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

RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

1. The Respondent certifies that these submissions are in a form suitable for publication on the internet.

PART II: ISSUES RAISED ON APPEAL

2. The issue raised in the appeal is whether a miscarriage of justice was caused by the failure of the trial judge to instruct the jury that they were prohibited from using the evidence led in support of the counts on the indictment relating to an individual complainant as tendency evidence in support of the counts on the indictment relating to other complainants.

PART III: SECTION 78B OF THE JUDICIARY ACT

3. The Respondent considers that no notice is required under s 78B of the *Judiciary Act* 1903 (Cth).

PART IV: MATERIAL CONTESTED FACTS

4. There are no material facts that are contested on appeal. As outlined above, the issue in the appeal is whether, in all of the circumstances, a miscarriage of justice was occasioned by reason of the failure of the trial judge to instruct the jury that they were prohibited from using the evidence led in support of the counts on the indictment relating to an individual complainant as tendency evidence in support of the counts on the indictment relating to other complainants.

PART V: ARGUMENT S24/2021

Background

The Crown Case

5. The applicant is the father of five children.[1] Three of the applicant's children (his first, third and fifth children) complained that the applicant had committed sexual acts on them. All of the offences were alleged to have occurred between 9 November 2014 and 20 February 2016, when the applicant, his then wife (the children's mother), and the five children were living in rental accommodation in Lane Cove.

6. The First Child, a daughter, gave evidence that on three occasions when she was 15 years old, the applicant got into bed with her and rubbed her vagina near her "vagina hole" in a "pulsing" motion (Counts 1 – 3): CCA judgment at [6]; Core Appeal Book ("CAB") at 90. On one of these occasions, the children's mother came into the room and found the applicant in bed with the First Child. The mother asked the First Child what had happened, but the First Child did not tell her. In her evidence at trial, the First Child explained that she was afraid that, had she answered truthfully, her mother would have confronted the applicant, and the applicant could have reacted violently; CCA judgment at [6]. The First Child did not tell anyone about the incident until she eventually told her mother about the incident on an outing to a Thai restaurant in October 2016: CCA judgment at [7]; CAB at 90.

7. The Fifth Child, a son, gave evidence of an occasion when he was 6 – 7 years old, when the applicant touched him on the bottom after getting out of the shower (Count 4). The Fifth Child also recounted two other occasions when the applicant had touched his bottom and penis simultaneously (Counts 5 and 6, and 7 and 8 respectively): CCA judgment at [8]; CAB at 90 - 91. The Fifth Child gave evidence that he had made immediate complaint to his mother on each of these occasions: CCA judgment at [9]; CAB at 91. The mother remembered complaints being made by her children about the applicant touching the Fifth Child's bottom, but it was only after the Fifth Child's formal disclosure that she realised the seriousness of the complaints: CAB judgment at [9], CAB at 91.

[1] To protect the identity of the children, the CCA referred to the children by order of birth: CCA judgment at [1].

8. The Third Child, a son, gave evidence that when he was 11 or 12 years old, his father had grabbed his penis while he was drying himself after getting out of the shower (Count 9): CCA judgment at [10]; CAB at 91. He also said that the applicant had grabbed his penis on an occasion when he was half naked and in the process of getting changed (Count 10): CCA judgment at [10]; CAB at 91. S24/2021

9. The Third Child first disclosed the applicant's conduct on 21 September 2017 in a meeting with the school counsellor at his school: CCA judgment at [11]; CAB at 91. His mother, the First Child and the Second Child were also at the meeting with the school counsellor. The mother had arranged the meeting with the school counsellor to tell the Second and Third Children about the allegations made by the First and Fifth Children, and to inform the boys that the applicant had been charged as a result. When told of the allegations, the Third Child started to cry and said that it had happened to him too: CCA judgment at [11]; CAB at 91.

10. At trial, the Crown led limited context evidence about the applicant's volatile behaviour in the home in order to explain the reluctance of the complainants to make contemporaneous complaints: CCA judgment at [13]; CAB at 91. This evidence included an occasion on 29 January 2016 ("the Rugby Ball incident"), when the applicant was alleged to have intentionally trodden on the Fifth Child's arm and head, and thrown a football at the children's mother. Police were called and the applicant was charged (and later convicted) of common assault. The complainants' mother commenced family law proceedings shortly after this incident. This evidence was also relied upon in rebuttal of the applicant's contention that he was of good character.

The Applicant's Case

11. The applicant's case at trial was that his ex-wife had suborned the complainants to give false evidence about being indecently assaulted in order to obtain custody of the children and exclusive occupation of the family home.

12. The applicant gave evidence denying each of the allegations. He also gave his own detailed version of the "Rugby Ball incident": CCA judgment at [25]; CAB 94. The applicant explained that he was attempting to discipline the boys who were throwing a football around the house. He said that he told the boys to stop as they were moving out

the next day and he was worried about getting the bond back. The applicant said that one of the boys suddenly tackled him and started punching him in the arm, and that all of the boys then jumped on him. He denied stepping on the Fifth Child and also denied throwing the ball at the mother's chest.

