THE QUEEN v DENNIS BAUER (A PSEUDONYM) (NO 2) (M1/2018)

Court appealed from:	Court of Appeal of the Supreme Court of Victoria [2017] VSCA 176
Date of judgment:	30 June 2017
Special leave granted:	15 December 2017

In this appeal the appellant (the Crown) seeks to reinstate the jury conviction of the respondent of 18 sexual offences against the complainant ("RC"), for which he was sentenced by the trial judge to a total effective sentence of 9 years 7 months' imprisonment with a non-parole period of 7 years. The prosecution case involved a course of sexual offending committed by the respondent against RC over a period of 11 years from 1988 to 1998. During this period RC was aged between 4 and 15 years and the respondent was aged between 42 and 53 years. RC was the foster child of the respondent and his then wife. She and her younger sister had lived with the respondent and his wife since RC was 2 years old.

The respondent has been through 9 trials since 2011 and has spent more than 900 days in custody. He was twice convicted of serious charges relating to RC, both overturned after successful appeals. The respondent's first trial, in 2013, was conducted on a joint indictment alleging sexual offending against five separate complainants. On appeal, proceedings involving two of the complainants were, in effect, permanently stayed, and a retrial was ordered on charges relating to the other three complainants. In a series of 8 re-trials however, guilty verdicts were returned only with respect to the charges relating to RC.

The Court of Appeal allowed the appellant's appeal on four grounds. The first related to the trial judge's permitting the prosecution to tender a recording of the evidence of the complainant given in the original trial rather than calling her to give evidence in person at the re-trial. The prosecutor had conveyed to the trial judge that the complainant had a "strong preference" not to give evidence at the re-trial. Those instructions were not put in issue by defence counsel or the trial judge, although defence counsel objected to the reliance on the recording. The recording of RC's original evidence was rendered admissible at the re-trial by virtue of s 379 of the *Criminal Procedure Act* 2009 (Vic) (the Act) which is subject to s 381(1)(c) of that Act which sets out the governing test for the admission of a recording, including the "availability or willingness of the complainant to give further evidence". The CA concluded that "a 'preference' not to give evidence is not unwillingness to do so" and allowed the appeal on that basis.

The second ground was also allowed by the Court of Appeal on the basis that the trial judge had erred by admitting tendency evidence at the re-trial, namely that the respondent had a tendency "to have a sexual interest in his foster daughter [RC] and a willingness to act on that sexual interest …". The issue is whether tendency evidence may be said to possess significant probative value when its source is a single complainant.

As to the third and fourth grounds, the Court held that a substantial miscarriage of justice had been occasioned by the trial judge's failing to order a severance of charge 2 on the indictment, as the only evidence called in support of that charge

flowed from another witness and not from the complainant. The Court also held that a substantial miscarriage of justice had been occasioned by the trial judge admitting a previous statement of complaint (made by RC to another person) as evidence at the re-trial.

The Crown appealed to the High Court. The grounds of appeal are:

- That the Court of Appeal erred in holding the trial judge erred in permitting the previously recorded evidence of the complainant to be tendered as evidence at the re-trial;

- That the Court of Appeal erred in holding that a substantial miscarriage of justice had been occasioned by the admission of tendency evidence at the re-trial;

- That the Court of Appeal erred in holding that a substantial miscarriage of justice had been occasioned by the trial judge failing to order severance in respect of charge 2 on the indictment and by the trial judge admitting a previous statement of complaint (made by the complainant to another) as evidence at the re-trial.

The respondent has cross-appealed on the ground that, upon allowing the appeal, the Court erred in ordering a new trial, in lieu of entering judgments of acquittal.