# HIGH COURT OF AUSTRALIA

KIEFEL CJ,
KEANE, EDELMAN, STEWARD AND GLEESON JJ

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HAMILTON (A PSEUDONYM) APPELLANT

AND

THE QUEEN RESPONDENT

*Hamilton (a pseudonym) v The Queen*
[2021] HCA 33
*Date of Hearing: 22 June 2021*
*Date of Judgment: 3 November 2021*
S24/2021

**ORDER**

*Appeal dismissed.*

On appeal from the Supreme Court of New South Wales

**Representation**

H K Dhanji SC with D R Randle for the appellant (instructed by George Sten & Co)

H Baker SC with B K Baker for the respondent (instructed by Office of the Director of Public Prosecutions (NSW))

## CATCHWORDS

### Hamilton (a pseudonym) v The Queen

Criminal practice – Trial – Directions to jury – Where appellant charged with ten counts of aggravated indecent assault against three of his children – Where appellant did not seek that counts be tried separately – Where appellant alleged complainants' evidence was inconsistent and had been concocted – Where appellant did not seek anti-tendency direction and no anti-tendency direction given – Where trial judge gave *Murray* direction requiring jury not to convict on any count unless satisfied that evidence of each child was honest and reliable in relation to that count – Where trial judge directed jury to give separate consideration to each count – Whether trial miscarried because of failure to give anti-tendency direction.

Words and phrases – "anti-tendency direction", "concoction of evidence", "counts tried together", "failure of counsel to seek a direction", "forensic advantage", "forensic strategy", "impermissible tendency reasoning", "miscarriage of justice", "multiple complainants", "*Murray* direction", "separate consideration direction", "stark contest of credibility".

*Criminal Appeal Act 1912* (NSW), s 6(1).

1 KIEFEL CJ, KEANE AND STEWARD JJ. The appellant was charged with ten counts of aggravated indecent assault contrary to s 61M(2) of the *Crimes Act 1900* (NSW). The offences were alleged to have been committed on separate occasions against three of the appellant's five children. The case has proceeded on the footing that, had each count been tried separately, only the evidence of offending bearing on each particular count would have been admissible against the appellant. The defence did not seek to have the counts tried separately. Rather, the defence embraced the opportunity to have all ten counts tried together as part of a strategy of inviting the jury to consider the evidence of all the complainants on all counts and, from a consideration of the totality of the evidence, to conclude that the children fabricated their allegations against him at the urging of their mother, his former wife.

2 At trial, counsel for the defence did not seek a direction from the trial judge – which the appellant now contends should have been given – that the jury must not reason from a finding that the appellant was guilty of one charged offence to conclude that he was guilty in respect of other charged offences because he was the kind of person who engaged in that kind of misconduct ("an anti-tendency direction"). The trial judge did, however, at the specific request of the defence, direct the jury that they could not convict the appellant unless they were satisfied beyond a reasonable doubt that the evidence of each child was honest and reliable in relation to each of the counts concerning that child ("the *Murray* direction").

3 The jury returned guilty verdicts on all ten counts. The appellant appealed to the New South Wales Court of Criminal Appeal on three grounds, all of which were rejected. The first ground is the only basis upon which the appellant appeals to this Court. This ground was that the trial miscarried because the trial judge did not give the jury an anti-tendency direction. The Court of Criminal Appeal (Adamson and Beech-Jones JJ, Macfarlan JA dissenting) rejected this ground, concluding that the absence of an anti-tendency direction did not, in the circumstances of this case, expose the appellant to a risk of conviction by the application of tendency reasoning and did not give rise to a miscarriage of justice.

4 In this Court, the appellant argued that the Court of Criminal Appeal erred in this regard. For the reasons that follow, the Court of Criminal Appeal was correct in concluding that there was no miscarriage of justice at trial. Accordingly, the appeal to this Court must be dismissed.

## The trial

5 The offences charged were alleged to have been committed against the three complainants between November 2014 and February 2016. Counts 1 to 3 were committed against the appellant's daughter ("the First Child"), who was 15 years of age at the time of the offences. Those counts concerned three occasions on

which the appellant got into the First Child's bed and touched her vagina over her clothes. On the third such occasion, the subject of count 3, the complainants' mother walked in on the appellant in bed with the First Child, but the First Child did not at that time say anything about what had happened. The First Child first complained to her mother some months later, at a family outing at a Thai restaurant.

6 Counts 4 to 8 were committed against one of the appellant's sons ("the Fifth Child"), who was between 6 and 7 years of age at the time of the offences. Those counts concerned one occasion on which the appellant touched the Fifth Child's bottom after he got out of the shower (count 4) and two occasions on which the appellant touched the Fifth Child's bottom and penis simultaneously after he got out of the shower (counts 5 and 6 and counts 7 and 8 respectively). The Fifth Child gave evidence that he complained to his mother after each occasion. The First Child also gave evidence that the Fifth Child had complained about the incidents to her.

7 Counts 9 and 10 were committed against another of the appellant's sons ("the Third Child"), who was between 11 and 12 years of age at the time of the offences. Those counts concerned two occasions on which the appellant grabbed the Third Child's penis. The Third Child complained to a counsellor about two years later.

*The Crown case*

8 At trial, each complainant gave evidence of the appellant's offending against that child and of the circumstances of that child's complaint about the appellant's conduct. In addition, the Crown led further evidence that fell into three categories. The first category can be described as "aggression evidence". This included evidence from the complainants of episodes of aggression and violence by the appellant towards his male children. This evidence also included three videos showing the appellant acting violently towards his children. The aggression evidence was led for a dual purpose: as "context evidence" both to explain the nature of the relationships between the appellant and his children and to explain the complainants' reluctance to make contemporaneous complaints; and as character rebuttal evidence to counter the evidence which the appellant had foreshadowed he would adduce in support of his good character[1].

9 The second category of evidence can be described as the "rugby ball incident evidence". This related to a specific incident in January 2016 in which the appellant threw the Fifth Child to the ground and trod on his arm and head, and

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**1** *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [13].

threw a rugby ball at the mother's chest at a time when she was recovering from breast reconstruction surgery. The appellant was convicted of the common assault of the Fifth Child and of the complainants' mother. The rugby ball incident evidence was also led as character rebuttal evidence[2].

