HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

THE QUEEN APPELLANT

AND

DENNIS BAUER (A PSEUDONYM) RESPONDENT

The Queen v Dennis Bauer (a pseudonym)
[2018] HCA 40
12 September 2018
M1/2018

ORDER

1. *Appeal allowed.*

2. *The application for leave to cross-appeal be refused.*

3. *Set aside orders 2, 3 and 4 made by the Court of Appeal of the Supreme Court of Victoria on 30 June 2017 and, in their place, order that the appeal to that Court be dismissed.*

On appeal from the Supreme Court of Victoria

Representation

B F Kissane QC with B L Sonnet for the appellant (instructed by Solicitor for Public Prosecutions (Vic))

C A Boston with P J Smallwood for the respondent (instructed by Doogue + George)

CATCHWORDS

The Queen v Dennis Bauer (a pseudonym)

Evidence – Criminal trial – Sexual offences with child under 16 years – Tendency evidence – Admissibility – Severance – Where evidence of complainant as to 17 sexual acts and several uncharged sexual acts admitted as tendency evidence – Where evidence of third party as to Charge 2 admitted as tendency evidence – Whether evidence of complainant and third party admissible as tendency evidence – Whether evidence of each charged act and uncharged act cross-admissible as tendency evidence in proof of each charge – Whether tendency evidence had significant probative value – Whether possibility of risk of contamination, concoction or collusion relevant to determination of probative value – Whether probative value substantially outweighed any prejudicial effect – Whether tendency notice defective – Whether Charge 2 should have been severed from indictment.

Evidence – Criminal trial – Recording of evidence – Admissibility – Where evidence of complainant recorded at previous trial admitted – Where prosecutor told court that complainant had strong preference not to give evidence at trial based on advice from counsellors – Where defence counsel did not challenge complainant's preference not to give evidence – Whether in interests of justice to admit recording.

Evidence – Criminal trial – Hearsay – Admissibility – Where complainant made representations to third party that she was sexually assaulted by respondent – Where representations made in response to leading questions from third party – Where inconsistencies between complainant's representations and other evidence given by complainant – Whether occurrence of asserted facts fresh in complainant's memory at time of representations – Whether probative value of evidence outweighed by danger of unfair prejudice.

Words and phrases – "charged act", "collusion", "complaint", "concoction", "contamination", "credibility", "cross-admissible", "discreditable acts", "fresh in the memory", "improper prejudice", "jury directions", "previously recorded evidence", "propensity", "recording", "reliability", "severance", "sexual attraction", "sexual interest", "sexual offence", "significant probative value", "single complainant", "special feature", "tendency", "uncharged act", "unfair prejudice", "willingness".

Criminal Procedure Act 2009 (Vic), ss 194, 379, 380, 381, 385.
Evidence Act 2008 (Vic), ss 66, 97, 99, 101, 135, 137.
Jury Directions Act 2015 (Vic), ss 61, 62.
Evidence Regulations 2009 (Vic), reg 7.

1 KIEFEL CJ, BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ. Following the last of a number of retrials before the County Court of Victoria at Melbourne, the respondent was found guilty and convicted of 18 charges of sexual offences committed against the complainant ("RC") over a period of approximately 11 years between 1988 and 1998. He was sentenced therefor to nine years and seven months' imprisonment with a non-parole period of seven years. He appealed against conviction to the Court of Appeal of the Supreme Court of Victoria (Priest, Kyrou and Kaye JJA) on four grounds of appeal, all of which were upheld[1].

2 The Court of Appeal held[2] that the trial judge had erred in admitting a recording of RC's evidence at a previous trial pursuant to s 381 of the *Criminal Procedure Act* 2009 (Vic); erred in admitting evidence of the charged acts and evidence of a number of uncharged acts, pursuant to s 97 of the *Evidence Act* 2008 (Vic), as tendency evidence; erred in failing to sever Charge 2 and order that it be tried alone; and erred in admitting evidence, pursuant to s 66 of the *Evidence Act*, of representations made by the complainant to a third party. Their Honours quashed the convictions and ordered that a new trial be had.

3 By special leave granted by Gageler, Gordon and Edelman JJ, the Crown now appeals to this Court. For the reasons which follow, the appeal should be allowed.

Relevant statutory provisions

Criminal Procedure Act

4 Section 194(2) of the *Criminal Procedure Act* creates a presumption that if two or more charges for sexual offences are joined in the same indictment those charges are to be tried together. Section 194(3) provides that that presumption is not rebutted merely because evidence of one charge is inadmissible on another charge.

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1 *Dennis Bauer (a pseudonym) (No 2) v The Queen* [2017] VSCA 176.

2 *Dennis Bauer (a pseudonym) (No 2) v The Queen* [2017] VSCA 176 at [42], [83], [99]-[100], [112]-[113].

5 Section 379 provides in substance and so far as is relevant that, subject to s 381, a recording of a complainant's evidence is admissible in evidence at trial, and at any new trial, as if its contents were the direct testimony of the complainant. Section 380 provides in substance that the prosecution must give notice to the accused and the court of any intention to tender such a recording.

6 Section 381 provides that:

> "(1) The court may admit a recording of the evidence of the complainant if it is in the interests of justice to do so, having regard to—
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> (a) whether the complainant's recorded evidence is complete, including cross-examination and re-examination;
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> (b) the effect of editing any inadmissible evidence from the recording;
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> (c) the availability or willingness of the complainant to give further evidence;
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> (d) whether the accused would be unfairly disadvantaged by the admission of the recording;
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> (e) any other matter that the court considers relevant.
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> (2) The court may admit the whole or any part of the contents of a recording and may direct that the recording be edited or altered to delete any part of it that is inadmissible."

7 Section 385 provides so far as is relevant that:

> "(1) ... if a recording of the evidence of the complainant is admitted into evidence in a proceeding, the complainant cannot be cross-examined or re-examined without leave.
>
> (2) A court must not grant leave to cross-examine a complainant unless the court is satisfied that—

(a) the accused is seeking leave because of becoming aware of a matter of which the accused could not reasonably have been aware at the time of the recording; or

(b) if the complainant were giving direct testimony in the proceeding, the complainant could be recalled, in the interests of justice, to give further evidence; or

(c) it is otherwise in the interests of justice to permit the complainant to be cross-examined or re-examined."

Evidence Act

8 At relevant times, s 66 of the *Evidence Act* relevantly provided that:

"(1) This section applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.

(2) If that person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by—

(a) that person; or

(b) a person who saw, heard or otherwise perceived the representation being made—

if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

(2A) In determining whether the occurrence of the asserted fact was fresh in the memory of a person, the court may take into account all matters that it considers are relevant to the question, including—

(a) the nature of the event concerned; and

(b) the age and health of the person; and

(c) the period of time between the occurrence of the asserted fact and the making of the representation.

Note

Subsection (2A) was inserted as a response to the decision of the High Court of Australia in *Graham v The Queen* (1998) 195 CLR 606."

9 Section 97 provides so far as is relevant that:

"(1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless—

(a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and

(b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value."

10 Pursuant to s 99, notices given under s 97 are to be given in accordance with any regulations or rules made for the purposes of the section. Relevantly, reg 7 of the Evidence Regulations 2009 (Vic) provides that a notice must state, so far as is relevant:

"(1) For the purposes of section 99 of the Act, a notice given under section 97(1)(a) of the Act (relating to the tendency rule) must state—

(a) the substance of the evidence that the notifying party intends to adduce, and

(b) if that evidence consists of, or includes, evidence of the conduct of a person, particulars of—

(i) the date, time and place at and the circumstances in which the conduct occurred; and

(ii) the name of each person who saw, heard or otherwise perceived the conduct".

11 Section 101 relevantly provides that:

"(1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.

(2) Tendency evidence about an accused ... that is adduced by the prosecution cannot be used against the accused unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the accused."

12 Section 135 provides so far as is relevant that:

"The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might—

(a) be unfairly prejudicial to a party; or

(b) be misleading or confusing; or

(c) cause or result in undue waste of time; or

(d) unnecessarily demean the deceased in a criminal proceeding for a homicide offence."

13 Section 137 provides that:

"In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the accused."

The Crown case at trial

14 The Crown case at trial was that, in or about 1985 or 1986, the Department of Human Services placed RC, who was then a child of two years of age, and her younger half-sister ("TB") with the respondent and his then wife as

foster parents. RC and TB came to regard the respondent and his wife as parents and called them dad and mum. Thereafter:

(1) Between 1 January 1988 and 15 January 1989, when RC was about five years of age and the respondent and RC were in the lounge room, the respondent placed RC's hand on his penis (Charge 1: indecent assault). It was an aggravating circumstance of the offence that the respondent also played RC a pornographic video and penetrated RC's vagina with his finger.

(2) Between 1 January 1990 and 31 December 1992, when RC was about seven years of age and the respondent and TB were together in the bath, RC came into the bathroom and the respondent placed RC's hand on his penis (Charge 2: indecent assault).

(3) Between 16 January 1990 and 31 December 1992, when RC was between seven and nine years of age and the family were travelling in the family van – the respondent's wife driving, TB seated in the next row and the respondent seated in the last row, next to RC – the respondent under cover of a blanket rubbed RC's vagina and placed her hand on his penis (Charges 3 and 4: indecent assault).

(4) Between 16 January 1991 and 15 January 1993, when RC was about eight years of age, the respondent took her into his bedroom and licked her vagina (Charge 14: indecent assault) while simultaneously inserting his penis into her mouth (Charge 15: sexual penetration of a child under 10). It was an aggravating circumstance of those offences that the respondent also made RC suck his scrotum.

(5) Between 1 January 1991 and 31 December 1992, when RC was eight to nine years of age and sleeping in TB's bed alone, the respondent touched RC's vagina (Charge 5: indecent assault) and attempted to insert his penis into her vagina (Charge 6: attempted sexual penetration of a child under 10).

(6) Between 1 January 1991 and 31 December 1992, when RC was around eight years of age and in the respondent's bedroom, the respondent showed RC pornographic photographs and then put her hand on his penis and made her masturbate him until he ejaculated

on her stomach (Charge 7: indecent assault). It was an aggravating circumstance of the offence that the respondent also touched the inside and outside of RC's vagina.

(7) Between 16 January 1992 and 15 January 1993, when RC was nine years of age – the respondent's mother being present but elsewhere in the house – the respondent rubbed RC's vagina as she lay ill in her bed in her bedroom (Charge 8: indecent act with a child under 16).

(8) Between 16 January 1992 and 15 January 1994, when RC was nine or ten years of age, the respondent rubbed RC's vagina as he drove home on his tractor with RC (Charge 9: indecent act with a child under 16).

(9) Between 16 January 1992 and 15 January 1994, when RC was between nine and 11 years of age, the respondent committed four acts of sexual penetration of RC on a single occasion while the respondent and RC were in the respondent's work truck at a property away from home: (1) he inserted his finger into RC's vagina (Charge 10: sexual penetration of a child under 16); (2) he inserted his tongue into RC's vagina (Charge 11: sexual penetration of a child under 16); (3) he inserted his finger into RC's vagina a second time (Charge 12: sexual penetration of a child under 16); and (4) he inserted his penis into RC's mouth until he ejaculated, making RC swallow the ejaculate (Charge 13: sexual penetration of a child under 16).

(10) Between 16 January 1994 and 15 January 1995, when RC was 11 years of age, the respondent, while the respondent and RC were in his work van at his work premises, rubbed his penis against RC's vagina until he ejaculated on her stomach (Charge 16: indecent act with a child under 16).

(11) When RC was 12 years of age, the respondent's then wife told the Department of Human Services that she could no longer deal with what she described as RC's behavioural problems, and RC was removed from the respondent's care. When RC was 13 years old, she returned to the respondent's home on one occasion to visit TB (who had remained in the respondent's care). On that occasion,

which was between 16 January 1996 and 15 January 1997, the respondent put his finger into RC's vagina as she lay in bed in the spare room (Charge 17: sexual penetration of a child under the respondent's care, supervision or authority). The respondent also put RC's hand on his penis although that was not charged as an offence.

