HIGH COURT OF AUSTRALIA

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Details of Filing

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Form 27A—Appellant's submissions

Note: See rule 44.02.2.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **The King**
Appellant

and

AR
Respondent

APPELLANT'S SUBMISSIONS

Part I: Internet Publication

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

Part II: Issues

2. The first issue that arises is whether the prosecution may properly rely on tendency reasoning where the evidence said to establish the tendency is the same evidence as is relied upon to establish the charges on the indictment. That arises in this case where a single child complainant alleges similar sexual misconduct occurring on several occasions in similar circumstances, and where all occasions give rise to charged acts. The appellant contends that established authority of this Court answers this issue in the affirmative.

3. The second and related issue is whether, in such circumstances, it is necessary to describe the asserted tendency only in general terms, in order to avoid particularising it in a way which replicates the detail of the charged allegations. The answer to this issue is no. The appellant contends that the specificity of the asserted tendency in the present case did not give rise to a miscarriage of justice.

Part III: Notice of constitutional matter

4. The appellant does not consider that any notice is required pursuant to s 78B of the *Judiciary Act 1903*.

Part IV: **Citation**

5. *AR v The King* [2025] NSWCCA 22 (**J**) (CAB 149-194).

Part V: **Facts**

6. In September 2020, the complainant (CG) was 10 years old. She and her older brother (XG) lived alternate weeks with their mother (JW), and their father (JG) (J[8]; CAB 156).

7. The respondent had been in a relationship with JW from April or May 2019. During that period, the pair had separated for short periods of time and then resumed the relationship. The respondent would spend time at JW's house, occasionally staying overnight (J[8]; CAB 156).

8. The respondent would sometimes drive the complainant to and from school and provide after school care (J[8]; CAB 156). The respondent would call the complainant by the nickname "Corgeous", tell the complainant that he loved her, and she would tell him that she loved him.[1] In about June 2020, the respondent and the complainant began to text each other (J[8]; CAB 156).

9. On 8 October 2020, the respondent and JW ended their relationship. The complainant knew that they had broken up.[2] Thereafter, between 11 October 2020 and 18 October 2020, the complainant was living at her father's house. She returned to JW's home on 18 October 2020. On that day, the respondent came to the house to return JW's car. The complainant asked her mother whether she and the respondent were back together, and became upset (J[9]; CAB 156). JW asked the complainant what was wrong and said "*Why are you upset? I thought you liked* [the respondent]?". The complainant said "*nothing, nothing*". JW said "*Look,*

[1] Trial transcript (28/7/2022) T94; Appellant's book of further materials (**ABFM**) 128, Trial transcript (29/7/2022) T149; ABFM 165.
[2] MFI 4 Q/A 172-184; ABFM 19-20, MFI 7 Q/A 105-111; ABFM 34-35.

whatever it is, we can fix it. It's, you know, nothing we can't fix together." The complainant then disclosed to JW that the respondent "*touched me inappropriately*". The respondent arrived at the home shortly after, and the complainant said she did not want to see him and went to her bedroom. JW drove the respondent back to his own home, during which time she made him aware of the allegations.

10. On 20 October 2020, the complainant participated in her first recorded interview with police and disclosed two incidents, which comprised counts 3 – 7 on the indictment.[3]

11. Count 3 (and count 4 in the alternative) related to an alleged incident that occurred on an occasion during the school holidays, between 24 September 2020 and 8 October 2020. The respondent had been at JW's house and was watching a movie with the complainant. The complainant's memory was that the movies watched on this occasion were Jumanji and Clueless.[4] The complainant was wearing a top and her pyjama shorts and had grey 'Bonds' brand underwear on. She was lying on the couch with her head on the respondent's lap. The complainant's mother went to bed. The complainant's brother XG was in his bedroom, playing a online game on his computer. While watching the movie, the complainant fell asleep with her head in the respondent's lap. When she woke up, the respondent was touching her with his hand on her vagina, inside her clothing on her skin. He was touching inside and outside the lips of her vagina.[5] The complainant sat up to let the respondent know she was awake.[6] At the time, the complainant was unsure if the respondent's conduct had been deliberate or if he was being affectionate. The respondent moved his hand to her thigh. The complainant continued to watch the movie until it finished. After the movie finished, the complainant told the respondent she was going to bed. The respondent went and said goodnight to JW and then left the premises. The complainant thought this was about 11pm or 12am. This incident is hereafter referred to as "**the first Narara incident**" (J[12]; CAB 157).

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[3] MFI 4; ABFM 5-22.
[4] MFI 4 Q/A 33-50; ABFM 8-10.
[5] MFI 4 Q/A 88-98; ABFM 12-13.
[6] MFI 4 Q/A 87; ABFM 12.