10 The third category of evidence was described by the trial judge in his summing-up to the jury as the "evidence of other acts". This comprised evidence from each of the Third Child and another of the appellant's sons ("the Fourth Child") of instances where they saw the appellant touching the Fifth Child's penis. This evidence did not relate to any specific offence with which the appellant was charged. Instead, the Crown sought to rely on this evidence of other, uncharged acts as tendency evidence in respect of the counts concerning the Fifth Child. To that end, in advance of the trial, the Crown served a tendency evidence notice under s 97 of the *Evidence Act 1995* (NSW). In the notice, the Crown described the evidence as demonstrating the appellant's tendency to have a sexual interest or inappropriate interest in his male children under the age of 13, and to act on that interest. The notice indicated that the Crown intended not only to rely on the evidence of the uncharged acts against the Fifth Child as tendency evidence supporting the counts concerning the Fifth Child, but also to rely on the evidence of the counts concerning the Third and Fifth children as being "cross-admissible as tendency evidence for their own counts and for each other"[3]. The Crown did not advance any paths of potential tendency reasoning which related to the counts committed against the First Child.

11 The Crown brought its tendency application on for argument prior to the trial; but, at the urging of the appellant's trial counsel, the application was adjourned to be determined later in the trial, by which time the evidence the subject of the tendency application had been adduced by the Crown[4]. The appellant's counsel told the trial judge, during argument on the tendency application, that the defence had "concluded that tactically all that evidence can go in" because it was

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**2** *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [13].

**3** *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [19]-[20].

**4** *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [91].

so inconsistent that "no reasonable jury in our view would accept it"[5]. The appellant's counsel explained further[6]:

> "[W]e want it in as all part of the circumstances the whole picture we want – I mean it's an unusual situation I know but that's what we want to do, we want it in as the whole picture for the jury".

12 The trial judge rejected the Crown's tendency evidence application. His Honour concluded that although the evidence would have significant probative value, its probative value was outweighed by the risk of unfair prejudice to the appellant. An aspect of the prejudice to which his Honour adverted was the possibility that the giving of a tendency direction could mislead or confuse the jury in relation to the use of evidence "which is already in as context, and partly as character evidence"[7].

13 In so ruling, the trial judge did not expressly address the second aspect of the Crown's tendency application, namely, the cross-admissibility of the evidence of the Third and Fifth children concerning the counts against them. No doubt, as was noted by Macfarlan JA, the trial judge's ruling "operated as a rejection of all that the Crown sought in its [tendency] notice"[8].

14 Ultimately, the evidence of the other, uncharged acts was left to the jury for the limited purposes of providing context to the Fifth Child's allegations and as "evidence to deal with the assertions made by [the appellant] of concoction of evidence".

15 The Crown, in its final address to the jury, was careful not to invite the jury to engage in reasoning to a guilty verdict on any count because they considered that he was guilty on another count and was therefore the kind of person who was likely to have committed the offence in question. The Crown summarised each complainant's evidence separately, and advanced reasons why the jury might accept that evidence quite apart from the evidence of the other complainants as to the appellant's offending against them.

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**5** *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [17].

**6** *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [93].

**7** *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [21]-[22], [92].

**8** *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [23].

*The defence case*

16 The appellant gave evidence in which he denied all the allegations against him. He contended that the Crown case was concocted. The appellant said that his wife, with whom he was embroiled in acrimonious Family Court proceedings, had orchestrated the children's allegations against him.

17 The appellant's counsel, in his opening address to the jury, stated that he would ask them to "join the dots" to conclude that the mother had manipulated the children to tell lies against their father[9]. The defence highlighted what were said to be inconsistencies between the evidence of the Fifth Child and the evidence of the Third and Fourth children concerning the uncharged acts alleged to have been committed against the Fifth Child as an indication that the evidence of the children had been concocted[10].

18 The appellant also called evidence from several witnesses who testified to his good character.

*The summing-up*

19 In a course that was rightly deprecated by the Court of Criminal Appeal[11], the summing-up was, at the request of the trial judge, largely drafted by the Crown and agreed to by trial counsel for the appellant[12]. During a break in his Honour's delivery of the summing-up, the appellant's counsel sought a *Murray* direction[13]. The giving of that direction was opposed by the Crown. The trial judge ruled that he would "err on the side of caution" and gave a *Murray* direction in a form agreed by the parties[14].

20 In all, the trial judge gave four directions to the jury which are of relevance to the present appeal. Given that the appellant's argument in this Court is that yet a further direction to the jury was necessary in order to avoid a miscarriage of justice, it is desirable to refer, necessarily at some length, to the directions that

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**9** *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [89].

**10** *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [93].

**11** *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [84], [97].

**12** *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [32].

**13** So called after *R v Murray* (1987) 11 NSWLR 12.

**14** *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [99].

were given in order to assess the extent of the risk that the jury might have reasoned to guilty verdicts by a path of impermissible tendency reasoning.

21 The first direction concerned what the trial judge referred to as "context evidence". As can be seen, this direction included an anti-tendency direction in relation to both the evidence of other acts and the aggression evidence:

> "I turn to a topic which is described as context evidence. You have heard evidence in the trial of other occasions, apart from those relating to any particular account, where the children have alleged that the accused was aggressive and hurt them. In the case of [the Fifth Child], he said that the accused punched him, kicked him, and smacked him. You have also heard evidence from [the Third Child] that the accused was violent and rough, and [the First Child] said that he was aggressive towards her brothers. That evidence has been placed before you to assist you in understanding the relationship that the Crown alleges existed between the accused and the complainants, his children, in 2015. The Crown has placed that evidence before you also to explain the delay in complaints made by [the First Child] and [the Third Child] and I will refer to that evidence later.
>
> Obviously, before you can convict the accused in respect of any charge you must be satisfied beyond a reasonable doubt that a particular allegation occurred. That is, the Crown must prove the particular act as alleged by the complainant. In addition to the evidence led by the Crown specifically in relation to the counts on the indictment, the Crown has led evidence of other acts of alleged misconduct by the accused towards [the Fifth Child]. I shall, for the sake of convenience, refer to this evidence as evidence of other acts.
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> The evidence of the other acts is as follows; first there were two acts of the accused allegedly touching [the Fifth Child], on the penis, in the bathroom and downstairs, allegedly witnessed by [the Third Child]. Secondly, acts of the accused touching [the Fifth Child's] penis, in the bathroom ensuite, allegedly witnessed by [the Fourth Child]. So, context evidence is background evidence which explains the complainants' conduct by putting it in a realistic context. The Crown says that these occasions, which are different to the ones described by [the Fifth Child], have been placed before you to understand the nature or the context of [the Fifth Child's] allegations.
>
> The Crown also relies on the evidence to deal with the assertions made by [the accused] of concoction of evidence. I must give you some important warnings with regard to the use of this evidence of other acts, that is, acts that are not the subject of a charge. Firstly, you must not use

evidence of other acts as establishing a tendency on the part of the accused to commit offences of the type charged. You cannot act on the basis that he is likely to have committed the offences charged because there are other allegations against him. The evidence has a very limited purpose, as I have explained to you, and it cannot be used for any other purpose, or as evidence that the particular allegations contained in the charges have been proved beyond a reasonable doubt.

