

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

BENJAMIN RODER (A PSEUDONYM)

RESPONDENT

Director of Public Prosecutions v Benjamin Roder (a pseudonym)

[2024] HCA 15

Date of Hearing: 13 March 2024

Date of Judgment: 17 April 2024

M85/2023

ORDER

1. *Special leave to appeal is granted.*
2. *Appeal allowed.*
3. *Set aside the order of the Court of Appeal of the Supreme Court of Victoria made on 31 October 2023 and, in its place, order that:*
 - (a) *leave to appeal be granted and the appeal be allowed;*
 - (b) *the interlocutory decision of the County Court of Victoria made on 12 September 2023 be set aside; and*
 - (c) *the matter be remitted to the County Court of Victoria.*

On appeal from the Supreme Court of Victoria

Representation

R J Orr KC, Solicitor-General for the State of Victoria, with S C Clancy and M-Q T Nguyen for the applicant (instructed by Office of Public Prosecutions (Vic))

T Kassimatis KC with C K Wareham for the respondent (instructed by Dribbin & Brown Criminal Lawyers)

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CATCHWORDS

Director of Public Prosecutions v Benjamin Roder (a pseudonym)

Criminal practice – Trial – Directions to jury – Tendency – Where respondent due to stand trial on charges of sexual offences committed against two children of former partner – Where prosecution served tendency notice stating intention to rely on evidence of uncharged and charged acts to support alleged tendency on part of respondent – Where respondent applied to trial judge for ruling about form of direction to be given to jury regarding standard of proof to be applied when addressing evidence of charged acts to determine whether alleged tendency established – Where trial judge ruled jury be directed that, before they use charged acts for tendency purposes, they must find that conduct to be proved beyond reasonable doubt – Where Court of Appeal upheld trial judge's proposed direction and found to direct otherwise would invite jury to engage in "circular reasoning" and "apply a less rigorous standard of proof" to charges than beyond reasonable doubt – Whether trial judge's proposed direction precluded by s 61 of *Jury Directions Act 2015* (Vic) – Whether, in any event, erroneous for trial judge to give proposed direction.

Words and phrases – "beyond reasonable doubt", "charged act", "elements of the offence", "intermediate fact", "jury", "jury direction", "standard of proof", "tendency", "tendency direction", "tendency evidence".

Jury Directions Act 2015 (Vic), ss 61, 62.

1 GAGELER CJ, GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ. In *R v Dennis Bauer (a pseudonym)*, this Court observed that trial judges in New South Wales should not ordinarily direct a jury that, before they may act on evidence of uncharged acts adduced to support an alleged tendency on the part of an accused, they must be satisfied of proof of the uncharged acts beyond reasonable doubt.¹ The Court noted that one circumstance in which such a direction should be given is where there is a "significant possibility of the jury treating the uncharged acts as an indispensable link in their chain of reasoning to guilt",² citing, amongst other cases, *Shepherd v The Queen*.³

2 In *Bauer*, this Court also observed that the giving of a direction to the effect that such uncharged acts should be proved beyond reasonable doubt is precluded in Victoria by ss 61 and 62 of the *Jury Directions Act 2015* (Vic).⁴ The principal question raised by this application is whether the same position applies in Victoria in relation to evidence of *charged* acts relied on to support an alleged tendency on the part of the accused. For the reasons that follow, the answer is "yes". As the Victorian Court of Appeal was wrong to conclude otherwise,⁵ special leave to appeal should be granted, the appeal should be allowed and the trial judge's ruling to the contrary should be set aside.

Background

3 The respondent, Benjamin Roder, is due to stand trial in the County Court of Victoria on an indictment charging him with 27 sexual offences committed against two children of his former domestic partner, AB and CD.⁶

1 *R v Dennis Bauer (a pseudonym)* (2018) 266 CLR 56 ("*Bauer*") at 98 [86].

2 *Bauer* (2018) 266 CLR 56 at 98 [86].

3 (1990) 170 CLR 573 at 584-585.

4 *Bauer* (2018) 266 CLR 56 at 98 [86].

