HIGH COURT OF AUSTRALIA

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: MDP
Appellant

and

THE KING
Respondent

APPELLANT'S REPLY

Part I: Certification as to publication

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

Part II: Reply

Proposed intervener's submissions

2. The appellant accepts the NSW Director and Commonwealth Director have the necessary legal interest to intervene identified in *Roadshow Films Pty Ltd v iiNet Ltd* [No 1] (2011) 248 CLR 37 at [2]. The respondent is a "large [organization] represented by experienced lawyers"[1] and so the Court will need to consider whether intervention will assist it.

The respondent's submissions

3. The respondent's argument proceeds on the following premises:

   (a) The bottom slapping evidence was admissible as relationship evidence relevant to the complaint being made "*out of the blue*".[2] Once admitted without objection, the *Pfennig* test was irrelevant[3] and the bottom slapping evidence was rendered "*admitted propensity evidence*".[4]

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[1] *Roadshow Films Pty Ltd v iiNet Ltd [No 1]* (2011) 248 CLR 37, 39 [6].
[2] Respondent's Submissions, 1 March 2024, [27], [29], [34].
[3] Respondent's Submissions, 1 March 2024, [29].
[4] Respondent's Submissions, 1 March 2024, [46]. See also [44]-[45].

(b) The directions given by the trial judge were generally in line with those proposed or contemplated by Gleeson CJ, Hayne J and Crennan J in *HML v The Queen; SB v The Queen; OAE v The Queen* (2008) 235 CLR 334 (***HML***),[5] and were unduly favourable to the appellant on the standard of proof.[6]

(c) There was no miscarriage of justice in circumstances where "*propensity reasoning on admitted propensity evidence does not give rise to a miscarriage of justice*";[7] defence counsel made a forensic decision capable of rational explanation not to object;[8] the evidence was of negligible prejudicial effect because it would "*sure up the defence case*" by evidencing a lack of sexual conduct by the accused. [9]

(d) No substantial miscarriage of justice actually occurred because the jury would not have used tendency reasoning.[10]

Admissibility of the bottom slapping evidence

4. The respondent contends the evidence was relevant as relationship evidence to rebut the insinuation of concoction of the complaint after the appellant left his relationship with her mother. It says the evidence allowed the complainant's evidence to be "*assessed in a realistic context and not incorrectly perceived as an allegation out of the blue*".[11] The reference to "*out of the blue*" in *Roach*[12] and *HML*[13] is to the conduct of the accused not being an isolated incident, rather than to an *allegation* coming out of the blue. The respondent has identified no case where an *allegation* said to come out of the blue may justify the admission of relationship evidence.

5. In any case, if the evidence was to be admitted on this basis, it was necessary for the prosecution to identify the questions that the relationship evidence is said to answer.[14] No such questions were identified by the prosecution in the appellant's trial at any time. The judge's directions did not identify any such questions, or any way in which the jury could

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[5] Respondent's Submissions, 1 March 2024, [31], [32], [44].
[6] Respondent's Submissions, 1 March 2024, [32].
[7] Respondent's Submissions, 1 March 2024, [39]. See also [63].
[8] Respondent's Submissions, 1 March 2024, [40]-[41].
[9] Respondent's Submissions, 1 March 2024, [37], [62].
[10] Respondent's Submissions, 1 March 2024, [61]-[66].
[11] Respondent's Submissions, 1 March 2024, [34] relying on *Roach v The Queen* (2011) 242 CLR 610, 624 [42] (French CJ, Hayne, Crennan and Kiefel JJ) (***Roach***).
[12] *Roach v The Queen* (2011) 242 CLR 610, 624 [42] (French CJ, Hayne, Crennan and Kiefel JJ).
[13] *HML*, 444 [318] (Heydon J), 468 [390]-[391] (Crennan J), 503 [517] (Kiefel J); *BBH v The Queen* (2012) 245 CLR 499, 545 [148] (Crennan and Kiefel JJ).
[14] *HML*, 498 [502] (Kiefel J).

use the evidence as relationship evidence. That is unsurprising as the sole basis of admissibility at trial was propensity.