Secondly, you must not substitute the evidence of other acts witnessed by [the Third Child] and [the Fourth Child] for the evidence of the specific allegations contained in the charges in the indictment. The Crown is not charging a course of misconduct by the accused, but has brought particular allegations arising from what [the Fifth Child] says was sexual misconduct. You are concerned with the particular and precise occasions alleged by [the Fifth Child]. You must not reason that just because the accused may have done something wrong to [the Fifth Child] on some other occasions witnessed by [the Third Child] or [the Fourth Child]. He must have done so on the occasion alleged in the indictment. You cannot punish the accused for other acts attributed to him by [the Third Child] or [the Fourth Child], by finding him guilty of any charge on the indictment. Such a process of reasoning would amount to a misuse of the evidence and would not be in accordance with the law."

22 Secondly, the trial judge gave a "separate consideration direction":

"[T]here are ten separate trials being conducted here. There are ten counts. The trials are being heard together for convenience, because there are a number of common parties, in relation to the complainants and the accused, but you must give separate consideration to each count. That means that you are entitled to bring in verdicts of guilty on some counts and not guilty on some other counts, if there is a logical reason for that outcome. If you were to find the accused not guilty on any count, particularly if that was because you have had doubts about the reliability of the evidence of one or all of the complainants then you would have to consider how that conclusion affected your consideration of the remaining counts in relation to that complainant."

23 Thirdly, the trial judge gave a "character direction":

"I turn to the question of character. The accused has called evidence to establish that he is a person of good character, and you have heard evidence from a number of witnesses who said that he is an honest person, and not a person likely to commit these offences. The Crown has led evidence to contest that assertion. The Crown led evidence of the three

> videos of the accused where the Crown says that he punched [the Fifth Child] in the stomach, put a pillow over [the Third Child's] face, and threatened to punch [the Third Child], as evidence to show that he was not a person of good character when it came to his children, and that he had a bad disposition towards his children.
>
> Similarly, the Crown has put before you the evidence of the common assault of [the Fifth Child], where he was convicted of throwing [the Fifth Child] to the ground and treading on his arm and head; and the common assault of [the mother], where he threw a ball at her chest. This is done to rebut the suggestion that he is a person who is of good character and who, other than those two matters, has no prior convictions. The Crown says these events depict the accused as a person not of good character and a bad parent, and it says that this incident, along with the video, show that the father was trying to control disobedient children. [Counsel for the accused] said that this incident, along with the videos showed that [the accused] was trying to control disobedient children, and that he had no support from his wife.
>
> It is necessary for you, bearing in mind the arguments that have been put on both sides on this issue, to have regard to the totality of the evidence relating to the character of the accused, and determine whether you consider that the accused is a person generally of good character. You may reason that such a person of good character is unlikely to have committed these offences as alleged by the Crown. A jury can use the fact that a person is of good character to support his credibility, and you may reason that a person of good character is less likely to lie or give a false account in giving evidence before you, or in giving an account of the events in question in answer to Police. Whether you reason that way is a matter for you to determine.
>
> None of this, of course, means that good character provides the accused with some kind of defence. It is only one of many factors you are entitled to take into account in determining whether you are satisfied beyond a reasonable doubt of the guilt of the accused. The weight that you give to the fact that the accused is a person of good character is completely a matter for you, but you should take it into account in the way that I have indicated to you."

24 Fourthly, as has been noted, the trial judge gave the "*Murray* direction" at the request of the appellant:

> "You have to exercise caution before you could convict the accused on any count because the Crown case largely depends on you accepting the

> reliability of a single witness. For example, [the First Child] is the only witness to the events that make up the counts on the indictment for her allegations, other than count 3 where her mother says she saw the accused in her bed. On the Crown case [the Fifth Child] was the only witness to the events that he describes, and [the Third Child] is the only witness regarding his allegations. That being so, unless you are satisfied beyond a reasonable doubt that [the First Child], [the Fifth Child], and [the Third Child], are both honest and accurate witnesses in the accounts that they have given you cannot find the accused guilty. Before you could convict the accused you should examine the evidence of the complainants very carefully in order to satisfy yourselves that you can safely act upon that evidence to the high standard required in a criminal trial.
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> ... In any criminal trial where the Crown relies solely or substantially on the evidence of a single witness, the jury must always approach that evidence with particular caution because of the onus and standard of proof placed upon the Crown. I am not suggesting that you are not entitled to convict the accused on any count on the evidence of a complainant, clearly you are entitled to do so, but only after you have carefully considered the evidence and satisfied yourself that it is reliable beyond a reasonable doubt. In considering the complainants['] evidence in each case and whether it does satisfy you of the guilt of the accused you should, of course, look to see if it is supported by any other evidence."

25 Despite a suggestion by the appellant that the last clause of this direction, by instructing the jury to consider "other evidence" that might support a complainant's evidence, might have been taken by the jury to be an invitation to engage in tendency reasoning, it is apparent from context that the trial judge was speaking of other evidence that directly supported a complainant's evidence. Such evidence may have included, for example, the evidence of the complainants' mother finding the appellant in bed with the First Child in relation to count 3, or the videos in the aggression evidence in support of the complainants' evidence of the nature of their relationships with the appellant.

**The Court of Criminal Appeal**

26 The ground of appeal to the Court of Criminal Appeal with which this Court is concerned did not involve any suggestion that the verdict of the jury should be set aside because it was "unreasonable, or cannot be supported, having regard to the evidence". And because the appellant had not sought an anti-tendency direction, it could not be said that the trial judge had made a "wrong decision of any question of law". The only basis on which the appeal might be brought pursuant to s 6(1) of the *Criminal Appeal Act 1912* (NSW) was that, on some other ground, "there was a miscarriage of justice".

27 The appellant contended that the trial miscarried because the jury were not warned by the trial judge against using tendency reasoning. Because the appellant's counsel had not sought a direction to that effect at trial, the appellant required leave to raise this ground pursuant to r 4 of the *Criminal Appeal Rules* (NSW). The Court of Criminal Appeal refused leave to appeal on that ground.

28 Beech-Jones J (with whom Adamson J agreed) held that there was no absolute requirement, or even a presumption, that an anti-tendency direction must be given in every case in which multiple counts of sexual assault involving different complainants are tried together and where the evidence in respect of the counts is not admitted as tendency evidence. His Honour observed that whether a miscarriage of justice is occasioned by a failure to give an anti-tendency direction depends on the extent of the risk that the jury will engage in tendency reasoning. The assessment of that risk will be informed by an analysis of the parties' respective cases and how they were conducted, the effect of other directions given, and whether counsel sought an anti-tendency direction[15].