13. Consistently with the indication given by defence counsel at the outset of the trial, the children's mother and the children were each cross-examined extensively as to concoction. Defence counsel also mounted a substantial attack upon the character of the children's mother: CCA judgment at [27]; CAB at 94. The applicant also called evidence from character witnesses who testified as to his own good character, and as to the complainants' mother's alleged motive to organise the conviction of the allegations against him: CCA judgment at [28]; CAB at 94.

14. In his opening and closing addresses, defence counsel invited the jury to "join the dots" across the whole of the evidence to conclude that all the children had been lying at the instigation of their mother, who had manipulated them "so that she can have maximum leverage in the Family Court and inflict as much pain as possible on the accused": CCA judgment at [48]; CAB at 101 and [89]; CAB at 110.

The Tendency Ruling

15. By way of Notice served prior to the commencement of the trial, the Crown sought to rely on tendency evidence. In particular, the Crown contended that the evidence of each of the applicant's two sons relating to the charged counts on the indictment (the Fifth Child and the Third Child, Counts 4 - 10) should be cross-admissible using tendency reasoning: CCA judgment at [19] – [20]; CAB at 92.

16. The Crown also pressed as tendency evidence from the Third and Fourth children of occasions (other than those charged) where the applicant had indecently assaulted the Fifth Child: CCA judgment at [19]; CAB at 92-93.

17. Defence counsel objected to the Crown's reliance on tendency reasoning. However, defence counsel informed the Court that, for tactical reasons, he did not want any of the counts on the indictment severed ("we concluded that tactically all that evidence can go in"): CCA judgment at [93]; CAB at 111. Defence counsel explained that "we want it in as all part of the circumstances the whole picture we want – I mean it's an unusual

situation I know but that's what we want to do, we want it in as the whole picture for the jury": CCA judgment at [93]; CAB at 111. In respect of the context evidence relating to uncharged acts, defence counsel positively sought admission of the evidence, but contended that the jury should not be permitted to engage in tendency reasoning in relation to this evidence.

18. In circumstances where the applicant did not seek severance of any of the counts, did not object to the admission of the evidence (including context evidence) of each complainant (and indeed, positively sought that "all of the evidence" be admitted), the trial judge did not rule upon the availability of tendency reasoning prior to the commencement of the trial.

19. In a judgment delivered on 20 February 2019 (following the evidence of the complainants), the trial judge held that the tendency evidence sought to be adduced by the Crown had "significant probative value": CCA judgment at [22]; CAB at 93. However, his Honour held that the evidence of the Third and Fourth children did not satisfy s. 101 of the *Evidence Act*, because the probative value of that evidence did not substantially outweigh its prejudicial effect.

20. In particular, his Honour concluded that the "jury may be misled or confused by a tendency direction in relation to this evidence, which is already in as context, and partly as character evidence, or evidence going to the issue of character": CCA judgment at [22]; CAB at 93. His Honour stated "[i]t would, in my view, be at least misleading or confusing to attempt to have the jury compartmentalise the evidence as tendency evidence separately", adding that his conclusion was fortified by "the way in which this case has been conducted". In particular, his Honour observed that the case had "evolved" into a detailed exposition of a number of incidents involving the accused and various members of his family relating to "events far beyond the particular assertions involving the ten counts on the indictment": CCA judgment at [22], CAB at 93. His Honour concluded:

> "The task of the jury in focussing on whether the Crown has proved beyond reasonable doubt the elements of each or any count beyond reasonable doubt should not, in my view, be unnecessarily complicated by attempting to direct the jury to consider the proposed evidence as tendency evidence": CCA judgment at [22]; CAB 93.

21. In considering the prejudicial effect of tendency reasoning, the trial judge appeared to

only consider the use of the uncharged acts and did not expressly address the cross-admissibility of for tendency purposes of the evidence of the Third and Fifth children concerning the counts relating to them: CCA judgment at [23]; CAB at 93. Nonetheless, as Macfarlan JA observed, the trial judge's decision "operated as a rejection of all that the Crown sought in its [tendency] notice": CCA judgment at [23]; CAB at 93. In accordance with this ruling, the Crown did not rely on tendency reasoning in its case in respect of any evidence, including the counts on the indictment.

The Trial Judge's Directions

22. The trial judge summed up to the jury on 26 and 27 February 2019. Previously, on the eighth day of the trial, the trial judge had informed the parties that he required them to prepare an agreed draft summing up which his Honour would then read to the jury: CCA judgment at [97]; CAB at 112. Although the appropriateness of that course was not the subject of a ground of appeal in the CCA, both Beech-Jones and Adamson JJ commented on the inappropriateness of the trial judge adopting this course: CCA judgment at [82] - [84], CAB at 109, per Adamson J; at [97], CAB at 112, per Beech-Jones J.