12. Count 5 (and count 6 in the alternative) and Count 7 related to the second alleged incident that occurred later in the same school holidays, between 3 October and 8 October 2020. On this occasion, the complainant was watching a movie with the respondent and JW, at JW's house.[7] The complainant was wearing trackpants on this occasion. At about 11pm or 12am, JW went to bed, leaving the respondent and the complainant in the lounge room watching the movie. The complainant was awake when JW went to bed. The complainant was lying on the couch and had her head resting on a pillow. The respondent was seated on the couch, next to the pillow. The complainant fell asleep. Sometime later, the complainant woke up. The complainant was lying on her side, facing the television, and her right hand was over her head. She became aware that the respondent had his hand on her vagina, and his fingers were inside her vagina (count 5).[8] She realised that her right hand was on the respondent's penis, with his own hand on the top of hers, "*squeezing*" (count 7).[9] The complainant stood up, and as she did so the respondent pulled his hand out of her pants. The complainant said "*goodnight*" to the respondent and told him she was going to bed. The respondent said to her, "*I can stay for as long as you want. I don't mind, you can fall asleep again*".[10] The complainant left the loungeroom and went to her bed. She did not watch the end of the movie. This incident is hereafter referred to as "**the second Narara incident**". (J[13]; CAB 157).

13. The respondent was charged in relation to the first and second Narara incidents and the matters were listed for trial.[11]

14. On 28 June 2022, shortly before the trial, JW was putting the complainant to bed. The complainant told her mother that she had remembered a further incident when the respondent had touched her when she had been sleeping over at his home. The

[7] MFI 4 Q/A123-126; ABFM 15.
[8] MFI 4 Q/A 124-131, ABFM 15-16.
[9] MFI 4 Q/A 134, 139-141, 186-190; ABFM 16-17, 20.
[10] MFI 4 Q/A 135; ABFM 16.
[11] On 5 May 2021, the complainant participated in a second recorded interview about these incidents in order to provide more detail and clarify some aspects of her earlier interview (ABFM 23-45).

complainant told her mother she had thought she had "*blocked out*" this incident.[12] Thereafter, the complainant disclosed the incident to her father.

15. On 1 July 2022, the complainant participated in a further recorded interview about the incident at the sleepover at the respondent's home.[13] The incident described in the 1 July 2022 interview comprised count 1 (and count 2 in the alternative) on the indictment (hereafter "**the West Gosford incident**").

16. The complainant told police that she had remembered the incident at the respondent's house after having had a 'vivid dream' about being locked in the respondent's apartment. She had been having nightmares, during which she dreamt she was being chased by the respondent. She said that a few days before the interview with the police, the complainant had a particularly vivid dream about the respondent's apartment. The respondent did not feature in the dream, and nor was there any sexual conduct or content that formed part of the dream.[14] However, the complainant told police that the feeling of being trapped in the apartment in the dream had prompted her memory of the incident itself. The complainant thought she had blocked out the incident as she did not want to remember it.[15]

17. The complainant reported that the incident had occurred on an occasion when the complainant was sleeping over at the respondent's home, without JW present. Two of the respondent's children were also sleeping overnight at the respondent's home. Those two children were put to bed earlier than the complainant, as they were younger. Before falling asleep, one of the respondent's children had come out and the respondent gave her a drink and then quickly ushered her back to the room and told her not to come back out. The complainant and the respondent were watching a movie on the television. The complainant thought that the movie may have been 'Godzilla', but in evidence at the trial agreed it may have been 'Bumblebee'.[16]

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[12] SU 34-36; CAB 43-45.
[13] This was the fourth recorded interview. On 18 July 2022, the complainant had participated in a third recorded interview to clarify her evidence about the underwear she wore on each of the occasions
[14] MFI 9 Q/A 173 – 198; ABFM 62-63, Trial transcript (28/7/2022) T72 – 74, 78; ABFM 112-114, 116, Trial transcript (29/7/2022) T159 – 160, 163 – 167; ABFM 174-175, 178-182.
[15] MFI 9 Q/A 185-187, 230; ABFM 64, 65.
[16] MFI 9 Q/A 78-82, 140-142; ABFM 54-55, 58-60, Trial transcript (01/08/2022) T198-199, ABFM 203-204.

18. The complainant fell asleep on the couch while watching the movie. She woke up and felt the respondent's hand on the inside of her vagina. His fingers were not moving, but she could feel them "*on where she peed out of*"[17] (Count 1, and Count 2 in the alternative). The complainant got up and told the respondent that she needed the toilet. She went into the bathroom and when she came back out, she told the respondent she wanted to go to bed. The complainant then went to sleep in the respondent's bed. The respondent was to sleep on the couch. However, when the complainant woke up in the morning, the respondent was lying on the bed beside her and looking at her.[18]

19. The complainant's memory was that the West Gosford incident had occurred after the Narara incidents (although she was not certain). However, the Crown case proceeded on the basis that this was the first incident, based on SMS messages between JW and the respondent which suggested the date of the sleepover (J[19], [21]-[25]; CAB 160-163).