5 *Director of Public Prosecutions v Benjamin Roder (a pseudonym)* [2023] VSCA 262 ("*Roder*") at [33].

6 "Benjamin Roder" is a pseudonym. The initials of the complainants are not "AB" and "CD".

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4 The applicant, the Director of Public Prosecutions, served a notice on the respondent pursuant to s 97(1)(a) of the *Evidence Act 2008* (Vic) stating an intention to adduce evidence that the respondent had a tendency to have a particular state of mind and to act in a particular way, which were both said to be applicable to proof of whether the acts constituting the alleged offences occurred (ie, a tendency notice). The particular state of mind was described in the notice as "an improper sexual interest" in AB and CD and a willingness to act on that interest "by engaging in sexual activity with them". The particular way of acting was described in the notice as the respondent using his "position of trust, physical proximity to and relationship with [AB and CD] to engage in sexual activity with each of them", "tak[ing] advantage of occasions when he was alone" with them to the same end, "engag[ing] in sexual activity with [AB and CD] when others were nearby and in circumstances where there was a high risk of detection", and "tell[ing] and/or threaten[ing] each of [AB and CD] to keep the offending 'a secret'".

5 The tendency notice included a table specifying 33 pieces of evidence that were said to support the alleged tendency. Six of the entries concerned alleged incidents involving the respondent and either AB or CD that were not the subject of any of the charges on the indictment (ie, "uncharged acts"). The other 27 entries corresponded with an incident the subject of the charges on the indictment. Although these charged incidents were referred to as the "charged acts", several of those incidents included a combination of acts some of which do and some of which do not constitute the physical elements of the charged offence, although all acts are said to have occurred during the same incident.

The trial judge's ruling

6 Prior to the trial, the respondent applied to the trial judge for a ruling about the form of the direction to be given to the jury about the standard of proof to be applied when addressing the evidence of the charged acts for the purpose of determining whether the alleged tendency was established. The respondent conceded that the evidence of both the charged and uncharged acts was "cross-admissib[le]" as tendency evidence.

7 The trial judge ruled that the jury would be directed that, before they could use the uncharged acts for tendency purposes, they must find that those acts occurred without his Honour identifying any applicable standard of proof but, in order to use the charged acts for tendency purposes, the jury must find that conduct to be proved beyond reasonable doubt. His Honour also ruled (or at least stated)

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that the jury would be "instructed sequentially" by, firstly, recommending that they decide whether the six uncharged acts occurred and, secondly, instructing them that, when considering the first charge, they apply the principles concerning tendency reasoning based on the uncharged acts that they accepted, then apply those principles to the second charge based on the uncharged acts that they accepted and the first charge if it was proved beyond reasonable doubt (and so on for each of the 27 charges).

The Court of Appeal's decision

8 The applicant applied for leave to appeal from the trial judge's "interlocutory decision",⁷ being the ruling described above, to the Court of Appeal. The trial judge certified that the decision was of "sufficient importance to the trial to justify it being determined on an interlocutory appeal".⁸

9 The Court of Appeal (Priest, Niall and Taylor JJA) noted the effect of the above principles from *Bauer*, but considered that they were "limited to the directions ordinarily to be given to a jury in a single complainant sexual offences case in which the prosecution [was] permitted to adduce evidence of uncharged acts as tendency evidence".⁹ The Court found that to direct the jury that they need not be satisfied beyond reasonable doubt of the existence of any charged act in order to use it for tendency purposes, whilst also directing that they could not find the respondent guilty of any particular charge unless satisfied that the elements of that charge (including the particular charged act) had been proved beyond reasonable doubt, would be "confusing" and invite the jury to "indulge" in "impermissible circular reasoning" and "apply a less rigorous standard of proof to the charges on the indictment" than beyond reasonable doubt.¹⁰ The Court did not accept that the direction proposed by the trial judge was precluded by s 61 of the *Jury Directions Act*.¹¹ The Court added that it was not necessary for the trial judge to direct the jury "sequentially", provided it was made clear that the charged

7 *Criminal Procedure Act 2009* (Vic), ss 3, 295(2).