23. In the summing up, the trial judge instructed the jury about the use that could be made of the context evidence (the evidence of the Third and Fourth Children of occasions when they saw the applicant touch the Fifth Child's penis): Summing Up ("SU") at [16] – [20]; CAB at 13 - 16. The trial judge explained that "context evidence is background evidence which explains the complainants' conduct by putting it in a realistic context": SU at [18]; CAB at 14 - 15. The trial judge warned the jury as follows:

> "I must give you some important warnings with regard to the use of this evidence of other acts, that is, acts that are not the subject of any charge. Firstly, you must not use evidence of other acts as establishing a tendency on the part of the accused to commit offences of the type charged. You cannot act on the basis that he is likely to have committed the offences charged because there are other allegations against him. The evidence has a very limited purpose, as I have explained to you, and it cannot be used for any other purpose, or as evidence that the particular allegations contained in the charges have been proved beyond a reasonable doubt": SU at [19]; CAB at 15.

24. The trial judge then emphasised to the jury that they "must not substitute the evidence of other acts witnessed by [the Third and Fourth Children] for the evidence of the specific allegations contained in the charges on the indictment": SU at [20]; CAB at 15 - 16. The judge instructed the jury that:

> "You are concerned with the particular and precise occasions alleged by [the Fifth Child]. You must not reason that just because the accused may have done something wrong to [the Fifth Child] on some other occasions witnessed by [the Third and Fourth Child] [that he] must have done so on the occasion alleged in the indictment. You cannot punish the accused for other acts attributed to him by [the Third or Fourth Child], by finding him guilty of any charge on the indictment. Such a process of reasoning would amount to a misuse of the evidence and would not be in accordance with the law": SU at [20]; CAB at 15 - 16.

25. The trial judge also gave the jury directions in relation to the accused's motive to lie. The trial judge reminded the jury that the accused bore no onus, and directed the jury that even if they could not find a plausible reason for any of the complainants to lie, that they could not reason that the complainants must therefore be telling the truth. The trial judge then directed the jury:

> "As you have been told, the essential elements of the Crown case must be proved beyond reasonable doubt, or the accused must be acquitted. If the case turns on the evidence of a complainant you must be satisfied that the evidence of the complainant satisfies you beyond a reasonable doubt": SU at [46]; CAB at 25.

26. The trial judge continued:

> "As I said to you at the start, 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. This means that 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 on the indictment": SU at [48], CAB at 26 (emphasis in transcript of summing up, reproduced in the CAB).

27. The trial judge also directed the jury about the use of the evidence as to the applicant's character: SU at [49] – [54]; CAB at 26 - 29. In particular, the trial judge noted the evidence that had been called on behalf of the applicant in respect of the issue of character, and the evidence that had been called by the Crown to rebut character: SU at [49] – [50]: CAB at 26 - 27.

28. The trial judge directed the jury about the use that could be made of this evidence if the evidence of good character was accepted. The trial judge also warned the jury about the use that could be made of the evidence if the evidence of good character was not accepted: SU at [52] – [54]; CAB at 28 - 29. In particular, the trial judge instructed the jury that:

> "If, on the other hand, you do not accept the evidence that the accused is a person of good character, you cannot use the evidence called by the Crown on that issue to strengthen the Crown case. That is, you are not entitled to reason that because of the evidence led by the Crown on the issue of character, that he is more likely to have committed the offence charged against him. The Crown did not call the evidence and does not rely upon that evidence to establish his guilt. It was simply led on the issue of the accused's character and it would be improper of you to use that evidence for any purpose other than on the issue of whether he is a person of good character.
>
> If, after considering the evidence on this issue, you find that he is a person of good character, then you cannot decide that he is a person of bad character and use that finding against the accused. Indeed, if you are not satisfied that he is a person of good character, the law requires you to put all consideration of character out of your minds in determining whether you are satisfied beyond reasonable doubt that he is guilty of the crimes charged. That is a direction of law that you are bound by your promises as jurors, to follow, during your deliberations": SU at [53] – [54]; CAB at 28 - 29.

29. At the conclusion of the first day of the summing up, and in the absence of the jury, the trial judge outlined the directions that would be given the following day and asked defence counsel whether he sought any further directions: SU 26/2/19 at 24; CAB at 31. In this context, there was discussion of the giving of a *Murray* direction (which was sought by defence).