29 Beech-Jones J concluded that, in the circumstances, the combined effect of the separate consideration direction and the *Murray* direction was sufficient to ensure that the jury understood that each of the First Child, the Third Child and the Fifth Child was the "only witness" to the events comprising each count relating to each child, so that the risk of the jury having engaged in tendency reasoning was substantially diminished[16]. Beech-Jones J said[17]:

> "Most significantly, the *Murray* direction precluded a juror from reasoning that they could convict the [appellant] on any count concerning a particular child even though they had doubts about the honesty and accuracy of the evidence of that child because of their acceptance of the evidence of another child and what that evidence might demonstrate about the [appellant's] tendencies or propensity. The effect of the *Murray* direction was that, unless the jury were positively satisfied that the relevant child was an honest and accurate witness, then they could not convict the [appellant] on the counts that related to that child."

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**15** *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [113].

**16** *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [115].

**17** *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [117].

30 His Honour acknowledged that, nevertheless, there remained "at least a theoretical risk"[18] that the jury might reason from their acceptance of the evidence of one complainant, to the view that the appellant was the type of person who would commit the offences with which he was charged, and then to conclude that the evidence of another complainant in relation to similar offending was honest and accurate. However, in his Honour's view, in the context where a *Murray* direction had been given, this risk was not sufficiently material such that the failure to warn against tendency reasoning was a miscarriage of justice[19]. In so concluding, his Honour considered it was relevant that the appellant's trial counsel had not sought an anti-tendency direction, and that this was, in his Honour's view, clearly a deliberate decision by the appellant's trial counsel "in the sense that he did not consider that such a direction was necessary given the *Murray* direction and the manner in which the defence case was put"[20].

31 Beech-Jones J also considered that the nature of the defence case of concoction and the various straightforward paths of reasoning towards guilt available to the jury meant there was little practical risk that the jury might embark upon the circuitous route of tendency reasoning. In this regard, his Honour said[21]:

> "Given the defence case that the children were party to an orchestrated campaign of lies, the most likely paths of reasoning that were adverse to the [appellant] and consistent with the directions given to the jury did not involve tendency reasoning. These paths of reasoning were a rejection of the existence of any such manipulation by the [appellant's] ex-wife and a separate assessment of each child's evidence to the effect that they were honest and reliable, or an acceptance of the honesty and reliability of the evidence of one child as a basis for rejecting the [appellant's] evidence which might then impact on an assessment of the honesty and reliability of the evidence of the other children. Neither of those paths of reasoning involves tendency reasoning."

32 Macfarlan JA, in dissent, considered that there was a "significant risk" that the jury would engage in impermissible tendency reasoning so that the absence of

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**18** *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [118].

**19** *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [118], [120].

**20** *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [119]. See also [113].

**21** *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [120].

an anti-tendency direction rendered the trial unfair[22]. Macfarlan JA reasoned that a ruling against the cross-admissibility of evidence relating to multiple counts would ordinarily result in an order for separate trials, because of the difficulty of confining the jury to permissible non-tendency reasoning[23], and since that had not occurred, it was incumbent on the trial judge to attempt to ameliorate, as far as possible, the potential prejudice to the appellant by the giving of appropriate directions[24]. In his Honour's view, the *Murray* direction was insufficient to avoid such prejudice, not least because it did not rule out the possibility of the jury employing tendency reasoning as between counts relating to the same complainant[25].

## The appellant's submissions

33 The appellant submitted that the key issue in the trial – whether the complainants' evidence as to the sexual assaults committed upon them should be accepted – was the kind of issue where the risk of impermissible tendency reasoning was high. Because that was so, the appellant submitted, the absence of an invitation from either counsel at trial to the jury to engage in tendency reasoning was of no moment. The risk was that the jury may be naturally inclined to engage in tendency reasoning unless they were clearly directed against that course by positive steps.

34 The appellant submitted that Beech-Jones J erred in proceeding on the footing that there was no requirement of law that an anti-tendency direction should always be given where multiple sexual offences are charged and where tendency reasoning is not permissible. The appellant submitted that his Honour was wrong to distinguish the observations of McHugh J in *KRM v The Queen*[26] to the effect

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**22** *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [39]-[40], [54].

**23** *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [42], citing *De Jesus v The Queen* (1986) 61 ALJR 1 at 2-3; 68 ALR 1 at 3-5; *Sutton v The Queen* (1984) 152 CLR 528 at 531, 539, 542-544, 561, 569; *Hoch v The Queen* (1988) 165 CLR 292 at 294; *R v Bauer (a pseudonym)* (2018) 266 CLR 56 at 99 [88]; *Decision restricted* [2019] NSWCCA 166 at [184], [196]; *Hamalainen v The Queen* [2019] NSWCCA 276; *Hughes v The Queen* (2017) 263 CLR 338 at 402-403 [171]-[172].

**24** *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [43].

**25** *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [45]-[46].

**26** (2001) 206 CLR 221 at 233-235 [32]-[38].

that, in cases involving a trial on multiple counts of sexual offences against multiple complainants, a tendency warning "will almost certainly be required". In this regard, the appellant relied on the observations of Brennan J in *Sutton v The Queen*[27]:

> "When two or more counts constituting a series of offences of a similar character are joined in the same information, a real risk of prejudice to an accused person may arise from the adverse effect which evidence of his implication in one of the offences charged in the indictment is likely to have upon the jury's mind in deciding whether he is guilty of another of those offences. Where that evidence is not admissible towards proof of his guilt of the other offence, some step must be taken to protect the accused person against the risk of impermissible prejudice. Sometimes a direction to the jury is sufficient to guard against such a risk; sometimes it is not. Where a direction to the jury is not sufficient to guard against such a risk, an application for separate trials should generally be granted."

35 One may pause here to recall that, in the present case, a number of directions were given which tended to ameliorate the risk adverted to by Brennan J. The real question is whether, in the circumstances of the case, those directions were sufficient to remove the practical risk that the jury might reason to a conviction on any count by tendency reasoning.

36 The appellant submitted that the separate consideration direction was inadequate to instruct the jury as to what evidence they could consider in relation to each count. First, the appellant noted that a separate consideration direction typically involves two parts: that the jury "must consider each count separately", and that the jury must consider each count "only by reference to the evidence that applies to it"[28]. The direction given by the trial judge did not contain the second warning and so, in the appellant's submission, did not identify for the jury the evidence available to prove each count.

37 Nor, in the appellant's submission, did the *Murray* direction identify for the jury, with clarity, the evidence to which they were entitled to have regard in assessing the honesty and reliability of each complainant. Indeed, in the appellant's submission, the *Murray* direction given in this case was capable of being understood by the jury as an invitation to engage in tendency reasoning across multiple complainants, rather than an admonition against reasoning in that way. In

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**27** (1984) 152 CLR 528 at 541-542. See also *De Jesus v The Queen* (1986) 61 ALJR 1 at 3; 68 ALR 1 at 4-5.