(12) Between 15 December 1998 and 17 December 1998, when RC was 15 years of age, she again visited the respondent's home to see TB, and, on that occasion, the respondent touched RC's vagina over her clothing (Charge 18: indecent act with a child under 16). RC gave evidence that the respondent grabbed her, told her that he wanted to kiss her like a boyfriend, pulled his pants down to show her his erect penis, and said to her: "This is what you do to me".

15 It is to be noted that Charge 2 was different from the other charges in that TB was the only prosecution witness to the offence. In the case of each of the other charges, RC was the only prosecution witness.

The defence case at trial

16 When first interviewed by the police in 2000, the respondent denied RC's allegations. By the time of the last trial, the record of interview had been lost or destroyed. When interviewed again in 2011, the respondent declined to comment. The defence case at trial was that the alleged conduct did not occur. The respondent did not give or call evidence but put the Crown to proof.

The trial judge's rulings

(i) Previously recorded evidence

17 Prior to trial, the Crown gave notice to the respondent and the court under s 380 of the *Criminal Procedure Act* that it intended to apply to tender a recording of RC's evidence from the most recent previous trial, and, in the course of pre-trial argument, it made an oral application to do so. Specifically, the prosecutor stated from the Bar table that, based on the advice of counsellors and others, RC had a strong preference not to give evidence at trial if at all possible. Over objection, the trial judge (Judge Sexton) allowed the application on the basis that the admission of the recording was in the interests of justice and would

not unfairly disadvantage the respondent. Defence counsel did not make a separate application under s 385 for leave further to cross-examine RC.

(ii) Tendency evidence

18 Prior to trial, the Crown also gave notice, in accordance with s 99 of the *Evidence Act*, of its intention to adduce the following evidence, pursuant to s 97 of the *Evidence Act*, as tendency evidence, in order to establish that the respondent had a sexual interest in RC and a willingness to act upon it:

(1) evidence of RC of the acts comprising Charges 1 and 3 to 18;

(2) evidence of TB of the act comprising Charge 2;

(3) evidence of RC of the following uncharged acts:

(a) on a number of occasions between 15 December 1998 and 17 December 1998, when RC returned to the respondent's home, the respondent brushed up against her and grabbed her breasts and vagina on the outside of her clothing;

(b) on one occasion between December 1994 and January 1995, when RC was nearly 12 years of age, the family drove to Port Macquarie and stayed with one of the respondent's relatives, and one night in RC's bedroom the respondent rubbed RC's vagina and inserted his finger into her vagina;

(c) on a few occasions when RC was around nine years of age, the respondent made her suck his penis while he wore a condom;

(d) on numerous occasions when RC was living in the respondent's home, the respondent played pornographic videos to RC and got her to copy what was happening in the videos. That included putting his penis into her mouth, penetrating her vagina with his finger and licking her vagina;

(e) on various, frequent occasions while RC was living in the respondent's home, when she was in the bathroom undressed, either in the bath or having a shower, the

respondent used to look at her through a hole in the door and poke his tongue through the hole;

(f) on various, frequent occasions abuse occurred when RC was alone; and

(4) evidence of TB of an uncharged act said to have occurred between 1992 and 1993, at the respondent's home, when TB got up in the middle of the night to go to the bathroom and took a few steps into RC's room intending to pass through it to the bathroom and saw the respondent in RC's bed on top of RC moving up and down[3]. When she asked: "What are youse doing?", the respondent yelled at her: "Get into fucken bed".

19 In addition, the Crown relied on evidence of TB that, on an occasion when the family was in Port Macquarie, TB was in bed in her foster parents' bedroom when she heard mumbling voices or noises in the next room which she identified as RC's voice and another, deeper voice. The Crown did not rely on that evidence as tendency evidence but as generally supporting RC's account of the uncharged act described in (3)(b) above.

20 Over objection, the trial judge ruled that the evidence listed in the s 97 notice was admissible as tendency evidence. After hearing detailed argument, her Honour delivered a considered ruling which included extensive analysis of the decisions of the Court of Appeal of the Supreme Court of Victoria in *JLS v The Queen*[4], *MR v The Queen*[5], *PCR v The Queen*[6], *Velkoski v The Queen*[7] and *Gentry v Director of Public Prosecutions (Vic)*[8], and of the decision of this Court

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3 The evidence was that TB saw the respondent on top of RC moving "backwards and forwards".

4 (2010) 28 VR 328.

5 [2011] VSCA 39.

6 (2013) 235 A Crim R 302.

7 (2014) 45 VR 680.

8 (2014) 244 A Crim R 106.

in *HML v The Queen*[9]. In accordance with the process of tendency reasoning explicated in those decisions, her Honour held that, because all of the acts of which it was proposed to give evidence as tendency evidence were committed against the one complainant, it was unnecessary that those acts be of a similar kind:

> "[T]he primary similarity in this case is that each act of sexual contact involves the same complainant, thereby demonstrating a particular ongoing sexual interest in the complainant. In such circumstances the relationship is the operative factor.
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> ...
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> In summary, insofar as a single complainant trial is concerned, the principles for the reception of evidence as tendency evidence outlined in *JLS* have been confirmed in *Velkoski*, *MR*, *PCR*, and *Gentry*. These include that the relationship between the accused and the complainant is important; it is not necessary for the acts relied on to be identical or have highly similar features for the evidence to be admissible as tendency [evidence] or be close in time to each other; and if the proposed evidence meets the test for tendency evidence, it is preferable that the charged acts are not excluded." (footnotes omitted)

The trial judge further observed, however, that if she were wrong in that conclusion, there were in fact features of commonality, or, as her Honour put it, "considerable overlap", comprised of the following:

> "There are 18 charged acts, but on four occasions, there are a number of charges occurring during the same event (Charges 3 and 4, Charges 5 and 6, Charges 10 through to 13 and Charges 14 and 15) while on four occasions, there are uncharged acts alleged to have taken place during the same event as charged acts ...
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> As a result of this analysis it can be seen that there are multiple allegations of masturbation of the accused by RC, and by the accused in her presence; of the accused rubbing RC's vagina under and over her clothing; of digital penetration by the accused of RC's vagina; of rubbing

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9 (2008) 235 CLR 334; [2008] HCA 16.

> his penis on the outside of RC's vagina including one attempted penile penetration; of penetration by his penis on RC's mouth; of licking her vagina; of touching her breasts; of kissing RC using his tongue; and of ejaculation in her presence. The only act which 'stands alone' is that of licking her breast, an uncharged act particularised to have occurred along with other sexual conduct during the act alleged as Charge 17.
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> ...
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> In my view, [the] dissimilarities do not diminish the probative value of [the] proposed tendency evidence, because each piece involves the same complainant, and each involve[s] the accused having access to the complainant through his position as her foster father. I find that the totality of the tendency evidence proposed to be led from RC is capable of demonstrating an ongoing sexual interest in her, and as such could, if accepted, enhance the probability of the charged acts having occurred. Further, the range of sexual acts and the time over which they are alleged to have been committed is capable of demonstrating a pattern of conduct engaged in by the accused in fulfilling his ongoing sexual interest."

21 Having so concluded, the trial judge turned to whether the probative value of the tendency evidence to be led from RC substantially outweighed its prejudicial effect. Her Honour held that it did:

> "Any prejudice is due to the inculpatory nature of the tendency evidence and is not unfair prejudice. The proposed tendency evidence goes to proof of the fact in issue in each charge and will not distract the jury from its task, and clear directions ... will ensure that there is no substitution of the tendency evidence for the charged acts and no impermissible reasoning towards guilt." (footnote omitted)

22 In a separate, further ruling, the trial judge held that, for similar reasons and because she was satisfied that there was no real possibility of contamination or collusion, the evidence of TB of Charge 2 and of the uncharged act of which it was proposed that TB give evidence would also be of significant probative value sufficient substantially to outweigh any prejudicial effect that it might have. As her Honour put it:

> "the evidence to be given by TB provides independent evidence of the accused's tendency; independent in the sense that it is from a source other

than the complainant. If the evidence from the same source – the complainant – can have a 'powerful probative effect', then evidence from another person of observations tending to show the same tendency must be of equal, if not greater probative effect.

... TB's evidence is direct evidence of the allegation comprising Charge 2, and provides general support for RC's account on other charges through the probability reasoning process. It is not necessary for its admissibility that RC also give evidence of the particular occasion. ...

Further, the significant probative value of the evidence of TB seeing the accused in bed on top of RC is not reduced because it is not known exactly what the accused is alleged to have been doing. As I have said, the proposed tendency evidence is to be considered in light of other evidence to be adduced. In combination with the other alleged sexual misconduct, if accepted, the observation by TB of the accused in such circumstances is clearly capable of founding an inference that he was acting upon his sexual interest for RC. TB's evidence overall has the potential to provide corroboration in the nature of independent evidence of the accused's specific tendency to have a sexual interest in RC." (footnotes omitted)

23 Thereafter, in a third ruling[10], published shortly after publication of this Court's decision in *IMM v The Queen*[11] and after hearing argument on the effect of *IMM*, the trial judge dealt specifically with the plurality's remark in *IMM* that[12]:

"without more, it is difficult to see how a complainant's evidence of conduct of a sexual kind from an occasion other than the charged acts can be regarded as having the requisite degree of probative value."

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10 *Director of Public Prosecutions v Dennis Bauer (a pseudonym) No 2 ruling No 4* [2016] VCC 1517.

11 (2016) 257 CLR 300; [2016] HCA 14.

12 *IMM v The Queen* (2016) 257 CLR 300 at 318 [62] per French CJ, Kiefel, Bell and Keane JJ.

24 As her Honour observed[13], relevantly *IMM* concerned evidence of only one uncharged act sought to be adduced in addition to evidence of a number of charged acts, where the evidence of the one uncharged act and the evidence of the charged acts was given by the complainant alone. By contrast, as her Honour stated in relation to the proposed tendency evidence of RC[14]:

> "[I]n the case before me: the evidence of other conduct of a sexual kind came from a source other than the complainant for charge 2 and so is not uncharged, and the evidence of TB as to an uncharged act in [the respondent's home] is also from a source other than the complainant.
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> ...
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> Having regard to the fact that the evidence adduced to show the accused's sexual interest came from a witness other than the complainant, and to the fact that further supporting non-tendency evidence was derived from a source other than the complainant, I think that the tendency evidence where the complainant was the source did have a significant capacity to rationally affect the probability that her account of the charged acts, other than charge 2, was true." (footnotes omitted)

25 In relation to the proposed tendency evidence of TB, her Honour stated[15]:

> "I remain satisfied that there was a high degree of probative value in TB's evidence, as it had a significant capacity to support the credibility of RC's account that the accused sexually abused her on the occasions the subject of the charges. Indeed, one of the acts is itself the subject of a charge (charge 2). While it was direct evidence for that charge, that did not prevent its use as tendency evidence for the charges for which RC gave evidence. Together with the other act relied on as tendency, TB's

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13 *Director of Public Prosecutions v Dennis Bauer (a pseudonym) No 2 ruling No 4* [2016] VCC 1517 at [18].

14 *Director of Public Prosecutions v Dennis Bauer (a pseudonym) No 2 ruling No 4* [2016] VCC 1517 at [35], [37].

15 *Director of Public Prosecutions v Dennis Bauer (a pseudonym) No 2 ruling No 4* [2016] VCC 1517 at [26].

> proposed evidence reached the required degree of probative value, as I found TB's evidence had the capacity to show that the accused had a sexual interest in RC, thereby having the capacity to support RC's credibility when she made those allegations in her evidence. A jury could rationally conclude that RC's account of charged acts of sexual misconduct was truthful, because TB gave an account that showed that on other occasions, the accused exhibited sexual interest in RC and was willing to act on it."

26 Accordingly, the trial judge affirmed[16] her earlier rulings that the tendency evidence of RC and TB was admissible, and thereafter the tendency evidence was received at trial in accordance with those rulings.