6. The appellant submits the bottom slapping evidence answers no questions that might arise in the jury's mind. The respondent's proposal – that the evidence could rebut recent invention – is simply propensity reasoning, inviting a conclusion that the complaint is more likely to be true because the appellant had a propensity to act in a sexual way toward the complainant.

7. The submission that Henry J's statement that the bottom slapping evidence was "*relevant evidence of the degree of familiarity of the domestic relationship and thus admissible per s 132B Evidence Act 1977 (Qld)*" did not state that the evidence was admissible under that section[15] is, with respect, bewildering.

Directions

8. Admissibility and directions are two sides of the same coin. Evidence which is admitted for one purpose cannot be used by the jury as propensity evidence unless it meets the requirements of admissibility for propensity evidence.[16] The contention that the evidence was "*rendered*" propensity evidence regardless of meeting the *Pfennig* test because it was admissible as relationship evidence[17] is inconsistent with this fundamental principle.

9. The respondent contends that the directions given in the present case were generally in line with those contemplated by Gleeson CJ, Hayne J and Crennan J in *HML*. Crennan J said in relation to relationship evidence that the judge must "*give a clear explanation to the jury of the purposes for which the conduct has been admitted, give a clear direction or indication not to substitute the evidence of prior misconduct for the direct evidence of the offences charged, and also give a warning against propensity reasoning in coming to a conclusion of guilt.*"[18] Gleeson CJ stated that if propensity reasoning was not relied on, it may be necessary for a trial judge to warn a jury against employing it.[19] By contrast, the directions in the present case expressly permitted propensity reasoning.

10. In the passage relied on by the respondent, Hayne J was considering whether the failure to give a sexual interest propensity direction occasioned a miscarriage of justice, and held it

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[15] Respondent's Submissions, 1 March 2024, [28].
[16] *HML*, 498-499 [502]-[503], 502 [512] (Kiefel J), *Roach*, 623-624 [41] (French CJ, Hayne, Crennan and Kiefel JJ).
[17] Respondent's Submissions, 1 March 2024, [44]-[46].
[18] *HML*, 489 [471], referred to in the Respondent's Submissions, 1 March 2024, [31].
[19] *HML*, 358-359 [26]-[27] (Gleeson CJ).

did not.[20] A propensity direction, which was not given in *HML*, was the only direction given in the present case.

11. The respondent contends that the direction was "*unduly favourable to the appellant in regard to the standard of proof for relationship evidence*".[21] That suggests that there were directions given about relationship evidence. But the directions here were solely about the use of the evidence as showing propensity. There was no relationship direction at all.

12. If the evidence was not admissible at all the jury should have been told to disregard it. If it was admissible as relationship evidence, but not propensity evidence, the direction should have identified which questions the evidence may answer and warned against propensity reasoning.[22] In either case, the directions were wrong at law.

Miscarriage of justice

13. The respondent relies on *Nudd,*[23] *TKWJ,*[24] *Patel*[25] and *Craig*[26] to contend that there is no miscarriage of justice because the appellant's trial counsel made a forensic decision not to object to the evidence or the propensity direction.[27] The first three of those cases fall within the category of decisions which are made by counsel in criminal trials. It is a different situation, in a case such as the present, where the jury is misdirected.

14. It is trite that counsel cannot concede a matter of law, and that a judge cannot dispense with the requirements of the law regardless of counsel's position.[28]

15. Both the majority[29] and minority[30] in *Hamilton (a pseudonym) v The Queen* (2021) 274 CLR 531 (***Hamilton***) held that while counsel's forensic decision not to seek an anti-tendency direction may be relevant to the assessment of the risk of erroneous reasoning, it was not determinative of the question of miscarriage. The key distinction between the

