 at 5):

> "The directions given about considering the charges separately and returning separate verdicts are standard directions given in any case where there is more than one charge against an accused person. They are not inconsistent with the possibility that in reaching their separate verdicts the jury may consider the totality of the evidence in the case as relevant to each charge."

36. In the present matter, the trial judge did not provide the jury with a summary of the evidence. The elements document (CAB 62-65) identified the act relied on as the basis for the particular charge. It did not identify the evidence available in proof of that act (cf Beech-Jones J at CCA [117], CAB 118). The provision of such specific assistance to a jury has been described, by this Court, as "essential in the areas of… similar facts or propensity": *BRS v The Queen* per Toohey J at 295. As noted above, given the manner of the preparation of the summing up, the trial judge did not independently turn his mind to whether any such summary of the evidence was necessary. Much evidence was uncontestably common to the counts (such as the relationships, living arrangements, and the occurrence of particular events) such that any delineation could not be assumed to be self-evident. Accordingly, the notion of 'separate consideration' was likely to have been understood by the jury as requiring separate debate, decision-making and verdicts on each count (rather than, for example, the return of a verdict on the indictment as a whole). The jury could have engaged in this process, consistent with the directions given, by considering all of the evidence and the inferences to be drawn from it, subject only to the express limitation on the use of the uncharged acts and the evidence led in rebuttal of good character. Even if this had not been understood explicitly, Beech-Jones J's reliance on the 'separate consideration' direction failed to have regard to what has

been acknowledged as the inevitability of unconscious influence as a result of the presence of multiple allegations by multiple complainants.

37. Further, not only was any 'separate consideration' direction deficient, the authorities relied on by Beech-Jones J, on analysis, do not support the contention that such a direction, even if it had been given in full, would have been sufficient to protect the appellant against the type of reasoning in issue. To the extent that Beech-Jones J relied on the statement of Hayne J in *KRM v The Queen* (at [133], referred to at CCA [107]; CAB 115, that "[g]enerally, the separate consideration direction is sufficient warning against misusing evidence of other charged acts", as noted above this was made in the context of a single complainant case (which was the basis on which Beech-Jones J distinguished the observations of McHugh J that were relied on by the appellant). Similarly, his Honour's reliance (at [108]-[112], CAB 115-117) on the CCA decisions of *Tolepai v R*, *Jiang v R*, *Lyndon v R* and *Erohin v R* to suggest a separate consideration direction was sufficient was misplaced, given, those decisions were also given in the context of a single complainant, or in the case of *Lyndon v R*, a single incident.

38. Finally, in relation to the (incomplete) separate consideration direction, it might be observed that the suggested efficacy of that direction is difficult to evaluate in circumstances where the appellant was found guilty of all charges.

The 'Murray' direction

39. The trial judge gave a '*Murray*' direction (at SU [24]-[25], CAB 39-40, reproduced at CCA [104], CAB 114). Beech-Jones J found "[m]ost importantly" (CCA [115], CAB 117) and "[m]ost significantly" (CCA [117], CAB 118), this direction operated to reduce the risk of impermissible reasoning, in that it "precluded a juror from reasoning that they could convict the accused on any count concerning a particular child even though they had doubts about the honesty and accuracy of the evidence of that child because of their acceptance of the evidence of another child and what that evidence might demonstrate about the appellant's tendencies or propensity" (CCA [117], CAB 118). Contrary to this, the appellant submits that Macfarlan JA was correct in concluding that the *Murray* direction did not "instruct the jury, certainly not in any clear fashion, that it could not use tendency reasoning as between the counts in deciding

whether to accept the evidence of a child in relation to a count concerning him or her as honest and accurate" (CCA [46], CAB 100).

40. It is important to consider to the actual wording of the direction given, having regard to its context. Beech-Jones J emphasised that the *Murray* direction referred to each complainant as being *"the only witness"* to the events that make up each charged count (CCA [115], CAB 117-118). It is trite to observe that someone being the only *witness* does not equate to that account being the only *evidence* to be used in consideration of a particular count. As noted above, there was much evidence that was uncontestably common to all counts. The direction concluded with the unqualified instruction to, "of course, look to see if it is supported by any other evidence" (SU [25], CAB 40). This was capable of being understood by the jury as an invitation to engage in tendency reasoning, rather than any kind of admonition against it. That is particularly so given that the body of the direction referred to the complainants compendiously, naming them one after the other, and inviting the jury, using the plural, to "examine the evidence of the *complainants* very carefully". By way of contrast, the jury were specifically directed that they could not use the uncharged acts (at SU [19], CAB 15), or the evidence in rebuttal of the evidence of good character (at SU [53], CAB 28) to reason that the appellant had a tendency to commit offences of the type charged, or that he was more likely to have committed the offences. As noted by Macfarlan JA (at CCA[40], CAB 99), these specific prohibitions implied that there was no similar prohibition with respect to the use of the evidence of the charged acts.