20. At trial, the complainant's evidence was that the feeling of worry associated with the respondent's apartment caused her memory of the sleepover incident to become clearer as to the acts that were the subject of Count 1. The complainant maintained that prior to her dream she had a memory of being at the sleepover, and being on the couch, and a memory that when she woke the respondent was on the bed with her and looking at her. However, before the dream, she did not recall the respondent touching her vagina on the couch. After having the dream, "*the feeling of being that worried kind of took me back and I remembered that that happened*".[19] After she had the vivid dream of being locked in the respondent's apartment, that feeling of being worried in that location "*took* [her] *back*" and she then remembered the acts that had occurred on the couch "*quite clearly*".[20]

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[17] MFI 9 Q/A 140-142; ABFM 59-60.
[18] MFI 9 Q/A 31 – 118, 129 – 173; ABFM 50-62.
[19] Trial transcript (28/07/2022) T73; ABFM 113, see also trial transcript (29/07/2022) T160.18; ABFM 175.
[20] Trial transcript (28/07/2022) T73; ABFM 113.

Trial proceedings

21. The respondent stood trial in the District Court at Sydney before Bright DCJ (**the trial judge**) and a jury between 26 July 2022 and 10 August 2022.

22. The respondent's case at trial was that he had never sexually touched the complainant or had sexual intercourse with her. However, he agreed that there had been an occasion when the complainant had a sleepover at his house, and that there had been two occasions when he had watched movies with the complainant at JW's premises.

23. At trial, the prosecution sought to rely on tendency evidence (J[30]-[32]; CAB 167-168). The tendency asserted was that the respondent:

    a. had a particular state of mind, namely, a sexual interest in the complainant; and

    b. a tendency to act on that sexual interest by penetrating her vagina with his fingers and/or sexually touching her when she had fallen asleep beside him watching a movie (**the asserted tendency**).

24. The evidence said to establish the asserted tendency was the evidence of the complainant about the respondent's conduct on each of the three (charged) occasions.

25. Section 97A of the *Evidence Act 1995* (NSW) (***Evidence Act***) applied to the respondent's trial. There was ultimately no dispute at trial (or on appeal) about the admissibility of the tendency evidence in this case. The trial judge ruled that the tendency evidence was admissible (J[32]; CAB 168; ABFM 246-250).

26. The trial judge gave the jury a tendency direction (SU 58-60; CAB 67-69; set out at J[54]; CAB 176). The direction was consistent with the tendency direction in the *Criminal Trial Courts Bench Book*[21] as it was at that time (J[96]; CAB 188-189). Relevantly, the direction included instructing the jury to "*decide what conduct occurred*" and then, if satisfied that some or all of the conduct occurred, decide

[21] Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* at [4.227].

whether it enabled the inference to be drawn that the respondent had the relevant tendency (SU 58 – 59; CAB 67-68).

27. On 10 August 2022, the jury returned unanimous verdicts in respect of each count. The jury found the respondent guilty of counts 3, 5 and 7 (the first and second Narara incidents).[22] The jury acquitted the respondent of counts 1 and 2 (the West Gosford incident) (J[3]; CAB 154).

Appeal to the New South Wales Court of Criminal Appeal

28. In April 2024, this Court delivered its judgment in *Director of Public Prosecutions v Roder (a pseudonym)* (2024) 98 ALJR 644 (***Roder***).

29. The respondent appealed to the New South Wales Court of Criminal Appeal (**CCA**) on a single ground with three sub-grounds, each of which concerned the jury directions with respect to the tendency evidence (J[4]; CAB 154-155). The CCA upheld only sub-ground 1(b),[23] which asserted that the manner in which the trial judge had directed the jury occasioned a miscarriage of justice, by directing the jury to consider whether the charged conduct occurred for the purpose of determining whether the tendency was established.

30. The CCA concluded that the direction given by the trial judge was "*at odds with Roder at [37]*" (**the first conclusion**) (J[87]; CAB 186). The CCA acknowledged that "*[such] flaw is not necessarily fatal*" (J[88]; CAB 187). The CCA went on to conclude that, in this case, a "*fundamental issue*" was that the tendency was particularised as a tendency to act on a sexual interest in the complainant in a particular way described in a manner that "*coincide[d] precisely*" with the conduct that was alleged against the respondent in each of the counts (J[89]; CAB 187); and that framing the tendency in this way and "*identifying the evidence to establish it so as to constitute exclusively the offending behaviour itself is inconsistent with the nature of tendency evidence*" (J[92]; 185-186) (**the second conclusion**) (J[89] – [99], [105]; CAB 187-189, 191).