(iii) Severance

27 Prior to trial, as part of the respondent's objection to the admissibility of the tendency evidence, the respondent contended that Charge 2 should be severed from the indictment and tried alone. The trial judge rejected the argument on the basis that, because she was satisfied that TB's evidence taken in conjunction with the other evidence of charged and uncharged acts was of high probative value and not productive of improper prejudice, the presumption as to joinder in s 194(2) of the *Criminal Procedure Act* was not rebutted.

(iv) Complaint evidence

28 Finally, prior to trial, the Crown stated that it intended to call evidence, pursuant to s 66 of the *Evidence Act*, that, during the holiday period between December 1997 and January 1998 when RC was in Year 8 at school, RC moved into the home of a school friend ("AF") and thereafter lived with AF and her family until RC completed Year 12. Shortly after moving in, RC had a conversation with AF in which AF was required to guess what had allegedly occurred between the respondent and RC, which ultimately led to RC disclosing to AF that she had been sexually assaulted by the respondent.

29 The respondent objected on grounds which included that the matters to which RC referred in her conversation with AF would not have been fresh in

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16 *Director of Public Prosecutions v Dennis Bauer (a pseudonym) No 2 ruling No 4* [2016] VCC 1517 at [26]-[28], [38]-[40].

RC's memory at the time of the conversation and, therefore, that AF's evidence did not satisfy the requirements of s 66(2)(b) of the *Evidence Act*. It was further contended that the evidence was so "vague" that its probative value was significantly outweighed by the prejudice it would cause the respondent. The trial judge did not deliver a detailed ruling but nevertheless rejected those contentions and AF's evidence was received.

The Court of Appeal's reasoning

30 The basis of the respondent's appeal to the Court of Appeal was that the trial judge erred in each of her rulings.

(i) Previously recorded evidence

31 The Court of Appeal accepted[17] that the recording of RC's evidence was complete and included a cross-examination which had been conducted with "conspicuous competence". The Court of Appeal appear also to have accepted that the respondent was not otherwise unfairly prejudiced by the admission of the recording. But the Court of Appeal held[18] that it had not been shown that RC was "unwilling" to give evidence within the meaning of s 381(1)(c) of the *Criminal Procedure Act*, and, therefore, that a condition of admissibility had not been established. In their Honours' view, the statement that RC preferred not to give evidence did not mean that she was unwilling to do so, and, in any event, the trial judge had erred by proceeding on the basis of the prosecutor's statement as to RC's attitude towards giving evidence rather than insisting on evidence of RC's disposition:

> "Self-evidently, a 'preference' not to give evidence is not unwillingness to do so. As a matter of ordinary language – and in context – 'willingness' is preparedness to do something – that is, give further evidence – and a complainant is unwilling if he or she is not so prepared. By way of contrast, a person has a 'preference' if he or she considers one course to be more agreeable than another. It is unsatisfactory that the prosecutor simply asserted from the Bar table that the complainant had a preference not to give evidence. Evidence in

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17 *Dennis Bauer (a pseudonym) (No 2) v The Queen* [2017] VSCA 176 at [38]-[39].

18 *Dennis Bauer (a pseudonym) (No 2) v The Queen* [2017] VSCA 176 at [41]-[42].

proper form that there was an absence of 'willingness' on the part of the complainant was required (assuming, of course, no concession was forthcoming from the [respondent])."

32 Their Honours found it unnecessary to reach a final view as to whether a substantial miscarriage of justice had occurred solely as a result of the trial judge's error in admitting the recording[19].

(ii) Tendency evidence

33 The Court of Appeal appear to have accepted[20] that the trial judge's approach to tendency evidence accorded with the Court of Appeal's reasoning in *JLS*, and thus *MR*, *PCR*, *Velkoski* and *Gentry*, and so also with this Court's reasoning in *HML*. But the Court of Appeal held[21] that the proper approach to the admissibility of tendency evidence had since been significantly qualified by the plurality's remark in *IMM* as to the limited probative value of a complainant's evidence of an uncharged act in proof of charged acts and by the majority's reasoning in *Hughes v The Queen*[22] regarding particular features of the offending in that case. The Court of Appeal thus proceeded on the basis that a complainant's evidence of uncharged sexual acts is no longer to be regarded as having significant probative value in proof of charged sexual acts unless there are special features of the complainant's account. In the view of the Court of Appeal, RC's evidence was devoid of any such special features, and so was inadmissible[23].

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19 *Dennis Bauer (a pseudonym) (No 2) v The Queen* [2017] VSCA 176 at [42].

20 *Dennis Bauer (a pseudonym) (No 2) v The Queen* [2017] VSCA 176 at [65]-[66].

21 *Dennis Bauer (a pseudonym) (No 2) v The Queen* [2017] VSCA 176 at [55], [69], [75], [79].

22 (2017) 92 ALJR 52; 344 ALR 187; [2017] HCA 20.

23 *Dennis Bauer (a pseudonym) (No 2) v The Queen* [2017] VSCA 176 at [81].

34 For the same reason, the Court of Appeal held[24] that TB's evidence was inadmissible:

> "The alleged offending in this case occurred over the course of a decade. RC was aged four or five years at the start of that period and 15 at the end of it. TB's evidence was that on an occasion in 1990, when RC was aged about six or seven years, the [respondent] placed RC's hand on his penis. TB also gave evidence that in 1992 or 1993 she got out of bed to go to the toilet, and, when she stepped into RC's room, she saw the [respondent] in RC's bed under the blankets on top of RC moving up and down. RC gave no evidence of either of these alleged events. In our view, whether considered by itself, or in combination with the evidence of RC, TB's evidence did not possess significant probative value. The single event in 1990 when the [respondent] was said to have placed RC's hand on his penis was too isolated to establish the relevant tendency, even when considered with the other evidence; and the evidence of what TB allegedly saw in RC's bedroom in 1992 or 1993 was too vague to establish the tendency alleged, either alone or in combination. Certainly there is no unusual feature (as there was in *Hughes*) which would take TB's evidence beyond that of mere propensity or disposition."

35 On those bases, the Court of Appeal concluded[25] that a substantial miscarriage of justice had been occasioned by the admission of RC's and TB's evidence as tendency evidence.

(iii) Severance

36 The Court of Appeal further held[26] that, because TB's evidence of Charge 2 was not cross-admissible in relation to the other charges, it had been productive of unfairness to the respondent to try Charge 2 with the other charges, and, therefore, that Charge 2 should have been severed and tried alone.

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24 *Dennis Bauer (a pseudonym) (No 2) v The Queen* [2017] VSCA 176 at [82].

25 *Dennis Bauer (a pseudonym) (No 2) v The Queen* [2017] VSCA 176 at [83].

26 *Dennis Bauer (a pseudonym) (No 2) v The Queen* [2017] VSCA 176 at [96], [99]-[100].

(iv) Complaint evidence

37 Lastly, the Court of Appeal held[27] that AF's evidence of RC's representations was not admissible under s 66 of the *Evidence Act*, because:

> "there was no evidence in this case that the occurrence of any relevant asserted fact was 'fresh in the memory' of RC at the time that she made the previous representations upon which the prosecution sought to rely. Any representation that she made was generic and non-specific as to activity, surrounding circumstances, date or time, and was made in response to suggestions made to her in the course of AF's questioning." (footnote omitted)

38 Alternatively, their Honours stated[28] that, if the evidence of RC's representations to AF was admissible as complaint evidence under s 66, the probative value of the evidence was so slight as not to outweigh the risk of unfair prejudice, and, therefore, that it should have been excluded under s 137:

> "[G]iven the manner in which the representations were elicited as part of a 'guessing game', any probative value that the evidence possessed would be slight, and would not outweigh the risk of unfair prejudice. The risk of unfair prejudice flows from the possible misuse of the evidence. In particular, the jury might have used the evidence as supporting the credibility of RC in circumstances where, given the manner in which the representations were drawn out of RC by AF's questioning, the evidence could not properly have been used for that purpose. Section 137 of the *Evidence Act 2008* ought to have dictated the exclusion of the evidence."

39 The Court of Appeal held that a substantial miscarriage of justice had been occasioned by the admission of AF's evidence of RC's representations[29].

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27 *Dennis Bauer (a pseudonym) (No 2) v The Queen* [2017] VSCA 176 at [112].

28 *Dennis Bauer (a pseudonym) (No 2) v The Queen* [2017] VSCA 176 at [113].

29 *Dennis Bauer (a pseudonym) (No 2) v The Queen* [2017] VSCA 176 at [114].

Grounds of appeal

40 The Crown's appeal to this Court was put on four grounds, in substance as follows:

(1) The Court of Appeal erred in holding that the trial judge was wrong to admit the recording of RC's evidence.

(2) The Court of Appeal erred in holding that a substantial miscarriage of justice was occasioned by the admission of RC's and TB's evidence as tendency evidence.

(3) The Court of Appeal erred in holding that the trial judge was wrong to refuse to sever Charge 2.

(4) The Court of Appeal erred in holding that a substantial miscarriage of justice was occasioned by the admission of AF's evidence of RC's representations.

Ground 1: willingness to give evidence

41 The Court of Appeal's approach to the question of RC's willingness to give evidence for the purposes of s 381(1)(c) of the *Criminal Procedure Act* was incorrect. The notions of willingness and preference are not mutually exclusive and "unwillingness" is not restricted to unqualified refusal. In its natural and ordinary sense, "unwillingness" includes reluctance and loathness just as much as it does obduracy[30]. Hence: "Norfolk, for thee remains a heavier doom, which I with some unwillingness pronounce"[31]. An inquiry as to a person's "willingness" to act is not ordinarily conceived of as limited to whether the person refuses to act. It is naturally and ordinarily understood as seeking to ascertain to what degree the person is willing or unwilling to act – conceptually, where along the scale of willingness which extends from abject refusal to unbridled enthusiasm the person is disposed. There is no reason to suppose that "willingness" is used in any different sense in s 381(1)(c) of the *Criminal Procedure Act*. If Parliament had intended to confine the operation of the provision to complainants

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30 See and compare *R v Darmody* (2010) 25 VR 209 at 214-215 [24]-[28].

31 Shakespeare, *Richard II*, act 1, scene 3, lines 150-151.

who refuse to give evidence, s 381(1)(c) would surely have been drafted in terms of a complainant's refusal to give evidence. Parliament's choice of the protean conception of "willingness" signifies that the question is one of degree.

42 Certainly, as the Court of Appeal observed[32], s 381(1) makes clear that a court may not admit a recording unless, having regard to the five considerations identified in pars (a) to (e) of the sub-section, it appears to be in the interests of justice to do so. The provision calls for a trial judge to weigh the identified considerations to determine whether, on balance, it is in the interests of justice to admit the recording[33]. But such is the nature of that exercise that the degree of unwillingness requisite to render it in the interests of justice to admit the recording is bound to vary according to the other identified considerations. For example, if a complainant's recorded evidence is incomplete, or if a complainant's recorded cross-examination is inadequate, or if there is some other risk of an accused being unfairly disadvantaged by admission of the recorded evidence, a trial judge should be loath to conclude that it is in the interests of justice to admit the recording, except, perhaps, where the complainant is not available to give evidence or refuses point blank to do so. By contrast, if the risk of disadvantage is less, a lesser degree of unwillingness will more likely suffice to tip the scales of the interests of justice in favour of admission. In such a case, it may be enough that the complainant is most reluctant to give evidence. And where, as here, a recording is complete and includes a cross-examination which is "conspicuously competent", there are no problems with editing, and there is no other reason to consider that the recording's admission will be unfairly disadvantageous to the accused, a still lesser degree of unwillingness on the part of the complainant to give evidence will suffice to tip the scales of the interests of justice in favour of admission.

43 As has been seen, the prosecutor advised the court that, based on the advice of RC's counsellors and others, it was RC's *strong preference* to avoid giving evidence *if at all possible*. In those circumstances, no error is shown in

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32 *Dennis Bauer (a pseudonym) (No 2) v The Queen* [2017] VSCA 176 at [28].