30. The following day, the trial judge continued with the summing up. His Honour gave the *Murray* direction sought by the applicant, and instructed the jury that:

> "… whenever the Crown seeks to establish the guilt of the accused based largely or exclusively on a single witness it is important that the jury be told that you should exercise caution and that is what I am doing now. You have to exercise caution before you could convict the accused on any count because the Crown case largely depends on you accepting the reliability of a single witness. For example, [the First Child] is the only witness to the events that make up the counts on the indictment for her allegations, other than count 3 where her mother says she saw the accused on her bed. On the Crown case [the Fifth Child] was the only witness to the events that describes, and [the Third Child] was the only witness regarding his allegations. That being so, unless you are satisfied beyond a reasonable doubt that [the First, Third and Fifth children] are both honest and accurate witnesses in the accounts that they have given you cannot find the accused guilty. Before you could convict the accused you should examine the evidence of the complainants very carefully in order to satisfy yourselves that you can safely act upon that evidence to the high standard required in a criminal trial": SU at [24]; CAB at 39.

31. The trial judge informed the jury that this warning was not based on his personal view of the evidence, but that, "in any trial where the Crown relies solely or substantially on the

evidence of a single witness, the jury must always approach that evidence with particular caution because of the onus and standard of proof placed upon the Crown": SU at [25]; CAB at 39. His Honour explained that he was not suggesting that the jury was not entitled to convict on any count on the evidence of a complainant ("clearly you are entitled to do so"), but directed the jury that they could do so "only after you have carefully considered the evidence and satisfied yourself that it is reliable beyond reasonable doubt" and that "[i]n considering the complainants evidence in each case and whether it does satisfy you of the guilt of the accused you should, of course, look to see if it is supported by any other evidence": SU at [25]; CAB at 40.

10 32. The trial judge then said:

> "One further thing I wish to put in relation to evidence is that there are circumstances in this case which include contradictions of the witnesses, delay in bringing the prosecution, and the fact that allegations arose after the accused left the family home and [the complainants' mother] commenced Family Court proceedings. It would lead you, as Mr Russell submits, to scrutinise the evidence of the complainants and [the complainants' mother] with great care and to exercise considerable caution before convicting the accused based on the evidence of a complainant alone": SU at [26]; CAB at 40.

33. Following the conclusion of the summing up, the jury retired to consider its verdict, and
20 subsequently returned verdicts of guilt to all counts on the indictment on 1 March 2019.

The Appeal to the Court of Criminal Appeal

34. The applicant sought leave to appeal to the CCA on three grounds: first, that the trial judge erred by failing to give an anti-tendency direction; second, that the trial miscarried by reason of the admission and use of evidence of "bad character"; and third, that the jury's verdicts were unreasonable. The applicant required leave to appeal because no ground of appeal raised a question of law alone: s. 5 of the *Criminal Appeal Act* 1912 (NSW).[2] In respect of Grounds 1 and 2, the applicant also required leave to appeal under Rule 4 of the *Criminal Appeal Rules* because the applicant had not sought either direction from the trial judge in the trial.

30 35. The Court unanimously refused the applicant leave to appeal in respect of the second ground of appeal, which related to the admission and use of evidence of "bad character".

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[2] Justice Macfarlan proceeded on the basis that leave was required on this basis, noting that applicant did not submit that leave was not required: CCA judgment at [3]; CAB at 89 – 90.

The Court granted the applicant leave to appeal with respect to the third ground of appeal (unreasonable verdict), but dismissed that ground of appeal: see : CCA judgment at[69]; CAB at 107, per Macfarlan JA; and [85]; CAB at 107, per Adamson J. S24/2021

36. In respect of the first ground of appeal, which alleged that the trial judge erred by failing to give an anti-tendency direction, a majority of the Court (Beech-Jones J, with whom Adamson J agreed), refused leave to appeal under Rule 4 of the *Criminal Appeal Rules*, and concluded that no miscarriage of justice was occasioned by the failure to give the direction: CCA judgment at [123]; CAB 120. Justice Macfarlan dissented, finding that a miscarriage of justice had been occasioned by the failure of the trial judge to give the jury an anti-tendency direction, and that leave to appeal under Rule 4 should accordingly be granted: CCA judgment at [55]; CAB 103.

37. For the reasons outlined below, the respondent contends that the majority of the CCA correctly held that the applicant had not demonstrated that a miscarriage of justice arose from the failure of the trial judge to instruct the jury that they were prohibited from using the evidence led in support of each count on the indictment as tendency evidence in support of the other counts on the indictment, or in concluding that leave should be refused under Rule 4 of the *Criminal Appeal Rules* in circumstances where that direction had not been sought by defence counsel at trial.

Submissions

The Nature of the Appeal and the Test to be Applied

38. Section 6(1) of the *Criminal Appeal Act* 1912 (NSW) provides that:

> "The court on any appeal under section 5 (1) against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

39. Section 6 of the *Criminal Appeal Act* contains three "limbs": the first limb relates to cases where it is alleged that the jury's verdict was unreasonable or cannot be supported having regard to the evidence; the second limb relates to cases where it is alleged that the trial

judge made a "wrong decision on any question of law"; and the third limb relates to cases where it is alleged that "on any other ground whatsoever there was a miscarriage of justice".