[22] No verdicts were taken on counts 4 and 6 (the alternative counts).
[23] Leave to appeal was refused in respect of ground 1(a). Leave to appeal was granted in respect of ground 1(c), but the ground was dismissed.

31. The CCA concluded that it was "*not possible for the jury to distinguish the tendency from the conduct constituting the alleged offences, which … invited circular or boot-strap reasoning*" (J [102]; CAB 190). The CCA found that there had been a miscarriage of justice occasioned by a misdirection of law: J [105] (CAB 191).

Part VI: **Argument**

Overview of argument

32. The grounds are interrelated and so are addressed together.

33. The appellant accepts the correctness of the first conclusion of the CCA, that the direction given to the jury did not accord with the guidance of this Court in *Roder* at [37]. However, as the CCA correctly acknowledged, that deficiency does not necessarily result in a miscarriage of justice by way of misdirection. The question of whether there was a misdirection to the jury (being the error or irregularity in the trial sought to be established) requires consideration of the whole of the summing up, as well as contextual matters, including the issues at the trial, the evidence, and closing addresses by counsel: *Huxley v The Queen* (2023) 98 ALJR 62 (***Huxley***) at [41]-[43]. The relevant question is whether the judge's instructions to the jury, taken as a whole, deflected the jury from its fundamental task of deciding whether the prosecution proved the elements of the charged offence(s) beyond reasonable doubt: *Brawn v The King* (2025) 99 ALJR 872 (***Brawn***) at [7]; *Huxley* [41]-[43], [67]; *Hargraves v The Queen* (2011) 245 CLR 257 (***Hargraves***) at [46], [49].

34. The appellant contends that the CCA erred in the second conclusion reached (as described above at Appellant's submissions (**AS**) [30]. The effect of J [89] – [99] and [102] read together is that the CCA held that it was inconsistent with the nature of tendency evidence (and accordingly no jury could be fairly directed) to rely on a tendency to act in a particular way which is articulated with specificity such that it describes or "*replicate*[s] *the detail*" of the type of conduct alleged in charges on the indictment, while seeking to establish that tendency exclusively by evidence of those charged acts.

35. Whilst the appellant contests the correctness of the reasoning of the CCA taken as a whole, the second conclusion (about which the appellant complains), involved interrelated errors as follows:

    a. A wrong finding that the way in which the tendency was framed coincided precisely with the offending behaviour (J[89]-[90], [92]; CAB 187-188); and the consequential misapplication of *Kanbut v The Queen* [2022] NSWCCA 259 (***Kanbut***)[24] (J[92]-[96]; CAB 187-189).

    b. An erroneous conclusion that because proof of the tendency relied exclusively upon evidence of charged acts, no direction could be given that did not invite impermissible circular reasoning (J[91]; CAB 187, J [98]; CAB 189, J [102]; CAB 190).

36. This reasoning is irreconcilable with the judgments of this Court and the principles applicable to tendency evidence, and its application in this case to reach a conclusion of a miscarriage was erroneous.

Summary of principles applicable to tendency evidence

37. Tendency evidence is a form of circumstantial evidence whereby the asserted tendency is an intermediate fact that is to be proved in its own right and then deployed in aid of the proof of each charge: *Roder* [27].[25]

38. To be admissible, tendency evidence must meet the threshold of having significant probative value: s 97(1)(b) *Evidence Act*; and that significant probative value must outweigh the danger of any unfair prejudice to the accused: s 101(2) *Evidence Act*.[26] As is well settled, the assessment of significant probative value of tendency evidence "*involves consideration of two interrelated but separate matters*": the

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[24] The judgment in *Kanbut* was restricted from publication awaiting a retrial at the time of the decision in AR, and is therefore cited in that judgment Decision Restricted [2022] NSWCCA 259, and described as the Restricted Decision: J [73]; CAB 181.

[25] Citing *Rassi v R* [2023] NSWCCA 119 (***Rassi***) at [8].

[26] Section 97A *Evidence Act 1995* (NSW), which applied in this case, provides a rebuttable presumption in child sexual offence matters that tendency evidence about a sexual interest that an accused has or had in children, or tendency evidence about the accused acting on a sexual interest he or she had in children, has significant probative value; however, the assessment of the degree of the (significant) probative value of the evidence remains relevant to the exercise required by s 101 *Evidence Act*.

extent to which the evidence supports the tendency; and the extent to which the tendency makes more likely the facts making up the charged offence(s): *Hughes v The Queen* (2017) 263 CLR 338 (***Hughes***) at [41]. This assessment necessarily involves a comparison between the asserted tendency and the facts in issue in the trial (*Hughes* [64]). A tendency expressed at a level of particularity or specificity will usually be more likely to provide strong support for the proof of a fact that makes up the offence charged (*Hughes* [41]).

