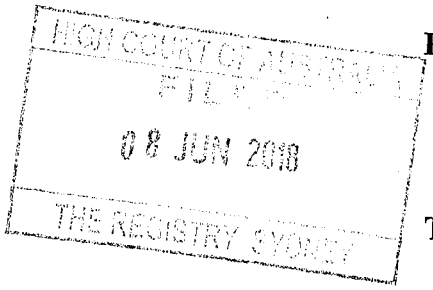
IN THE HIGH COURT OF AUSTRALIA **No. S 121 of 2018**
SYDNEY REGISTRY

BETWEEN: **RICHARD McPHILLAMY**
Appellant



and

THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. It is certified that the submission is in a form suitable for publication on the Internet.

Part II: Statement of the issues

2. The issues that arise in this appeal are:

    1. Did the tendency evidence have significant probative value?

    2. What was the prejudicial effect that the tendency evidence might have had on the appellant?

    3. What is required for the probative value of tendency evidence to "substantially" outweigh any prejudicial effect it might have on an accused?

Part III: Notice

3. It is certified that the appellant considers that no notice need be given under section 78B of the *Judiciary Act 1903.*

Part IV: Citation

4. The internet citation of the reasons for judgment of the New South Wales Court of Criminal Appeal is *McPhillamy v R* [2017] NSWCCA 130

Filed on behalf of the Appellant
Dated: 8 June 2018
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Part V: Narrative statement

5. In 2013, the appellant was charged with a number of offences involving the sexual abuse of a child, NC, arising out of two incidents occurring between November 1995 and March 1996. The appellant was an acolyte, and the complainant an 11 year old altar boy under his supervision, at a cathedral in Bathurst. NC testified that, in the first incident, the appellant followed him into a toilet and masturbated in front of him, encouraged NC to masturbate and briefly touched NC's penis (AFM 45-47). NC said that he did not tell his parents or anyone else about what had happened because the appellant had told him that he was gay and that everyone would turn against him (AFM 48.15). In the second incident, the appellant again followed NC into a toilet and masturbated in front of him, then masturbated NC and himself, then performed oral sex on NC and finally persuaded NC to perform oral sex on the appellant (AFM 49-52). When NC gagged and was crying, the appellant comforted him (AFM 52.43). He told NC not to tell anyone (AFM 53.34). After Mass he told NC that he was "sorry that it had gone that far" (AFM 53.45).

6. When questioned by the police in 2013, the appellant admitted that he knew NC as an altar boy under his supervision when he was an acolyte at the Cathedral but he denied the alleged offences. The appellant entered pleas of not guilty. He did not testify. The defence case was that NC made false allegations of sexual abuse against the appellant in a fraudulent attempt to obtain financial compensation when he was in significant financial difficulty. NC conceded that he had obtained $30,000 from the Catholic Church in 2010 after he had made a complaint to the Church about what the appellant had done (AFM 55) and also conceded that part of his account to the Church (that the appellant had engaged in anal intercourse with him during the second incident) was knowingly false (AFM 64-65).

7. At the trial, objection was taken to tendency evidence adduced by the prosecution. A voir dire hearing was held. The trial judge admitted the evidence and stated that reasons would be provided for this ruling when time permitted. However, no such reasons were ever given. The appellant appealed against conviction on a number of grounds in respect of the admission of the tendency evidence. Harrison and Hulme JJ accepted that the trial judge should have provided reasons for admitting the tendency

evidence but concluded that there was no miscarriage of justice on the basis that the evidence was correctly admitted. Meagher JA dissented, holding that in the light of what occurred in the trial, the tendency evidence was inadmissible.