33 See generally Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 17 September 2009 at 3377; Victoria, Legislative Assembly, Criminal Procedure Amendment (Consequential and Transitional Provisions) Bill 2009, Explanatory Memorandum at 28-29.

the trial judge's conclusion that it was in the interests of justice that the recording be admitted. On the facts of this case, there were no interests of justice to be served by its exclusion. And the fact that very experienced defence counsel did not seek leave under s 385 to cross-examine RC any further on specific matters fortifies that conclusion.

44 That leaves the point as to whether the trial judge should have insisted on evidence of RC's unwillingness to give evidence rather than acting on the prosecutor's statement of it. Granted, where there is an issue about a complainant's state of willingness to give evidence, a trial judge should not proceed in the absence of evidence sufficient to establish the facts. But there was no issue about that here. What occurred was as follows:

> "[PROSECUTOR]: … (c) the availability or willingness of the complainant to give further evidence. I've conferred with her. She prefers not to give evidence.
>
> HER HONOUR: But she's otherwise available.
>
> [PROSECUTOR]: She's otherwise available. She's had counselling. I can get some evidentiary material if I need to but if the court is prepared for the moment at least to take it from the prosecutor that I've conferred with her. Her strong preference, based on advice from counsellors and others is to avoid giving evidence if at all possible. That is her preference.
>
> HER HONOUR: So it's counselling undertaken since the first trial?
>
> [PROSECUTOR]: It's continuous counselling that's part of the process but certainly my impression was that it was counselling in recent times but would the court just defer acting on that until I confirm that. I'm pretty sure that's what the effect of her statement to me was but it might be we'll just check with her on that. I suggest it will be (d) that will be a major issue in this case and that is whether the accused will be unfairly disadvantaged by the admission of the recording."

45 Thereafter, although defence counsel contended that there was no evidence of how RC would be *affected* by giving evidence, defence counsel did not challenge the fact that it was RC's strong preference, based on the advice of her counsellors and others, not to give evidence if at all possible. The argument as to the admission of the recording proceeded accordingly. Most of the debate

was directed to defence counsel's contention that the respondent would be at an unfair disadvantage if the recording were admitted because the scope of the retrial was so much different from the scope of the previous trial that the cross-examination appropriate to the retrial needed to be substantially different. The principal bases for that contention were that the previous trial involved multiple complainants who had met; a defence that their evidence was affected by contamination, concoction or collusion; and the Crown putting its tendency case on a different footing. But the trial judge and the Court of Appeal[34] rejected the contention, and, although in argument before this Court it seemed at times as if the respondent's counsel were seeking to reagitate the point, there was no contention to that effect. The remainder of the debate at trial was directed to a subsidiary contention that it would be unfair to receive the recording because, after editing, the recording would be replete with non-responsive answers and inadmissible material. The trial judge ruled in favour of the admission of the recording, noting that there was very little cross-examination of RC in relation to other complainants and very little editing required for references to TB's other allegations in the evidence of RC. Her Honour, however, did leave it open to defence counsel to revisit the matter after the editing had been completed, but, in the event, no such further application was ever made. Counsel for the respondent contended before the Court of Appeal that, after editing, one was left with a "bland cross-examination" of RC which did not include matters of substance. But the Court of Appeal rejected[35] that contention and there was no contention before this Court against its rejection.

46 Given the way in which the matter was dealt with before the trial judge, it did not lie in the mouth of the respondent later to complain to the Court of Appeal that he had been unfairly disadvantaged by the absence of evidence of RC's state of mind, or by being deprived of the ability effectively to cross-examine RC. Ground 1 should be upheld.

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34 *Dennis Bauer (a pseudonym) (No 2) v The Queen* [2017] VSCA 176 at [37]-[38].

35 *Dennis Bauer (a pseudonym) (No 2) v The Queen* [2017] VSCA 176 at [39].

Ground 2: tendency evidence

(i) Tendency reasoning

47 As is apparent from comparison of the trial judge's ruling with the Court of Appeal's reasons for judgment, previous decisions of this Court have left unclear when and if a complainant's evidence of uncharged sexual and other acts is admissible as tendency evidence in proof of charged sexual offences. That is due in part to differences of opinion between members of the Court in *HML* – and in subsequent tendency evidence decisions, most recently *IMM* – as to the rationale of admissibility of tendency evidence in single complainant sexual offences cases. It is unsatisfactory that trial judges and intermediate courts of appeal should be faced with that problem. It is also unsatisfactory that the issue should continue to be attended by as many complexities as have thus far been thought to surround it. The admissibility of tendency evidence in single complainant sexual offences cases should be as straightforward as possible consistent with the need to ensure that the accused receives a fair trial. With that objective, the Court has resolved to put aside differences of opinion and speak with one voice on the subject.

48 Henceforth, it should be understood that a complainant's evidence of an accused's uncharged acts in relation to him or her (including acts which, although not themselves necessarily criminal offences, are probative of the existence of the accused having had a sexual interest in the complainant on which the accused has acted) may be admissible as tendency evidence in proof of sexual offences which the accused is alleged to have committed against that complainant whether or not the uncharged acts have about them some special feature of the kind mentioned in *IMM* or exhibit a special, particular or unusual feature of the kind described in *Hughes*[36].

49 As the trial judge in substance observed, it has long been the law that a complainant's evidence of charged and uncharged sexual acts may be of significant probative value in the proof of other charged sexual acts. Taken in combination with other evidence, it may establish the existence of a sexual attraction of the accused to the complainant and a willingness to act on it which

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36 (2017) 92 ALJR 52 at 68-69 [57]-[58], [62]-[64] per Kiefel CJ, Bell, Keane and Edelman JJ; 344 ALR 187 at 203-204.

assists to eliminate doubts that might otherwise attend the complainant's evidence of the charged acts[37]. In *HML*, Kiefel J (as her Honour then was) explained[38] its significance thus:

> '"[R]elationship evidence' refers to all the conduct of a sexual kind that has taken place between the accused and the complainant. It encompasses sexual conduct which is an offence, often referred to as 'uncharged acts', and misconduct which may not be an offence. ...
>
> Clearly, relationship evidence is relevant as showing the sexual interest of the accused in, or the 'guilty passion' for, the complainant. Its relevance in this regard has been acknowledged by judges of this Court and by judges of State courts. *There can be little doubt about its probative force*. It may reveal a tendency in the accused, sometimes described as a motive. Where the relationship evidence shows that the accused has carried out sexual acts upon the complainant, or undertaken acts preparatory to them, the tendency or propensity on the part of the accused may be taken as confirmed. It may be concluded that the accused is prepared to act upon the tendency to an extent that it may be inferred that the accused will continue to do so. The evidence may then render more probable the commission of the offences charged." (emphasis added; footnotes omitted)

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37 *R v Ball* [1911] AC 47 at 70-71 per Lord Loreburn LC (Earl of Halsbury, Lords Ashbourne, Alverstone CJ, Atkinson, Gorell, Shaw of Dunfermline, Mersey and Robson agreeing at 71-72); *R v Gellin* (1913) 13 SR (NSW) 271 at 277-278 per Cullen CJ (Pring J and Sly J agreeing at 278-279); *R v Etherington* (1982) 32 SASR 230 at 235 per Walters J (Matheson J relevantly and Millhouse J agreeing at 241, 247); *B v The Queen* (1992) 175 CLR 599 at 601-602 per Mason CJ, 605, 608 per Brennan J, 610-611 per Deane J, 618 per Dawson and Gaudron JJ; [1992] HCA 68; *KRM v The Queen* (2001) 206 CLR 221 at 230 [24] per McHugh J, 264 [134] per Hayne J; [2001] HCA 11.

38 (2008) 235 CLR 334 at 494-495 [492]-[493], see also at 352-353 [6]-[7], 354 [11], 358-359 [25]-[27] per Gleeson CJ, 382-384 [103], [109]-[110] per Hayne J (Gummow J and Kirby J agreeing at 362 [41], 370 [59]), 425-426 [277]-[278] per Heydon J, 478-480 [425]-[433] per Crennan J, 500-502 [506], [510], [512] per Kiefel J.

50 Since proof of an accused's commission of a sexual offence against a complainant on one occasion makes it more likely that the accused may have committed another, generally similar sexual offence against the complainant on another occasion, at least where the two are not too far separated in point of time, where an accused is charged with a number of counts of generally similar sexual offences against a single complainant the several counts may ordinarily be joined in a single indictment and so tried together[39]. In such cases, evidence of each charged act is admissible as circumstantial evidence in proof of each other charged act and, for the same reason, evidence of each uncharged act is admissible in proof of each charged act[40].

51 The juridical basis of cross-admissibility of evidence of charged acts and of the admissibility of evidence of uncharged acts in such cases rests on the "very high probative value" of that kind of evidence which results 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[41]. As Hayne J (with whom Gummow and Kirby JJ agreed) concluded[42] in *HML*:

> "Generally speaking ... there usually will be no reasonable view of other sexual conduct which would constitute an offence by the accused against the complainant, even if it is an isolated incident and temporally remote, which would do other than support an inference that the accused is guilty of the offence being tried."

And the fact of itself that evidence of uncharged acts is given by a complainant does not mean that it lacks significant probative value. Although there is a lack of independence in the sense that the evidence of uncharged acts depends on the complainant's account, once the evidence is admitted, and assuming it is

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39 See *Criminal Procedure Act* 2009 (Vic), s 194.

40 *HML v The Queen* (2008) 235 CLR 334 at 397-398 [168], 401-402 [181] per Hayne J.

41 *HML v The Queen* (2008) 235 CLR 334 at 423 [272] per Heydon J.

42 *HML v The Queen* (2008) 235 CLR 334 at 384 [109].

accepted, it adds a further element to the process of reasoning to guilt[43] and so, therefore, may be seen as significantly probative of the accused's guilt of the charged offences.

52 Of course, *HML* was concerned with the admissibility of evidence of uncharged sexual acts as tendency evidence under common law rules of admissibility; in particular, under the common law rule of admissibility propounded in *Hoch v The Queen*[44] and confirmed in *Pfennig v The Queen*[45] that evidence of an accused's commission of discreditable acts other than those the subject of a charge may be admitted as tendency evidence only where it supports the inference that the accused is guilty of the offence charged and permits of no other, innocent explanation. Under s 97 of the *Evidence Act*, the *Hoch* test of admissibility has been superseded by the less demanding criterion of significant probative value[46]. But *HML* remains relevant. Given that six members of the Court in *HML* held[47] that a complainant's evidence of uncharged acts is usually of sufficient probative value to pass even the *Hoch* test of admissibility, *HML* stands in effect as a pronouncement of the "very high probative value" of such evidence for the purposes of s 97 of the *Evidence Act*.

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43 *HML v The Queen* (2008) 235 CLR 334 at 427 [280] per Heydon J. See also at 402 [182]-[184] per Hayne J (Gummow J agreeing at 362 [41]). And necessarily implicit in reasons of Gleeson CJ, Kirby J and Kiefel J.

44 (1988) 165 CLR 292 at 294-295 per Mason CJ, Wilson and Gaudron JJ, 302-303 per Brennan and Dawson JJ; [1988] HCA 50. See also *Sutton v The Queen* (1984) 152 CLR 528 at 564-565 per Dawson J; [1984] HCA 5.

45 (1995) 182 CLR 461 at 481-482 per Mason CJ, Deane and Dawson JJ; [1995] HCA 7. See also *Harriman v The Queen* (1989) 167 CLR 590 at 602 per Dawson J; [1989] HCA 50.

46 *IMM v The Queen* (2016) 257 CLR 300 at 317 [59] per French CJ, Kiefel, Bell and Keane JJ.

47 (2008) 235 CLR 334 at 359 [27] per Gleeson CJ, 386 [118], 399 [171]-[173], 414 [234] per Hayne J (Gummow J and Kirby J agreeing at 362 [41]-[42], 370 [59]), 430-432 [287], [289], 451-452 [336], 460-461 [364], 467 [387] per Heydon J, 501-502 [510]-[511] per Kiefel J.