39. In single complainant cases where a tendency is asserted, evidence adduced in order to prove the charged conduct is admissible as circumstantial evidence in proof of each charged act; and the same principles apply to evidence of uncharged conduct alleged by the same complainant: *The Queen v Dennis Bauer (a pseudonym)* (2018) 266 CLR 56 (***Bauer***) at [49] – [51]. That is due to the very high probative value that such evidence will ordinarily have, resulting from "*ordinary human experience that, where a person is sexually attracted to another and has acted on that sexual attraction and the opportunity presents itself to do so again, he or she will seek to gratify his or her sexual attraction to that other person by engaging in sexual acts of various kinds with that person*." (*Bauer* [51], see also [60]).

40. The inferential reasoning process engaged by tendency evidence involves the trier of fact reasoning from satisfaction that a person has a tendency to act in a particular way to determine the likelihood that the person acted in that particular way on the specific occasion charged in the indictment (*Roder* [24]). Inferential reasoning will have greater strength where a tendency is articulated with a degree of specificity or particularity (*Hughes* [64]). The fact that a person acts on their state of mind (here, sexual interest in the complainant) in a specific or particular way, or in certain specific circumstances, is a matter which the prosecution may rely on to strengthen the inference that an accused acted on that tendency in respect of an individual count on the indictment. As this Court observed in *TL v The King* (2022) 275 CLR 83 (***TL***) at [29], "[t]*he specificity of the tendency has a direct impact on the strength of the inferential mode of reasoning*."

41. For a jury to find that an alleged tendency has been proved to a lesser standard by relying on direct evidence of charged acts, and then rely on that tendency in

determining whether the charged acts have been proved beyond reasonable doubt, "*does not involve circular or incoherent reasoning. Instead it simply means that the jury may consider the same evidence 'at different stages of its deliberations with a different onus of proof and for a different purpose*" (*Roder* [27]). Unless the tendency is itself an intermediate fact which is indispensable to proof of guilt, it need not be proved beyond reasonable doubt: *Bauer* [86]; *Roder* [24], [27]; *JS v R* [2022] NSWCCA 145 (***JS***) at [45]. In *Roder*, this Court observed that a direction to the jury in respect of tendency evidence should not direct or invite the jury to make findings, in respect of charged *conduct,* but rather to consider whether they are satisfied of the alleged tendency on the basis of the evidence relied upon to support it (which may be evidence of charged or uncharged conduct, or both) (at [37]).

Wrong finding that the asserted tendency coincided precisely with the offending behaviour, and misapplication of Kanbut v The Queen [2022] NSWCCA 259

42. The CCA was critical of the fact that the asserted tendency was particularised in a way which coincided with a description of the conduct alleged against the accused in each of the counts (J [89]-[90]; CAB 187). The criticism was that by describing the asserted tendency to act in a particular way, namely, "*by penetrating* [the complainant's] *vagina with his fingers and/or sexually touching her when she had fallen asleep beside him watching a movie*", this description "*coincide[d] precisely*" with the charged acts (J[89]; CAB 187). The CCA elaborated at J[90] (CAB 187) on what was meant by the phrase "*coincides precisely*": that "[t]*he formulation of the relevant tendency thus replicated the detail of how the offences were allegedly committed in specifying how the* [respondent]*'s alleged sexual interest in the complainant was acted upon*" (emphasis added). [27] The CCA incorrectly reasoned (J [90], [92], [95]; CAB 187-188) that this coincidence created

[27] This was also expressed as follows: "*expressing the tendency in precisely the same terms as the facts making up the charged offences*" (J [93]); that the tendency "*precisely coincide with the evidence*" (J [92]); "*the tendency is expressed in the same terms as the conduct alleged*" (J [98]); "*the tendency being expressed in precisely the same terms as the acts relied upon to establish the tendency and relied upon to establish the guilt of the* [respondent]" (J [99]); "*tight connection between the tendency and the offending conduct*" (J [102]); "*the asserted tendency, as acted upon, replicated the offending conduct*" (J [102]); "*tendency expressed in the same terms as the charged conduct*" (J [105])

the same fatal flaw as that identified in a judgment of the NSW CCA (Beech-Jones CJ at CL, with whom Adamson JA and Campbell J agreed) of *Kanbut*.

43. The appellant in *Kanbut* was tried on an indictment that alleged four slavery offences and two money laundering offences.[28] Each of the offences reflected a course of conduct rather than a discrete act. The offending involved two complainants (X and Y). The Crown had nominated particulars to meet the definition of slavery in s 270.1 of the *Criminal Code 1995* (Cth) in respect of the four slavery related counts on the indictment. The Crown relied on tendency evidence at the trial. The tendency was expressed as being a tendency to commit a series of acts against *both* of the complainants X and Y, where that series of acts particularised in the Notice wholly comprised every particular relied on to satisfy proof of the offences on the indictment (and no other conduct): *Kanbut* [60] – [63].

