



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

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: This outline is in a form suitable for publication on the internet.

Part II:

1. The critical issue at trial was the reliability and credibility of the complainant and whether her evidence could be accepted beyond reasonable doubt (**RS**¹ [9]). Regardless of tendency, the whole of her account, including the alleged offences, was inter-admissible as is clear from the Crown's opening and closing addresses and the trial judge's summing up (**RBFM 2-4, 37-39, CAB 39, 76; RS [10]; cf. AR [12]**).
2. The tendency was articulated by reference to the particular circumstances of the charged acts and the only evidence of the tendency was the charged acts (**ABFM 218**).
3. The Crown's articulation of tendency reasoning in opening and closing employed linear reasoning (**RBFM 12, 43**). This was endorsed in the directions (see below at [4]). The Crown's approach: prove offence A, B and C (taken together) occurred at some standard below beyond reasonable doubt, to infer a tendency to commit offences of the description of A, B and C, to make it more likely the accused committed offences A, B

¹ In this Outline the **CCA** is the NSW Court of Criminal Appeal, **AS** is the Appellant's Submissions, **RS** is the Respondent's Submissions, **AR** is the Appellant's reply, **CAB** is the Core Appeal Book, **ABFM** is the Appellant's Book of Further Materials, **RBFM** is the Respondent's Book of Further Materials and **JBA** is the Joint Book of Authorities.

-2-

and C, and therefore prove the accused committed each of the offences A, B and C beyond reasonable doubt.

4. The directions to the jury on tendency evidence were erroneous (**CAB 67-69**):
 - a. The directions required the jury to make findings as to conduct the subject of the charges (cf. *Director of Public Prosecutions v Benjamin Roder (a pseudonym)* [37] (*Roder*) **JBA Vol 4 373**; *JS v R* [2022] NSWCCA 145 (*JS*) [43] **JBA Vol 4 422**).
 - b. The directions outlined impermissible “linear reasoning” (*JS* [43] **JBA Vol 4 422** adopted in *Roder* at [26] **JBA Vol 4 371**).
 - c. The tendency articulated coincided precisely with conduct the subject of the charges and relied on satisfaction of the particular charged act/acts (contra *Kanbut v R* [2022] NSWCCA 259 [63]-[64] **JBA Vol 4 451**).
 - d. Conduct constituting the offences was to be considered (in combination) for tendency purposes but to be established at some standard lower than beyond reasonable doubt. In the circumstances of this case, at the very least, this meant there was a substantial risk of undermining the necessity for proof of the charge beyond reasonable doubt (cf. *Roder* [27], [28] **JBA Vol 4 371**; *New v R* [2025] NSWCCA 32 [276] **JBA Vol 4 549-550**; **RS [34]**).
 - e. The direction contemplated tendency from satisfaction of “some of the conduct” which meant the approach in [3] above might just become A and B or just A.
 - f. The jury were told that if they were not satisfied of any conduct, they were to put the issue to one side (contra *Kanbut* [68] **JBA Vol 4 453**). If this was the case, then the respondent would be entitled to an acquittal.
 - g. If the jury were satisfied of the conduct (taken in combination) it followed that the tendency would be established and the tendency made it more likely the offences charged were committed. However, given the alignment between the tendency and the particulars of the charged acts and its proof solely via proof of the offences, it is difficult to see why this would not be conclusive. There would be nothing further for the jury to consider.
 - h. The directions permitted the jury to use a finding that the accused committed one or two of the charged acts to consider whether it was “more likely” the accused committed one or two of the charged acts.

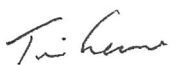
-3-

- i. The directions presented tendency reasoning as somehow independent/objective evidence supporting the complainant's credibility when in fact it depended on her evidence and hence her credibility (cf. **AR [12]**). In the directions on counts 1/2 and counts 3-7 tendency was included as if it was a discrete body of evidence (**CAB 69, 75, 81**).

Miscarriage of justice

5. The CCA was correct to conclude there was a miscarriage of justice (**RS [17]-[19]**; cf. **AS [57]-[63]**). It is common ground that the directions were contrary to *Roder* (CCA [87] **CAB 186**; **RS [18]**; **AS [33]**).
6. The risk of the misapplication of the standard of proof in this case was most acute given the framing of the tendency and the use of the evidence of solely charged acts from a single complainant in support of the tendency (**RS [39]**).
7. Subject to framing the tendency in a manner that would avoid linear reasoning, a direction in accordance with *Roder* would have addressed the flaws in directing the jury as they were in this case and would not have given the tendency inappropriate weight.
8. In this case there was no need to frame the tendency in a way that aligned precisely with the charged acts and the strength of the case lay in the circumstantial use of the incidents in respect of each other and not their separate use as tendency evidence.
9. The acquittals on counts 1/2 are not a reliable indicator that the jury properly applied the standard of proof given the unique frailties of the evidence on those counts (CCA [17]-[20], [26] **CAB 159-164**; CCA [102] **CAB 190**; **RS [40]**; cf. **AS [62]** and **AR [14]**).
10. In fact, the acquittals increased the risk the standard of proof would be undermined as it meant the jury were likely left with only two incidents as evidence of the tendency (**RS [40]**). Thus, the reasoning at [3] would be based only on two incidents.

Dated: 13 November 2025


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