8. The tendency evidence was given by two witnesses, TR and SL. TR testified that he attended St Stanislaus College in Bathurst in 1985. He was a boarding student who turned thirteen in that year. The appellant was an assistant house master at the school. On one occasion (AFM 201-202), TR was homesick and upset and went to the appellant's bedroom. The appellant cuddled him and subsequently rubbed his genitals. On a second occasion (AFM 205-206), also in 1985, TR was naked in the shower and the appellant inappropriately touched his bottom. SL testified that he also attended St Stanislaus College in Bathurst in 1985 as a boarding student. He also turned thirteen in that year. On one occasion (AFM 226-227), he was homesick and upset and went to the appellant's bedroom. The appellant massaged his shoulders and back and then massaged around his groin area, touching his genitals. On a second occasion (AFM 228-231), also in 1985, SL was again very homesick and was massaged by the appellant, fell asleep on the appellant's bed and woke up to see the appellant kneeling beside the bed with his head near SL's groin. SL "felt the sensation of wetness around my penis". SL jumped up and left the room. About a week later, the appellant apologised and said that he had done the wrong thing and he could be in a lot of trouble for it (AFM 234.34).

9. Defence counsel who cross-examined TR and SL did not challenge the substance of the allegations made by these witnesses. Accordingly, there was no dispute in the trial regarding the conduct of the appellant alleged by them.

10. The trial judge directed the jury regarding the tendency evidence prior to its admission and characterised the evidence as follows (AFM 189.40):

> The Crown will argue that the evidence of those two witnesses demonstrate that [the appellant] had a tendency to act in a particular way; that is, to by his conduct demonstrate a sexual interest in male children in early their teenage years who were under his supervision.

11. In his final address, the Crown Prosecutor stated (AFM 257.23):

> The Crown says the evidence that you have heard from [TR] and [SL] and [NC] shows that the accused had a sexual attraction or interest in young teenage males. He acted on it in his dealings with [TR] and with [SL] when he was alone with them. The Crown says he acted on it with [NC], too, just like [NC] told you.

12. In the summing-up, the trial judge stated (CAB 27.22):

> However, you have heard evidence that the Crown also relies upon to prove beyond reasonable doubt that [the appellant] had a sexual interest in [NC] and was willing to act upon it in the way that [NC] alleges. That is the evidence the Crown placed before you from two witnesses, [TR] and [SL], who each gave evidence of other sexual acts alleged by them to have been committed by the accused against each of them separately. The Crown argues that the evidence of those two witnesses demonstrates [the appellant] had a tendency to act in a particular way, that is, by his conduct, demonstrate a sexual interest in male children in their early teenage years who were under his supervision. The Crown argues if you find beyond reasonable that the evidence of [SL] or [TR] demonstrates such a sexual interest, that you may use that tendency in considering whether the Crown can prove beyond reasonable doubt the specific allegations in the indictment relating to [NC].

13. In the Court of Criminal Appeal, Meagher JA, in dissent, upheld a ground of appeal that contended that admitting the tendency evidence resulted in a miscarriage of justice. Meagher JA held that the evidence did not have "significant probative value" to prove the charged offences (CAB 142 [117]) and was not admissible pursuant to s 97(1)(b) of the *Evidence Act 1995* (NSW) (CAB 143 [119]). His Honour also held that the probative value of the tendency evidence did not substantially outweigh "any prejudicial effect it may have" and accordingly did not meet the requirements of s 101(2) of the *Evidence Act* (CAB 143 [120]).

14. Harrison and Hulme JJ held that the evidence did have significant probative value as required by s 97(1)(b): CAB 145-6 [127]–[129]. Harrison and Hulme JJ also held that the submission that "the evidence should not have been admitted on the basis that

its probative value did not substantially outweigh its prejudicial effect: *Evidence Act*, s 101(2) … cannot be accepted for the reasons provided by Meagher JA (above at [121])": CAB 146-7 [130].

Part VI: Argument

15. Two of the three grounds of appeal advanced in the Court of Criminal Appeal were as follows:

> Ground 1. The trial judge erred in admitting the evidence of TR and SL as tendency evidence.
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> Ground 2. Alternatively, the decision to admit the evidence of TR and SL as tendency evidence resulted in a miscarriage of justice.

