



HIGH COURT OF AUSTRALIA

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Form 27E – Appellant’s reply

Note: see rule 44.05.5.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

The King
Appellant

and

AR
Respondent

APPELLANT’S REPLY

Part I: Internet Publication:

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

Part II: Reply

No difference in mode of reasoning where only charged acts or single source of evidence

2. The application of the principles explained in *Director of Public Prosecutions v Roder (a pseudonym)* (2024) 98 ALJR 644 (**Roder**) and *The Queen v Bauer (a pseudonym)* (2018) 266 CLR 56 (**Bauer**) and *JS v The Queen* [2022] NSWCCA 145 (**JS**) is not confined to only those cases where the evidence relied upon to establish the tendency includes conduct other than acts charged on the indictment: cf **Response [29], [32]-[34]**. The reference to “*charged and uncharged acts*” in [37] of *Roder* was made in the context of the issue in dispute in that case being whether different principles applied to uncharged acts in comparison with charged acts: *Roder* [1]-[2]; cf **Response [33]**.
3. At a level of principle, the reasoning process involved in tendency evidence does not alter depending on the evidence relied upon: cf **Response [6], [32] – [34]**. The rationale underpinning *Roder*, *JS* and *Bauer* is that tendency evidence is a species of circumstantial evidence, governed by the principles applicable to that category of evidence: *Roder* [23], [27]. Once that is accepted, there is no basis to assert a distinction in the process of reasoning that applies depending on the source of the evidence from which the inference is sought to be drawn.

4. Each act relied upon to form the basis of the asserted tendency may be considered an “*item of evidence*” in the circumstantial reasoning process at the tendency stage: see *Shepherd v The Queen* (1990) 170 CLR 573 at 579-580 (per Dawson J). The jury’s consideration of whether the tendency is established involves consideration of the whole of the evidence upon which the inference is sought to be drawn. If, upon the whole of that body of evidence, the asserted tendency is established then the intermediate fact of the accused’s tendency is a piece of circumstantial evidence taken into account in proof of the individual charge to which it relates: *Roder* [27]; *JS* [43]. For the reasons explained in *JS* and in *Roder*, this inferential reasoning process is not impermissible circular reasoning: AS [52]-[54]; cf **Response [32]**; J[98], [102] (CAB 189-190).
5. Accordingly, the mode of reasoning to be employed by the jury in assessing whether the tendency is established does not differ depending on whether the “*item of evidence*” relied upon to establish the tendency is reflected in a charge on the indictment or not: cf **Response [6], [29], [31], [33], [34]**. The example provided by Adamson JA in *Gardiner v R* [2023] NSWCCA 89¹ at [192] is illustrative of the flaw in such a contention. The process of reasoning described by the respondent at **Response [33]**, that “*the jury were engaging in a process of reasoning whereby they could look at the whole of the evidence, as part of a holistic process, in order to establish an intermediate fact namely, the existence of the alleged tendency and then employ the existence of the alleged tendency in considering guilt beyond reasonable doubt*” is the process engaged in irrespective of whether the “*item of evidence*” is a charged act or uncharged conduct.
6. Neither *Roder* nor *Hughes v The Queen* (2017) 263 CLR 338 (**Hughes**) supports the conclusion of the CCA that the reasoning process involved in tendency evidence will lead to impermissible circular reasoning where the tendency is sought to be established on the basis of acts charged on the indictment and is articulated with specificity in respect of the “particular way” the accused is said to have acted: cf **Response [31], [33]-[34]**. The respondent’s suggestion that *Roder* rejected only the proposition that tendency reasoning “*necessarily involve[s] circular reasoning*” (**Response [32]**, emphasis added) is an unduly limited characterisation.
7. The respondent’s contention that “the distinction drawn in *JS* at [43] between making findings as to conduct and making findings as to tendency falls away completely” in a case such as the present (i.e. a single complainant and only three incidents) overlooks that *JS* was itself a case involving a single

¹ Cited in *Roder* [27], footnote 43.

complainant and three incidents²: cf **Response [34]**. That was the very context in which Basten JA rejected the argument that the tendency reasoning in that case involved “linear” or “circular” reasoning: **Response [32]**. The process of reasoning is not “linear”, even where the tendency is sought to be established on evidence comprising only acts charged on the indictment, or on the basis of a limited number of incidents: cf **Response [34]**.

Misdirection

8. The conclusion at J[90]-[92] was inextricable from the conclusion that there had been a misdirection: cf **Response [21]**. The respondent’s suggestion that the conclusion of the CCA was not dependent on the misapplication of *Kanbut v The Queen* [2022] NSWCCA 259 (*Kanbut*) cannot be reconciled with the clear statement in J[105] that the conclusion as to misdirection was reached by “[a]pplying the relevant reasoning of *Beech-Jones CJ at CL in [Kanbut]*”: cf **Response [35]**; see also J[73] (CAB 181).
9. **Response [36] – [37]**, like the CCA judgment, elides the distinction between the tendency in *Kanbut* and that in this case. The flaw of the tendency in *Kanbut* was that proof of the indivisible tendency required proof of all acts (not some of them). The alleged tendency could not operate as evidence that on *another* occasion the accused had acted in accordance with the tendency asserted, because the tendency was only alleged to have manifested itself on a single occasion (the slavery counts): **AS [43]-[44]**.
10. As recognised at **Response [18]**, as well as the CCA at J[88] (CAB 187), the fact that a jury has been directed with a reference to anterior conduct findings does not necessarily amount to a misdirection on a matter of law, as made clear by *JS* itself. The assessment of whether there has been a misdirection requires an evaluation of the risk that the jury would not have properly understood the onus and standard of proof, having regard to the whole of the summing up in the trial that was had: *JS* [44]; *Roder* [37].³ That accepted principle applies even where there is a single complainant and only three incidents: cf **Response [28]**.⁴
11. The portion of the summing up extracted at **Response [16]** was followed by the trial judge explaining to the jury the distinction between their consideration of the alleged conduct in order to determine whether the tendency was established, and the reasoning process to be employed at the verdict stage in

² In *JS* two of the incidents were charged acts, and one was an uncharged act: *JS* [3]

³ See also *Huxley v The Queen* (2023) 98 ALJR 62 at [41]-[43] and *Hargraves v The Queen* (2011) 245 CLR 257 at [46] and [49] as to misdirection on a matter of law more generally.