8 *Criminal Procedure Act*, s 295(3)(b).

9 *Roder* [2023] VSCA 262 at [28].

10 *Roder* [2023] VSCA 262 at [29], [34].

11 *Roder* [2023] VSCA 262 at [33].

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conduct could not be used for tendency purposes unless it had been proved beyond reasonable doubt.¹²

10 The applicant sought special leave to appeal from the Court of Appeal's judgment to this Court. On 7 December 2023, Gordon J referred the application to the Full Court.

11 The applicant raised two proposed grounds of appeal, being that the direction proposed by the trial judge was precluded by s 61 of the *Jury Directions Act* and that, even if it was not precluded, it would be erroneous for the trial judge to give the proposed direction. Each proposed ground will be addressed in turn.

The *Jury Directions Act*

12 One of the stated purposes of the *Jury Directions Act* is "to reduce the complexity of jury directions in criminal trials".¹³ The "[g]uiding principles" referred to in s 5 of the Act recognise Parliament's concern that the law governing those directions had become "increasingly complex"¹⁴ and recite Parliament's intention that such directions "be as clear, brief, simple and comprehensible as possible".¹⁵ These concerns reflected the reports upon which the Act was based.¹⁶

13 To that end, Pt 3 of the *Jury Directions Act*, which is entitled "Request for directions", addresses the circumstances in which a trial judge should give a direction at the request of a legal practitioner acting on behalf of a party¹⁷ and when

12 *Roder* [2023] VSCA 262 at [34].

13 *Jury Directions Act 2015* (Vic), s 1(a).

14 *Jury Directions Act*, s 5(1)(b).

15 *Jury Directions Act*, s 5(4)(c).

16 Weinberg et al, *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group* (August 2012); Victoria, Department of Justice & Regulation, Criminal Law Review, *Jury Directions: A Jury-Centric Approach* (March 2015).

17 *Jury Directions Act*, ss 12, 14.

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a direction should be given when no such request has been made.¹⁸ Part 3 has no application to a "general direction" or a "direction that the trial judge is required to give, or not to give, to the jury" under the *Jury Directions Act* or any other Act.¹⁹ Part 4 is entitled "Evidential directions" and deals with, inter alia, the directions that must be given in relation to particular categories of evidence in accordance with Pt 3 when it is invoked, such as any reliance by the prosecution on post-offence conduct to demonstrate the accused's guilt,²⁰ so-called "[o]ther misconduct evidence" (which includes tendency evidence)²¹ and identification evidence.²²

14 Division 1 of Pt 7 deals with general directions concerning proof beyond reasonable doubt. Section 61 provides that, subject to an enactment otherwise providing, "the *only matters* that the trial judge may direct the jury must be proved beyond reasonable doubt are ... (a) the elements of the offence charged or an alternative offence; and (b) the absence of any relevant defence" (emphasis added). Section 62 provides that "[a]ny rule of common law under which a trial judge in a criminal trial is required to direct the jury that a matter, other than a matter referred to in section 61, must be proved beyond reasonable doubt is abolished".

15 The notes at the foot of each of these provisions and the examples provided at the foot of s 61 form part of the *Jury Directions Act*.²³ The notes at the foot of s 61 identify certain matters that the trial judge must direct the jury as requiring proof beyond reasonable doubt, none of which concern tendency evidence. The text under the heading "Examples" at the foot of s 61 notes that the trial judge "may relate the evidence in the trial to directions under section 61 in many different ways". One of the examples provided is that "where the only evidence relied on by the prosecution to prove an element is an alleged admission made by the accused, the trial judge may refer to the alleged admission and direct the jury that it must be

18 *Jury Directions Act*, s 16.

19 *Jury Directions Act*, s 10(1).

20 *Jury Directions Act*, Pt 4 Div 1.

21 *Jury Directions Act*, Pt 4 Div 2.

22 *Jury Directions Act*, Pt 4 Div 4.

23 *Interpretation of Legislation Act 1984* (Vic), s 36(3A).