It is apparent that one reason that Ground 2 was advanced in the alternative to Ground 1 was that the trial judge never delivered reasons for admitting the evidence of TR and SL as tendency evidence. In the absence of reasons, it was not possible for the appellant to identify any particular error of law.

16. Meagher JA upheld Ground 2 ([119]). His Honour held that the evidence of TR and SL, admitted by the trial judge after a voir dire hearing, "resulted in a miscarriage of justice" because, "having regard to what occurred in the trial, it may be concluded that the evidence should not have been admitted" ([36]). Meagher JA observed that the use made by the Crown of the tendency evidence in the trial departed from that described in its tendency notice ([94]). Focussing on the tendency use that the Crown relied upon at the conclusion of the trial, Meagher JA held that "the evidence used to prove the tendency relied on was not … properly admitted", that this "resulted in a miscarriage of justice" and the appeal should be allowed ([119]). For that reason, his Honour did not consider the remaining grounds of appeal ([45]).

17. Harrison and Hulme JJ granted leave to appeal but dismissed all the grounds of appeal. There is some apparent confusion at [131] regarding the understanding of Grounds 1 and 2 but it is apparent that their Honours rejected Ground 2 on the basis that their Honours considered that the evidence of TR and SL, as relied upon for the

tendency use articulated by the Crown at the conclusion of the trial, was properly admitted (that is, that use was not prohibited by either s 97 or s 101).

Section 97(1)(b)

18. The appellant respectfully adopts the analysis of Meagher JA in relation to the application of s 97(1)(b) *Evidence Act*. While it would strictly be necessary to assess the probative value of the tendency evidence separately in relation to each count on the indictment, the analysis of Meagher JA demonstrates that the use made by the Crown of the evidence of TR and SL at the conclusion of the trial meant that the evidence was "not admissible" for a tendency use in respect of any of the counts on the indictment. Section 95(1) makes it clear that the evidence may not be used by the jury in that way. The trial judge permitted the jury to use the evidence in that way, thereby resulting in a miscarriage of justice.

19. In particular, the appellant adopts the reasoning of Meagher JA at [93] –[119]. It is submitted that there is no aspect of that analysis inconsistent with the judgment of Kiefel CJ, Bell, Keane and Edelman JJ in *Hughes v The Queen* [2017] HCA 20; (2017) 92 ALJR 52.

20. It is submitted that Harrison and Hulme JJ erred in holding that the 10 year gap between the conduct in relation to TR and SL and the alleged conduct in relation to NC did not "fatally … imperil the strength of the inference promoted by the Crown" (at [129]). Their Honours considered that "it does not seem to us to be particularly controversial for a jury to be asked to infer that a sexual interest in young teenage boys would be unlikely to become attenuated in the space of ten years". However, as their Honours noted at [125], the "Crown case was based upon the proposition that the appellant had a sexual interest in young teenage boys *and that he acted upon that interest when the opportunity arose*". The tendency sought to be proved was not just to have a sexual interest in young teenage boys but to act upon that interest. Even if the appellant's sexual interests remained stable over a decade or more, it is an entirely different matter to infer a continuing tendency to act on those sexual interests by committing serious sexual offences. As Meagher JA reasoned at [116]:

> Whilst the earlier conduct manifested a sexual interest in young boys it did not show the appellant was prepared to act on that interest in circumstances similar to those in which the charged offences occurred, or in all circumstances where the opportunity might arise.

Further, as Meagher JA pointed out at [103], "there was no evidence independent of the complainant's evidence which suggested that the tendency had manifested itself in any form over the intervening decade". Harrison and Hulme JJ provided no answer to this analysis.