44. As Beech-Jones CJ at CL explained at [60] – [64], the flaw in the tendency evidence and direction in *Kanbut* was the framing of the tendency which grouped the conduct engaged in against both complainants together (such that the tendency could be established only upon satisfaction of the conduct against *both*) and which described conduct that comprised every particular (of all slavery counts) on the indictment. The direction given to the jury wholly failed to achieve its purpose (being to enable the jury to utilise its acceptance of the evidence of one of the complainants to accept the evidence of the other): *Kanbut* [65]. The tendency evidence in *Kanbut* could not have significant probative value because, putting aside the burden of proof, before satisfaction could be reached about the tendency, *all* of the counts to which the tendency related had to be established: proof of the tendency was entirely co-extensive with proof of all of the charged acts themselves: *Kanbut* [64], [66]. The analogous flaw in the instant case would be a tendency to commit the entire series of precise acts alleged on *all of* the three (specifically identified) occasions: cf J[94] (CAB 188).

[28] The offences were four slavery offences contrary to s 270.3(1)(a) of the *Criminal Code Act1995* (Cth) (**the *Code***) and two money laundering offences contrary to s 400.6(1) of the *Code*. Each complainant was the subject of two slavery offences (possess a slave, and use a slave) and one money laundering offence (in respect of the profit derived).

45. The tendency in *Kanbut* is to be contrasted with the tendency in this case. The tendency, while framed with a high level of particularity in accordance with *Hughes* at [41], describes the particular way and general circumstances in which the respondent is alleged to have acted on his sexual interest. It is not co-extensive with (nor "precisely coincides" with) proof of each and every of the four individual acts charged. Unlike *Kanbut*, in this case it was open to the jury to be satisfied (to an indeterminate standard) of some of the acts, but not others, and so be satisfied that the respondent had the asserted tendency (cf J[93]-[94]; CAB 188).

46. The CCA's misapplication of *Kanbut* is of significance because it informed the erroneous conclusion of the CCA that the particularity with which the asserted tendency in the present case was framed rendered it "*inconsistent with the nature of tendency evidence*" (J [92]; CAB 187-188) and created "*intractable problems*" (J [95]) in fairly directing a jury J[99], [102], [109] (CAB 188-190, 192).

47. The reasoning of the CCA, taken to its conclusion, has the effect either that a tendency to act in a particular way cannot be advanced in a single complainant case on the basis of evidence which is exclusively of charged acts; or if it can, the tendency must be described only in general terms and cannot be particularised with specificity where an accused has allegedly behaved in a particular or similar way on the charged occasions. These conclusions are contrary to principle.

Inconsistency of reasoning with established principle in this Court

48. A "*tendency to act in a particular way*" for the purpose of s 97(1) *Evidence Act* must, by its nature, describe *how* the relevant person acts. In many cases, the articulated tendency will – at least to some degree – mirror the detail of how the alleged charged acts were committed. That is inherent in the fact that in such cases the prosecution is alleging that an accused acted in conformity with the tendency to act in the particular way on those charged occasions. The force of tendency evidence will involve comparison between the tendency articulated and the facts in issue in the case: ordinarily, the greater the level of particularity, the greater the extent to which the tendency makes more likely the facts making up the charged offences: *Hughes* [41], [64]; *TL* [29]. The mere fact that a broadly expressed tendency may still have significant probative value, particularly in a single

complainant case[29] does not mean that the prosecution ought not frame a tendency that has the greatest degree of probative value in its case (particularly having regard to s 101 *Evidence Act*).

49. The jury will be directed, as this jury was, that it remains a question for the jury to consider whether the asserted tendency is established by the evidence relied upon and, if it is, whether the accused acted in conformity with the tendency on the specific occasions charged in the indictment.

50. While there is no requirement that tendency evidence demonstrate a "*modus operandi*" or "*operative features of similarity with the conduct in issue*" before tendency evidence will have significant probative value (*Hughes* [39], [41]), it does not follow that a tendency cannot or should not be articulated with specificity that reflects those similarities where they do exist. Similarly, while there is no requirement for common features of offending in single complainant sexual offence cases (*Bauer* [60]), it does not follow that a tendency must be expressed in general terms which do not include such common features of the offending as arise in a particular case (cf J[89] – [99]; CAB 187-189).

51. The conclusion of the CCA at J [89] – [99] (CAB 187-189) is contrary to these established principles arising from *Hughes* and *TL*. The effect of the judgment is to improperly preclude the Crown from framing an asserted tendency to reflect particularity where it exists.