41. Thus, while the terms of the *Murray* direction informed the jury that it had to find the particular complainant to be an honest and accurate witness, the direction did not tell the jury what evidence they could use in making that assessment. As noted above, the absence of any summary of the evidence going to the particular counts compounded the problem. Further, on any view, the *Murray* direction was incapable of guarding against impermissible *intra*-complainant tendency reasoning.[9]

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[9] While it was contended in the CCA was that there was an impermissible risk of both *inter*-complainant and *intra*-complainant tendency reasoning, Beech-Jones J limited the issue to the former: CCA [114]; CAB 117.

42. It is noteworthy that, in the CCA, the respondent did not rely on the *Murray* direction in response to the complaint concerning the trial judge's failure to direct the jury as to the unavailability of tendency reasoning.

43. The *Murray* direction was likely to have been understood, correctly, by the jury as an observation that these were not alleged crimes involving other eyewitnesses, and, accordingly, it was important to look for support for the particular complainant's account. The giving of this direction could not cure the deficiency in the separate consideration direction. Rather, by encouraging the jury to look beyond the individual complainant for support for his or her account, it tended to exacerbate the problem.

The nature of the defence case

44. Beech-Jones J, additionally, placed reliance on the positive defence case, which suggested the possible joint fabrication of the allegations at the instigation of the complainants' mother. His Honour, in this context, expressed the view that "the most likely paths of reasoning that were adverse to the [appellant] did not involve tendency reasoning" (CCA at [120], CAB 119). His Honour's approach in postulating paths of reasoning that ostensibly denied the possibility of tendency reasoning was contrary to the established authority of this Court on the accepted dangers in cases of this kind.

45. Beech-Jones J's postulated paths of reasoning do not, in any event, answer the danger of impermissible reasoning (or unconscious influence). The first such path was said to be a rejection of the defence case followed by a separate consideration of the honesty and reliability of each child. As can immediately be seen, given that any rejection of the defence case necessarily led to a second step, the assessment of the Crown case, it is not apparent how the existence of a positive defence case ensured that the assessment of the prosecution case relied only upon permissible reasoning. The second mode of reasoning was said to commence with an assessment of the honesty and reliability of one child (the first step), the use of this finding to reject the defence case (the second step), with a consequent impact on the assessment of the honesty and reliability of the other complainants (the third step). The problem is similar and occurs at the first and third steps: namely, there remains the real possibility that the assessment of the honesty and reliability of the first complainant was impermissibly affected by the jury's view of the appellant in the context of the multiplicity of allegations and complainants; and,

having rejected the defence case based on the first complainant, it remained open to the jury to engage in tendency reasoning in support of allegations made by the other complainants.

46. The appellant submits that Beech-Jones J's conclusion as to the absence of potential impermissible reasoning is further flawed in proceeding on the premise that the defence case stood to be considered (and, it transpired, rejected) in isolation. The presentation of a positive defence case set up a contest between the defence and the prosecution as to the possible source of the allegations. The jury's rejection of the defence case was inevitably informed by its view of the prosecution case. The rejection of the possibility of concoction across the complainants may well have been (indeed was likely to have been) contributed to by the existence of multiple allegations across multiple complainants.

47. A further problem with analysing the matter by attempting to deduce (possible) rational paths of reasoning is that unconscious, impermissibly prejudicial, reasoning is necessarily excluded. The "likely paths of reasoning" approach adopted by Beech-Jones J involves a type of linear analysis that ignores such potential misuse of evidence, the danger of which has been recognised by this Court in trials of this kind (see, above at [22] – [25]).

48. The defence focus on inconsistency between the complainants (and in particular, the lack of consistency between the witnesses who gave context evidence and the evidence of the Fifth Child in relation to whose counts that evidence was given), inevitably invited a consideration of the evidence of all the children in the consideration of each charged offence. This, of course, was a legitimate defence strategy: the jury could use all of the evidence, and in particular the inconsistencies across the witnesses, to support the theory that the evidence of offending was (at least as a possibility) sourced in a common motive to fabricate the allegations. However, that legitimate use of the evidence for the defence case was also one that heightened the need for the jury to be carefully directed as to the strict limits on how they could use the multiplicity of allegations to reason towards guilt. Thus, contrary to the reasoning of Beech-Jones J, the nature of the defence case did nothing to mitigate the danger of the jury engaging in impermissible reasoning towards guilt. As with the *Murray* direction, it tended to exacerbate the problem.