40. The applicant contends that the trial judge erred by failing to instruct the jury that they were prohibited from using the evidence led in support of each count on the indictment as tendency evidence in support of the other counts on the indictment. This is an allegation of third limb error. In the present case, where the applicant's counsel did not request an anti-tendency direction at trial, there is no "decision" on a question of law that could be the subject of second limb error: CCA judgment at [105]; CAB at 114; see *Papakosmas v The Queen* [1999] HCA 37; 196 CLR 297 at [72] (per McHugh J). For this reason, the applicant must establish that the failure to give the direction constituted a "miscarriage of justice".

41. As the applicant acknowledges, there is no "universal rule" that an anti-tendency direction must be given in every case in which there are multiple complainants on an indictment: AWS at [27]; see also CCA judgment at [39]; CAB at 98, per Macfarlan JA and at [113]; CAB 117, per Beech-Jones J, with whom Adamson J agreed.[3] This concession is properly made: *KRM v The Queen* (2001) 206 CLR 221 at [33] and [37], per McHugh J; at [72], per Gummow and Callinan JJ; at [114], per Kirby J; at [133] – [134], per Hayne J. Rather, whether a failure to give an anti-tendency direction in a particular case will give rise to a miscarriage of justice depends upon an assessment of the risk that impermissible reasoning would have been employed by the jury in the particular circumstances of the case, in particular, having regard to how the respective cases were conducted and the effect of other directions given by the trial judge: CCA judgment at [113]; CAB at 117, per Beech-Jones J, citing, *inter alia KRM* at [133], per Hayne J.

42. As there is no universal rule that an anti-tendency direction must be given in every case where there are multiple complainants on an indictment, the absence of such a direction does not, of itself, give rise to a miscarriage of justice. Further, the fact that a direction

[3] Whilst the applicant accepts the correctness of Beech-Jones J's finding that there is no "universal rule", the applicant submits that there is "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 complainant sexual assault case": AWS at [27]. However, it should be noted that in the paragraph cited, Beech-Jones J found that there was "neither a requirement or a presumption that in all cases in which multiple counts of sexual assault involving different victims are tried together … an anti-tendency direction must be given such that a failure to do so will amount to a miscarriage of justice": CCA judgment at [113], CAB at 117, emphasis added.

might be given out of "prudence" is not sufficient to establish a miscarriage: *KRM* at [72], per Gummow and Callinan JJ. S24/2021

43. As Beech-Jones J correctly held, a miscarriage will only arise if there was a "real chance" that the jury improperly engaged in tendency reasoning: CCA judgment at [113]; CAB at 117; see *BRS* at 306. The applicant does not dispute the applicability or appropriateness of this test. His submission is that there was a "real risk" that the jury reasoned towards guilt by an impermissible route: AWS at [60].

44. For the reasons outlined below, it is submitted that the applicant has not demonstrated that there was a "real chance" that the jury so reasoned. Accordingly, the appeal should be dismissed.

The Applicant's Contention

45. In the present case, the jury heard evidence from three siblings as to sexual offences which they each testified had been committed upon them by the applicant. The applicant does not complain about the admission of the evidence of all three siblings in the trial. His case, which was one of concoction orchestrated by the complainants' mother, required that the jury hear all of the evidence from each of the complainants. Rather, the applicant contends that there has been a miscarriage of justice because the jury were not instructed with an anti-tendency direction with respect to this evidence: AWS at [61].[4]

The Present Case

46. It may be accepted that where there are multiple counts on an indictment relating to different complainants, there is a risk that the jury may engage in impermissible tendency reasoning. However, that risk is not equal in every case. The extent of the risk will be affected by the particular issues in the trial. For example, where, as in *Sutton v The Queen* [1983] HCA 5; 152 CLR 528 and *De Jesus v The Queen* [1986] HCA 65; 68 ALR 1 (cited at AWS [22] and [23]), the identity of an assailant is an issue in the trial, the risk of

[4] Although the applicant alleges that miscarriage of justice arose from the failure of the trial judge to give an anti-tendency direction with respect to "any" count on the indictment (AWS at [60] - [61]), the contention that appears to be advanced in his submissions is more limited. In particular, the applicant contends that a miscarriage of justice arose from the failure of the trial judge to instruct the jury that they were not permitted to use tendency reasoning between the counts relating to each complainant: see, for example, AWS at [2(i)], [22] – [32] and [45]. These submissions address the narrower issue advanced by the applicant, namely whether a miscarriage of justice arose from the failure of the trial judge to instruct the jury that they were not permitted to use tendency reasoning between the counts relating to each complainant.

impermissible tendency (or coincidence) reasoning will be particularly high. The risk of impermissible reasoning will also be affected by the way in which the Crown and defence cases are advanced.

