HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	M85/2023
File Title:	The Director of Public Prosecutions v. Benjamin Roder (a pseu
Registry:	Melbourne
Document filed:	Form 27E - Applicant's Reply
Filing party:	Applicant
Date filed:	26 Feb 2024

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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

APPLICANT'S REPLY

PART I: CERTIFICATION

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

PART II: REPLY

A. WHAT DOES THE PROPOSED DIRECTION REQUIRE?

2. The respondent denies that the proposed direction requires the jury, when considering an asserted tendency, to disregard *all* charged conduct unless proved beyond reasonable doubt (**cf AS [55]**). He contends that, for each "charge the subject of its separate consideration", the jury need only proceed "without reference to that charge" (**RS [38], cf [15]**). That description of the proposed direction is wrong. The proposed direction prohibits evidence of every "charged act" from being considered in the proof of an asserted tendency unless or until it is proved beyond reasonable doubt.[1] That is plain from the reasoning process that the trial judge described (**CAB 20.8-24**) and from the Court of Appeal's holding that "none" of the charged conduct can be used for the purpose of tendency reasoning unless it is proved beyond reasonable doubt (**CAB 39 [34]**).[2]

3. In any event, the respondent's case is that a prior "finding" about the accused's conduct would unacceptably "compromise" the jury's later task of deciding whether the elements of an offence are proved beyond reasonable doubt (**RS [21]**). Even if his characterisation of the proposed direction were correct, such a direction would not address this concern: for example, it would still allow the jury, when evaluating a tendency in the context of charge 1, to consider evidence of the conduct that is the subject of charge 2 before considering charge 2.[3] The respondent's case thus compels him to defend the full width of the proposed direction and its adverse consequences (**cf RS [38]; see AS [52]-[58]**).[4]

B. "CIRCULAR" REASONING

4. The respondent contends that the proposed direction is "necessary" in order to address two concerns arising from the use of charged conduct as tendency evidence: (1) that it

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1 See **CAB 16.25-17.4, 18.30-32, 19.7-13**.

2 See also Judicial College of Victoria, *Criminal Charge Bench Book* (updated 16 November 2023) at [4.17.2].

3 For the avoidance of doubt, the applicant submits that a direction of the type described by the respondent is likewise contrary to s 61 of the *Jury Directions Act 2015* (Vic) (the **JDA**) and otherwise inappropriate.

4 Cf *Decision restricted* [2023] NSWCCA 119 at [3]-[4]. The applicant in that case initially submitted that, when considering the tendency evidence *on each count*, the jury should only exclude the evidence adduced in support of "that particular count". But the logic of his argument drove him to embrace a direction that excluded evidence of all charged acts unless the evidence was proved beyond reasonable doubt.

requires the jury to engage in "circular" reasoning; and (2) that, "even if" that is not so, it creates the risk of an "erosion" of the standard of proof, in that the jury might reach a view that charged conduct occurred and then fail correctly to apply the criminal standard of proof to each charge (**RS [11], [14]-[19], [22], [31]-[33], [39]**).[5]

5. The first concern is misconceived. Neither tendency reasoning generally,[6] nor the use of charged conduct as tendency evidence specifically, involves any "measure of circularity" or "circular" reasoning (**cf RS [14]-[15]**). The essence of circular reasoning is that a person assumes the truth of the very conclusion sought to be proved. Beech-Jones CJ at CL in *Decision restricted* was correct to conclude that no such process is called for when evidence of charged conduct is adduced in proof of an asserted tendency (**cf RS [12], [32]**).[7] The jury considers tendency evidence, including evidence of charged conduct, in order to determine whether the accused has the asserted tendency.[8] In that process, the jury is neither required nor permitted to "assume" that the accused engaged in any conduct.[9] To the extent that the jury or individual jurors, when considering the tendency evidence, form a discrete view that the accused engaged in some of the conduct of which evidence is adduced, that is not an "assumption". Rather, it is a view reached by the jury or jurors themselves through an evaluation of the admissible evidence. Further, to suggest that such a view equates to a conclusion of guilt ignores the standard of proof that the jury is told attaches to that conclusion: a premise of *guilt beyond reasonable doubt* forms no part of the reasoning process that the jury is invited to undertake **(cf RS [32]**).[10]

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[5] While the respondent points to broader potential issues with the use of tendency evidence identified in *Hughes v The Queen* (2017) 263 CLR 338 and *HML v The Queen* (2008) 235 CLR 334 (**RS [9]-[10]**), those issues do not arise for consideration in this case.