21. Even if it were assumed that the tendency evidence tended to show that the appellant was the sort of person who *could* have committed the offences charged, that was not the relevant question. Section 97(1)(b) required a focus on the question of the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue. In the context of this trial, it required a focus on the extent to which the evidence could increase the probability that the appellant *did* engage in the sexual acts alleged by NC. Whatever the extent to which the evidence could show that he was someone who could have engaged in those acts, the evidence could not significantly increase the probability that he did engage in those acts. In circumstances where the defence did not adduce character evidence for the purpose of showing that the appellant was not the sort of person who might commit the acts alleged by NC, the tendency evidence did not have significant probative value.

22. Harrison and Hulme JJ noted at [126] the view of Meagher JA that there was "high level of generality" in the tendency relied upon by the Crown but considered that there was "overriding similarity between the charged conduct and the earlier incidents" (at [127] and considered that "the appellant's earlier conduct could be regarded by the jury as strongly supporting" the prosecution case that the charged conduct occurred (at [46]). However, it should be accepted that evidence of a tendency to have a sexual interest in young teenage boys and to act on that interest by engaging in sexual acts with young teenage boys will not usually have significant probative value. It is evidence of a disposition or propensity to commit crimes of the kind in question and a tendency expressed at such a high level of generality will not be "important" or "of consequence"

(*R v Lockyer* (1996) 89 A Crim R 457 at 459) to the assessment of the probability of a fact in issue": see *Hughes v The Queen,* Kiefel CJ, Bell, Keane and Edelman JJ at [58], [64], Gageler J at [111], Nettle J at [157]-[159], [202], Gordon J at [218]. It will have very limited value in supporting the inference that the accused person committed the particular offences on the alleged occasions.

23. Additional specificity in the alleged tendency may mean that the evidence will have significant probative value. Thus, as demonstrated in *Hughes*, it may have seemed inherently unlikely that the accused would engage in criminal behaviour where there was a high risk of discovery and evidence of a tendency to engage in such high-risk criminal behaviour may have significant probative value as a result. However, the additional specificity referred to by Harrison and Hulme JJ did not support such reasoning. Their Honours noted at [125] that the tendency on which the Crown relied was "a tendency to be sexually interested in male children in their early teenage years and to have acted upon that interest with such children" and stated at [127] that "in all cases the appellant's conduct was concerned with or involved him taking advantage of his position of responsibility for young teenage boys in his care and with his exploiting the opportunity that was presented when alone with them to fondle their genitals or to engage in oral sex". The tendency so formulated involved a high level of generality. The reasoning was as follows:

> (a) the appellant when alone with two young teenage boys in respect of whom he had a position of responsibility had fondled each boy's genitals or engaged in oral sex; and
>
> (b) this made it significantly more likely that he engaged in similar conduct with another young teenage boy on another occasion

This reasoning involved no more than reliance on a disposition to commit crimes of the kind charged (involving touching of the genitals of a young teenage boy and engagement in oral sex). The fact that reference was made to being in a position of responsibility and taking advantage of being alone with the boy does not alter that conclusion. Neither particular was unusual or uncommon nor did either alter the general nature of the tendency. It would not have seemed inherently unlikely that the

appellant took advantage of a position of responsibility in relation to NC. Evidence of a tendency to act on a sexual interest in young teenage boys where advantage was taken of a position of responsibility would not, therefore, have significance. The fact that the appellant was in a position of responsibility is not a feature that increased the probative value of the tendency evidence in the present case. The same may be said with respect to the particular of acting on such an interest when alone with the young teenage boys. There was nothing inherently unlikely about NC's allegation that the offending occurred in a toilet cubicle. Evidence that the appellant acted on a sexual interest in young teenage boys when alone with them would not, therefore, have significance.

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24. The fact that the tendency expressed at such a high level of generality meant that there was "similarity between the charged conduct and the earlier incidents" did not, as Harrison and Hulme JJ concluded, mean that the tendency evidence had significant probative value. While it may be accepted that the tendency expressed at this level of generality meant that the evidence of TR and SL provided support for the existence of that tendency, the tendency thus established could not establish anything more than relevance. Such a tendency may be unusual as a matter of ordinary human experience but did not have significant probative value in respect of the question whether the appellant engaged in the sexual acts alleged by NC.