47. Finally, the risk of a jury engaging in impermissible tendency reasoning will be affected by the directions that are given to the jury, considered as a whole. It does not follow from the prohibition against tendency reasoning in s. 95 of the *Evidence Act* 1995 (NSW) that a warning against such reasoning must be given in every case; cf AWS at [21]. Sometimes a direction to the jury that they must approach a case in a way that is inconsistent with tendency reasoning will be sufficient to avoid the prospect of impermissible reasoning. (Indeed, in some cases it may be more effective to direct a jury as to the reasoning that should be employed, rather than directing the jury about the reasoning that should not be employed: see *KRM* at [37], per McHugh J.) For example, it is well accepted that in cases of multiple counts relating to a single complainant, the giving of a separate consideration direction, together with the omission of direction permitting tendency reasoning will usually be sufficient to ameliorate the risk of impermissible reasoning: *KRM* at [36], per McHugh J.

48. In the present case, there was no issue of identification. The issue was whether the complainants' evidence as to the sexual assaults committed upon them should each be accepted beyond reasonable doubt. The jury heard evidence from each of these complainants. As outlined below, neither the Crown, nor the defence invited the jury to engage in impermissible tendency reasoning. When considered in the context of the directions that were given, it is submitted that the applicant has not demonstrated that there was a "real chance" of the jury engaging in impermissible reasoning such as to give rise to a miscarriage of justice.

The Way the Cases were Advanced

49. The Crown Prosecutor in the present case did not invite the jury to engage in a forbidden path of reasoning. In her closing address, the Crown Prosecutor carefully took the jury separately through the evidence of each individual complainant, and the reasons why the Crown submitted, on the basis of that evidence, the individual complainant's evidence should be accepted by the jury beyond reasonable doubt: T720 – 756; Respondent's Further Material ("RFM") at 5 - 41. She did not suggest that a finding that any

complainant was credible and reliable would in any way affect the jury's reasoning in respect of any other complainant.

50. Nor did defence counsel suggest that the jury would engage in impermissible tendency reasoning. In his closing address, defence counsel contended that the complainants and their mother had a common motive to lie, but emphasised that if the jury did not accept this motive, this did not mean that they could find that the applicant was guilty. Rather, he submitted that "all you are concerned with is as to whether you can find beyond reasonable doubt that these witnesses are reliable": T761.24; RFM at 47.

51. In short, neither the way in which the Crown nor the defence advanced the case conveyed to the jury that it was permissible to use the evidence in support of the counts on the indictment to find other counts on the indictment proved. In this way, the present case stands in stark contrast to the decision in *BRS*.

52. *BRS* concerned a teacher who was alleged to have masturbated a male student and then used a yellow towel to clean himself. At trial, a student, "W", gave evidence that, on another occasion, the applicant had masturbated himself in front of W and used a yellow towel to clean himself. The trial was held before the commencement of the *Evidence Act*, and W's evidence was not admitted as tendency evidence. In closing, the Crown relied on W's evidence to rebut good character and to corroborate aspects of the complainant's account. The Crown also submitted to the jury that, if they accepted W's evidence, they would be satisfied that the applicant "had a predilection and a liking for the company of young boys and for masturbation in their company": *BRS* at 307. In his summing up, the trial judge did not refer to W's evidence or to the Crown address at all.

53. A majority of the Court (McHugh, Toohey, Gaudron and Kirby JJ, Brennan CJ dissenting), upheld BRS's appeal against conviction. In finding that there was a real chance that the jury had misused the evidence, both Gaudron and Kirby JJ took into account (at 301 and 327) the fact that the prosecutor had invited the jury to engage in improper propensity reasoning; cf McHugh J at 307.

54. In the present case, Beech-Jones J correctly concluded that neither the Crown nor the defence case invited tendency reasoning: CCA judgment at [120]; CAB at 119. Any remaining risk that arose from the nature of the evidence was sufficiently ameliorated by the directions that were given, which are outlined below.

The Directions

55. The judge's summing up should be read as a whole, and should not be read in a narrow, technical way; cf AWS at [39], citing CCA judgment at [46]; CAB 100, per Macfarlan JA. The question is not whether the summing up contained a "loophole" by which a jury could justify engaging in tendency reasoning, but whether any existing risk of tendency reasoning (assessed in particular by reference to the nature of the evidence and the way the cases were run) was sufficiently mitigated by the directions that were given so as not to give rise to a miscarriage of justice.

56. In the present case, there were four important aspects of the summing up. These were:

(i) The character direction, which contained an express warning in respect of anti-tendency reasoning;

(ii) The context direction, which also contained an express warning in respect of anti-tendency reasoning;

(iii) The separate consideration direction, which reminded the jury of the instructions given at the commencement of the trial; that there were 10 separate charges and 10 separate trials that were being held together for convenience, and that the jury must give separate consideration to each count; and

(iv) The *Murray* direction, which directed the jury that in reasoning towards guilt in respect of a count, the jury was confined to scrutinising the relevant child's evidence carefully. The jury were directed that they could only convict in relation to a count relating to an individual child if they were satisfied that the individual child was honest and reliable beyond reasonable doubt.