53 In *IMM*, a majority of this Court held[48] that a complainant's evidence of a sole uncharged sexual act did not have significant probative value. Their Honours reasoned that, because the principal issue in that case was the complainant's credibility, the complainant's evidence of the uncharged act was rationally incapable of adding significantly to the probability that the complainant was telling the truth about the charged acts. The issue arose in a context in which the uncharged act was alleged to have occurred sometime after the charged acts, and was relatively innocuous by comparison. But the plurality also observed[49], more generally, that a complainant's evidence of an uncharged act can generally have only limited capacity rationally to affect the probability of the complainant's account of the charged acts being true, unless there are some special features of the complainant's account of the uncharged act.

54 That observation accorded with the reasoning of Howie J in the Court of Criminal Appeal of the Supreme Court of New South Wales in *Qualtieri v The Queen*[50] and with several subsequent decisions of the Court of Criminal Appeal[51]. It was, however, to some extent at odds with the process of reasoning that found favour with the majority in *HML* and was followed by the Court of Appeal of the Supreme Court of Victoria in *JLS*[52], *MR*[53], *PCR*[54],

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48 (2016) 257 CLR 300 at 318 [61]-[64] per French CJ, Kiefel, Bell and Keane JJ, 328-329 [107]-[108] per Gageler J.

49 *IMM v The Queen* (2016) 257 CLR 300 at 318 [62] per French CJ, Kiefel, Bell and Keane JJ.

50 (2006) 171 A Crim R 463 at 493-494 [116]-[118] (Latham J agreeing at 495 [124]).

51 See for example *AW v The Queen* [2009] NSWCCA 1 at [50] per Latham J (Bell JA and Fullerton J agreeing at [1], [58]).

52 (2010) 28 VR 328 at 334-337 [19]-[20], [22]-[23], [28] per Redlich JA (Mandie JA and Bongiorno JA agreeing at 340 [37], [38]).

53 [2011] VSCA 39 at [13]-[15] per Hansen JA (Buchanan JA and Harper JA agreeing at [16], [17]).

54 (2013) 235 A Crim R 302 at 307 [37]-[38] per Buchanan JA (Neave JA and Priest JA agreeing at 310 [56]-[59], [61]).

Velkoski[55] and *Gentry*[56]. In the result, as appears from the Court of Appeal's reasons for judgment in this case[57], the Court of Appeal took the plurality's observation in *IMM* as in effect vindicating Priest JA's earlier expressed[58] disagreement with the authority of *JLS*, and so as supporting the conclusion that RC's evidence of uncharged acts lacked significant probative value because her account of them was devoid of special features.

55 So to have reasoned is unsurprising. But, as the trial judge in this case observed[59], strictly speaking the reasoning of the plurality in *IMM* was limited to the case there under consideration: one which involved an uncharged act relevantly remote in time and of a significantly different order of gravity from the charged offending. *IMM* may be distinguished from a case like the present, where what is in issue is a course of offending comprised of a succession of uncharged sexual acts, of generally a similar kind to the charged acts, interspersed between the charged acts throughout the alleged period of offending. Thus, despite the apparent generality of the dicta in *IMM*, henceforth it should not be regarded as implying any departure from the majority opinions expressed in *HML* or, therefore, as contrary to the reasoning in *JLS*, *MR*, *PCR*, *Velkoski* or *Gentry* as to the high probative value which is ordinarily to be attributed to a complainant's evidence of uncharged sexual acts. *IMM* should be understood as confined to the particular, relatively exceptional circumstances of that case.

56 As was earlier noticed, the Court of Appeal further reasoned[60] that the majority judgment in *Hughes* dictated that, in a single complainant sexual

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55 (2014) 45 VR 680 at 701 [92]-[93], 718 [168], 737-738 [235].

56 (2014) 244 A Crim R 106 at 112-113 [24]-[29] per Redlich JA (Tate JA and Priest JA agreeing at 118 [49], [50]).

57 *Dennis Bauer (a pseudonym) (No 2) v The Queen* [2017] VSCA 176 at [63]-[64], [71]-[72], [75].

58 *Murdoch (A Pseudonym) v The Queen* (2013) 40 VR 451 at 471 [83].

59 *Director of Public Prosecutions v Dennis Bauer (a pseudonym) No 2 ruling No 4* [2016] VCC 1517 at [30]-[31], [35].

60 *Dennis Bauer (a pseudonym) (No 2) v The Queen* [2017] VSCA 176 at [62]-[63], [71]-[72], [75].

offences case, evidence of charged acts is not admissible as tendency evidence in proof of other charged acts, and that evidence of uncharged acts is not admissible in proof of charged acts, unless there is some "special feature" of the complainant's evidence. As appears from the Court of Appeal's reasons, their Honours did so because they equated the significance of the particular features of the offending identified in *Hughes* with the significance of the special features of a complainant's account of an uncharged act referred to in *IMM*. So to reason mistook the logic of when and why it is necessary that sexual offending have some "special feature" about it in order to render it significantly probative of other sexual offending.

57 The conclusion of the majority in *Hughes*[61] that particular features of the offending imbued the subject tendency evidence with significant probative value reflected the process of probability reasoning that applies to cases where an accused is charged with a number of sexual offences committed against a multiplicity of complainants. As has been explained, the reference in *IMM* to "special features" of a complainant's account of an uncharged act should be understood as limited to a process of reasoning which sometimes applies in cases where an accused is charged with multiple sexual offences against a single complainant and it is sought to adduce evidence from the complainant of a single relatively remote and innocuous uncharged act as support for his or her evidence of the charged acts. Those two processes of reasoning are essentially different.

58 In a multiple complainant sexual offences case, where a question arises as to whether evidence that the accused has committed a sexual offence against one complainant is significantly probative of the accused having committed a sexual offence against another complainant, the logic of probability reasoning dictates that, for evidence of the offending against one complainant to be significantly probative of the offending against the other, there must ordinarily be some feature of or about the offending which links the two together. More specifically, absent such a feature of or about the offending, evidence that an accused has committed a sexual offence against the first complainant proves no more about the alleged offence against the second complainant than that the accused has committed a sexual offence against the first complainant. And the mere fact that an accused has committed an offence against one complainant is ordinarily not

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61 (2017) 92 ALJR 52 at 68-69 [57]-[60] per Kiefel CJ, Bell, Keane and Edelman JJ; 344 ALR 187 at 203-204.

significantly probative of the accused having committed an offence against another complainant[62]. If, however, there is some common feature of or about the offending, it may demonstrate a tendency to act in a particular way proof of which increases the likelihood that the account of the offence under consideration is true.

59 *Hughes* illustrates the point. The case involved multiple complainants each alleging that the accused had committed one or more sexual offences against her, where the offences that were alleged to have been committed against some groups of complainants were in significant respects different in kind and circumstance from the sexual offences alleged to have been committed against each other group of complainants[63]. It was not disputed that evidence of each sexual offence alleged to have been committed against a complainant was admissible as tendency evidence in proof of other sexual offences alleged to have been committed against that complainant, even though, in some cases, the nature of the offending differed significantly from one charge to another. The issue was how much if any of each complainant's evidence of the sexual offences and uncharged acts alleged to have been committed against her was admissible as tendency evidence in proof of the sexual offences alleged to have been committed against the other complainants. And the case was ultimately decided by majority[64] on the basis that, taken as a whole, the evidence of each alleged sexual offence and uncharged act demonstrated a common feature that a man of mature years had a sexual interest in female children under 16 years of age and a tendency to act upon it by committing sexual offences against them opportunistically in circumstances which entailed a high risk of detection. In the view of the majority, such was the significance of that common feature that

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62 See *HML v The Queen* (2008) 235 CLR 334 at 354 [11]-[12] per Gleeson CJ, 382-383 [105] per Hayne J (Gummow J and Kirby J agreeing at 362 [41], 370 [59]); *GBF v The Queen* [2010] VSCA 135 at [26]; *BBH v The Queen* (2012) 245 CLR 499 at 525 [70]-[71] per Hayne J (Gummow J agreeing at 522 [61]); [2012] HCA 9.

63 See *Hughes v The Queen* (2017) 92 ALJR 52 at 66-68 [44]-[54] per Kiefel CJ, Bell, Keane and Edelman JJ; 344 ALR 187 at 200-202.

64 *Hughes v The Queen* (2017) 92 ALJR 52 at 68-69 [57]-[60] per Kiefel CJ, Bell, Keane and Edelman JJ; 344 ALR 187 at 203-204.

evidence of each alleged sexual offence and uncharged act had significant probative value in proof of each other charged offence.

60 By contrast, in a single complainant sexual offences case, where a question arises as to whether evidence that the accused has committed one sexual offence against the complainant is significantly probative of the accused having committed another sexual offence against that complainant, there is ordinarily no need of a particular feature of the offending to render evidence of one offence significantly probative of the other. As was established in *HML* and has since been applied in Victoria under s 97 of the *Evidence Act* in *JLS*, *MR*, *PCR* and *Gentry*, and was recognised, too, in *Velkoski*, evidence that an accused has committed one sexual offence against a complainant taken in conjunction with evidence of another sexual offence against the complainant suggests that the accused has a sexual interest in or sexual attraction to the complainant and a tendency to act upon it as occasion presents. And as has been seen, that is so because, where one person is sexually attracted to another and has sought to fulfil that attraction by committing a sexual act with him or her, it is the more likely that the person will continue to seek to fulfil the attraction by committing further sexual acts with the other person as the occasion presents.

(ii) The probative value of RC's evidence

61 The question of whether tendency evidence is of significant probative value is one to which there can only ever be one correct answer, albeit one about which reasonable minds may sometimes differ. Consequently, in an appeal against conviction to an intermediate court of appeal, or on a subsequent appeal to this Court, it is for the court itself to determine whether evidence is of significant probative value, as opposed to deciding whether it was open to the trial judge to conclude that it was[65].

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65 *R v Zhang* (2005) 158 A Crim R 504 at 514-515 [45] per Basten JA in diss; *L v Tasmania* (2006) 15 Tas R 381 at 402 [55] per Underwood CJ (Tennent J agreeing at 408 [86]); *R v Ford* (2009) 273 ALR 286 at 311-314 [93]-[107], 316 [124] per Campbell JA, cf at 320 [145]-[146] per Howie J (Rothman J agreeing at 322 [157]-[158]); *Dibbs v The Queen* (2012) 225 A Crim R 195 at 211-212 [78]-[80] per Harper JA (Weinberg JA and T Forrest AJA agreeing at 197 [1], 216 [105]); Odgers, *Uniform Evidence Law*, 13th ed (2018) at 802-805 [EA.101.450]. See and compare *McCartney v The Queen* (2012) 38 VR 1 at 7-12 [31]-[51].

62 In this case, in contrast to *Hughes*, there was only one complainant, all of the charged and uncharged acts were alleged to have been committed against her, and none of them was far separated in point of time or far different in nature and gravity from the others. Here, therefore, there was no need of any "special feature" in order to render the evidence of one charge cross-admissible in proof of the other charges, or to render the evidence of uncharged acts admissible in proof of the charged acts. Here, as in *HML*, *JLS*, *MR*, *PCR* and *Gentry*, the "very high probative value" and thus admissibility of the evidence of each charged and uncharged act rested on the logic that, where a person is sexually attracted to another and has acted upon that attraction by engaging in sexual acts with him or her, the person is the more likely to seek to continue to give effect to the attraction by engaging in further sexual acts with the other person as the opportunity presents. The trial judge was correct to hold that RC's evidence met the s 97(1)(b) test of significant probative value on that basis.

(iii) RC's evidence not excluded by s 101, s 135 or s 137

63 Although it was contended before this Court that RC's evidence should have been excluded under s 101 or ss 135 and 137, in oral argument that contention was in effect confined to a submission that there was such a significant possibility of contamination, concoction or collusion that the evidence should have been excluded as tendency evidence. As is explained later in these reasons, that submission must be rejected. The trial judge was correct to hold that RC's evidence was not productive of unfair prejudice.