Erroneous conclusion as to circular reasoning

52. A tendency that reflects detail common to charged acts, even where it relies only on charged conduct (and no uncharged acts), does not involve "*impermissible circular reasoning*" (cf J[98], [102]; CAB 189-190). For the reasons explained by Basten AJA in *JS* at [43], and by this Court in *Roder* at [26]-[27], a submission that tendency reasoning that relies on charged acts involves "circular reasoning" proceeds on the flawed assumption that the process of reasoning is a linear one whereby the Crown seeks to prove conduct at a lesser standard of proof in order to prove the tendency, and then use the tendency to establish the same acts. However,

[29] *Bauer* [60].

tendency reasoning does not operate in that manner. Tendency reasoning is a process of reasoning whereby the tribunal of fact considers the whole of the evidence relied upon to support the asserted tendency (at an indeterminate standard of proof) to determine whether the tendency alleged can be inferred from that evidence: if so, then the tribunal of fact may deploy the intermediate fact of the established tendency as circumstantial evidence in determining whether a specific charged act has been proved beyond reasonable doubt, in addition to the direct evidence about that particular charge: *Roder* [27]; *JS* [43]; *Rassi* [6]-[9] (cited in *Roder* [27]). This is not circular or incoherent reasoning: *Roder* [27].

53. Neither *Roder* nor *JS* identified that inferential tendency reasoning of the type considered here involved "*impermissible circular reasoning*": (cf J[98], [102]; CAB 189-190). The judgment in *Roder* at [25] noted the conclusions of the intermediate appellate court in that case, and went on to observe that "[t]*hese concerns have been addressed and resolved in recent decisions of the* [NSWCCA], *which applied the principles from Bauer to evidence of charged acts relied upon to support an alleged tendency*". Thereafter, at [26], the judgment cites *JS* at [43], which addressed a complaint about circular reasoning by explaining why such a complaint was flawed (outlined above at **AS [52]**). Thereafter, at [27], the judgment confirmed that it was *not* circular reasoning for a tribunal of fact to find that an alleged tendency has been proved to a lesser standard by relying on direct evidence of charged acts and then deploying that tendency in determining whether the charged acts have been proved beyond reasonable doubt.

54. To the extent that the CCA intended J[98] to refer to the acceptance in *JS* and *Roder* that where a jury considers the same evidence at the tendency stage and at the verdict stage, it may give rise to some risk of undermining the burden of proof in a criminal case, that risk is not due to "*circular or boot-strap reasoning*" (cf J[98], [102]; CAB 189-190). Rather, it was an acknowledgment that consideration of the same evidence at different stages, for different purposes, will require a trial judge to ensure that a jury is not confused about the different burdens of proof applying at each stage – and in particular to acknowledge and emphasise that proof of guilt of the charged acts on the indictment requires satisfaction beyond reasonable doubt: *Roder* [37]; *JS* [43].

Tendency evidence in the present case

55. This was a case where the intermediate fact of the tendency, if established, was of importance, as there was a qualitative difference between the direct evidence in respect of the West Gosford incident and that of the Narara incidents. The complaint in respect of the West Gosford incident was delayed. The incident was recalled in circumstances where the complainant had initially failed to recall the acts themselves, despite recalling the sleepover event, and where the memory of the incidents was 'triggered' by a dream. The complainant was inaccurate about the relative timing of the incident. If the jury were satisfied that the whole of the evidence established the asserted tendency, that may have been an important matter in proof of count 1 (and count 2 in the alternative). As it happened, the respondent was acquitted of those counts. So much is consistent with a proper consideration by the jury of each of the charges individually and to the appropriate standard: see below at **AS [62]**.

56. In the present case, the asserted tendency was for the respondent to engage in particular conduct (penetrating the complainant's vagina with his fingers and/or sexually touching her) in particular circumstances (when she had fallen asleep beside him watching a movie). The conduct, whilst similar, was not identical on each charged occasion. The sexual conduct alleged in the counts was different: Counts 1, 3 and 5 alleged acts of sexual intercourse by digital penetration. Count 7 alleged an act where the respondent assaulted the complainant by using his hand to hold her hand on his penis. Counts 2, 4 and 6 were alleged acts of sexual touching on the vulva (in the alternative, if the jury were not satisfied as to penetration beyond reasonable doubt). Some of the detail as to surrounding circumstances was also different: see **AS [11]-[12]** That the asserted tendency could "replicate" (or reflect) *all* of those types of acts is a matter which speaks to a degree of generality remaining. The fact that the asserted tendency was articulated in terms which "replicated" or reflected a similar type of conduct to the charged acts is consistent with the inferential reasoning that underpins tendency evidence, rather than inconsistent.: cf J[90], [92]

No Misdirection

57. In the circumstances of this case, the respondent sought to establish a miscarriage of justice occasioned by a misdirection in respect of the tendency evidence: J[7], [105] (CAB 156-156, 191). The CCA correctly accepted that its first conclusion (see **AS [30]**) did not necessarily establish a miscarriage of justice by way of a misdirection. However, the CCA held that the framing of the tendency was a "*fundamental issue*" (J[89]; CAB 187), resulting in "*intractable problems*" (J[95], CAB 188). In reaching the conclusion that there was a misdirection, the CCA concluded that the summing up of the trial judge "*was not designed to, and could not adequately in our view, address the difficulties that arose as a result of the tendency being expressed in precisely the same terms as the acts relied upon to establish the tendency and relied upon to establish the guilt of the applicant in respect of the relevant counts.*" (emphasis added) (J[99]; CAB 189). The erroneous reasoning and conclusion as to the framing of the tendency was determinative in the finding that there was a misdirection.