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Section 101(2)

25. Section 101(2) of the *Evidence Act* provides an entirely discrete basis on which it should be concluded that the tendency evidence from TR and SL resulted in a miscarriage of justice. While it is conventional for a court to consider the operation of this provision only after determining that the requirements of s 97 are satisfied (particularly bearing in mind the proposition in s 101(1) that the section "applies in addition to sections 97 and 98"), there is no obligation to follow that sequence. A court may determine that the requirement in s 101(2) is not satisfied, with the consequence

30 that there is no need to apply s 97. If the requirements of s 101(2) are not satisfied, the tendency evidence "cannot be used against the defendant". In such circumstances, inviting or permitting the jury to use the evidence for a tendency purpose would result in a miscarriage of justice.

26. Meagher JA, in dissent, held at [120] that, in circumstances where the tendency evidence did not have significant probative value it could not be concluded that its probative value substantially outweighed "any prejudicial effect it may have" on the appellant. Meagher JA had noted at [82] "examples" of "unfair prejudice" given by Hoeben CJ at CL in *Sokolowskyj v R* [2014] NSWCCA 55; (2014) 239 A Crim R 528 at [48], [50]:

> In the present case, one of the dangers of unfair prejudice was that the jury would use the evidence in the way they were directed not to use it — to show that the appellant was a sexual deviant who, as a result, was the sort of person who was likely to have committed the offence alleged against him. A second danger was that the jury would be so emotionally affected by the evidence that they would disregard the appellant's account in his police interview and disregard the directions to assess the evidence in an unemotional manner. A third danger was that the jury might be disinclined to give the appellant the benefit of any reasonable doubt.
>
> ...
>
> In *R v GAC* [2007] NSWCCA 315; 178 A Crim R 408 Giles JA said at [83] that the primary danger was that, notwithstanding any directions given by the trial judge, "the jury might reason no more rationally than that, if the respondent molested [two other persons], he did the same to the complainant, and that emotion not rationality would govern".

Meagher JA at [121] did not accept a submission "that there were four additional respects in which the evidence carried a risk of prejudice that went beyond the kind of prejudice referred to at [82]". However, it is apparent that his Honour did accept that the kind of prejudice referred to by Hoeben CJ at CL in *Sokolowskyj* "was likely to arise in any event" (at CAB 144.5).

27. Harrison and Hulme JJ considered s 101(2) at [130]:

> The appellant also submitted that the evidence should not have been admitted on the basis that its probative value did not substantially outweigh its prejudicial effect: *Evidence Act*, s 101(2). This submission cannot be accepted for the reasons provided by Meagher JA (above at [121]).

While it is apparent that Meagher JA was not persuaded that the "four additional respects" relied on to show a risk of prejudice "beyond the kind of prejudice referred to in [82] above" represented "a significant risk of prejudice ... which went beyond the prejudice that it is accepted was likely to arise in any event", Meagher JA did not hold that the test in s 101(2) for admission of the evidence was satisfied. Rather, his Honour rejected additional reasons advanced for showing a risk of prejudice other than those referred to earlier in his judgment at [82] and which he considered did constitute "prejudice [that] was likely to arise". It follows that what Meagher JA said at [121] did not "provide reasons" why the test in s 101(2) was satisfied. Accordingly, Harrison and Hulme JJ have not provided any reasons as to why the test was satisfied.

28. Section 101(2) provides that tendency evidence cannot be used against the defendant "unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant". A court is required to embark on a three-stage analysis:

1. Determine the probative value of the evidence (that is, "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue" in the trial).
2. Determine the prejudicial effect the evidence may have on the defendant.
3. Determine whether the probative value of the evidence "substantially outweighs" any prejudicial effect it may have on the defendant.