(iv) The probative value of TB's evidence

64 Essentially similar considerations apply to TB's evidence of Charge 2 and the uncharged act to which she was witness. Contrary to the Court of Appeal's reasoning, Charge 2 was not remote in time or context from the remainder of the charged offences. It was an integral part of the alleged continuum of sexual offending that ran between 1988 and 1998. Consistently with *HML*, *JLS*, *MR*, *PCR* and *Gentry*, TB's evidence of Charge 2 was cross-admissible in relation to each other charge as circumstantial evidence of the respondent's sexual attraction to RC and his tendency to act upon it when the opportunity presented. For the same reason, TB's evidence of the uncharged act – the respondent in RC's bed on top of her moving up and down – was admissible as circumstantial evidence of the respondent's sexual attraction to RC and his tendency to act upon it when the opportunity presented.

65 Counsel for the respondent submitted that, given that TB was only four or five years old at the time of the events comprising Charge 2 and only a few years older at the time of the uncharged act, her evidence of those events was so inherently unreliable as rationally to be incapable of acceptance[66].

66 That submission cannot be accepted. Admittedly, an adult's memory of what occurred when he or she was only four or five years of age is, generally speaking, limited. Ordinary experience suggests that much of those aspects of our memories consists of little more than relatively vague impressions[67]. But it also accords with ordinary experience that an adult's recollection of an extraordinary or shocking event that occurred at that age may be much more vivid[68]. No doubt, a jury would hesitate before accepting evidence of that kind. People of ordinary intelligence and experience are in the habit of questioning the accuracy of childhood recollections. But the likelihood of an adult having a precise recollection of an extraordinary or shocking event that occurred at the age of about four or five years is by no means so improbable that it is bound to be rejected. And especially is that so where, as here, there is evidence of another, similar event which occurred a few years later. The two are mutually supportive. Additionally, here it would have been open to the jury to reason that TB's recollection of Charge 2 was not unlikely to have been refreshed and reinforced by the uncharged act that she later witnessed and which according to her evidence so much concerned her as to cause her to inquire of RC and her foster mother regarding their significance at the time.

67 Counsel for the respondent submitted that there was such a significant possibility of contamination, concoction or collusion in relation to TB's evidence

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66 See *R v Shamouil* (2006) 66 NSWLR 228 at 236-237 [56] per Spigelman CJ (Simpson J and Adams J agreeing at 240 [81], [82]); *IMM v The Queen* (2016) 257 CLR 300 at 317 [58] per French CJ, Kiefel, Bell and Keane JJ.

67 See generally *Longman v The Queen* (1989) 168 CLR 79 at 101 per Deane J, 107-108 per McHugh J; [1989] HCA 60.

68 See generally *R v XY* (2010) 79 NSWLR 629 at 648 [98] per Whealy J (Campbell JA and Simpson J agreeing at 630 [1], [2]); *LMD v The Queen* [2012] VSCA 164 at [24] per Harper JA (Bongiorno JA and Davies AJA agreeing at [39], [40]); *Pate v The Queen* (2015) 250 A Crim R 425 at 437 [62] per Weinberg JA (Dixon AJA agreeing at 456 [150]).

as to deprive it of the degree of significant probative value necessary to satisfy the requirements of s 97. Counsel called in aid recent decisions of the Court of Criminal Appeal of the Supreme Court of New South Wales in *R v GM*[69] and of the Court of Appeal of the Supreme Court of Victoria in *Murdoch (A Pseudonym) v The Queen*[70] in support of that submission.

68 The submission should be rejected. In *GM*, the New South Wales Court of Criminal Appeal held[71] that, despite the decision in *IMM*, the possibility of contamination, concoction or collusion is a relevant consideration in the determination of whether tendency evidence has significant probative value for the purposes of s 97, because the risk of contamination, concoction or collusion may give rise to a "competing inference" sufficient to render the evidence inherently implausible. More recently, in *BM v The Queen*[72] the New South Wales Court of Criminal Appeal stated that until and unless this Court says otherwise, the possibility of contamination, concoction or collusion remains relevant to admissibility. What was said in *GM* and *BM* now requires qualification.

69 In this context, reference to competing inferences is unhelpful, and likely to lead to error. Relevantly, the only sense in which competing inferences are of significance in the assessment of the probative value of evidence is in the determination of whether the evidence could rationally affect the assessment of the probability of the existence of a fact in issue[73]. As was established in *IMM*[74],

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69 [2016] NSWCCA 78.

70 (2013) 40 VR 451.

71 [2016] NSWCCA 78 at [100], [111] per Hoeben CJ at CL (Hall J agreeing at [127]), [129]-[134] per Button J.

72 [2017] NSWCCA 253 at [60] per Bathurst CJ (McCallum J and Bellew J agreeing at [70], [71]).

73 *Evidence Act* 2008 (Vic), Dictionary, definition of "probative value". See also *IMM v The Queen* (2016) 257 CLR 300 at 313-314 [42]-[48] per French CJ, Kiefel, Bell and Keane JJ.

74 (2016) 257 CLR 300 at 314-316 [49]-[54] per French CJ, Kiefel, Bell and Keane JJ.

that is a determination to be undertaken taking the evidence at its highest. Accordingly, unless the risk of contamination, concoction or collusion is so great that it would not be open to the jury rationally to accept the evidence, the determination of probative value excludes consideration of credibility and reliability. Subject to that exception, the risk of contamination, concoction or collusion goes only to the credibility and reliability of evidence and, therefore, is an assessment which must be left to the jury. To the extent that *GM* or *BM* suggests otherwise, it should not be followed.

70 In *Murdoch*, which predated *IMM*, the Victorian Court of Appeal stated[75] that, in determining the admissibility of tendency evidence given by two complainants against an accused, if a trial judge determines that the similarity in the complainants' accounts is capable of reasonable explanation on the basis of contamination, concoction or collusion, the evidence cannot possess sufficient probative value for the purposes of s 101 of the *Evidence Act*. In light of *IMM*, that approach must be taken as overruled. At common law, there is a need for separate judicial consideration of the risk of contamination, concoction or collusion, and a requirement that evidence be excluded if there is a reasonable possibility of it being affected by contamination, concoction or collusion. That requirement exists because of the common law rule of exclusion that, because tendency evidence is inadmissible unless there is no reasonable view of it consistent with innocence, tendency evidence is not admissible if there is a realistic possibility of it being affected by contamination, concoction or collusion[76]. Under the *Evidence Act*, the position is different. The replacement of the *Hoch* test with the less demanding s 97 criterion of significant probative value means that that common law rule of exclusion has no application. Under the *Evidence Act*, provided evidence is rationally capable of acceptance, the possibility of contamination, concoction or collusion falls to be assessed by the jury as part of the ordinary process of assessment of all factors that may affect the credibility and reliability of the evidence.

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75 (2013) 40 VR 451 at 454-455 [4]-[8] per Redlich and Coghlan JJA, 475 [99] per Priest JA.

76 *Hoch v The Queen* (1988) 165 CLR 292 at 296-297 per Mason CJ, Wilson and Gaudron JJ, 302-303 per Brennan and Dawson JJ; *Pfennig v The Queen* (1995) 182 CLR 461 at 485 per Mason CJ, Deane and Dawson JJ; *IMM v The Queen* (2016) 257 CLR 300 at 348 [166] per Nettle and Gordon JJ.

71 Counsel for the respondent submitted that, even so, there remained a real possibility of contamination, concoction or collusion which rendered the tendency evidence inadmissible. That submission must be rejected. As both the trial judge and the Court of Appeal concluded[77], there was "thin support" for any suggestion of contamination, concoction or collusion, and nothing submitted by counsel before this Court throws any doubt on that conclusion.

(v) TB's evidence not excluded by s 101, s 135 or s 137

72 Counsel for the respondent further contended that, if TB's evidence were of sufficient probative value to pass the significant probative value test of s 97, it nevertheless lacked sufficient probative value substantially to outweigh the prejudicial effect of the evidence for the purposes of s 101, or to outweigh the danger of unfair prejudice within the meaning of ss 135 and 137. In counsel's submission, the risk of unfair prejudice inhered in the possibility that the jury would be overwhelmed by the nature and number of allegations, and so fail to pay sufficient regard to real questions of credibility and reliability that were said to arise. Counsel also instanced the possibility of the jury according undue weight to TB's evidence by reason of seeing her give her evidence as an adult rather than as the four to seven year old girl she had been at the time when the events in issue were alleged to have occurred. Counsel contended, too, that the evidence was unfairly prejudicial in that it required the respondent to answer a raft of uncharged acts stretching back decades, and that the process was made all the more unjust by reason of the fact that the record of interview of the respondent conducted in 2000 had been lost or destroyed. In counsel's submission, there was as well a further real risk of the jury failing to allow for the possibility that, although the respondent might once have had a sexual attraction to RC, and acted upon it, he might not have done so on the occasions of the charged offences; a possibility which, it was submitted, was made the more likely by the long period of time over which the offending was alleged to have occurred and the large number of charges preferred. And in counsel's submission, the evidence was confusing and had the potential to divert the jury from their task, especially given that the trial judge did not direct the jury that, before treating charged or uncharged acts as proof of the alleged tendency, the jury needed to be satisfied of those charged or uncharged acts beyond reasonable doubt. It was further contended that defence counsel could not provide the jury

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77 *Dennis Bauer (a pseudonym) (No 2) v The Queen* [2017] VSCA 176 at [84].

with a complete picture of the risk of contamination, concoction or collusion without introducing highly prejudicial material relating to allegations by other complainants. It followed, in counsel's submission, that TB's evidence should have been excluded and, therefore, that Charge 2 should have been severed.

73 Those submissions are not persuasive. Despite textual differences between the expressions "prejudicial effect" in s 101, "unfairly prejudicial" in s 135 and "unfair prejudice" in s 137, each conveys essentially the same idea of harm to the interests of the accused by reason of a risk that the jury will use the evidence improperly in some unfair way[78]. Here there was not a real risk of the jury using the tendency evidence in such an unfair way.

74 The jury were most unlikely to have been overwhelmed by the nature and number of allegations. The Crown case was essentially simple. Despite the number of charged and uncharged acts, the case presented was of an 11 year period over which the respondent offended against only one complainant, RC, as occasion presented, on the occasions of the charged acts. It is equally unlikely that the jury would have failed to consider the possibility that the respondent did not act on his sexual attraction to RC on the occasions of the charged acts. The trial judge several times specifically directed them that they could not convict the respondent of any charged act unless satisfied beyond reasonable doubt of the commission of that act, and further specifically directed them that they could not substitute evidence of other charged acts or other alleged uncharged acts, or a conclusion that the respondent had a sexual interest in RC, for what was alleged in the particular charge. There is no reason to doubt that the jury heeded those directions.

75 The concern that the jury might have given undue weight to TB's testimony by reason of seeing her as an adult rather than as the child she was at

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78 See *BD* (1997) 94 A Crim R 131 at 139 per Hunt CJ at CL, 148 per Smart J, 151 per Bruce J; *Papakosmas v The Queen* (1999) 196 CLR 297 at 325 [91]-[92] per McHugh J; [1999] HCA 37; *R v Yates* [2002] NSWCCA 520 at [252]; *Ainsworth v Burden* [2005] NSWCA 174 at [99] per Hunt AJA (Handley JA and McColl JA agreeing at [1], [2]); *R v Ford* (2009) 273 ALR 286 at 300-301 [55]-[58] per Campbell JA. See also Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 1 at 351-352 [644], 529 [957]; Odgers, *Uniform Evidence Law*, 13th ed (2018) at 780 [EA.101.190].

relevant times is misplaced. The need to make allowance for TB's ageing was something which the trial judge considered and concluded was within the range of ordinary experience, and so could be left to the jury[79]. It is true that defence counsel sought an unreliable evidence direction in respect of TB's evidence, pursuant to s 32 of the *Jury Directions Act* 2015 (Vic), which the trial judge refused to give[80]. But it was not contended before the Court of Appeal or this Court that the trial judge was thus in error.