57. It is acknowledged that no direction expressly instructed the jury that they could not utilise tendency reasoning in respect of the counts on the indictment. However, as Beech-Jones J held, the separate consideration and *Murray* directions, when considered together, instructed the jury that, when determining whether the Crown had proved its case beyond reasonable doubt, their focus must be on the individual complainants, whose evidence they were required to carefully scrutinise: CCA judgment at [120]; CAB at 119.

58. The separate consideration direction instructed the jury that there were 10 separate counts,

which needed to be the subject of their separate consideration. The applicant complains about the limited form of this direction: AWS at [33] – [34]. The applicant contends that the direction was deficient because it failed to require the jury "to consider each count only by reference to the evidence that applies to it": AWS at [34], citing *KRM* at [4] and [36]; Hayne J at [132].

59. It is apparent that this "second limb" of the separate consideration direction was omitted to ensure that the force of the defence case was not undermined. The defence case invited the jury to consider all of the evidence when considering each count on the indictment, so as to "join the dots" to conclude that each of the complainants were lying. The second limb of the separate consideration direction would have precluded the jury from reasoning in the manner which the defence advocated.

60. However, the *Murray* direction, which was limited to reasoning in support of the Crown case (in that it applied "whenever the Crown seeks to establish the guilt of the accused") clearly directed the jury as to the evidence that they could use when reasoning towards guilt. In this direction, the jury were instructed that they had "to exercise caution" before convicting the accused on any count and further instructed the jury that "unless you are satisfied beyond a reasonable doubt that [the First, Third and Fifth children] are both honest and accurate witnesses in the accounts that they have given you cannot find the accused guilty." As Beech-Jones J found, this direction "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 applicant's tendency or propensity": CCA judgment at [117]; CAB at 118.

61. The applicant contends that the *Murray* direction left open the possibility of tendency reasoning, in that it invited the jury in considering each complainant's evidence to consider whether the individual complainant's evidence *was supported by any other evidence* (SU at [25]; CAB at 40, emphasis added); AWS at [40].

62. However, this part of the trial judge's *Murray* direction needs to be read in the context of the directions that had preceded it. Importantly, earlier in the *Murray* direction, the trial judge told the jury that the First Child was the only witness who made up the counts on

the indictment for her allegations, *other than* the one count where her mother said that she saw the applicant in bed with the First Child. The trial judge also stated that the Third Child was the only witness to the allegations that he described and that the Fifth Child was the only witness to the allegations that he described: SU at [24]; CAB at 39.

63. Viewed in this immediate context, the jury would readily have understood that when the judge invited them to consider whether there was "supporting evidence", the trial judge was referring to direct evidence, such as the mother's evidence in respect of the First Child, and was not referring to the unrelated evidence of the other complainants. This direction was reinforced by the written elements document, which (in contrast to elements documents typically provided to juries), contained not only the elements of each count, but also contained a description of the particular act of the child alleged to constitute the count and the fact that it was denied by the accused: see CCA judgment at [117], CAB at 118. Further, the jury would have understood the direction in light of the Crown's closing address, which made reference to the evidence of the complainants' mother concerning the First Child, but did not in any way suggest that a finding as to the credibility and reliability of one complainant could support the evidence of another complainant.

64. Further, no aspect of the anti-tendency directions given in respect of the context and character evidence suggested that tendency reasoning would be available in respect of the counts on the indictment; cf AWS at [20], citing CCA judgment at [40(3)]; CAB 99, per Macfarlan JA. In this respect, it may be noted that, in the character direction, the trial judge directed the jury that if they were not satisfied that the applicant was of good character, "the law requires you to put all consideration of character out of your minds in determining whether you are satisfied beyond reasonable doubt that he is guilty of the crimes charged": SU at [54]; CAB at 29. In other words, whilst the direction was framed around the issue of character, the warning given was not so limited. Whilst the directions left the possibility of tendency reasoning technically open to the jury (CCA judgment at [40(3)], CAB at 99, per Macfarlan JA), the jury would have understood that tendency reasoning was impermissible generally, particularly in view of the other directions that were given.

65. In summary, as Beech-Jones J found:

> "The combined effect of the *Murray* direction, and the absence of a tendency direction, meant that the Crown case in respect of each count was confined to

having the jury being required to accept that the relevant child was honest and accurate in their evidence and to scrutinise each of their evidence very carefully. In contrast, counsel for the applicant was free to, and did, invite the jury to 'join the dots' and conclude that each of them (and their mother) were lying. In that context, the risk that the jury might, consistently with the *Murray* direction, reason from their acceptance of the honesty and accuracy of one child's evidence, that the applicant is the type of person who would commit the offences with which he is charged and use that conclusion to support a finding that the Fifth Child was honest and accurate was remote": CCA judgment at [120], CAB at 119.