**28** *KRM v The Queen* (2001) 206 CLR 221 at 234 [36], 263-264 [132].

any event, the appellant submitted, the *Murray* direction was ineffective to ward against impermissible tendency reasoning between counts relating to the same complainant.

38 The appellant contended that Beech-Jones J was wrong to infer that the failure of the appellant's trial counsel to request an anti-tendency direction was a deliberate decision made in the belief that such a direction was not necessary in the circumstances. In the appellant's submission, as Macfarlan JA concluded[29], it was not possible to form a view whether the appellant's trial counsel made a calculated forensic decision not to seek an anti-tendency direction. It was emphasised that even experienced counsel may make mistakes or be guilty of oversight and omission[30]. Accordingly, so it was said, the absence of a request for a direction did not relieve the trial judge of his duty to provide appropriate warnings to the jury.

**The Crown's submissions**

39 The Crown submitted that the appellant had not demonstrated that the failure to give an anti-tendency direction gave rise to a miscarriage of justice, because he had not demonstrated that there was a "real chance" that the jury in the present case might have improperly engaged in tendency reasoning[31].

40 The Crown submitted that the extent of the risk depends on the issues in the trial, contrasting the present case with cases where the identity of the assailant is in issue and the risk of impermissible tendency reasoning is particularly high. In the Crown's submission, neither the Crown Prosecutor nor the defence invited the jury to engage in tendency reasoning. Nor did any of the directions suggest that tendency reasoning would be permissible. The giving of the character direction, the context direction, the separate consideration direction and the *Murray* direction sufficiently mitigated the theoretical risk that the jury would employ tendency reasoning.

41 The Crown noted that the omission of the "second limb" of the standard separate consideration direction – to consider each count "only by reference to the evidence that applies to it" – was apt to ensure the defence case was not

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**29** *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [54].

**30** See *KRM v The Queen* (2001) 206 CLR 221 at 255-256 [101]; *Doggett v The Queen* (2001) 208 CLR 343 at 382-383 [147]-[148].

**31** See *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [113], citing *BRS v The Queen* (1997) 191 CLR 275 at 306.

undermined, defence counsel having invited the jury to consider all the evidence and to "join the dots" to conclude that each of the complainants was lying. In any event, the *Murray* direction clearly directed the jury as to the evidence they could use when reasoning towards guilt.

**A miscarriage of justice?**

42 Insofar as the appellant's argument depends upon the proposition that an anti-tendency direction must be given in every case where multiple counts of sexual offences against several complainants involving similar fact evidence are tried together, that submission must be rejected. It is noteworthy that the authorities, including *KRM v The Queen*[32], simply do not support the absolute proposition that a failure to give an anti-tendency direction in such circumstances always constitutes a miscarriage of justice[33].

43 It may be accepted, of course, that courts must be astute to protect the accused person against the risk of impermissible tendency reasoning, a risk that is "peculiarly" strong in cases where sexual offences are alleged[34]. As Macfarlan JA observed, in a sexual assault case, as a matter of "ordinary human experience"[35], it may be natural for the jury to use conclusions about one or more charged offences to assist them in deciding whether another charged offence was committed. But there is no absolute rule that in such cases the risk of impermissible tendency reasoning is such as always to necessitate the giving of an anti-tendency direction. The risk of tendency reasoning is not present in every case to the same extent; rather, the extent of the risk will depend upon the issues presented by the parties and the other directions given by the trial judge.

44 As the Crown suggested, the risk may be higher where, for example, the issue is as to the identity of the offender and the evidence of identification is circumstantial. Given the issues tendered by the parties to the jury in this case, however, there is an air of unreality in the suggestion that an anti-tendency

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**32** (2001) 206 CLR 221 at 234-235 [38].

**33** *BRS v The Queen* (1997) 191 CLR 275 at 308. See also *Erohin v The Queen* [2006] NSWCCA 102; *Toalepai v The Queen* [2009] NSWCCA 270; *Jiang v The Queen* [2010] NSWCCA 277; *Lyndon v The Queen* [2014] NSWCCA 112.

**34** *De Jesus v The Queen* (1986) 61 ALJR 1 at 3; 68 ALR 1 at 4-5.

**35** *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [40], citing *R v Bauer (a pseudonym)* (2018) 266 CLR 56 at 83 [51]. See also *HML v The Queen* (2008) 235 CLR 334 at 423 [272].

direction was necessary to ensure that the jury did not reason to guilt by reliance on tendency reasoning. The defence case put at front of mind for the jury the appellant's contention that each complainant was lying about the counts on the indictment that concerned the particular complainant. Each complainant was said to be concocting his or her evidence as part of a conspiracy against the appellant. Counsel for the defence, in his closing address, submitted to the jury that "[a]ll you are concerned [with] is as to whether you can find beyond reasonable doubt that [the prosecution] witnesses are reliable".

45 True it is that, as a matter of law, the rejection of the defence case of concoction did not mean that the appellant was, ipso facto, guilty on any count. But there can be little doubt that in the present case the issue of credibility as between the appellant on the one hand, and each of the complainants and their mother on the other hand, was overwhelmingly likely to be decisive of the appellant's guilt on any count. And confronted with such a stark contest of credibility, to reject the defence case of concoction was a legitimate path of reasoning which was consistent with the *Murray* direction that the jury could convict in respect of a count only if they were satisfied beyond reasonable doubt as to the reliability of the evidence of the complainant in respect of that count. That path of reasoning did not stray into tendency reasoning. If the jury were to accept that the evidence of each complainant was honest and reliable, the jury would have no occasion to resort to tendency reasoning to bolster the evidence of an unconvincing complainant by reference to a finding of guilt in respect of another complainant. The *Murray* direction was clear, and it had the force of simplicity.

46 Given the directions that the jury were actually given by the trial judge, it was distinctly unlikely that they would reason that a doubt about the reliability of any complainant in relation to any one complaint might be resolved by reasoning that the appellant was the kind of person who was disposed to engage in such conduct based on the evidence in relation to other counts.

47 Further in this regard, the Crown was scrupulous to put its case to the jury with the evidence of each of the complainants, and the arguments in favour of accepting that evidence as honest and reliable, summarised separately as to each complainant and as to each count. The Crown's response to the appellant's attack upon the credibility and reliability of the complainants was put to the jury in the following terms:

> "Of course, if you believe that [the accused] is telling you the truth, that he did not commit these offences, then clearly the Crown has not established its case. Even if you do not positively believe [the accused], but what he says gives you a reasonable doubt as to whether he did commit these offences, then you could not be satisfied beyond a reasonable doubt that he did, in fact, commit the offences. What the Crown says to you though

> is this. You would reject [the accused's] evidence entirely and you would reject it on critical issues involving his children and once you reject him in the way in which he dealt with his children, whether it be physically or decently, you put his evidence to one side and you go back to the Crown case and you work out whether you're satisfied that those three children told you the truth."