Defence counsel's failure to request the direction

49. Beech-Jones J found that the absence of any request by defence counsel for a direction prohibiting the use of the charged acts as evidence of a tendency on the part of the appellant to act in a particular way, was "deliberate" at least "in the sense that he did not consider that such a direction was necessary" (CCA [119], CAB 118-119). His Honour then relied on that conclusion to fortify his view that the risk that the jury might "reason from their acceptance of … one child's evidence, that the [appellant] is the type of person who would commit the offences which he is charged" and use that conclusion to support the evidence of some other child "was remote" (CCA [120], CAB 119).

10 50. As a general proposition, it can be accepted that, if defence counsel does not seek a particular direction, this may provide an insight into the atmosphere of the trial and in turn support a conclusion that such direction was not required in the circumstances of the trial. There are limits to such reasoning. In a case such as the present, no insight into one participant's perception of the "atmosphere" of the trial could make any significant contribution to the determination of the risk the jury may have misused the presence of multiple complainants to reason towards guilt. As was the case in *BRS v The Queen* "a failure by the appellant's counsel to ask for directions designed to exclude any reliance on similar facts or propensity is not an answer to the defects in the summing up": per Toohey J at 295.[10] McHugh J's conclusion in the same case (at 303, 306), that
20 a miscarriage had been occasioned even though the appellant there may have had a better chance of acquittal than would have been the case had the trial judge directed the jury as to the limits on the use of the evidence in question, underscores the importance of proper directions in such cases.

51. In *KRM v The Queen,* Kirby J said at [101], p255-6, footnote omitted:

> "Because of the variability of the representation of accused persons at criminal trials and the near total dependence of the accused in such matters upon his or her legal representative, the trial judge is not exempt from duties to provide a warning to a jury, even if not expressly requested to do so. The omission to seek such a warning might be tactical and may have been so here. However, commonly, I suspect, it

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[10] See also Gaudron J at 302, McHugh J at 303 and Kirby J at 330

arises from mistake, oversight, ignorance or inexperience on the part of an accused's legal representative."

52. The above remarks are particularly apposite in the present context, where the trial judge did not turn an independent mind to the directions that were required. Kirby J's observations *Doggett v The Queen* (2001) 208 CLR 343; [2001] HCA 4 at [147] – [148] are to similar effect. There his Honour said:

> "…I accept that sometimes an omission on the part of legal representatives will suggest an informed forensic choice made in the belief that it is in the accused's best interests. At other times, however, even experienced counsel make mistakes or are guilty of oversight and omission that should not redound to the serious disadvantage of an accused."

53. The express forensic decisions of trial counsel evident from the record militate against any inference that trial counsel made a deliberate and rational tactical decision to not request a direction prohibiting tendency reasoning. Trial counsel's resistance of the Crown application to rely on evidence of one complainant for a tendency purpose with respect to another complainant was predicated on the assumption that tendency reasoning was a rational mode of reasoning that would advance the Crown case (CCA [19] –[20], CAB 92). On this point, Beech-Jones J misrepresents defence counsel's position in opposing the original Crown tendency application, stating that counsel "did not want separate trials for his client and was content for all the evidence to go in and the jury be left to "*take it at what you will*", provided that the Crown did not obtain a tendency direction" (CCA 119, CAB 119, italics in original). The real concern of trial counsel must, rationally, have been grounded, not in the Crown obtaining a tendency *direction*, but rather in the jury having available to it, tendency *reasoning* in support of the Crown case. Defence counsel took no issue with the jury being warned against tendency reasoning in relation to more limited categories of evidence, namely, the context evidence and the evidence led in rebuttal of good character.

54. Significantly, Beech-Jones J did not suggest that trial counsel either perceived, or obtained, any forensic advantage in not seeking a direction. There was no direct evidence of defence counsel's state of mind, (as to which see *TKWJ v The Queen* (2002) 212 CLR 124 at [17] (131); [25]-[26] (133), [97] (156), [107] (158)). Nor was there a

clear basis for inferring defence counsel's state of mind (see Macfarlan JA at CCA [54], CAB 103). While, in the CCA, the respondent submitted that defence counsel sought to obtain certain forensic advantages by not requesting the direction (rather than focusing on asserting that there was no real danger of impermissible reasoning), Beech-Jones J rejected this contention (CCA at [122], CAB 120).