The Failure of Counsel to Seek the Direction

66. As outlined above, defence counsel had made a series of careful forensic decisions in respect of the advancement of the defence case. Throughout the trial, defence counsel made it clear that this was an "unusual case" where the defence was advancing a positive case of concoction, and, to that end, a forensic decision had been made that "tactically all of the evidence should go in": CCA judgment at [17]; CAB at 92. Defence counsel had also determined to rely on good character, accepting that this would necessarily allow the Crown to adduce evidence of the rugby ball incident. Further, defence counsel had been actively involved in the drafting of the summing up. That summing up included anti-tendency directions in respect of the evidence of uncharged acts and the evidence in rebuttal of good character, which, as Beech-Jones J observed, had been drafted by both counsel: CCA judgment at [122]; CAB at 120. When the trial judge asked the parties if any further directions were required, the applicant's counsel did not request an anti-tendency direction in respect of the counts on the indictment, but rather, pursued a *Murray* direction, which was given in the favourable terms outlined at [30] – [32] above.

67. Whilst the failure to seek a direction is not determinative of the question of whether the failure to give the direction has produced a miscarriage of justice (see *BRS* at 295, per Toohey J and 306 – 307, per McHugh J), the fact that defence counsel did not seek a specified direction may support a conclusion that, in the context of the trial, the direction was not required to avoid such a miscarriage; *De Silva v The Queen* [2019] HCA 48; 37 ALR 1at [35]; *GBF v The Queen* [2020] HCA 40; 384 ALR 569 at [25].

68. As the applicant submits, a failure by defence counsel to seek a direction may stem from mistake, oversight, ignorance or inexperience on the part of defence counsel: AWS at [51] – [52], citing *KRM* at [101], per Kirby J. However, in the present case, as outlined above, defence counsel made a forensic decision not to seek severance of the indictment;

successfully argued against the availability of tendency reasoning (with the tendency judgment being delivered proximate to the delivery of the summing up); and ensured that the context and character evidence admitted in the trial was subject to an anti-tendency direction; and successfully argued for the inclusion of a favourable *Murray* direction.

69. In view of these matters, it was well open to the majority of the CCA to conclude that the decision of defence counsel not to seek an anti-tendency direction was "*deliberate*" at least "*in the sense that he did not consider that such a direction was necessary*": CCA judgment at [99] and [119]; CAB at 113 and 118 - 119. In particular, the active involvement of defence counsel as outlined above points against the failure to seek the direction as having been caused by mistake, ignorance, inexperience or oversight.

70. Although Beech-Jones J did not accept that the failure to seek an anti-tendency direction secured the particular forensic advantages nominated by the Crown in the proceedings before the CCA, his Honour held that the directions that were given left defence counsel "free to … invite the jury to 'join the dots' and conclude that each of them (and their mother) were lying": CCA judgment at [122]; CAB 120 and [120]; CAB 122 respectively. In other words, the giving of an anti-tendency direction (which would have directed the jury that they had to determine the credibility and reliability of each complainant separately) had some potential to detract from the primacy of the defence contention that the jury should consider all of the evidence when assessing the whether the complainants had a motive to lie; whereas the particular *Murray* direction that was given protected against tendency reasoning by instructing the jury that, to reason towards guilt, they were confined to carefully scrutinising the individual child's evidence. In these circumstances, it was open to Beech Jones J to find that defence counsel made a "deliberate" decision not to seek an anti-tendency direction in circumstances where that direction was not "necessary".

71. In any event, in circumstances where defence counsel was actively involved in the drafting of directions specifically addressing tendency reasoning, any "oversight" by defence counsel may itself illustrate that, in the atmosphere of the trial, the possibility of the jury engaging in the impugned form of reasoning was not readily apparent.

72. In these circumstances, it is submitted that Beech-Jones J correctly found that the decision of defence counsel not to seek an anti-tendency direction fortified the conclusion that the

risk of tendency reasoning was not sufficiently material so as to amount to a miscarriage of justice: CCA judgment at [121]; CAB at 119.

Conclusion

73. For the reasons outlined above, it is submitted that the majority of the CCA did not err in finding that a miscarriage of justice was not occasioned by the failure of the trial judge to give an anti-tendency direction in respect of the counts on the indictment. Accordingly, the appeal should be dismissed.

PART VII: ESTIMATE OF TIME

74. The Respondent estimates that it will require 1 - 1.5 hours for its oral argument.

10 Dated 13 May 2021

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S24 of 2021

Between:

HAMILTON (A PSEUDONYM)
Appellant

and

The Queen
Respondent

ANNEXURE

RESPONDENT'S LIST OF RELEVANT STATUTORY INSTRUMENTS

1. *Crimes Act 1900* (NSW), version in force from 23 October 2014

2. *Criminal Appeal Act 1912* (NSW), version in force from 8 January 2019

3. *Evidence Act 1995* (NSW), version in force from 2 July 2018

4. *Criminal Appeal Rules*, version in force from 21 September 2018