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
SYDNEY REGISTRY

BETWEEN: **HAMILTON (a pseudonym)**
Appellant
and
THE QUEEN
Respondent

APPELLANT'S REPLY

Part I: Certification

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

Part II: Reply

The scope of issues raised on appeal

2. The issues raised are not limited to the need for a direction prohibiting the use of the evidence of the complainants as tendency evidence with respect to the counts relating to the other complainants, but also extends to the use of the evidence as tendency evidence with respect to the other counts concerning that same complainant: see appellant's written submissions (**AS**) [2](i); AS [41], cf respondent's submissions (**RS**) at [2], [4] and fn 4.

3. The appeal also raises the issues set out at AS [2](ii) and (iii), (cf RS [2], [4]).

Response to the respondent's submissions

4. The respondent does not challenge the statements of principle relied on by the appellant discussed at AS [22]-[25]. Thus, despite accepting, for example, that "[t]he importance of directions in cases where evidence may show propensity should not be underestimated" such that it is "necessary in such a case that a trial judge give a clear and comprehensible warning about the misuse of the evidence for that purpose and explain the purpose for which it is tendered" (*Roach v The Queen* (2011) 242 CLR 610; [2011] HCA 12 at [47]; AS [24]), the respondent maintains that no such directions were required.

5. The respondent relies on the observation of Beech-Jones J in the Court of Criminal Appeal (**CCA**), that a miscarriage will only arise if there was a "real chance" that the

jury improperly engaged in tendency reasoning: CCA [113], CAB 117; RS [43]. Beech-Jones J, however, in undertaking this assessment, prior to considering particular features of this case, held that there was "neither a requirement or even a presumption" that a direction against tendency reasoning should be given in a multiple complainant sexual assault trial (CCA [113]; CAB 117). Thus, the foundation from which his Honour assessed particular features of this trial failed to have regard to statements of this Court as to the need for clear directions prohibiting tendency reasoning in multiple complainant sexual assault cases. The respondent does not deal with this flaw in the reasoning process leading to the determination of the majority in the CCA.[1]

10 6. Nor does the respondent adopt Beech-Jones J's analysis of the "likely paths of reasoning" to guilt in a manner not involving tendency reasoning (CCA [120], CAB 119, analysed at AS [44] – [47]). Rather, the respondent seeks to maintain a submission that directions prohibiting tendency reasoning were not required based on: "the particular issues in the trial" (RS [46]); "the way in which the Crown and defence cases [were] advanced" (RS [46]); and "the directions … given to the jury" (RS [47]).

The issues at trial

7. As stated by the respondent, in issue was "whether the complainants' evidence as to the sexual assaults committed upon them should be accepted beyond reasonable doubt": RS [48]. The respondent's application to rely on evidence for a tendency purpose was
20 founded on the availability of a rational basis for reasoning towards acceptance of a particular count based on the propensity of the appellant to "have a sexual interest or inappropriate interest in his male children under 13" (CCA [20]; CAB 92). The trial judge accepted that the evidence had, for this purpose, significant probative value (CCA [22]; CAB 93).

8. Quite apart from the Notice (which was limited to a tendency with respect to the male children) the evidence showed the appellant's propensity to commit indecent assaults against his children regardless of gender. The existence of such a propensity made it more likely that he acted on that propensity on the occasions alleged. The respondent

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[1] While the respondent refers to this part of Beech-Jones J's reasons (at RS [41], footnote 3), there is no reconciliation of his Honour's conclusion at CCA [113]; CAB 117, with the statements of principle of this Court relied on by the appellant.

does not submit that propensity reasoning was not a rational mode of reasoning in this case. Nor does the respondent attempt to explain why, despite being a rational mode of reasoning, the risk of propensity reasoning in this a case was somehow less than in a case involving, for example, identification (cf RS [46], [48]). Nor is there any explication of the basis on which the general statements of principle in this Court can be read down so as not to apply in circumstances where, as here, propensity reasoning was a logical and rational, but prohibited, mode of reasoning.

The way in which the Crown and defence cases were advanced

9. The respondent places significant emphasis on the way in which the case was run at trial, including the absence of any invitation by the parties' counsel to the jury to engage in impermissible tendency reasoning: RS at [54].

10. The need for directions arises in cases such as the present because the prohibition on tendency reasoning runs counter to the natural inclinations of persons hearing the evidence (AS [22] – [26]; Macfarlan JA at CCA [40]; CAB 98). It is not the case that a jury would be expected to engage in such a reasoning process only if invited to do so (by counsel or otherwise). Rather, the real risk is that the jury (or individual jurors) will do so unless clearly directed against such reasoning. Indeed, given the natural inclination towards tendency reasoning, by the time of addresses, the jury having by then heard all the evidence over a number of weeks, it was necessary that positive steps be taken to preclude such a reasoning process. Moreover, the impermissible reasoning process may arise wholly as a matter of unconscious influence: AS [22].