[6] If tendency reasoning truly involved circularity as the respondent contends, tendency evidence could never meet the test for admissibility because it would lack the rationality required for relevance. If the respondent is suggesting that tendency reasoning in single complainant cases inherently involves "circularity" insofar as the tendency evidence is from the same source as the allegations the subject of charge (**RS [14]**), that is inconsistent with the recognition that such evidence ordinarily has significant probative value: see *R v Bauer* (2018) 266 CLR 56 at 81-89 [47]-[62] (the Court).

[7] [2023] NSWCCA 119 at [6], [9] (with Button J agreeing).

[8] The proposed direction would attach a standard of proof to matters that the jury is otherwise not separately directed to "find" (cf **RS [15]**): see *JS v The Queen* [2022] NSWCCA 145 at [43] (Basten AJA); *Decision restricted* [2023] NSWCCA 119 at [7]-[8] (Beech-Jones CJ at CL), [115]-[116] (Hamill J). See also *Shepherd v The Queen* (1990) 170 CLR 573 at 580, 585 (Dawson J), 594 (McHugh J).

[9] The general directions given to the jury mean that there is no risk of a juror considering that they are being invited, or are entitled, to make "assumptions" about an accused's conduct, including for tendency purposes: see JDA, s 3 (in particular paragraphs (a), (d), (f) and (h) of the definition of "general directions").

[10] For example, the jury or a juror may accept the evidence of a witness in respect of charged conduct as truthful and reliable and conclude that it supports the asserted tendency; but may also conclude that, on the whole of the evidence, there remains a reasonable doubt as to the accused's guilt on the charge.

6. Once that is understood, it is clear that the respondent's reliance on *Perry v The Queen*[11] and *Sutton v The Queen*[12] is mistaken (**cf RS [17]**). The point made in those cases was that, when assessing the cogency of similar fact evidence to determine its admissibility, a court could not *assume* that the accused was *guilty* of the offence in respect of which the evidence was sought to be adduced. That is not this case.

C. "EROSION" OF THE CRIMINAL STANDARD OF PROOF

7. As to the second concern, the respondent repeatedly describes the proposed direction as "necessary" to address the asserted risk of an "erosion" of the criminal standard of proof. That characterisation is supported by no more than a broad claim that such a risk is "real" (**RS [21]**) and an assertion that directions are sometimes given "not just as a matter of law, but so as to guard … against error or the real risk of error" (**RS [33]**). It is a characterisation that fails to grapple with the protective effect of other directions jurors receive, both generally and when tendency evidence is adduced.

8. Insofar as jurors may, in the course of considering tendency evidence, form a view that some or all of the charged conduct occurred, any risk that they would later fail faithfully to apply the criminal standard of proof when determining whether the accused is guilty of an offence charged is addressed by the clear and repeated directions the jury receives about the presumption of innocence and the burden and standard of proof.[13] Juries are also routinely instructed about the process of circumstantial reasoning and the importance of not jumping to conclusions, in terms that reinforce the strictness of the criminal standard of proof.[14] Further, under s 27 of the JDA, defence counsel may request a direction which (among other things) identifies how tendency evidence is relevant to the existence of a fact in issue, directs the jury not to use the evidence for any other purpose, and directs the jury not to decide the case based on prejudice. More generally, nothing prevents a trial judge from emphasising the criminal standard of proof in a manner and to an extent that is commensurate with the complexity of the evidence and issues in a trial.[15] That is reflected in the approach conventionally taken by trial judges where the tendency

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11 (1982) 150 CLR 580 at 589-590 (Gibbs CJ), 612 (Brennan J).

12 (1984) 152 CLR 528 at 552 (Brennan J).

13 See, eg, Judicial College of Victoria, *Criminal Charge Bench Book* (updated 1 January 2023) at [3.7.1]. See also JDA, s 3 (definition of "general directions").

14 See Judicial College of Victoria, *Criminal Charge Bench Book* (updated 17 May 2019) at [3.6.1].

15 See the examples set out under s 61 of the JDA, which expressly contemplate that a trial judge will give directions that "relate the evidence in the trial to" directions about proof beyond reasonable doubt.

evidence includes evidence of charged conduct.[16] If such directions are followed, the criminal standard of proof will be correctly applied and the risk of an "erosion" of that standard of proof does not arise.