⁴ Noting that *JS* was such a case.

the event that they were satisfied as to the existence of the tendency. The trial judge instructed the jury that they must not reason automatically having found the tendency established, and that finding the tendency established was insufficient to prove the guilt of the accused on each charge beyond reasonable doubt (SU 60; CAB 69). The trial judge reinforced to the jury (as part of the tendency direction) that even if satisfied that the tendency was established, they must consider whether each specific offence on the indictment was proved beyond reasonable doubt based upon all of the evidence relevant to that specific charge, which would include the established tendency (SU 60; CAB 69): see **AS [60]-[61]**.

Other matters in reply

12. In the trial of the respondent, the Crown did not rely on the evidence of the complainant as to each incident as either context or relationship evidence: cf **Response [10], [14]**.⁵ The only “cross-admissibility” of the evidence of each incident was as the tendency evidence. The assessment of whether there has been a misdirection on a matter of law, or a miscarriage of justice, requires a focus on the actual trial that was had: *Brawn v The King* (2025) 99 ALJR 872 at [11]; *Huxley v The Queen* (2023) 98 ALJR 62 at [43]. Further, to the extent that **Response [14]** is intended to suggest that, in cases where proof of the offence relies on the jury accepting the direct evidence of the complainant, the probative value of tendency evidence is limited to a credibility purpose, this ought not be accepted. The probative value of an established tendency lies in the extent to which it makes the complainant’s direct evidence of the offence more objectively probable: *Hughes* [16], [86]-[87], [98]; *Bauer* [50]-[51]. See also *Bauer* [55] in respect of the respondent’s reliance on *IMM v The Queen* (2016) 257 CLR 300 at [62].
13. The meaning to be attributed to the reasoning of the CCA at J [90]-[99] (CAB 187-189) is borne out by the judgment itself: cf **Response [21], [38]; AS [47] – [51]**. The CCA accepted that the departure from *Roder* did not necessarily amount to a misdirection and that regard must be had to the summing up, read as a whole (J[87]-[88]; CAB 186-187). As the CCA accepted, the summing up as a whole dealt appropriately and properly with the onus and the standard of proof (J[99]; CAB 189). In this context, the CCA identified that the fact that the asserted tendency was framed with specificity (that is, it “*replicated the detail*” of how the offences were committed: J[90]; CAB 187) was fundamental to

⁵ The only relationship or context evidence relied upon was the evidence of the text messages between the respondent and the complainant: see SU 58 (CAB 67), SU 65 (CAB 74), SU 69 (CAB 78), SU 71 (CAB 80), SU 82 (CAB 91). The Crown case is summed up by the trial judge at SU 82-86 (CAB 91-95) including the relationship evidence of the text messages.

the resolution of the ground (J[89]; CAB 187). The CCA distinguished the tendency in this case from one framed at a level of generality (that is, “*a tendency to have a sexual interest in the complainant/s...[and] act on that sexual interest.*”: J[89]; CAB 187). The CCA concluded that articulating a tendency with such specificity, while relying on the same body of evidence that was relied upon to prove the counts on the indictment, was “*inconsistent with the nature of tendency evidence*” (J[90], [92]; CAB 187, 188). On that basis, the CCA reasoned that even a tendency direction which accorded with *Roder* could not ameliorate the risk of the jury making findings about whether charged conduct occurred at the tendency stage in such circumstances (J[91]-[92]; CAB 187-188). The CCA concluded that the summing up “*was not designed to, and could not*” resolve the difficulties of a tendency framed with specificity which relied exclusively on charged conduct (J[99] CAB 189), difficulties which “*may well have supported a refusal to allow the use of tendency reasoning*” in the case (J[109]; CAB 192). The effect of the reasoning is to improperly preclude the Crown from relying on a tendency that is framed with specificity in any case where that tendency is sought to be inferred from charged acts alone: cf **Response [21], [38]**; see *JS* [39].

14. With respect to the mixed verdicts, it should not be accepted that “*the only way of explaining the verdicts of the jury is that the evidence concerning counts 1/2 was simply put to one side when the jury came to consider the question of tendency*”: cf **Response [40]**. It is also possible that the jury took into account the complainant’s evidence about the West Gosford incident (to an indeterminate standard) for tendency purposes, but did not find the offence proved beyond reasonable doubt given the qualitative difference in the evidence. In any event, the respondent’s argument in respect of the mixed verdict requires this Court to accept the argument that the evidence on counts 1 and 2 was “seriously problematic” (**Response [40]**) or “very frail” (**Response [8]**). While it is accepted that evidence on those counts was comparatively weaker than counts 3 – 7, the appellant maintains that it is not particularly unusual in child sexual assault matters that complaint may be delayed or staggered, or that a particular offence might be recalled after a memory is triggered by another event.⁶

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⁶ See, by way of example only: *Berntsen v R* [2023] NSWCCA 296 at [82], [110]; *AL v R* (2017) 266 A Crim R 1 at [24]-[27], [176]-[178]; *TO v R* (2017) 265 A Crim R 191 at [44], [69], [187], [220]-[221].