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satisfied that that evidence proves that element beyond reasonable doubt". However, in such a case, s 61 does not contemplate the jury being directed that they have to be satisfied beyond reasonable doubt that the admission was made and was true, as was previously held to be required in some Victorian cases prior to the enactment of the *Jury Directions Act*.²⁴

16 The notes at the foot of s 62 state that the provision abolishes the rule attributed to *Shepherd* concerning circumstantial evidence, namely that, in an appropriate case, a jury must be directed that they must be satisfied beyond reasonable doubt of an intermediate fact that is indispensable to proof of guilt even if it is not one of the ultimate facts that constitute the offence (ie, a "link[] in a chain").²⁵ Section 62 has been construed consistently with that note.²⁶ Given that tendency evidence is a form of circumstantial evidence,²⁷ it follows from the express abolition of *Shepherd* that these provisions remove any doubt about whether a direction can be given to the jury requiring proof beyond reasonable doubt of the facts said to support the existence of a tendency, including charged acts. The notes to s 62 also state that the provision abolishes "any other rule that requires a jury to be directed that it must be satisfied beyond reasonable doubt of any matter other than a matter referred to in section 61".

17 There was some debate during the hearing of the application as to the meaning of "matters" in ss 61 and 62. The word "matters" is used throughout the *Jury Directions Act* either as part of the phrase "matters in issue" in a trial²⁸ or to denote a topic or factor to be considered.²⁹ Regardless of the sense in which it is used in s 61, ss 61 and 62, together with the notes to those provisions, could not be more emphatic in stipulating that it is only the elements of an offence (and disproof

24 See, for example, *Magill v The Queen* (2013) 42 VR 616 at 617 [4], 633 [76].

25 *Shepherd v The Queen* (1990) 170 CLR 573 at 579, cited in *Gipp v The Queen* (1998) 194 CLR 106 at 133 [79].

26 See *Beqiri v The Queen* (2017) 270 A Crim R 523 at 546 [121].

27 See below at [23].

28 See, for example, *Jury Directions Act*, ss 9(a)(i), 12(a).

29 See, for example, *Jury Directions Act*, s 3 definition of "general directions", ss 32(2)-(3), 36(2)-(3), 44J.

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of any relevant defence), not some particular piece of evidence or intermediate fact, that must be proved beyond reasonable doubt.

18 In concluding that the direction proposed by the trial judge was not precluded by s 61, the Court of Appeal reasoned as follows:³⁰

"By its clear terms, s 61 requires a trial judge to direct the jury that 'the elements of the offence charged' must be proved beyond reasonable doubt. In the present case, every sexual act alleged in every charge on the indictment is an element of that charge. A direction that any *such element* must be proved beyond reasonable doubt – no matter the use sought to be made of *the evidence* – would not offend s 61 of the [*Jury Directions Act*]. Indeed, such a direction would plainly be in conformity with the section." (emphasis added)

19 This passage elides the difference between "the elements of the offence" and the evidence that supports the proof of such elements, a distinction that is at the heart of ss 61 and 62. Juries must be instructed that the former requires proof beyond reasonable doubt. However, subject to any contrary provision, juries must not be instructed that they have to be satisfied beyond reasonable doubt of the latter on any topic.

20 It follows that the first proposed ground of appeal should be upheld. However, the second proposed ground of appeal should also be addressed.

Charged acts and tendency evidence

21 Section 56(1) of the *Evidence Act 2008* (Vic) specifies that, except as otherwise provided, evidence that is relevant (to proving the existence of a fact in issue)³¹ in a proceeding is admissible in the proceeding. One provision that otherwise provides is s 97(1) of the *Evidence Act*. Section 97(1) precludes the admission of evidence of, inter alia, "a tendency that a person has or had ... to act in a particular way, or to have a particular state of mind" to prove that the person has or had that tendency unless "the party seeking to adduce the evidence [has given] reasonable notice in writing" and "the court thinks that the evidence will,

30 *Roder* [2023] VSCA 262 at [33].

31 *Evidence Act 2008* (Vic), s 55(1).

