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
MELBOURNE REGISTRY

M85 of 2023

BETWEEN:

The Director of Public Prosecutions
Applicant

and

Benjamin Roder (a pseudonym)
Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE APPLICANT

PART I: CERTIFICATION

1. This outline is in a form suitable for publication on the internet.

PART II: OUTLINE

2. Evidence of the respondent's conduct is to be admitted to prove that the respondent has certain tendencies (**AFM 4-19**). The proposed direction would require the jury, when deciding whether the respondent has those tendencies, to disregard evidence of any conduct that is the subject of a charge until that conduct is proved beyond reasonable doubt (**CAB 17-20**). The proposed direction is not a direction about proof of the elements of an offence. It is therefore prohibited by s 61 of the *Jury Directions Act 2015* (Vic) (the **JDA**).

Text, context and purpose of s 61

3. In enacting the JDA (**JBA v 1, Tab 3**), Parliament recognised that the law of jury directions in criminal trials had become increasingly complex, which had made directions increasingly difficult for judges to give and for jurors to understand and apply (ss 1, 5). The JDA requires judges to give directions that are as "clear, brief, simple and comprehensible as possible"; to that end, it alters and displaces the common law (ss 4, 5 and 62).

4. Division 1 of Pt 7 exhaustively regulates directions about what must be proved beyond reasonable doubt. Section 61 identifies "the elements of the offence charged or an alternative offence" and the absence of a defence as the *only* "matters" that a jury can be directed must be proved beyond reasonable doubt. The preclusion of directions attaching that standard of proof to any other matters was a considered legislative choice (**JBA v 7,**

Tab 36 and **v 8, Tabs 39, 40**), and is a manifestation of the broader objective of removing complexities for judges and jurors.

5. The Court of Appeal's reasoning, and its conclusion that the proposed direction is "in conformity with" s 61 (**CAB 39 [33]-[34]**), evince four errors.

First error: conflating distinct stages of the jury's reasoning process

6. Where the prosecution relies on an asserted tendency in proof of a charge, the reasoning process of the jury involves two stages. *First*, the jury considers the tendency evidence (whether it is charged or uncharged conduct or both) to decide whether the accused has the tendency. The jury is not required to agree on any "findings" about the individual pieces of evidence. *Second*, the jury considers whether the charge is proved, having regard to all the evidence (including the fact of the tendency, if the jurors are satisfied that the accused has that tendency). Only at this stage do the jurors consider whether the elements of the offence are proved; and they must then apply the criminal standard of proof: *Decision restricted* [2023] NSWCCA 119 at [7]-[9] (**JBA v 6, Tab 23**).

7. The fact that some of the evidence relied on in proof of the asserted tendency (the evidence of the charged conduct) will be considered again for another purpose at the second stage does not mean that, when the jury is considering the *evidence* at the first stage, it is making any "findings" about the *elements* of the offence (**cf CAB 39 [33]; RS [53], [55], [58]**). The proposed direction therefore contravenes, and is not "in conformity with", s 61.

Second error: unprincipled difference in treatment of charged and uncharged conduct

8. When the jury looks at evidence of an accused's conduct to decide whether they have an asserted tendency, characterisation of the conduct as "charged" or "uncharged" has no probative significance. All of the conduct (and its surrounding circumstances) is simply *evidence* relied on to prove a fact: the asserted tendency. The only significance of the labels of "charged" and "uncharged" conduct is to acknowledge that evidence of the former is also relevant to the trial in another way.

9. Accordingly, the proper approach to tendency reasoning, as with all circumstantial reasoning, is for the jury to have regard to all the admissible evidence relied on in proof of the asserted tendency: *JS* [2022] NSWCCA 145 at [43] (**JBA v 6, Tab 29**). The proposed direction departs from that approach by creating an unprincipled distinction in the treatment of evidence of "charged" and "uncharged" conduct, and requiring the jury at the outset to disregard the former: *Gardiner* [2023] NSWCCA 89 at [192] (**JBA v 6, Tab 26**).

Third error: the proposed direction is contrary to the purpose of s 61

10. The proposed direction is inconsistent with the purpose of s 61. It would require the jury to engage in a "sequential" form of reasoning which may require it consider the same tendency multiple times on the basis of incrementally changing bodies of evidence (**CAB 19-20**). The proposed direction would engender complexity and confusion, which may itself increase the risk of jury error: *Decision restricted* [2023] NSWCCA 119 at [105]-[106], [109], [115]-[117] (**JBA v 6, Tab 23**). It is implausible that such an operation and outcome could be regarded as "in conformity" with s 61.

Fourth error: concerns about "impermissible" reasoning do not justify the proposed direction

11. The concerns about "impermissible" jury reasoning identified by the Court of Appeal and relied on by the respondent — (1) "circular reasoning" and (2) the risk of the jury misapplying the criminal standard of proof — do not justify a conclusion that the proposed direction is "in conformity" with s 61.

12. Circular reasoning involves assuming the truth of a conclusion sought to be proved. No such process is invited where evidence of charged conduct is used in proof of an asserted tendency. The fact that the jury may consider the same evidence more than once, and may form views about that evidence, does not involve or lead to any circularity: *Decision restricted* [2023] NSWCCA 119 at [6], [9], [90] (**JBA v 6, Tab 23**); cf *Sutton* (1984) 152 CLR 528 at 552 (**JBA v 5, Tab 21**).

13. As for the risk of the jury misapplying the criminal standard of proof, that concern falls away in light of the entirety of the directions given to the jury in cases of this kind. Trial judges can and do give detailed, tailored directions which emphasise the importance and strictness of the standard of proof and explain how the evidence at trial relates to that standard: *Criminal Charge Book* (**JBA v 7, Tab 35**); JDA, ss 27, 65 (**JBA v 1, Tab 3**); *Bauer* (2018) 266 CLR 56 at [72], [74] (**JBA v 4, Tab 17**). There is no reason to depart from the fundamental assumption that those directions will be followed: *HCF* (2023) 97 ALJR 978 at [62], [88] (**JBA v 6, Tab 27**). They are the appropriate means of addressing any such risk: *JS* [2022] NSWCCA 145 at [39]-[40], [43], [49]-[50] (**JBA v 6, Tab 29**).

Dated: 13 March 2024

Rowena Orr **Stephanie Clancy** **Minh-Quan Nguyen**