48 The Crown case was focussed upon the credibility and reliability of the complainants in light of evidence including the aggression evidence and the rugby ball incident evidence. The Crown case invited the jury to follow an orthodox path of reasoning to conviction, which made the risk that the jury might instead detour into tendency reasoning distinctly remote.

**Forensic advantage?**

49 A rational decision by defence counsel as to the conduct of a criminal trial that can be seen to have been a legitimate forensic choice that competent counsel could fairly make will not give rise to a miscarriage of justice within s 6(1) of the *Criminal Appeal Act*[36]. The adversarial system does justice through the diligent exertions of competent counsel in coming to grips with the special circumstances of the particular case.

50 It might be suggested that the failure by defence counsel to seek a direction, the fundamental premise of which is that the jury might accept the evidence of a complainant on one count, reflects a choice on the part of the appellant's representatives to give no countenance to even the possibility that the appellant might be convicted on any count, given the stark contest of credibility that the defence case presented to the jury. It might also be suggested that the appellant's case was unequivocally that the allegation that he had sexually assaulted any of his children on any occasion was a wicked lie. It might have been thought that the forensic strategy that the defence actually pursued was the only strategy that would, if successful, result in acquittals on all counts. Bold though such a forensic strategy may seem, in the course of human experience it is not unknown for bold strategies to fail.

51 It is not, however, necessary to pursue any of these speculations further. In the Court of Criminal Appeal, Beech-Jones J was not satisfied that the failure of

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**36** *TKWJ v The Queen* (2002) 212 CLR 124 at 130-131 [16], 133-134 [26]-[31], 147-149 [74]-[78], 159-160 [111]-[112].

the defence at trial to seek an anti-tendency direction was explicable in terms of the pursuit of forensic advantage[37].

52 It was, of course, theoretically possible for the trial judge to give an anti-tendency direction while at the same time reminding the jury of the defence case that they should scrutinise the evidence of all the complainants and their mother and so discern indications of concoction. But the issue is not about what was theoretically possible or even what might have been prudent. The issue is whether the extent of the risk of impermissible tendency reasoning as a pathway to verdicts of guilty was such as to require an anti-tendency direction to obviate that risk in the circumstances of this case.

53 If the jury were to entertain a doubt as to whether even one of the complainants was a reliable witness, then they might well have been disposed to entertain the possibility that all the complainants' evidence was concocted. On the other hand, if the jury were satisfied beyond reasonable doubt that the evidence of each complainant was honest and reliable in accordance with the separate consideration direction and the *Murray* direction, then there would simply be no occasion for the jury to resort to tendency reasoning. The *Murray* direction, which the appellant's counsel had secured, meant that the jury were focussed on whether any of the complainants might not be honest and reliable. If, with that focus, the jury were satisfied that each complainant was honest and reliable, verdicts of guilty would follow directly. But in no case would a conviction on any count follow from reasoning that doubts about the honesty and reliability of any complainant could be resolved in favour of conviction by tendency reasoning.

## A deliberate decision and its significance

54 Within our system of justice, save for exceptional cases, "parties are bound by the conduct of their counsel, who exercise a wide discretion in deciding what issues to contest, what witnesses to call, what evidence to lead or to seek to have excluded, and what lines of argument to pursue"[38]. While it is true that, as Kiefel CJ, Bell, Gageler and Gordon JJ said in *De Silva v The Queen*[39]:

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**37** *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [122].

**38** *Nudd v The Queen* (2006) 80 ALJR 614 at 618 [9]; 225 ALR 161 at 164; *R v Baden-Clay* (2016) 258 CLR 308 at 324 [48].

**39** (2019) 268 CLR 57 at 70 [35].

> "[t]he failure of counsel to seek a direction is not determinative against successful challenge in a case in which the direction was required to avoid a perceptible risk of the miscarriage of justice",

their Honours went on to say:

> "The absence of an application for a direction may ... tend against finding that that risk was present."

55 The majority of the Court of Criminal Appeal were right to conclude that the failure of the appellant's counsel at trial to seek an anti-tendency direction was a deliberate decision based on the circumstance "that he did not consider that such a direction was necessary"[40] to ensure a fair trial of the appellant. Indeed, this is clearly the better view.

56 There is no reason to doubt the competence of defence counsel. Indeed, it may be said that he conducted his client's case with considerable success. He resisted, successfully, the Crown's tendency application. And, as has been seen, in the course of the trial judge's summing-up, when defence counsel was afforded the opportunity to consider whether further directions were required, he did not seek an anti-tendency direction in respect of the counts on the indictment but rather pressed – again successfully – his application for the *Murray* direction, which was ultimately given by the trial judge. In these circumstances, the suggestion that defence counsel failed to seek an anti-tendency direction as a result of oversight on his part is fanciful.

57 One can be confident that the appellant's counsel at trial did not seek an anti-tendency direction for the reason that he perceived that, in light of the directions that were given to the jury and the stark choice presented to the jury by the parties, there was little practical risk that the jury would reason to verdicts of guilty via the impermissible path of tendency reasoning. The Court of Criminal Appeal had no reason to reach a different assessment of that risk, and neither does this Court. While it is true that the rejection of the defence case of concoction would not mean, ipso facto, that the appellant was guilty on all ten counts, the straightforward path of reasoning by which the jury would accept the evidence of each complainant (and their mother) as honest and reliable beyond reasonable doubt was such as to render recourse to the circuitous path of tendency reasoning a theoretical risk only.

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**40** *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [119].

## Conclusion and order

58 The majority of the Court of Criminal Appeal were right to refuse the appellant leave to appeal on the ground argued in this Court.

59 The appeal should be dismissed.

60 EDELMAN AND GLEESON JJ. The relevant facts concerning the prosecution and defence cases and the course of the trial are set out in the judgment of Kiefel CJ, Keane and Steward JJ. We also gratefully adopt their Honours' description of the reasoning of the New South Wales Court of Criminal Appeal.

61 The issue is whether, by reason of the trial judge's failure to give the anti-tendency direction, "on any other ground whatsoever there was a miscarriage of justice" within the meaning of s 6(1) of the *Criminal Appeal Act 1912* (NSW). The appellant contends that he was deprived of his entitlement to a trial in which the relevant law was correctly explained to the jury, and that this was a miscarriage of justice[41]. The law relevantly included that evidence admitted for one purpose is not admissible for another purpose, and cannot be used for another purpose[42]. In *Sutton v The Queen*[43], Brennan J explained the rationale for this rule as follows:

> "[I]n a criminal trial evidence of the commission of offences other than the offence charged is prima facie inadmissible against an accused person. The chief reason for the prima facie inadmissibility of evidence of an offence other than the offence charged is this: it is thought that the antipathy which evidence of another offence is apt to engender may unjustly erode the presumption of innocence which protects an accused person at his trial; ie, the evidence of the other offence may be regarded by the jury as being more probative of guilt of the offence charged than it can fairly be thought to be."