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either by itself or having regard to other evidence adduced or [sought] to be adduced ... have significant probative value". Section 101(2) precludes the prosecution from adducing such evidence about an accused "unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the accused".

22 As noted, the cross-admissibility of the evidence of the charged and uncharged acts as tendency evidence was accepted before the trial judge. Although the above provisions are to be applied by reference to the facts in issue on each charge on the indictment,³² the acceptance that the evidence was cross-admissible can be taken as an acceptance that each of the thresholds in those provisions was met in relation to each item of evidence relied on and each charge.

23 Tendency evidence (or propensity evidence) is a form,³³ and indeed a "special class",³⁴ of circumstantial evidence. Prior to the "uniform" Evidence Acts³⁵ coming into force, and in recognition of its capacity to be strongly prejudicial, the admissibility of such evidence was treated as being governed by the test to be applied by juries in determining guilt by reference to circumstantial evidence, namely whether there was "no rational view of the evidence consistent with the innocence of the accused".³⁶ The common law principles governing the admissibility of tendency (or propensity) evidence were abrogated and replaced by the provisions of the relevant form of the *Evidence Act*,³⁷ which, for Victoria, have been noted earlier. However, as the passage from *Bauer* set out in the opening

32 *Hughes v The Queen* (2017) 263 CLR 338 ("*Hughes*") at 391-392 [153], 423 [216].

33 *HML v The Queen* (2008) 235 CLR 334 at 401-402 [181], 493 [489], 500 [506]; *Bauer* (2018) 266 CLR 56 at 83 [50].

34 *Pfennig v The Queen* (1995) 182 CLR 461 ("*Pfennig*") at 482-483.

35 *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic); *Evidence Act 2011* (ACT); *Evidence (National Uniform Legislation) Act 2011* (NT).

36 *HML v The Queen* (2008) 235 CLR 334 at 493-494 [489], citing *Pfennig* (1995) 182 CLR 461 at 482-484. The Court in *Pfennig* held that "'rational' must be taken to mean 'reasonable'": *Pfennig* (1995) 182 CLR 461 at 483.

37 *Hughes* (2017) 263 CLR 338 at 353 [31].

paragraph of this judgment confirms, and leaving aside the *Jury Directions Act*, the directions applicable to the standard of proof concerning tendency evidence have been treated as still being governed by the principles applicable to circumstantial evidence, specifically those stated in *Shepherd*.

24 In *Hughes v The Queen*, the majority in this Court explained that with tendency evidence, "[t]he trier of fact reasons *from* satisfaction that a person has a tendency to have a particular state of mind, or to act in a particular way, *to* [determining] the likelihood that the person had the particular state of mind, or acted in the particular way, on the occasion in issue" (emphasis added).³⁸ The process of reasoning involved is similar to the manner in which an assessment of the significant probative value of the evidence is undertaken by the trial judge for the purpose of determining its admissibility, namely, by first assessing the strength of the evidence in establishing the tendency and then considering "the extent to which the tendency makes more likely the elements of the offence charged".³⁹ In the language of *Shepherd*,⁴⁰ the tendency is an "intermediate fact" that the prosecution seeks to establish and rely on as circumstantial proof of the elements of the offence. Unless the tendency is an "intermediate fact" which is "indispensable" to proof of guilt, it need not be proved beyond reasonable doubt.⁴¹

25 As noted, the Court of Appeal accepted that, unless the jury were instructed that they had to be satisfied beyond reasonable doubt of the existence of any charged act in order to use it for tendency purposes, the jury may engage in "circular reasoning" and apply a "less rigorous standard of proof to the charges on the indictment" than beyond reasonable doubt.⁴² These concerns were said to arise from the jury being directed in terms that first invited them to apply a lesser standard in finding whether the charged acts took place for the purpose of determining whether the alleged tendency was established, and then instructed

38 *Hughes* (2017) 263 CLR 338 at 348 [16].

39 *Hughes* (2017) 263 CLR 338 at 363 [64].

40 *Shepherd v The Queen* (1990) 170 CLR 573 at 579.

