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
AT CANBERRA

BEWEEN

The Director of Public Prosecutions
Appellant

-and-

Benjamin Roder (a pseudonym)
Respondent

RESPONDENT'S SUMMARY OF ORAL ARGUMENT

A. Summary

1. The proposed direction endorsed by the Court of Appeal is necessary. It is necessary to safeguard from circularity the tendency reasoning on which the prosecution intends to rely, or the jury's engagement with that process. It is also necessary to guard against the erosion of the criminal standard of proof.

2. The proposed direction does not offend s 61 of the *Jury Directions Act*. The section permits a trial judge to direct a jury, when necessary, that a charged act – or a fact expressed as or constituting an element of the offence charged – must be proved beyond reasonable doubt before it can be used as tendency evidence.

3. The proposed direction is also necessary to guard against a further vice. Without it, the process leaves open the real risk that a jury will use as tendency evidence charged acts which may result in or be the subject of the jury's 'not guilty' verdicts in the trial (see *Kemp v The King* (1951) 83 CLR 341 at 342; *Garrett v The Queen* (1977) 139 CLR 437 at 445).

B. Tendency evidence and tendency reasoning

4. Tendency evidence – like all forms of evidence – must satisfy a rational threshold for its admission at trial. The inductive method which the jury is asked to apply when they engage in tendency reasoning must, similarly, conform to the basic precepts of logic.

5. Without the proposed direction, the process which the prosecution intends to utilise is intolerably circular. A jury asked to consider one of many charges on an indictment should not be permitted to infer the existence of a tendency from a body of evidence, and from findings made by the jury, which include the act which tendency is relied upon to prove.

6. A jury would not be permitted, on its consideration of only one charge, to rely upon its finding that the charged act occurred, to prove that the charged act occurred. The process is no less objectional when it is applied to an indictment containing 10 charges. The introduction to the chain of proof of tendency reasoning does not render the process less objectionable.

7. The problem of circularity persists despite the applicant's emphasis on different standards of proof attaching to different stages of the analytical process. The decisions by the NSW Court of Criminal Appeal which have held that a jury's use of charged acts in proof of tendency should, without qualification, mirror their use of uncharged acts are wrong.

8. Even if the resort to different standards at different stages of the process solves the problem of circularity, it does so only as a matter of strict logic. Jurors are not logicians. The direction is still necessary.

9. The direction will be necessary if the process of reasoning in which the jury is asked to engage is itself impermissible. The process will be impermissible if it is circular, or if it betrays a measure of circularity which might compromise the inductive method. That is a question of logic. But the direction may also be necessary if the process creates the *real risk* that, without it, the jury will reason toward guilt impermissibly.

10. The process also exposes an accused person to the real risk that it will distort or erode the jury's application of the criminal standard of proof. It would permit or require a jury to apply, for each charge it considers, different standards of proof to its principal or ultimate finding at different stages along its chain of reasoning towards verdict. It is (perhaps) impossible to know the cognitive impact upon a jury and its verdict of a process that permits or requires the jury to reason from a finding that 'an act occurred' to the finding that 'an act occurred beyond reasonable doubt'. But the risk is real that the jury's first finding will compromise the integrity of its latter finding (and verdict).

11. The law assumes that juries apply the directions they are given. But it also recognises that directions are sometimes necessary not as a matter of law, but so as to guard the jury's verdict against error or the real risk of error (*The Queen v Bauer (a pseudonym)* (2018) 266 CLR 56 at 96; *HML v The Queen* (2008) 235 CLR 334 360-61 [31]-[32] (Gleeson CJ)).

12. If the direction is necessary as a matter of law it must be given. If it is necessary in the sense that it is required to avoid a perceptible risk of a miscarriage of justice it will usually be appropriate.

13. That the courts in *JS v The Queen* [2022] NSWCCA 145 and *Decision restricted* [2023] NSWCCA 119 concluded that the directions given in those cases at trial were adequate does not render the proposed direction less necessary. Those holdings were made after the Courts found that the use of charged acts as tendency evidence did not expose an accused person to the problem of circularity, and did not materially place in jeopardy the criminal standard of proof.

14. The proposed direction is not unprincipled. It is a product of an adherence to principle. It preserves the essential inductive nature of tendency reasoning whilst providing a necessary and explicit safeguard against a particular kind of error.

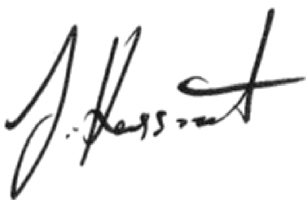
C. SECTION 61 OF THE JDA

15. Section 61 of the *Jury Directions Act* does not prohibit the proposed direction. The Court of Appeal's reasons betray neither a conflation of the distinction between 'elements' and 'evidence', nor a failure properly to understand the reasoning process which the prosecution wants the jury to employ.

16. To the contrary, the Court's holding and reasons follow logically from its analysis of the process itself. The Court recognised that, in its application to that process, the distinction between elements of an offence and a jury's ultimate findings on issues which constitute the elements, is without a difference: that 'every sexual act alleged in every charge on the indictment is an element of that charge… no matter the use sought to be made of the evidence' **(CAB 39 [33])**.

17. The proposed direction is intended to prevent the prosecution from inviting the jury to make a finding which is expressed as, or constitutes, an element of the offence charged to a standard other than the criminal standard (see *Smith v The Queen* (2001) 206 CLR 650 at 654 [7]; *Chief Executive Officer of Customs v El Hajje* (2005) 224 CLR 159 at 174 [3]).

18. Rather than its representing a violation of s 61, it is an application of its mandate.



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