11. The respondent's characterisation of the appellant's case at trial as one of deliberate concoction driven by the complainants' mother (RS [11], [13], [45], [66]), whilst accurate in the sense of describing a 'positive' aspect of the defence case, obscures the fact that the defence also took the more straightforward approach during the trial in arguing that, irrespective of the possibility of a specific motive to fabricate, each complainant was insufficiently reliable for the prosecution to prove any count relating to that complainant: see, for example, Respondent's Further Material at 46 – 47; T.760.43 – 761.3; 761.21-27.

12. As the appellant's analysis of Beech-Jones J's "likely paths of reasoning" shows (AS [44] – [48]), the raising of concoction as part of the defence case, did not obviate the

potential for, or diminish the force of, impermissible tendency reasoning.

13. The respondent makes the somewhat muted submission that a direction against tendency reasoning "…would have directed the jury that they had to determine the credibility and reliability of each complainant separately… [and therefore] *had some potential* to detract from the primacy of the defence contention that the jury should consider all of the evidence when assessing the (sic) whether the complainants had a motive to lie": RS [70], *emphasis added*. Contrary to this submission, Beech-Jones J (correctly, the appellant respectfully submits), did not accept that there was any forensic advantage in not seeking the directions prohibiting tendency reasoning (CCA [122], CAB 120; AS [54]). As pointed out (at AS [56]), a direction against tendency reasoning takes away a path of reasoning towards guilt. It could not have been detrimental to the appellant.[2]

14. Further, in seeking to support a conclusion that the decision of trial counsel was "deliberate", the respondent fails to acknowledge the failure of the trial judge to turn an independent mind to the directions required and the consequent danger in drawing inferences from the conduct of the case at trial (see RS [66]-[68]). In any event, whether the decision was deliberate, particularly in the absence of a forensic advantage, is not determinative of miscarriage: see AS [56].

15. The respondent's submission, ultimately, highlights the potential for the defence tactic of inviting the jury to 'join the dots' across all complainants to create, for an unwarned jury, a heightened risk of impermissible tendency reasoning. The jury might not have understood that the defence approach of considering aspects of the complainants' evidence collectively was not also available to the Crown in proving its case.

The directions that were given

16. The respondent's suggestion that there may have been no more than a "loophole" in the directions given which would have allowed tendency reasoning (RS [55], [57]) does not sit easily with the generally recognised need for directions against tendency reasoning in cases such as the present. For the reasons advanced at AS [33] – [43], the directions

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[2] Differentiation in the application of legal directions to the prosecution and defence cases is a common feature of a summing up, as recognised in the respondent's submissions (see for example, RS [60] in relation to the *Murray* direction). It is also evident in the present case in the 'motive to lie' direction given by the trial judge: SU 18, [46] –[47]; CAB 25-26]; and in the '*Markuleski*' direction: SU 19 [48]; CAB 26.

given (and relied upon by Beech-Jones J) did not address the risk of impermissible reasoning.

17. The respondent's submission that the second limb of the separate consideration direction was deliberately "omitted to ensure that the force of the defence case was not undermined" (RS [59]) is speculative and unsupported. Had this been a concern, it could have been allayed by framing the direction in a manner that made it clear the jury was entitled to consider all the evidence when considering the possibility of concoction. As noted above (at [13], footnote 2), directions with differential application are routine.

18. The respondent's analysis of the *Murray* direction (RS [60]-[63]) fails to address the absence of any clear limitation on the evidence to be considered when determining the reliability of a particular complainant. This is a particular difficulty in the light of the trial judge's direction to, when "considering the complainants['] evidence in each case … look to see if it is supported by any other evidence": SU [25]; CAB 40; see also per Macfarlan JA at CCA [46][3]; CAB 100; AS [39]. That a complainant might be the only witness to an event, is doubtless less of a problem for a Crown case where the evidence suggests the accused is a person with a propensity to act in the manner alleged.

19. There was nothing in the elements document that did more than identify to the jury the act relied on by the Crown in support of the particular count: AS [36], cf RS [63]; CCA [117]; CAB 118. Further, the express direction prohibiting the use of the context evidence and the evidence relied on to rebut good character for a tendency purpose would have naturally left the impression that all other logical forms of tendency reasoning were permissible: per Macfarlan JA at CCA [40]; CAB 99; cf RS [64]).

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[3] His Honour there observed the *Murray* direction "did not instruct the jury, certainly not in any clear fashion, that it could not use tendency reasoning"