41 *Bauer* (2018) 266 CLR 56 at 98 [86], citing *Shepherd v The Queen* (1990) 170 CLR 573 at 584-585.

42 *Roder* [2023] VSCA 262 at [34].

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them to determine whether each charge was proved beyond reasonable doubt. These concerns have been addressed and resolved in recent decisions of the New South Wales Court of Criminal Appeal, which applied the above principles from *Bauer* to evidence of charged acts relied on to support an alleged tendency.⁴³

26 In *JS v The Queen*, the New South Wales Court of Criminal Appeal recognised the potential for such directions to undermine the necessity for proof of each charge beyond reasonable doubt but concluded that that concern should be addressed by the careful formulation of directions.⁴⁴ Basten A-JA (with whom Hamill and Dhanji JJ agreed) addressed a complaint about circular reasoning and how the directions should be formulated as follows:⁴⁵

"Insofar as the applicant complained that the reasoning [which the trial judge directed the jury to undertake] was 'incoherent' [or circular], this was premised on the assumption that the Crown, in a linear process, sought to prove the commission of an offence (at a standard of proof less than beyond reasonable doubt), and then relied on that finding to prove the tendency, and then relied on the tendency to prove the offence. However, this does not accurately represent the reasoning process involved. *It is the tendency that is relied on as circumstantial evidence in proof of the charge on the indictment.* The proper approach is to have regard to all the evidence ... relied on in proof of the tendency as evidence of the tendency alleged. To the extent that the jury is satisfied of the existence of the tendency, the tendency may be relied on in proof of the charge. *Given this process, it is preferable not to direct a jury to make findings as to the conduct relied on in proof of a charge. Rather the jury should be directed with respect to finding the alleged tendency.*" (emphasis added)

27 Two matters should be noted about this passage. First, it correctly identifies the alleged tendency as an intermediate fact that is to be proved in its own right

43 *JS v The Queen* [2022] NSWCCA 145 ("JS"); *Gardiner v The King* [2023] NSWCCA 89; *Rassi v The King* [2023] NSWCCA 119 ("Rassi").

44 *JS* [2022] NSWCCA 145 at [40].

45 *JS* [2022] NSWCCA 145 at [43].

and then deployed in aid of the proof of each charge.⁴⁶ For a tribunal of fact to find that an alleged tendency has been proved to a lesser standard by relying on, inter alia, direct evidence of charged acts, and then deploying that tendency in determining whether the charged acts have been proved beyond reasonable doubt, does not involve circular or incoherent reasoning. Instead, it simply means that the jury may consider the same evidence "at different stages of its deliberations with a different onus of proof and for a different purpose".⁴⁷

28 Second, as noted, his Honour accepted that there was a risk of undermining the jury's understanding of the necessity for proof of the elements of the charge beyond reasonable doubt but identified that one means of minimising that risk was to avoid giving a tendency direction that invited the jury to make findings as to the conduct relied on in proof of the charge. Instead, the direction should identify the evidence said to support the alleged tendency and invite the jury to consider whether that tendency has been established.⁴⁸ Otherwise, in *JS*, Basten A-JA noted that the balance of the summing up given to the jury meant that there was "no risk ... that the onus and standard of proof were not understood and properly applied".⁴⁹

29 The Court of Appeal distinguished these New South Wales authorities on the basis that the position in New South Wales is governed by s 161A of the *Criminal Procedure Act 1986* (NSW).⁵⁰ Section 161A(1) precludes a jury from being directed that "evidence needs to be proved beyond reasonable doubt to the extent that it is adduced as tendency evidence or coincidence evidence". Section 161A(2) provides that, if the evidence is also adduced as evidence of an "element or essential fact of a charge", the jury "may be directed that the evidence needs to be proved beyond reasonable doubt, but only to the extent that it is adduced as proof of the element or essential fact". Section 161A(3) relaxes the prohibition in

46 *Rassi* [2023] NSWCCA 119 at [8].

47 *Rassi* [2023] NSWCCA 119 at [9].