76 The suggestion that TB's evidence was confusing is incorrect. It was not confusing but straightforward, and, if accepted, it was of strong probative value as evidence of events consistent with the existence of the respondent's sexual attraction to RC and a tendency to act upon it; which, because it came from a witness other than the complainant, gave it added credibility.

77 Counsel for the respondent contended that confusion was likely to arise because of similarities and differences between TB's and RC's accounts of uncharged acts. Counsel instanced the fact that TB gave the evidence already mentioned of seeing the respondent at his home in RC's bed on top of RC moving up and down and that TB recalled that the respondent told her: "Get into fucken bed". TB gave evidence that she had asked RC the following day about why the respondent was in bed with RC, and that she had told her foster mother what she had seen. RC, on the other hand, gave evidence of an uncharged act which she said occurred at Port Macquarie involving the respondent coming into her room at night and assaulting her before TB entered the room and the respondent rolled off the bed. RC recalled that TB had asked her whether she was "having sex with dad" and that the following morning her foster mother had said to her that she had "heard that you were having sex with dad". In counsel's submission, the similarities and differences between those two accounts were bound to be confusing for the jury.

78 There is no reason why that should be so. It was open to the jury to take the view that the similarities and differences threw doubt on the account of one or

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79 Cf *McKinney v The Queen* (1991) 171 CLR 468 at 476 per Mason CJ, Deane, Gaudron and McHugh JJ; [1991] HCA 6.

80 See *Jury Directions Act* 2015 (Vic), ss 14, 31, 32; cf *Arthur Hudson (a pseudonym) v The Queen* [2017] VSCA 122 at [52], [61].

other of the witnesses. But the jury were not bound to do so. For all that appears, the two witnesses were describing different, albeit similar uncharged acts, or, alternatively, one or other of them was mistaken about some of the peripheral details. Ultimately, the similarities and differences were in effect no more than factors which bore on the assessment of the credibility and reliability of the evidence of TB and RC, and that was a task that was well within the capacity of the jury. The argument that similarities and differences of that kind rendered TB's evidence so lacking in credibility or reliability as to make the evidence unfairly prejudicial to the respondent is untenable.

79 No doubt the fact that the alleged events occurred so long before the trial and perhaps also that the record of the respondent's interview conducted in 2000 had been lost or destroyed were productive of forensic disadvantage to the respondent. But the jury were directed in terms which approximated closely to a *Longman* warning[81] as to how to allow for the difficulties imposed on the respondent by reason of that kind of disadvantage and to assess the evidence accordingly. No exception was taken to that direction and it was not contended before the Court of Appeal or this Court that it was deficient.

80 No error is shown, either, in relation to the trial judge's course in not warning the jury that they needed to be satisfied of uncharged acts beyond reasonable doubt[82]. Ordinarily, proof of the accused's tendency to act in a particular way will not be an indispensable intermediate step in reasoning to guilt[83]. And, in Victoria, the common law rule attributed to *Shepherd v The Queen*[84], that in an appropriate case a jury should be directed that it must be

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81 *Longman v The Queen* (1989) 168 CLR 79 at 91 per Brennan, Dawson and Toohey JJ, 101 per Deane J, 108-109 per McHugh J. See also *Jury Directions Act*, ss 38-40.

82 *HML v The Queen* (2008) 235 CLR 334 at 390 [132], 396-397 [164], 405-406 [195]-[196], 407 [201], 415 [242], 416 [244] per Hayne J (Gummow J and Kirby J agreeing at 362 [41]-[42], 363-364 [46], 370-371 [61]-[63], 376-377 [81], [83]), 500 [506] per Kiefel J.

83 *Shepherd v The Queen* (1990) 170 CLR 573 at 584-585 per Dawson J; [1990] HCA 56.

84 (1990) 170 CLR 573 at 584-585 per Dawson J.

satisfied beyond reasonable doubt of an indispensable fact, and the rule attributed to *R v Sadler*[85], that a jury must be directed that it must be satisfied beyond reasonable doubt of uncharged acts that the jury may use as a step in their process of reasoning towards guilt, have been abolished by s 62 of the *Jury Directions Act*[86]. The trial judge did, however, and quite properly, specifically direct the jury as to how the evidence of uncharged acts could be used, as demonstrating a sexual attraction of the respondent to RC and a tendency to act upon it as the occasion presented, and equally that, if the jury were not satisfied beyond reasonable doubt that the act alleged in a particular charge occurred, they were bound to acquit the respondent of that charge. Further, as has been observed, her Honour specifically directed the jury that they could not substitute evidence of other charges or other alleged activity, or a conclusion that the respondent had a sexual interest in RC, for what was alleged in the particular charge. There is no reason to suppose that the jury failed to heed those directions.

81 Finally on this aspect of the matter, for the reasons earlier given in relation to the probative value of TB's evidence, the risk of contamination, concoction or collusion was not something that fell to be considered in the determination of whether TB's evidence might cause the respondent improper prejudice. Since TB's evidence was not rationally incapable of acceptance, the risk of contamination, concoction or collusion was something to be left to the jury as part of their assessment of TB's credibility and reliability. And, as the trial judge held, whether defence counsel chose to put the allegations of other complainants to TB as indicative of contamination, concoction or collusion was entirely a matter for defence counsel in the exercise of forensic choice. It was not improper prejudice.

82 The trial judge was correct not to exclude TB's tendency evidence pursuant to s 101 or, therefore, ss 135 and 137[87].

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85 (2008) 20 VR 69 at 89 [67].

86 See also *Jury Directions Act*, s 61; *Beqiri v The Queen* [2017] VSCA 112 at [121], [130].

87 See *R v WRC* (2002) 130 A Crim R 89 at 103 [34] per Hodgson JA (Kirby J agreeing at 133 [123]); *R v Ngatikaura* (2006) 161 A Crim R 329 at 343 [71] per

(Footnote continues on next page)

(vi) Form of tendency notice

83 As noticed at the outset of these reasons, the Crown's tendency notice particularised the 18 charged acts and a further seven uncharged acts that were alleged to establish a tendency on the part of the respondent "to have a sexual interest in his foster daughter [RC]" and "a willingness to act on that sexual interest in respect of [RC]" on which the Crown would rely in proof of all charges. Counsel for the respondent submitted that the notice was defective in taking a "broad-brush" approach that failed to identify which charged and uncharged acts were cross-admissible in relation to which charges and for what purpose.

84 The submission must be rejected. The notice was in a conventional form for a single complainant sexual offences case and, subject to a couple of errors that were corrected by the prosecutor in the course of pre-trial oral argument, made clear that the tendency sought to be established and admitted in relation to all charges was a tendency to have a sexual interest in RC (which it was proposed to prove by proof of the acts and circumstance precisely identified in Table B) and a willingness to act upon it (which it was proposed to prove by the acts and circumstances precisely identified in Table C); each fact and circumstance described in Tables B and C being therein precisely cross-referenced to the evidence that it was proposed to adduce in proof of it. A footnote stated that each charged act was cross-admissible and each uncharged act was admissible in proof of each charged act. The notice as corrected by the prosecutor left no room for doubt and thus satisfied the requirement in s 97(1)(a) of the *Evidence Act*.

85 Ground 2 should be upheld.

(vii) Jury directions in single complainant sexual offences cases

86 Before departing from Ground 2, however, it is appropriate to say something further of the directions ordinarily to be given to a jury in a single complainant sexual offences case where the Crown is permitted to adduce evidence of uncharged acts as evidence of the accused having a sexual interest in

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Simpson J (Rothman J agreeing at 343 [74]); *R v Ford* (2009) 273 ALR 286 at 300-301 [55]-[59] per Campbell JA; cf Odgers, *Uniform Evidence Law*, 13th ed (2018) at 786 [EA.101.195].

the complainant and a tendency to act upon it. Where evidence is admitted on that basis, the trial judge should direct the jury that the Crown argues that the evidence establishes that the accused had a sexual interest in the complainant and a tendency to act upon it which the Crown contends makes it more likely that the accused committed the charged offence or offences. If the Crown also relies on the evidence as putting the charged offence or offences in context in some other identified fashion or respects, the trial judge should further direct the jury that the Crown contends that the evidence serves also to put the charged offence or offences in context and identify the manner or respects in which the Crown contends that it does so. The trial judge should stress that the evidence of uncharged acts has been admitted for those purposes and, if the jury are persuaded by it, that it is open to the jury to use the evidence in those ways, although no other. The trial judge should further stress that it is not enough, however, to convict the accused that the jury may be satisfied of the commission of the uncharged acts or that they establish that the accused had a sexual interest in the complainant on which the accused had acted in the past; it remains that the jury cannot find the accused guilty of any charged offence unless upon their consideration of all of the evidence relevant to the charge they are satisfied of the accused's guilt of that offence beyond reasonable doubt. Contrary to the practice which has operated for some time in New South Wales[88], trial judges in that State should not ordinarily direct a jury that, before they may act on evidence of uncharged acts, they must be satisfied of the proof of the uncharged acts beyond reasonable doubt. Such a direction should not be necessary or desirable unless it is apprehended that, in the particular circumstances of the case, there is a significant possibility of the jury treating the uncharged acts as an indispensable

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88 See for example *DJV v The Queen* (2008) 200 A Crim R 206 at 217 [30] per McClellan CJ at CL (Hidden J and Fullerton J agreeing at 227 [58], [59]); *R v FDP* (2008) 74 NSWLR 645 at 654 [38]; *DJS v The Queen* [2010] NSWCCA 200 at [54]-[55] per Hodgson JA (Kirby J and Whealy J agreeing at [86], [87]).

link in their chain of reasoning to guilt[89]. And, as explained earlier in these reasons, a trial judge is precluded from giving such a direction in Victoria[90].

87 In this matter it has not been suggested that the trial judge's directions fell short of those requirements in any material respect.

Ground 3: severance

88 The only basis on which it was contended that Charge 2 should have been severed and tried alone was that TB's evidence was not admissible in proof of the other charges. As has been explained, it was. For the reasons earlier stated, the trial judge was correct to hold that there was no basis for the severance of Charge 2[91]. Ground 3 should be upheld.

Ground 4: complaint evidence

(i) Fresh in the memory

89 In *Graham v The Queen*[92], a majority of this Court held that, as s 66 of the *Evidence Act* 1995 (NSW) was then drafted, its use of the word "fresh" imported a close temporal relationship between the occurrence of the asserted fact and the time of making the representation and hence that contemporaneity was the most

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89 *Shepherd v The Queen* (1990) 170 CLR 573 at 584-585 per Dawson J; *Gipp v The Queen* (1998) 194 CLR 106 at 133 [79] per McHugh and Hayne JJ; [1998] HCA 21; *HML v The Queen* (2008) 235 CLR 334 at 360-361 [31]-[32] per Gleeson CJ in diss on point, 490 [477] per Crennan J in diss on point.

90 See *Jury Directions Act*, ss 61, 62; *Beqiri v The Queen* [2017] VSCA 112 at [121], [130].

91 See generally *Criminal Procedure Act*, s 194; *Sutton v The Queen* (1984) 152 CLR 528 at 531, 537 per Gibbs CJ, 539 per Murphy J, 542, 554 per Brennan J, 561 per Deane J, 569 per Dawson J; *De Jesus v The Queen* (1986) 61 ALJR 1 at 3 per Gibbs CJ, 7 per Brennan J, 8-10 per Dawson J; 68 ALR 1 at 4-5, 12, 14-16; [1986] HCA 65; *James Baker (a pseudonym) v The Queen* [2015] VSCA 323 at [67]-[71].

