IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY

**No. M1 of 2018**



BETWEEN:

**THE QUEEN**

Appellant

-v-

**DENNIS BAUER (A PSEUDONYM) (NO.2)**

Respondent

## APPELLANT'S OUTLINE OF ORAL ARGUMENT

**Part I:**

The appellant certifies that this outline it in a form suitable for publication on the internet.

**Part II:**

*Ground 1 – Use of complainant's evidence from original trial*

1.1 The error in the Court below is the transposition of one of the relevant statutory factors from a consideration of "willingness" to give evidence to an "unwillingness" to give evidence and elevation of that factor to a precondition to admissibility. See Core Appeal Book, 155 - 156.

1.2 The expressed "preference" not to give evidence was sufficient for the trial judge to act upon in circumstances where this preference was not challenged.

1.3 In the absence of challenge it was sufficient for the trial judge to act on the statements of counsel and to focus on the issues litigated – "willingness" to give evidence was not one of the issues the trial judge had to consider as there was no request to question the complainant on this issue. See Appellant's Book of Further Material, 233 (Ruling No. 1).

1.4 The ruling of the trial judge was directed to the issue of the quality of cross-examination at the first trial and not towards the willingness or otherwise of the complainant to give evidence. Little was said by defence counsel about the issue of the willingness of the complainant to give evidence again other than it needs to be balanced against the other factors (in this case the question of whether the accused could receive a fair trial). (See ABFM, 79). The trial judge's ruling was a discretionary one directed towards the primary consideration of the interests of justice.

1.5 The trial judge in her ruling does not reverse the onus of proof (see ABFM, 234). The reference is to the policy behind the section. The judge clearly understood that what had to be established was that the admission of the recording was in the interests of justice. Further the Court below found the cross examination was complete.

*Ground 2 – Tendency evidence in a single complainant case*

2.1 This ground raises the issues of tendency in a single complainant case and the cross admissibility of evidence across the charges.

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2.2 The rulings of the trial judge were correct in allowing the prosecution to employ tendency reasoning. The particulars sought to be led as tendency related to each charged act of sexual misconduct about which evidence was given by RC, the charged act about which evidence was given by TB, and each uncharged act relating to evidence given by both RC and TB. This was to show that the accused had a sexual interest in RC and a willingness to act on that interest (see AFM, 238.12 - 239.3, Ruling No. 2). The way the evidence was to be used by the jury was set out in the Charge (see CAB, 25.26 - 27.16).

2.3 This was a conventional way of analysing the tendency in relation to a single complainant case. It accorded with the line of authority established by the Victorian Court of Appeal in *JLS*. The requisite degree of probative value was met because it demonstrated a sexual interest and a willingness to act on it in relation to a particular complainant. Evidence by a complainant of other sexual acts by an accused will ordinarily permit probability reasoning in relation to the charged act being considered. In *Aung Thu*, quoting from *Gentry*, Redlich JA referred to the high probative value stemming from the specific tendency of an accused to show a sexual interest against a particular victim. This path of reasoning should be preferred to that in the decision of the Court below relying as it does on *Murdoch*.

2.4 It is the nature of the relationship which allows the significant probative value test to be met. However, here, there is not only the nature of the relationship but the evidence of TB which is independent of RC and assists to a significant extent in establishing the respondent's sexual interests in the complainant and a willingness to act on it. The evidence of TB which on any view is independent of RC is and remains an important distinction in the factual matrix of this case. It means that here the tendency evidence does not only flow from the complainant although as *IMM* pointed out there may be cases when this is sufficient.

2.5 It was appropriate to consider the totality of the evidence in considering the admissibility of tendency evidence. However the Court below appears to split the evidence up into the evidence of RC and the evidence of TB and then to look for special features of each independently rather than taking the evidence together. Indeed, the structure of the judgment was to find there was no special feature in relation to RC (see CAB, 179.35) and then to find that TB's evidence also lacked any special feature (see CAB, 179.42). TB's evidence was capable of providing the "special feature" permitting tendency reasoning.

2.6 Further, there were additional features of RC's evidence which supported and allowed for tendency reasoning across the charges if the jury chose to reason in this way.

2.7 This case was akin to the NSW case of *R v Versi* – there it was held by the Court of Criminal Appeal that once the jury accepted the evidence of one charge it could be used to as going to the probabilities that the charge under consideration occurred using sexual interest reasoning. In that particular case there was coincidence evidence relating to one charge from a separate source.

2.8 *IMM* was a significantly different factual scenario – there does not appear to have been any effort in that case to employ tendency reasoning in the way it was sought to be employed in this case. Further, unlike IMM, this case had an independent source of evidence.

2.9 To the extent that the respondent submits that charge 2 and the uncharged act about which TB gave evidence does not have significant probative value it relies on an analysis of the evidence of TB in isolation. Further no suggestion has previously been made that the evidence of TB was not relevant or that it ought to have been excluded pursuant to section 101. Likewise the risk of contamination was not a live issue.

*Ground 3 – Severance*

3.1 Charge 2 was properly joined. It arose out of the same series of offences and as such was a related offence. The trial judge was correct to refuse severance. The evidence on the charged and uncharged acts was cross admissible as argued above. In any event, it is difficult to see why a strong warning would not have sufficed if there was no cross-admissibility.

*Ground 4 – Complaint evidence*

4.1 The complaint was "fresh in the memory" and thus met the requirement for admissibility.

4.2 This case was not like the case of *Pate v R* where there was gap of 12 years. In this case the offending had only ended a short time before the complaint was made. It was not necessary for the complainant to offer her opinion that the evidence was fresh in her memory. This was capable of being a matter of inference relating to the time period, the nature of the event and the age and health of the maker of the representation. Although some evidence was elicited by questioning it appears that the evidence about the showing of pornographic videos was unsolicited. This was particularly powerful and said to be so in the prosecutor's closing address (see RBFM, 194). The evidence of the showing of pornographic videos did not just relate to charge 1 but there were uncharged acts relating to it that the complainant described occurring throughout the period of offending. It is not necessary that the complaint evidence be referable to a particular charge – this is particularly so where the evidence of complainant relates to offending over a number of years. Applying the decision of *IMM*, it is submitted that the evidence was properly admitted.

*Cross- appeal*

The Court below correctly applied the test in ordering a re-trial. It was open to the Court to exercise its discretion in the way it did.

**Brendan F. Kissane QC - Chief Crown Prosecutor (Vic)**