48 See *Rassi* [2023] NSWCCA 119 at [115].

49 *JS* [2022] NSWCCA 145 at [44].

50 *Roder* [2023] VSCA 262 at [20]-[21], [32]-[33]. Section 161A came into force with effect from 1 March 2021 pursuant to Sch 1.8[8] of the *Stronger Communities Legislation Amendment (Miscellaneous) Act 2020* (NSW).

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s 161A(1) in the circumstances contemplated by *Shepherd*. Contrary to the Court of Appeal's reasoning, the New South Wales authorities treated the principles from *Bauer* noted in the opening paragraph of this judgment as being applicable to charged acts and observed that s 161A simply conformed with that understanding. Those authorities were correct to so hold.

30 At the hearing of the application, the respondent raised a further contention in support of the trial judge's proposed direction to the effect that, unless it was given, any acquittal by the jury on charges that corresponded to the charged acts would be undermined if the evidence in support of those charged acts could nevertheless be used in support of the alleged tendency to demonstrate the respondent's guilt on other charges.⁵¹ This point is without substance. The principle upon which the respondent sought to rely only concerns an accused obtaining the benefit of a "prior acquittal", that is, an acquittal at an earlier trial.⁵² The principle has no application in this case.

31 It follows that, even leaving aside the *Jury Directions Act*, the trial judge erred in ruling that the jury should be directed that, to use the evidence of the charged acts for tendency purposes, the jury must find those charged acts proved beyond reasonable doubt. The conclusion that such a direction was necessary also drove his Honour to rule that the jury would be instructed "sequentially" in the manner outlined above. However, to direct or even recommend such a sequential approach only highlights the error in that, if the jury adopted such an approach, it would mean that, notwithstanding the concession that the evidence of the charged acts was cross-admissible on a tendency basis, evidence of the charged acts that constitute, say, charges 2 to 27 would not be considered by the jury when determining whether the respondent had the alleged tendency in adjudicating on charge 1 (and so on). While a trial judge in Victoria may direct a jury on the order in which they must or may consider multiple offences,⁵³ that power cannot be invoked to limit the jury's consideration of evidence that is conceded to be relevant

51 See, for example, *Kemp v The King* (1951) 83 CLR 341; *Garrett v The Queen* (1977) 139 CLR 437 at 444-445.

52 *Garrett v The Queen* (1977) 139 CLR 437 at 444-445. See also *R v Storey* (1978) 140 CLR 364 at 372, 398, 424; *R v Carroll* (2002) 213 CLR 635 at 647-648 [35]-[37], 650-651 [45]-[50].

53 *Jury Directions Act*, s 64E(2)-(3).

to (and substantially probative of) the facts in issue in relation to each charge. Further, the adoption of a sequential approach of this kind might result in the manner in which the jury reason to their verdicts being dependent on the order in which the trial judge told them to approach their verdicts so that the evidence the jury could consider when determining whether the alleged tendency is established may increase as they reach their verdicts on each successive charge.

A different form of direction?

32 In oral submissions, the respondent sought to raise a new, and alternative, argument that had not been raised before the trial judge or the Court of Appeal. The respondent contended that the jury should be directed that, when considering the respondent's guilt for each particular charge, they could not use the direct evidence of the corresponding charged act as part of the body of evidence relied on by the prosecution to support the alleged tendency.

33 The same submission was made in *Rassi*, and that submission immediately confronts the same difficulty as it did in that case, namely that such a direction would make the jury's task vastly more difficult.⁵⁴ In the ordinary course, the jury receive a separate tendency direction and then directions emphasising the necessity to be satisfied of each element of each offence charged beyond reasonable doubt.⁵⁵ During the summing up, the trial judge will refer the jury to the way in which the parties have set out their respective cases and identify the evidence necessary to assist the jury in determining the issues in the trial.⁵⁶ In doing so, it can be expected that the trial judge will identify the particular alleged act of the accused relied on by the prosecution for each charge.