58. So much is confirmed by the additional observation of the CCA that even if the trial judge had given a direction that accorded with the guidance of this Court in *Roder* at [37] (that is, even putting aside the first conclusion reached at J [87]; CAB 186), that would be insufficient to address the risk of miscarriage in cases with a tendency framed in such a way (J [91]; CAB 187). The logical progression of that reasoning, although not expressly stated, is that tendency which is expressed in a manner that reflects similar detail as the conduct alleged on charged acts, where the tendency evidence is exclusively charged conduct, must be inadmissible. While not called upon to determine the issue , the CCA suggests so much at J [109] (CAB 192-193). There, in dismissing sub-ground 1(c) of the respondent's appeal, the CCA commented that the issues raised pursuant to that sub-ground in combination with the "*problems in the framing of the tendency notice and the potential difficulty in assisting a jury to use tendency reasoning in the circumstances of this particular case in a way that was not unfair*" may have supported a refusal by a trial judge to permit the use of tendency reasoning at all.

59. The second conclusion of the CCA was fundamental to the ultimate decision regarding miscarriage of justice, such that the conclusion of the CCA on the question of miscarriage cannot be separated from the errors in respect of the second conclusion.

60. No miscarriage of justice was occasioned in this case by the direction to the jury to make findings about charged conduct to determine if the tendency is established (cf J[105]; CAB 191). As stated, the first conclusion of the CCA is accepted. However, as accepted by the CCA, that conclusion does not answer the question of whether there was a miscarriage of justice arising from a misdirection of law, which requires consideration of the whole of the summing up to the jury and whether, taken as a whole, those instructions to the jury deflected the jury from its proper task: *Hargraves* [46]; *Huxley* [41]; *Roder* [33]; *JS* [44] (see J[88]; CAB 187).

61. In the respondent's trial, the jury had been "*appropriately and properly*" directed about the onus and the standard of proof: (J[99]; CAB 189). The trial judge also directed the jury about the drawing of inferences in a criminal trial (SU 21-23; CAB 30-32). In delivering the tendency direction to the jury, the trial judge directed the jury a second time about the reasoning involved in drawing inferences and the appropriate caution to be exercised (SU 59; CAB 68). The trial judge clearly explained to the jury that, at the tendency stage, they did not need to consider whether the acts had been proved beyond reasonable doubt (SU 59; CAB 68). The tendency direction appropriately reinforced that the jury must consider whether the accused acted in accordance with the tendency on each particular occasion charged (SU 60; CAB 69); and also that proof of the charge itself required the jury to decide whether the elements of the particular count were proved beyond reasonable doubt (SU 60; CAB 69). The counts related to a single complainant and the jury were clearly instructed that her credibility and reliability was a central issue in the trial. There was no risk that, having regard to the whole of the summing up, the jury was deflected from its fundamental task of establishing whether the evidence proved the elements of each charge beyond reasonable doubt.

62. The mixed verdicts returned in this case stand against such a contention, and against the CCA's conclusion that the jury's attention would have been deflected from

applying the required standard of proof in respect of the offences charged (cf J[105]; CAB 191). The outcome in this case is consistent with the jury being careful to deal with each charge separately as directed by the trial judge and not treating the tendency evidence in an unthinking, uncritical or uniform way: *cf* J[102] (CAB 190)

63. For the above reasons, the tendency direction did not amount to a misdirection. In the context of the whole of the trial judge's instructions to the jury, it did not deflect the jury from its fundamental task of deciding whether the prosecution proved the elements of the charged offence beyond reasonable doubt.

Part VII: Orders sought

64. The appellant seeks the following orders:

a. Appeal allowed.

b. Orders 6, 7, 8 and 9 of the Court of Criminal Appeal of Supreme Court of New South Wales made on 3 March 2025 on the respondent's appeal against conviction be set aside.

c. In place of those orders, the respondent's appeal against conviction be dismissed.

Part VIII: Estimate of oral argument

65. The appellant estimates that 1.5 hours will be required for presentation of oral argument.

Dated: 11 September 2025

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ANNEXURE TO APPELLANT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1.	*Evidence Act 1995 (NSW)*	No 25 (version for 1 July 2020 to 24 November 2022	s 97 s 97A s 101	Act in force at the date of the trial before Bright DCJ	Between 26 July 2022 and 10 August 2022 (inclusive).