62 "[C]riminal courts take it as axiomatic that, where the evidence reveals the criminal convictions or propensity of the accused, there is a real risk that the jury will reason towards guilt by using the conviction or propensity."[44] The risk arises because such evidence would ordinarily be regarded as relevant and because it is thought that juries are likely to attach importance (and, indeed, too much importance) to such evidence[45]. Thus, the concern to be addressed is the prospect

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**41** *Mraz v The Queen* (1955) 93 CLR 493 at 514; *Weiss v The Queen* (2005) 224 CLR 300 at 308 [18], 311 [27].

**42** *BRS v The Queen* (1997) 191 CLR 275 at 294, quoting *B v The Queen* (1992) 175 CLR 599 at 607-608.

**43** (1984) 152 CLR 528 at 545.

**44** *BRS v The Queen* (1997) 191 CLR 275 at 308.

**45** *Perry v The Queen* (1982) 150 CLR 580 at 585; *Gilbert v The Queen* (2000) 201 CLR 414 at 420 [13]; *Hughes v The Queen* (2017) 263 CLR 338 at 365-366 [71]-[73].

that a jury, applying ordinary reasoning, might engage in tendency reasoning unless discouraged[46].

63 The law's acceptance that propensity reasoning will often be highly prejudicial is reflected in s 97 of the *Evidence Act 1995* (NSW), which conditions the admissibility of evidence of "the character, reputation or conduct of a person, or a tendency that a person has or had" to prove that the person has or had a tendency to act in a particular way, on a requirement of "significant probative value". The difficulty of mitigating the risk was expressed graphically by Lord Cross of Chelsea, who, in *Director of Public Prosecutions v Boardman*[47], observed that a trial involving multiple complainants would require the jury to "perform mental gymnastics" by directions to the effect that "in considering whether the accused is guilty of the offence alleged against him by A they must put out of mind the fact – which they know – that B and C are making similar allegations against him".

64 The risk of tendency reasoning was increased in this case because the trial did not merely involve multiple complainants[48], but alleged conduct that may have suggested to a jury tendencies of paedophilic and incestuous attraction on the part of the appellant. In such circumstances, an anti-tendency warning has been said to be "particularly important"[49].

65 Separate trials in relation to the allegations of each complainant would have avoided the real and well-recognised risk that the jury could reason towards guilt in respect of offences against one child by reference to evidence of offences against

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**46** See McClellan, "Who is telling the truth? Psychology, common sense and the law" (2006) 80 *Australian Law Journal* 655 at 657.

**47** [1975] AC 421 at 459. More recently, in *Hughes v The Queen* (2017) 263 CLR 338 at 403 [172], Nettle J concluded, in a trial involving multiple allegations of sexual assault and multiple complainants, that the process of reasoning that would have been required of a properly directed jury was so complex as to have required two separate trials.

**48** *KRM v The Queen* (2001) 206 CLR 221 at 254 [97].

**49** *T* (1996) 86 A Crim R 293 at 299. See also *Hughes v The Queen* (2017) 263 CLR 338 at 361-362 [59]-[60], 377 [109], 403 [172].

another child[50]. However, the appellant chose to have a single trial because an important aspect of his defence was that the allegations were concocted. The defence argued that the complainants had "put stories together", poisoned by their mother so that she could both maximise her position in proceedings in the Family Court of Australia against the appellant and inflict upon him as much pain as possible. In order to make good that case, the appellant wished to have a single trial of all the charges.

66 Having determined upon a single trial, the "most obvious danger [was] that a jury, unless adequately warned, and perhaps even if given the strongest warning, [would] find irresistible the temptation to use the evidence relevant to one set of charges as an aid to reaching a conclusion in relation to another set of charges"[51]. Thus, in *KRM v The Queen*[52], McHugh J expressed the opinion that, in the case of a single trial of alleged offences against different victims where the evidence in respect of one or more counts is inadmissible in respect of the other counts, "a propensity warning will almost certainly be required". In *Roach v The Queen*[53], the plurality stated:

> "The importance of directions in cases where evidence may show propensity should not be underestimated. It is necessary in such a case that a trial judge give a clear and comprehensible warning about the misuse of the evidence for that purpose and explain the purpose for which it is tendered. A trial judge should identify the inferences which may be open from it or the questions which may have occurred to the jury without the evidence. Those inferences and those questions should be identified by the prosecution at an early point in the trial."

67 The obvious danger of impermissible tendency reasoning in the appellant's trial required mitigation unless there was no real risk that the jury might convict

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**50** See *Director of Public Prosecutions v Boardman* [1975] AC 421 at 459; *Sutton v The Queen* (1984) 152 CLR 528 at 531, 541-542; *De Jesus v The Queen* (1986) 61 ALJR 1 at 3; 68 ALR 1 at 4-5.

**51** *R v Johnson* (unreported, New South Wales Court of Criminal Appeal, 23 July 1990).

**52** (2001) 206 CLR 221 at 235 [38].

**53** (2011) 242 CLR 610 at 625 [47].

the appellant by a chain of impermissible reasoning[54]. There was a miscarriage of justice in this case if, in the absence of the anti-tendency direction, there is a real and not fanciful risk that the jury might have used propensity reasoning to find the appellant guilty[55].

**Assessment of risk of impermissible tendency reasoning**

68 It was common ground that there was a risk of impermissible tendency reasoning in this case. The respondent accepted that the risk was of a sufficient magnitude to have compelled separate trials if they had been sought by the appellant.

69 The starting point is the "axiomatic" proposition that where the evidence may have revealed to the jury a propensity to offend, there was a real risk that the jury would reason towards guilt by using the identified propensity. The risk necessarily arose in this case because there was a joint trial of charges involving multiple complainants. The risk was exacerbated by reason of the nature of the particular charges, involving, as they did, sexual offences against three of the appellant's five children. The risk was further exacerbated because of the particular nature of the alleged offences involving the third and fifth children, demonstrated by the trial judge's finding as to the significant probative value of the evidence of those children for the purposes of s 97 of the *Evidence Act*.

70 Although the prosecution did not suggest tendency reasoning to the jury from the outset (its tendency evidence application being undecided), nor did it proceed in the manner advocated by *Roach v The Queen*[56], namely by identifying the inferences which may be open from evidence of multiple offences against multiple complainants at an early point in the trial and dispelling those inferences. Consistent with the determination of the tendency application after the complainants' evidence had been adduced, no directions were given by the trial judge limiting the use of the evidence of any single complainant prior to, or

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**54** *BRS v The Queen* (1997) 191 CLR 275 at 306. See also *KRM v The Queen* (2001) 206 CLR 221 at 234 [37].