92 (1998) 195 CLR 606 at 608 [4] per Gaudron, Gummow and Hayne JJ, see also at 614 [34] per Callinan J (Gleeson CJ agreeing at 608 [1]); [1998] HCA 61.

important consideration in assessing a representation under that section. Thereafter, sub-s (2A) was inserted into s 66 of the *Evidence Act* to make clear that the intention of the section is that "freshness" is not confined to the time which elapses between the occurrence of the relevant event and the making of the representation about that event[93]. Since then, it has rightly come to be accepted by intermediate courts of appeal that the nature of sexual abuse is such that it may remain fresh in the memory of a victim for many years[94]. It depends on the facts of the case.

90 Here there was evidence from which it could be inferred that the facts were "fresh in the memory" of RC at the time that she made the representations to AF. As was earlier observed, it established that, during the holiday period between December 1997 and January 1998, when RC was in Year 8 at school, she moved into AF's home and thereafter lived with AF and AF's family until RC completed Year 12 some four years later. Shortly after moving in, when RC was around 15 years old, she had a conversation with AF in which she disclosed to AF that she had been sexually assaulted by the respondent. According to AF's effectively unchallenged testimony, the conversation proceeded thus:

> "[AF]: [RC] and I shared a bedroom, so we were in our bedroom and we were talking. I can't particularly remember what stroke – struck the conversation but we were talking about, I don't know, life in general and, you know, she was sad about her real father that had died, and she missed him and she missed having a real family. And then, you know, she was really upset and crying, and so I was pushing her, you know, 'What's

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93 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, (December 2005) at 255-256 [8.122]-[8.124]; Victoria, Evidence Bill 2008, Explanatory Memorandum at 22.

94 See for example *R v XY* (2010) 79 NSWLR 629 at 646-648 [91]-[92], [98]-[99] per Whealy J (Campbell JA and Simpson J agreeing at 630 [1], [2]); *LMD v The Queen* [2012] VSCA 164 at [24] per Harper JA (Bongiorno JA and Davies AJA agreeing at [39], [40]); *ISJ v The Queen* (2012) 38 VR 23 at 37 [48]; *Clay (A Pseudonym) v The Queen* (2014) 43 VR 405 at 413-414 [38]-[48]; *Pate v The Queen* (2015) 250 A Crim R 425 at 437-438 [62]-[65] per Weinberg JA (Dixon AJA agreeing at 456 [150]).

wrong, what's going on', and then that's when she went on to say 'There's, you know, something I need to tell you about my foster family, something that happened while I was there'.

...

She was crying, and so I asked her what was wrong, and she said that it was something that happened back at her foster family. And I said, 'Well, what, did they mistreat you, what happened?' She said that – she started with that her foster mother Jan was very mean to her and she made her do a lot of chores ... and then, you know, she went on crying and I was thinking, okay, so what else is there, and she said, you know, 'Something that, you know, my father did to me'. And I said, 'Well, what?' So she made me guess, and from her way that she was obviously distraught I eventually after a while said 'Was it sexual harassment?' and she said 'Yes'.

...

I asked her what he did to her and she didn't want to tell me. She asked me to guess. So I guessed a few things. There's some words in my statement. I probably don't like to use those words these days but - - -

...

Well, the words that I used were things like 'Did you toss him off?' Sorry, I find it hard to say but anyway, she said 'Yes'. She – and I said 'Did you have to' – you know – 'suck him off' is the word I used at that time, and she said 'Yes'. And I remember she said that he made her watch pornographic videos and make her act out what was done in those videos, yeah but - - -

...

He just used to say that – she said when – when the family used to go out and he would come and get her from the room and, you know, she would pretend to sleep and – but he obviously would wake her up or know that she was pretending and then make her do these things. She would have to touch him obviously inappropriately and watch those videos - - -

[PROSECUTOR]: ... Can you ... tell us what she said he did?

> [AF]: Well, touching his penis.
>
> ...
>
> [PROSECUTOR]: All right. In terms of the touching did she tell you that she would have to touch him and he would touch her, or what was said about that?
>
> [AF]: All she said was that she was made to touch him. I said 'Did he' ... 'Did he make you have sex with him or did he' – I used the word 'finger', and she said 'No' at that point."

91 Contrary to the Court of Appeal's reasoning, RC's representations were not generic, they were specific: "Something that ... my father did to me"; "when the family used to go out ... he would come and get her from the room and, you know, she would pretend to sleep and – but he obviously would wake her up or know that she was pretending and then make her do these things"; "She would have to touch him obviously inappropriately and watch those videos ... touching his penis"; and she had to "toss him off" and "suck him off". Granted, RC did not specify when the acts occurred, but, in the terms in which she spoke, it is apparent that such acts were repeated many times in the period which extended up until RC moved out of the respondent's home relatively shortly before moving in with AF. Contrary also to the Court of Appeal's reasoning, the circumstances of their commission were specified, namely, when the family used to go out and the respondent would get RC out of bed.

92 Admittedly, the representations that she had to "toss him off" and "suck him off" were made in response to leading questions. But in contrast to the position at common law[95], under s 66 the fact that representations are made in response to leading questions does not of itself render evidence of the representations inadmissible. It goes to the weight of the evidence, which, as has

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95 *R v Stewart* (1920) 21 SR (NSW) 33 at 35-36 per Pring J (Ferguson J and Wade J agreeing at 37); *R v Freeman* [1980] VR 1 at 5-8; *R v EF* (2008) 189 A Crim R 463 at 471-473 [47]-[54] per Weinberg JA (Nettle JA and Mandie AJA agreeing at 464 [1], 473 [56]); *R v Ahmet* (2009) 22 VR 203 at 210-211 [46]-[49] per Ashley JA (Buchanan JA and Vincent JA agreeing at 204 [1], [2]).

been emphasised, is for the jury to assess[96]. Moreover, seen in the context of the remainder of the conversation, the fact that those few answers were given in response to leading questions does not suggest that RC's recollection of "tossing off" or "sucking off" the respondent were any less vivid or fresh in her memory than the recollections she disclosed to AF, without being led, of being taken out of bed when the family was away and made to touch the respondent's penis and watch pornographic videos and act out what was done in them. To the contrary, given the nature of the sexual acts alleged, the fact that they were repeated time and again over a period of years, the fact that it seems they continued up to less than a year before the conversation with AF, and RC's highly emotional state at the time of the conversation with AF, it is very probable that the events disclosed to AF were vivid in RC's recollection at the time of the conversation and would remain so for years to come[97].

93 Counsel for the respondent contended that there were inconsistencies between RC's representations to AF and other evidence which belied the finding that the events were fresh in RC's memory at the time of the representations. Counsel instanced the fact that RC denied to AF that the respondent had "fingered" her, and contrasted that with RC's evidence at trial that the respondent had many times touched and digitally penetrated her vagina. Counsel also emphasised that RC had told AF that AF was the first person to whom RC had disclosed the respondent's abuse, and contrasted that with RC's evidence at trial that she had already told another friend and that friend's mother about the abuse when she was 12 years old.

94 Such inconsistencies do not belie that the events the subject of the representations to AF were fresh in the memory of RC at the time of the representations. Arguably, RC's reticence to mention to AF that she had been "fingered" by the respondent might be taken to mean that RC's subsequent allegations of digital penetration were untrue. But, in view of RC's age at the time of the representations to AF and the enormity of the respondent's alleged

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96 See *R v XY* (2010) 79 NSWLR 629 at 646 [89]-[90] per Whealy J (Campbell JA and Simpson J agreeing at 630 [1], [2]).

97 See and compare *R v Le* [2000] NSWCCA 49 at [52] per Sully J (Hidden J agreeing at [124]-[127]), [82]-[84] per Hulme J; *R v XY* (2010) 79 NSWLR 629 at 647 [92] per Whealy J (Campbell JA and Simpson J agreeing at 630 [1], [2]).

offending, the jury would have been at least as entitled to conclude that RC was simply not ready at that stage to tell her best friend of the full extent of her violation. The fact that RC might have told someone else of the matter before RC told AF is of little significance. It could mean that, by the time RC came to give evidence at trial, she was mistaken about whom she first told about the respondent's offending. Equally, it could mean that RC's statement to AF that AF was the first to be told was either mistakenly or deliberately untrue. Logically, however, it says little if anything at all as to whether the matters which RC disclosed to AF were fresh in RC's recollection at the time of the representations.

(ii) AF's evidence not excluded under s 137

95 The Court of Appeal were wrong to hold that AF's evidence should have been excluded under s 137. As has been emphasised, it is not for a trial judge to say what probative value a jury should give to evidence but only what probative value the jury acting rationally and properly directed could give to the evidence. Hence, unless evidence is so lacking in credibility or reliability that it would not be open to a jury acting rationally and properly directed to accept it, the probative value of the evidence must be assessed, for the purposes of s 137, at its highest.

96 Counsel for the respondent submitted that, because of what she contended was the "general" nature of RC's description of the offending, it was impossible to say whether RC's representations to AF related to any of the charged offences, and, therefore, impossible to tell whether RC's representations had any significant probative value. That is not so. To repeat, the Crown case was that the respondent offended against RC frequently over a period of approximately 11 years and the charged offences comprised just some of the totality of that offending. Evidence of the uncharged acts over that period of 11 years was therefore admissible as evidence of the respondent's sexual attraction to RC and his tendency to act upon it as occasion presented during that period, which logically made it more likely that he committed the charged offences over that period. In those circumstances, it is hardly to the point that the jury may not have been able to say whether RC's representations to AF specifically related to any of the charged offences as opposed to the uncharged acts.

97 It might have been different if, say, there had been but one charged offence and RC's representations to AF had been confined to an isolated incident of offending that occurred years before or after the charged offence. In such a case, it would be much less likely that the evidence of the previous offending

would be sufficiently pertinent to the charged offence, or otherwise indicative of a sexual attraction and a tendency to act upon it, to render it admissible as tendency evidence. But here, because of the continuum of alleged offending over the 11 year period in issue, the evidence of RC's representations to AF was significantly probative of each of the charged offences during that period. If accepted, it was confirmatory of RC's testimony that the respondent offended against her frequently throughout the 11 years and thereby confirmatory of the existence of the respondent's sexual attraction to RC and his tendency to act upon it over that period of time by offending against her as the occasion presented.

98 Nor did the fact that some of RC's representations to AF were made in response to AF's leading questions deprive them of credibility or reliability to such an extent as to render them rationally incapable of acceptance. It was open to the jury to accept defence counsel's invitation to discount the probative value of the representations on the basis that some of them were made in response to AF's leading questions or because of the time at which they were made or the time at which the represented events were alleged to have occurred. But the jury were not logically bound so to discount them. For the reasons already given, the jury were at least as much entitled to conclude that RC's representations to AF had the compelling ring of truth and reliability about them and hence that AF's testimony significantly supported the credibility and reliability of RC's testimony concerning the charged offences.

99 Counsel for the respondent submitted that, because AF had very little independent recollection of the representations by the time of trial and in effect was merely repeating the statement which she had made to police many years before, the respondent was so unfairly prejudiced by AF's evidence that it should have been excluded. That submission should also be rejected. If AF's state of recollection by the time of trial were productive of any forensic disadvantage for the respondent it was certainly not so great as to warrant the exclusion of her evidence. AF readily conceded in response to defence counsel's questioning that her state of recollection was limited and, as has been seen, the trial judge gave the jury full directions on how they should allow for any problems for the respondent to which that might give rise.

100 There being little if any risk that the jury would reason improperly from RC's representations to a conclusion of guilt, the trial judge was right to conclude that the probative value of AF's evidence sufficiently outweighed its prejudicial effect as to avoid exclusion pursuant to s 137. Ground 4 should be upheld.

Cross-appeal

101 The respondent sought leave to cross-appeal on the basis that, if the Court of Appeal were correct in concluding that his convictions should be quashed, the Court of Appeal erred in ordering that a new trial be had. For the reasons given, the Court of Appeal should not have ordered that the convictions be quashed, and accordingly the application for leave to cross-appeal should be refused.

Conclusion and orders

102 The appeal should be allowed on all grounds and the application for leave to cross-appeal should be refused. Orders 2 to 4 of the Court of Appeal should be set aside and in their place it should be ordered that the appeal to the Court of Appeal be dismissed.