29. As regards the first step, the court would engage in a similar analysis to that required by s 97(1)(b), without the need to determine whether the probative value was "significant". It is submitted that, for the reasons given by Meagher JA, the probative value of the tendency evidence adduced from TR and SL was not high.

30. As regards the second step, the term "prejudicial effect" is not defined in the legislation. It is curious that there is no reference to "unfair prejudice", as in s 137, but it is accepted that the concept of "prejudicial effect" could not apply simply on the basis that the evidence tended to prove the guilt of the accused, thereby "prejudicing" the defendant's prospects of acquittal. The concept should be understood in substantially

the same way as "unfair prejudice" in s 137, albeit with an emphasis on the way that the evidence may, rather than necessarily will, impact adversely on the accused. In *Hughes v The Queen*, Kiefel CJ, Bell, Keane and Edelman JJ stated at [17]:

> The reception of tendency evidence in a criminal trial may occasion prejudice in a number of ways. The jury may fail to allow that a person who has a tendency to have a particular state of mind, or to act in a particular way, may not have had that state of mind, or may not have acted in that way, on the occasion in issue. Or the jury may underestimate the number of persons who share the tendency to have that state of mind or to act in that way. In either case the tendency evidence may be given disproportionate weight. In addition to the risks arising from tendency reasoning, there is the risk that the assessment of whether the prosecution has discharged its onus may be clouded by the jury's emotional response to the tendency evidence.

The discussion of Hoeben CJ at CL in *Sokolowskyj*, extracted above, is to similar effect.

31. With respect to the danger of tendency evidence being "given disproportionate weight", in *Pfennig v The Queen* [1995] HCA 7; (1995) 182 CLR 461, McHugh J (at 512) cited research that "tribunals of fact, particularly juries, tend to assume too readily that behavioural patterns are constant and that past behaviour is an accurate guide to contemporary conduct". Gageler J observed in *Hughes v The Queen* at [71] that "there inheres a very real risk of attaching 'too much importance' to the tendency evidence — of giving tendency evidence 'too much weight'." Gageler J added at [72]:

> The problem is one of cognitive bias, amounting to an inclination observable on the part of most persons to overvalue dispositional or personality-based explanations for another person's conduct and to undervalue situational explanations for that conduct. The bias is towards overestimating the probability of another person acting consistently with a tendency that the person is thought to have — of treating the person as more consistent than he or she actually is.

While Gageler J considered that the danger of cognitive bias had more relevance to s 97 than s 101(2), his Honour accepted that it may be seen as a form of prejudice (at [73]). Gageler J referred at [87] to "the ever-present risk that the objective probability

will be subjectively overestimated ... the risk of the evidence unwittingly being given too much weight". This was a clear danger in the present case.

32. With respect to the danger of tendency evidence clouding the jury's assessment of whether the prosecution has discharged its onus by generating an "emotional response", the Australian Law Reform Commission explained (ALRC 26, vol 1, para 644) in relation to what became s 135(a) of the *Evidence Act* (with its reference to evidence that "might...be unfairly prejudicial to a party"):

> The risk of unfair prejudice is one of the potential disadvantages mentioned. By risk of unfair prejudice is meant the danger that the fact-finder may use the evidence to make a decision on an improper, perhaps emotional, basis, ie on a basis logically unconnected with the issues in the case. Thus evidence that appeals to the fact-finder's sympathies, arouses a sense of horror, provokes an instinct to punish, or triggers other mainsprings of human action may cause the fact-finder to base his decision on something other than the established propositions in the case. Similarly, on hearing the evidence the fact-finder may be satisfied with a lower degree of probability than would otherwise be required.

The tendency evidence in the present case would inevitably have provoked an adverse emotional response and created the real danger that the jury would be disinclined to give the appellant the benefit of any reasonable doubt arising from the fact that the appellant had given a false account to the Church when he first sought compensation in 2010.