**55** *BRS v The Queen* (1997) 191 CLR 275 at 302, 308, 330; *Gipp v The Queen* (1998) 194 CLR 106 at 166 [175]. See also *Erohin v The Queen* [2006] NSWCCA 102 at [68]; *Toalepai v The Queen* [2009] NSWCCA 270 at [46], [49]; *Jiang v The Queen* [2010] NSWCCA 277 at [44]; *Lyndon v The Queen* [2014] NSWCCA 112 at [63].

**56** (2011) 242 CLR 610 at 625 [47].

immediately following, that evidence being given[57]. This aspect of the course of the trial left the jury open to the significant temptation, as the trial proceeded, of using the evidence of the charges concerning each complainant in its evaluation of the evidence of each of the other complainants.

71 The matters identified above point to a high risk of tendency reasoning by the jury, unless otherwise instructed.

72 Although the risk might have been effectively addressed by directions of the general kind given by the trial judge to the jury, the directions in this trial did not achieve that result[58]. In particular, the separate consideration direction given by the trial judge[59] did not follow the common language of such a direction, as stated by McHugh J in *KRM v The Queen*[60], in that it omitted words to the effect that the jury must consider each count only by reference to the evidence that applies to the count. The respondent submitted that the separate consideration direction was adapted to take into account the defence case of concoction. Even if this be true, the direction given to the jury in this case failed to convey what evidence was relevant to each count and what evidence was not to be used in the course of giving separate consideration to each count. The direction did not effectively address the risk that the jury would reason towards guilt in relation to the counts concerning one complainant by reference to the evidence of the other complainants.

73 The trial judge gave a *Murray* direction[61], that is, a direction based on the following statement in *R v Murray*[62], approved in *Robinson v The Queen*[63]:

> "In all cases of serious crime it is customary for judges to stress that where there is only one witness asserting the commission of the crime, the evidence of that witness must be scrutinised with great care before a

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**57** cf *R v Beserick* (1993) 30 NSWLR 510 at 516.

**58** cf *R v J [No 2]* [1998] 3 VR 602 at 639; *R v Robertson* [1998] 4 VR 30 at 40.

**59** See *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [35].

**60** (2001) 206 CLR 221 at 234 [36]. See also *R v Markuleski* (2001) 52 NSWLR 82 at 92 [33].

**61** See *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [104].

**62** (1987) 11 NSWLR 12 at 19.

**63** (1999) 197 CLR 162 at 168-169 [21]. See also *Tully v The Queen* (2006) 230 CLR 234 at 252-253 [55]-[59], 260 [89].

> conclusion is arrived at that a verdict of guilty should be brought in; but a direction of that kind does not of itself imply that the witness' evidence is unreliable."

74 The *Murray* direction required the jury to accept the honesty and accuracy of each complainant and to scrutinise their evidence carefully before convicting the appellant of an offence against that complainant. However, the direction did not address, explicitly or implicitly, the risk of tendency reasoning from the evidence of one complainant to the guilt of the appellant of an offence against another complainant. Further, it did not conform to the trial judge's earlier instruction to give separate consideration to separate counts, and it did not indicate that the jury must not have regard to the evidence of offences against the other complainants in assessing the honesty and accuracy of each complainant. To the contrary, the *Murray* direction was expressed in a manner which may have positively encouraged the jury to consider the honesty and accuracy of the complainants collectively (by instructing the jury that "unless you are satisfied beyond a reasonable doubt that [the first child], [the third child], and [the fifth child] are both honest and accurate witnesses in the accounts that they have given you cannot find the accused guilty. Before you could convict the accused you should examine the evidence of the complainants very carefully").

75 While it may be accepted that the trial judge's directions to the jury did not positively encourage impermissible tendency reasoning, they did not discourage the misuse of the evidence of the various complainants and, accordingly, did not reduce the risk of impermissible reasoning. Beech-Jones J's postulated paths of reasoning are the likely ones but, having regard to the overall conduct of the trial, that is insufficient to support a conclusion that there was no real risk of impermissible tendency reasoning by the jury in this case. That conclusion is in conformity with the result in *BRS v The Queen*[64], in which this Court concluded that the accused had been denied a fair trial, with McHugh J observing that the "only basis for concluding that the jury may have used a forbidden chain of reasoning in reaching its verdict" was the axiomatic proposition that there was a real risk of propensity reasoning in the face of evidence of propensity.

76 Finally, it is necessary to consider the significance of the fact that the appellant's counsel did not seek an anti-tendency direction. Beech-Jones J correctly observed that the failure of defence counsel to seek an anti-tendency direction can affect an assessment of the relevant risk[65]. However, the failure of

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**64** (1997) 191 CLR 275 at 308.

**65** *Hamilton (a pseudonym) v The Queen* [2020] NSWCCA 80 at [113].

counsel to seek the anti-tendency direction is not determinative if the direction was required in order to avoid a perceptible risk of miscarriage of justice[66]. Deliberate forensic choices of the appellant's counsel did not relieve the trial judge of the responsibility to give such directions as were required by law[67].

77 In this Court, the respondent conceded that it would have been possible for the trial judge to give an asymmetrical anti-tendency direction, that is, a direction that would not have cut across the appellant's concoction case to the extent that it might have relied upon tendency reasoning. More precisely, the direction would have instructed the jury that in considering the defence case, the jury was free to consider all of the evidence, but that in considering the prosecution case, the jury was limited to considering identified evidence in support of each count sequentially.

## Conclusion

78 For these reasons, the Court of Criminal Appeal erred in failing to identify the real risk of conviction by impermissible reasoning in circumstances where the jury was not explicitly warned that the evidence of each complainant was not relevant to the charges concerning each of the other complainants, or that the evidence of offences against one complainant must not be treated as tending to prove that the appellant was guilty of any offence against another complainant or to prove an inclination in the appellant towards the alleged offending conduct.

79 In the Court of Criminal Appeal, the respondent did not submit that, if there was a miscarriage of justice, the proviso in s 6(1) of the *Criminal Appeal Act* could be applied. We would allow the appeal, set aside the orders of the Court of Criminal Appeal made on 27 April 2020 and, in their place, order that leave to appeal on ground 1 be granted, the appeal be allowed, the appellant's convictions be quashed, and a retrial be ordered.

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**66** *De Silva v The Queen* (2019) 268 CLR 57 at 70 [35]. See also *BRS v The Queen* (1997) 191 CLR 275 at 294-295, 302; *KRM v The Queen* (2001) 206 CLR 221 at 255-256 [101].

**67** *BRS v The Queen* (1997) 191 CLR 275 at 302, 306, 328.