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[20] *HML*, 407 [201] (Hayne J).
[21] Respondent's Submissions, 1 March 2024, [32].
[22] *HML*, 499 [503], 502 [512]-[513] (Kiefel J); *PRS v The State of Western Australia* [2023] WASCA 106, [89]; *Hamilton (a pseudonym) v The Queen* (2021) 274 CLR 531, 554-555 [46]-[48] (Kiefel CJ, Keane & Steward JJ), 563 [75] (Edelman & Gleeson JJ).
[23] *Nudd v The Queen* (2006) 80 ALJR 614.
[24] *TKWJ v The Queen* (2002) 212 CLR 124.
[25] *Patel v The Queen* (2012) 247 CLR 531.
[26] *Craig v The Queen* (2018) 264 CLR 202.
[27] Respondent's Submissions, 1 March 2024, [41].
[28] *Pemble v The Queen* (1971) 124 CLR 107, 117-118 [18]-[20] (Barwick CJ); *BRS v The Queen* (1997) 191 CLR 275, 295 (Toohey J), 305 (McHugh J); *Perara-Cathcart v The Queen* (2017) 260 CLR 595, 638-639 [124] (Nettle J); *Kalbasi v Western Australia* (2018) 264 CLR 62, 109 [133] (Nettle J) cf 83 [57] (Kiefel CJ, Bell, Keane and Gordon JJ); *Hamilton (a pseudonym) v The Queen* (2021) 274 CLR 531, 563 [76] (Edelman & Gleeson JJ).
[29] *Hamilton (a pseudonym) v The Queen* (2021) 274 CLR 531, 557 [55] (Kiefel CJ, Keane and Steward JJ).
[30] *Hamilton (a pseudonym) v The Queen* (2021) 274 CLR 531, 563 [76] (Edelman and Gleeson CJ).

majority and minority judgments was the level of the risk of tendency reasoning in that case, not whether counsel's decision not to seek an anti-tendency warning decided the case.

16. Evidence that reveals propensity will ordinarily pose a risk of propensity reasoning without a warning.[31] Indeed, the prosecutor told the jury it was "independent proof" of the offences by way of propensity reasoning.[32] The suggestion that the evidence supported the defence case[33] is absurd.

17. This is not a case like *Hamilton*, where the Crown was careful not to invite tendency reasoning,[34] and the judge gave several warnings.

No substantial miscarriage of justice

18. There is no scope for the application of the proviso. The error in the present case is of a type that prevents an appellate court from determining if guilt was proved to the criminal standard, being both a case that turns on contested credibility, and a process error where the jury were wrongly directed about how to use significant evidence which was said to be "independent support" to the complainant's evidence.[35]

19. Further, the respondent should not be permitted to contend for the proviso to be applied in circumstances where no notice of contention has been filed,[36] and where the proviso appears not to have been relied on in the Court of Appeal.[37]

Dated: 18 April 2024

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Name: Saul Holt KC
Telephone: 07 3369 5907
Email: sholt@8pt.com.au

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Name: Susan Hedge
Telephone: 07 3012 8222
Email: susan.hedge@qldbar.asn.au

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[31] *Hamilton*, 558-559 [62] (Edelman and Gleeson CJ).
[32] ABFM, p95, Transcript, 04/08/2021, Addresses, p17.41-47.
[33] Respondent's Submissions, 1 March 2024, [37], [62].
[34] *Hamilton*, 543 [15], 555 [47]-[48] (Kiefel CJ, Keane & Steward JJ).
[35] *Kalbasi v Western Australia* (2018) 264 CLR 62, 71 [15] (Kiefel CJ, Bell, Keane and Gordon JJ).
[36] A notice of contention is required under rule 42.08.5 of the *High Court Rules 2004* (Cth) when "a respondent does not seek a discharge or variation of a part of the judgment actually pronounced or made, but contends that the judgment ought to be upheld on the ground that the court below has erroneously decided, or has failed to decide, some matter of fact or law…"
[37] ABFM, p105-114. Outline of Submissions on behalf of the Respondent in the Court of Appeal, undated.

IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

BETWEEN: MDP

Appellant

and

THE KING

Respondent

ANNEXURE – LIST OF CONSTITUTIONAL AND LEGISLATIVE PROVISIONS REFERRED TO IN APPELLANT'S REPLY SUBMISSIONS

1. *Evidence Act 1977* (Qld), s132B (Reprint current from 5 July 2021)