



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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Form 27F – Outline of oral submissions

Note: see rule 44.08.2.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

The King
Appellant

and

AR
Respondent

APPELLANT’S OUTLINE OF ORAL SUBMISSIONS**Part I: Publication**

1. This outline of oral submissions is in a form suitable for publication on the internet.

Part II: Outline of propositions to be advanced in oral argument

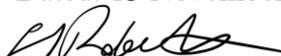
2. At the respondent’s trial, the Crown alleged that he had sexually offended against the 10-year-old daughter of his partner on three separate occasions. The circumstances on each occasion were very similar, involving the respondent sexually touching the complainant when she had fallen asleep on a lounge with him watching a movie: AS [11], [12], [17]-[18]; ABFM 8-22, 50-60. The Crown relied upon tendency evidence arising from the charged conduct only, articulated with specificity: ABFM 218-219; J[30]-[31] (CAB 167).
3. There was no dispute at trial that the tendency evidence was admissible: J[32]; CAB 168; ABFM 220. The grounds pleaded on appeal in the CCA concerned only the directions to the jury about the tendency evidence: CAB 148; J[4] (CAB 154-155).
4. The CCA correctly held that the direction given by the trial judge was “at odds with *Roder* at [37]” in that the trial judge directed the jury to “decide what conduct occurred” as part of the tendency direction (J[87], CAB 186). The CCA correctly accepted “that flaw [was] not necessarily fatal” (J[88], CAB 189), but ultimately held that there had been a miscarriage of justice occasioned by a misdirection of law (J[105], CAB 191): AS [30]-[31]. The appellant contends that the reasoning and conclusions of the CCA are inconsistent with authority of this

Court: *Director of Public Prosecutions v Benjamin Roder (a pseudonym)* (2024) 98 ALJR 644; *The Queen v Dennis Bauer (a pseudonym)* (2018) 266 CLR 56; *Hughes v The Queen* (2017) 263 CLR 338; AS [34]-[36], [42]-[54]; Reply [2], [6], [13].

5. Tendency evidence is a form of circumstantial evidence: *Roder* [23]-[24] (JBA 370). It involves a process of inferential reasoning, which is not circular reasoning: AS [41]; *Roder* [27] (JBA 371); *JS v R* [2022] NSWCCA 145 [43] (JBA 422); *Rassi v R* [2023] NSWCCA 119 [6] – [9] (JBA 575-576); cf [98], J[102] (CAB 189, 190).
6. 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 on the indictment: *Roder* [24] (JBA 370); *Hughes* [16] (JBA 174-175); AS [37]-[38]. Inferential reasoning will ordinarily have greater strength where a tendency is articulated with a degree of particularity: AS [40]; *Hughes* [64] (JBA 189).
7. Tendency reasoning is a form of reasoning which has significance beyond its capacity to bear on the credibility of the complainant: *Bauer* [50]-[51]; AS [39], [55]-[56]; cf Response [10]. It is well-established and not disputed by the respondent that it is open to the Crown to rely upon charged acts as tendency evidence: Response [2]. At a level of principle, the reasoning process involved in tendency evidence does not alter depending on the source of the evidence relied upon to establish the tendency, and whether the inference is sought to be drawn from charged conduct only (as distinct from a combination of charged and uncharged acts) or is from a single witness rather than multiple witnesses or sources of evidence: AS [52]-[54]; Reply [2]-[7]; cf. Response [6], [29], [31]-[34].
8. The CCA held that there was a “fundamental issue” created by the fact that the asserted tendency in the present case replicated the detail of how the offences were allegedly committed and relied exclusively on the same body of evidence relied upon to prove the offences themselves: J[89]-[90] (CAB 187). The CCA erroneously concluded that no direction could be given that did not invite impermissible circular reasoning in circumstances where a tendency is sought to be established upon evidence of only charged acts articulated with particularity: AS [52]-[54]; J[91] (CAB 187), J[95] (CAB 188), J[98] (CAB 189), J [102] (CAB 190), [105] (CAB 191), J[109] (CAB 192)

9. In so reasoning, the CCA effectively determined, contrary to *Roder* and *Bauer*, that it is not permissible for the Crown to rely upon tendency evidence arising only from charged acts: J[91] – [92] (CAB 187-188) and J[99] (CAB 189), J[102] (CAB 190), J[105] (CAB 191), J[109] (CAB 192); AS [51]-[52]. Further, the CCA misapplied the decision of the NSWCCA in *Kanbut v The King* [2022] NSWCCA 259 (JBA 426-461): AS [42] – [48], [55]-[56]; cf J[92], [95], [99], [102], [109] (CAB 187-190, 192). The effect of the judgment of the CCA is that a tendency to act in a particular way cannot be advanced on the basis of evidence of charged acts alone, 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 the same particular way on the charged occasions: AS [46]-[51]; J[89]-[99] (CAB 187-189), J[102], [105], [109] (CAB 190-192). This is inconsistent with principle as to the nature of the inferential or predictive reasoning involved in tendency evidence: AS [38], [40], [48]-[51], [56]; Reply [6]; *Hughes* [41], [64] (JBA 182-193, 189); *Bauer* [49] – [51] (JBA 335-336); cf. J[89] – [92] (CAB 187-188); J[98]-[99] (CAB 189); J[105] (CAB 191).
10. The erroneous reasoning of the CCA as to the framing of the tendency in this case was inextricable from the ultimate conclusion that there was a misdirection occasioning a miscarriage of justice: AS [57] – [60]; Reply [8]-[9], [13]; cf. Response [21], [38].
11. There was no misdirection of law occasioning a miscarriage of justice in the respondent’s trial: cf J[105] (CAB 191). The direction given departed from the approach in *Roder* at [37] (JBA 373). However, as the CCA accepted, the jury had been “appropriately and properly” directed about the onus and standard of proof: J[99] (CAB 189). In the course of the direction concerning the tendency evidence, the jury was clearly instructed that proof of any individual charge required the jury to determine whether the elements of that charge had been proved beyond reasonable doubt (CAB 67-69). Having regard to the whole of the summing up, the jury was not deflected from its fundamental task: AS [60]-[63]; Reply [10]-[11]; CAB 14-16, 32, 67-69.

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