34 To give effect to the respondent's alternative submission, the trial judge would be required to give the jury a tendency direction at each point in the summing up where a particular charge is being addressed. In doing so, the trial judge would have to direct the jury that, in considering whether the prosecution has established that charge beyond reasonable doubt, they must exclude from their consideration so much of the tendency evidence relied on that consists of direct

54 *Rassi* [2023] NSWCCA 119 at [3]-[4].

55 *Jury Directions Act*, s 61.

56 *Jury Directions Act*, ss 65-66.

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evidence of that charge. Directions of this kind would require the jury to repeatedly revisit their own reasoning and conclusions in relation to the existence of the tendency in relation to each successive charge. The complexity of the jury's task would significantly increase as the jury proceed through their consideration of each charge. As was noted in *Rassi*, the only means of avoiding this would be to direct the jury that they can only rely on evidence of charged acts as tendency evidence if they are satisfied that evidence has been proved beyond reasonable doubt,⁵⁷ a proposition that has already been rejected.

35 In any event, this alternative submission overlooks the nature of tendency evidence and tendency reasoning as explained above. Tendency evidence has been described as evidence that on "another occasion or occasions" different to the occasion the subject of a charge, the accused "acted in a particular way".⁵⁸ If so described, the direct evidence of a particular charged act would not be admitted as tendency evidence in relation to that same charged act. However, as already explained,⁵⁹ any assessment of whether evidence relating to "another occasion or occasions" to a particular charged act has significant probative value for the purpose of determining its admissibility as tendency evidence is to be undertaken "having regard to other evidence", which includes the evidence of that charged act.⁶⁰ The jury's assessment of the weight or strength of the evidence involves similar reasoning.

36 It follows that, if, instead of giving a single separate tendency direction, a jury were directed that they had to reconsider whether an accused possessed the alleged tendency at each point in their deliberations when addressing whether the accused was guilty of a particular charge, then the jury would still consider the same body of evidence in determining whether the tendency was established with the same result. Contrary to the guiding principles of the *Jury Directions Act*, this approach would make the summing up repetitive and confusing.⁶¹ It would also

57 *Rassi* [2023] NSWCCA 119 at [4].

58 *IMM v The Queen* (2016) 257 CLR 300 at 328 [104].

59 See [21] and [24].

60 *Evidence Act*, s 97(1)(b).

61 See *Jury Directions Act*, s 5(4)(c).

carry a much greater danger of undermining the jury's understanding of the necessity to establish the elements of the offence to the requisite criminal standard than giving the jury a single separate tendency direction. The means to address that danger with a single separate tendency direction has already been noted.

Content of directions

37 As this case concerns Victoria, the primary point of reference for determining the content of the appropriate directions in relation to tendency evidence is the *Jury Directions Act*.⁶² That said, it follows from the nature of tendency evidence that, in a case where the prosecution relies on both uncharged and charged acts to establish an alleged tendency of the kind under consideration here, a single separate tendency direction should ordinarily be given. Such a direction should not direct or invite the jury to make findings in respect of charged conduct, but instead should indicate the evidence relied on to support the alleged tendency,⁶³ direct the jury to consider whether they are satisfied of the alleged tendency and then advise the jury that, if they are so satisfied, they can use that tendency in considering whether it is more likely that the accused committed the specific offences with which he or she is charged. Careful directions should be given to the jury as to the requisite onus and standard of proof⁶⁴ as well as to the contents of the elements of the offence and the need for separate consideration of each charge.⁶⁵

Conclusion

38 Both of the applicant's proposed grounds of appeal should be upheld. There should be a grant of special leave to appeal, the appeal should be allowed, the orders of the Court of Appeal and the ruling of the trial judge should be set aside, and the matter should be remitted to the trial judge to consider what ruling, if any, should be made in relation to the respondent's application.

62 *Jury Directions Act*, Pt 4 Div 2.

63 *JS* [2022] NSWCCA 145 at [43]; see also *Jury Directions Act*, s 27(3)(a).

64 *Jury Directions Act*, ss 61-64.

65 *MFA v The Queen* (2002) 213 CLR 606 at 617 [34]; *JS* [2022] NSWCCA 145 at [44].