9. There is no reason to doubt that juries can and will observe such directions. Indeed, it is common in a criminal trial for evidence to be adduced which, if accepted, would be "a sufficient condition for the existence of [a] fact in issue", including a fact which is itself capable of establishing an element of an offence:[17] admissions as to conduct, or identification evidence, are straightforward examples. Acceptance of this evidence does not relieve the jury of the need to consider, on the whole of the evidence, if the element is proved beyond reasonable doubt, and any risk they will fail to do so is adequately addressed by conventional directions. To the extent that the respondent relies on any unique problem of "circularity" where evidence is adduced for two purposes (to establish a tendency and to establish an element of an offence), that is erroneous for the reasons given earlier. As for the respondent's statement that it is "difficult … to know the cognitive and analytical impact upon a jury" (**RS [21]**), that nebulous suggestion provides no good reason to depart from the assumption that juries understand and follow a trial judge's directions, and is apt to understate juries' capacity to do so in cases involving tendency evidence.[18] The proposed direction is not "necessary" to counter any risk.

10. The respondent is also wrong to liken the proposed direction to the direction about indispensable intermediate facts described in *Shepherd v The Queen* (**RS [34]**).[19] Conceptually, the direction described in *Shepherd* recognises that, where an intermediate fact is indispensable to proof of the elements of an offence, a rational jury could only return a guilty verdict if satisfied of that fact beyond reasonable doubt. Hence, such a direction instructs the jury to reason in the way that it logically must.[20] In contrast, the proposed direction in this case deliberately distorts the jury's reasoning process and

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16 See, eg, the directions described in *Bauer* (2018) 266 CLR 56 at 94 [74] (the Court).

17 See *IMM v The Queen* (2016) 257 CLR 300 at 313 [45] (French CJ, Kiefel, Bell and Keane JJ).

18 See Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017), Pts III-VI at 460-467, 607-628.

19 (1990) 170 CLR 573 at 579-580 (Dawson J, with Mason CJ, Toohey and Gaudron JJ agreeing).

20 See *R v Davidson* (2009) 75 NSWLR 150 at 152-153 [10] (Spigelman CJ, with James J agreeing). As to the abolition of such directions under s 62 of the JDA, see Victoria, Department of Justice and Regulation, Criminal Law Review, *Jury Directions: A Jury-Centric Approach* (March 2015) at 118 (stating that there was no evidence that juries made mistakes without a direction of the kind described in *Shepherd*).

thereby trenches on the jury's task.[21] It takes the novel step of attaching a standard of proof to a specific step in the jury's reasoning process, supposedly to address a greater mischief: the risk that the jury might fail correctly to apply the standard of proof beyond reasonable doubt to the ultimate question of guilt. There is no sound basis for thinking that such a distortive step is "necessary" to avert that risk.

D. SECTION 61 OF THE JDA

11. Insofar as the respondent also uses the asserted "necessity" of the proposed direction to indirectly justify the Court of Appeal's conclusion on s 61 of the JDA (**RS [31], [50], [53]**), that approach should be rejected. The claimed "necessity" is not made out. Nor does that approach avoid the need to grapple with the language of the provision.

12. The respondent's submissions on s 61 of the JDA reduce to the proposition that any fact that "corresponds to an element of an offence" must be found beyond reasonable doubt (**RS [53], [55], [58]**). That proposition — specifically, the looseness of the respondent's use of the relational word "corresponds" — simply restates the Court of Appeal's conflation (**CAB 39 [33]**) of the different purposes for which evidence of charged conduct may be relevant in a trial.[22]

13. Quite apart from the fact that (but for the proposed direction) the jury would not ordinarily be directed to agree on specific "findings" about conduct in the process of considering an asserted tendency (**cf RS [15]**),[23] any views that the jury or jurors may form about the conduct are no more than steps in determining the issue of whether the accused has the asserted tendency. They are not findings about the legal elements of the offence charged.

Dated: 26 February 2024

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[21] Cf *Azzopardi v The Queen* (2001) 205 CLR 50 at 69-70 [49]-[50] (Gaudron, Gummow, Kirby and Hayne JJ) (stating that "it is not the province of the judge to direct the jury about how they may (as opposed to may not) reason towards a conclusion of guilty"). See **AS [52]-[58]**.

[22] Cf *Decision restricted* [2023] NSWCCA 119 at [9] (Beech-Jones CJ at CL, with Button J agreeing).

[23] See, eg, the model direction on unanimity of verdicts: Judicial College of Victoria, *Criminal Charge Bench Book* (updated 17 May 2019) at [3.11.1] (directing that the verdict on each charge must be unanimous, but need not to be reached for the same reasons).