33. In considering any prejudicial effect the tendency evidence "may have" on the appellant, judicial directions to the jury designed to reduce that risk must be taken into account. There are judicial statements that it must be assumed that such directions will be effective. For example, in *Gilbert v The Queen* [2000] HCA 15; (2001) 201 CLR 414, McHugh J (in dissent) observed at [31] that "unless we act on the assumption that criminal juries act on the evidence and in accordance with the directions of the trial judge, there is no point in having criminal jury trials". On the other hand, in the same case, Gleeson CJ and Gummow J stated at [13]:

> The system of criminal justice, as administered by appellate courts, requires the assumption, that, as a general rule, juries understand, and follow, the directions they are given by trial judges. It does not involve the assumption that their decision-making is unaffected by matters of possible prejudice.

See also *Dupas v The Queen* [2010] HCA 20; (2010) 241 CLR 237 at [29]. In *Sokolowskyj v The Queen*, Hoeben CJ at CL observed at [56]–[57]:

> An assumption that a judicial direction to the jury designed to minimise the risk of unfair prejudice will be completely effective would effectively prevent s 101(2) operating as a safeguard against the potential risk of miscarriages of justice arising from the admission of tendency evidence. In the present case there was a real risk that, notwithstanding directions to the jury, the jury would see the appellant as a sexual deviant who had no credibility in denying the allegation against him, was not deserving of the benefit of any reasonable doubt and was the sort of person who was likely to have committed the offence alleged against him.
>
> Members of the jury might have so proceeded subconsciously, even accepting that they would have tried to follow the directions given to them.

34. It may be accepted that the jury in this case followed the direction given to them by the trial judge (CAB 29.30) not to seek to punish the appellant for his conduct in relation to TR and SL. However, it should not be assumed that the directions attempting to prevent general propensity reasoning (CAB 29.20) would be completely effective. Equally, it should not be assumed that the trial judge's general injunction to the jury in the summing up that "[y]ou must, as a jury, act impartially, dispassionately and fearlessly. You must not let sympathy or emotion or bias or prejudice sway your judgment" (CAB 12.30) would be completely effective. Nor could the risk that the jury would give too much weight to the evidence be excluded. The prejudicial effect the evidence *might* have had on the appellant was considerable.

35. As regards the third step, determining whether the probative value of the evidence "substantially outweighs" any prejudicial effect it may have on the defendant, the nature of this test was elucidated in *R v Ellis* (2003) 58 NSWLR 700. Spigelman CJ (Sully,

O'Keefe, Hidden and Buddin JJ agreeing) held (at [95]) that "[s]ection 101(2) calls for a balancing exercise which can only be conducted on the facts of each case". The court must give "consideration to the actual prejudice in the specific case which the probative value of the evidence must substantially outweigh" (at [94]). The way in which the majority of the High Court in *Pfennig v The Queen* [1995] HCA 7; (1995) 182 CLR 461 formulated the common law test for similar fact or propensity evidence did not apply to the balancing exercise under s 101(2), primarily because the statutory provision expressly requires a balancing process and tilts that process by the use of the word "substantially". The High Court initially granted special leave to appeal from this judgment but the grant was rescinded on 1 December 2004, the Court expressed agreement with the construction of the *Evidence Act* by Spigelman CJ (*Ellis v The Queen* [2004] HCATrans 488).

36. Reference may also be made to the statutory context. As noted above, section 137 adopts a similar balancing test, but there are two important differences. First, s 101(2) prohibits tendency reasoning unless the court is persuaded that it should be permitted, in contrast with s 137 where the court must be persuaded that the balancing favours exclusion. Second, as Spigelman CJ noted in *Ellis*, the balance in s 101(2) is tilted in favour of inadmissibility (or prohibition on use) by the use of the word "substantially". The same word may be found in s 135, but there is scant authority on the term used in that context.