55. Given the dangers, as recognised by this Court, of impermissible tendency reasoning, in circumstances such as that here, and in the absence of finding of forensic advantage, it is respectfully submitted a higher degree of circumspection on the part of Beech-Jones J was required, before any inference could be drawn that counsel's decision was deliberate.

56. Moreover, even if a deliberate decision was made, little weight could be given to the opinion of counsel in light of the danger the evidence posed. A direction prohibiting tendency reasoning, by its terms, takes away a path (or paths) of reasoning to guilt on one or more count(s) which a jury might otherwise engage in. Such a warning could not be detrimental to the positive defence case in the appellant's trial, including the invitation to consider inconsistencies between complainants suggesting, at least, the possibility of a common motive to fabricate the allegations. Thus, in terms of any forensic decision, there was no advantage in not seeking the direction, while there was a significant, and well recognised, risk in the direction not being given (cf *TKWJ v The Queen* per Gaudron J at [27] – [28] (133)).

57. The above matters are, additionally, to be seen in the context of the apparent lack of any independent assessment by the trial judge of the need for the absent direction, a matter to which Beech-Jones J did not have regard in coming to his conclusion as to the significance of counsel's failure to request the direction.

58. A final difficulty with the reasoning of Beech-Jones J with respect to the failure of defence counsel to request the direction is that the reasoning depends on the correctness of his Honour's earlier conclusions as to the effectiveness of the *Murray* direction, and the significance of the defence case as factors militating against a real risk of the jury engaging in impermissible tendency reasoning. For the reasons given above, such reliance was misplaced.

59. It is respectfully submitted that Macfarlan JA was correct to conclude that "it is not possible to form a firm view whether the [appellant's] trial counsel made a calculated forensic decision not to seek [a direction warning the jury on the prohibition on tendency reasoning relating to the evidence of any charged count]" (CCA [54], CAB 103). As noted above, oversight was, perhaps, the most likely reason.

Conclusion

60. As submitted above, the absence of a direction prohibiting the use of the charged acts to support tendency reasoning created a real risk that the jury reasoned toward findings of guilt by an impermissible route. This risk existed independently of the attitude of counsel. Indeed, the absence of a proper direction had the additional result that the jury, left uninstructed as to the nature and extent of seemingly available tendency reasoning, was allowed greater licence to engage in tendency reasoning than had been sought, unsuccessfully, by the Crown. Had the evidence been admitted for a tendency purpose, directions would have been required as how the jury could, and could not, use the evidence in a manner consistent with the basis for its admission: see Macfarlan JA at CCA [44], CAB 100.

61. The failure of the trial judge to give the jury a direction prohibiting the use of tendency reasoning for the evidence of any charged count rendered the appellant's trial unfair (Macfarlan JA at CCA [54]; CAB 103). The Crown did not submit that, if the ground was established, the proviso to s6(1) of the *Criminal Appeal Act 1912* (NSW) could be applied. This was, with respect, appropriate: see Macfarlan JA at CCA [55], CAB 103.

62. The convictions should be quashed and a new trial ordered.

Part VII: Orders

63. The appellant submits that the Court should make the following orders:

i. Appeal allowed.

ii. Set aside the orders made by the CCA on 27 April 2020.

iii. Quash the convictions in relation to each count on the indictment and order a new trial.

Part VIII: Time Estimate

64. The appellant estimates that 2 hours will be required for the presentation of his oral argument, including submissions in reply.

Dated: 15 April 2021

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **HAMILTON (a pseudonym)**
Appellant

and

THE QUEEN
Respondent

ANNEXURE TO THE APPELLANT'S SUBMISSIONS
LIST OF CONSTITUTIONAL PROVISIONS, STATUTES AND STATUTORY INSTRUMENTS LISTED REFERRED TO IN SUBMISSIONS

Pursuant to paragraph 3 of Practice Direction No 1 of 2019

CONSITUTIONAL PROVISIONS

Nil

STATUTES

1. Criminal Appeal Act, 1912 (NSW), current
2. *Crimes Act 1900* (NSW), as at 1.1.2009 – 30.11.2018.
3. *Evidence Act 1995* (NSW), as at 1.7.2020 – 30.6.2020
4. *Crimes (Sentencing Procedure Act) 1999*, current.

STATUTORY INSTUMENTS

1. Criminal Appeal Rules, current.