37. It may be noted that the *Evidence Act 1995* (Cth) received the Royal Assent in February 1995, well before the High Court reformulated the common law rule in *Pfennig v The Queen* [1995] HCA 7; (1995) 182 CLR 461. Brennan J (as his Honour then was) in *Harriman v The Queen* (1989) 167 CLR 590 at 593–594 formulated the common law test:

> Evidence that an accused has committed other offences of the same or similar character is inadmissible ... unless the probative force of the evidence clearly transcends the merely prejudicial effect of showing that the accused has committed other offences.

It is submitted that the use of the term in s 101(2) requires the court to be satisfied that, at a minimum, the probative value of the evidence *clearly* outweighs the dangers of

unfair prejudice. If it does not do so clearly, it could not be said that it does so substantially. The word "substantially" may have been intended to convey more than "clearly" but it is not necessary to determine the full operation of the term in the present case. It is submitted that, in the present case, the probative value of the tendency evidence did not clearly outweigh the risks of prejudice to the appellant. The evidence did not have sufficient probative value to justify the ever present risk that the objective probability would be overestimated by the jury and the ever-present risk that the jury would be unable to put to one side the emotional impact of the evidence (and its implications for the proper application of the applicable standard of proof).

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38. It is apparent that there is a very close similarity between the statutory test in s 101(2) and the common law test as it existed prior to the judgment in *Pfennig*. It follows that guidance provided by common law authorities prior to the judgment in *Pfennig* will provide assistance in the application of s 101(2) (see *Hughes v The Queen*, Nettle J at [192]), although it is the statutory language that must be applied. Further, it should be noted that, in *Pfennig*, McHugh J discussed the common law rule of exclusion propounded by the House of Lords in *Director of Public Prosecution v P* [1991] 2 AC 447 at 460-1 and expressed support for it at 515 ("as a matter of law and not discretion the probative value of evidence revealing bad character or criminal propensity must be
20 sufficiently strong to outweigh or clearly transcend the prejudicial effect of the evidence"). McHugh J observed (at 528) that "prejudicial effect and probative value are incommensurables." Accordingly, McHugh J held (at 529) that what is required is that "the probative force of the evidence compared to the degree of risk of an unfair trial is such that fair minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial". This analysis was applied by the NSW Court of Criminal Appeal in *Sokolowskyj* at [57]. It is submitted that this test, to the extent that it illuminates the statutory test in s 101(2), was not satisfied in the present case.

30 39. Finally, as Spigelman CJ observed in *R v Ellis* at [96], "[t]here may well be cases where, on the facts, it would not be open to conclude that the probative value of particular evidence substantially outweighs its prejudicial effect, unless the 'no rational explanation' test were satisfied". This raises for consideration the view expressed by

McHugh J in *Pfennig v The Queen* at 531-2 that "when the Crown is relying on the accused's criminal propensity" the "risk of prejudice from propensity reasoning is so high" that the evidence "cannot be admitted unless that evidence together with the other evidence denies any rational explanation of the accused's conduct that is consistent with his or her innocence". On that approach, the tendency evidence in the present case was clearly inadmissible.

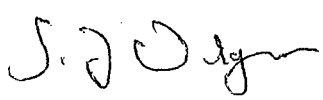
Part VII: Orders sought

40. The appellant seeks the following orders: That the appeal be allowed, the orders of the New South Wales Court of Criminal Appeal be set aside and in lieu thereof order that the appeal against conviction be allowed and a new trial held.

Part VIII: Estimate

41. It is estimated the presentation of the appellant's oral argument will require 2-3 hours.

Dated: 8 June 2018



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S.J. Buchen

To: **The Respondent:** Office of the Director of Public Prosecutions (NSW)
Level 17, 175 Liverpool Street, Sydney NSW 2000

TAKE NOTICE: Before taking any step in the proceedings you must, within **14 DAYS** after service of this application, enter an appearance in the office of the Registry in which the application is filed, and serve a copy on the appellant.

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