HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B6 of 2020

BETWEEN:

CHARLES WILLIAM DAVIDSON
Applicant

and

THE QUEEN
Respondent

APPLICANT'S REPLY

Part I: Certification

1. I certify that this submission is in a form suitable for publication on the internet.

Part II: Reply

The application focusses on the refusal to separate the rape counts having led to a miscarriage of justice

2. It is uncontroversial that the applicant sought a greater separation of the counts at pre-trial stage but does not now press for that same degree of separation.[1] This application is focussed upon a miscarriage of justice having occurred in relation to each of the charges upon which the applicant was convicted, by reason of the failure to order separate trials for the rape charges. A retrial is sought in relation to each count upon which the applicant was convicted. A retrial is already pending on the two charges upon which the jury could not agree.[2]

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[1] See the respondent's submissions at [17], including footnote 7; and also, the reasons of McMurdo JA in *R v Davidson* [2019] QCA 120 at [10]-[11]; AB 208.
[2] Counts 16 and 17, being the alleged rapes of HL.

3. It also may be accepted that the question of joinder under section 567 of the *Criminal Code*, which is focussed upon whether two or more counts form a series of offences of the same or similar character,[3] is different to the question of separation under section 597A(1) of the *Code* of a count that is properly joined under section 567 but in respect of which the accused person may be prejudiced in their defence by reason of the joinder.[4] Nonetheless, the issues for consideration in relation to those two questions may overlap and present additional complexities by reason of that connection.

4. For example, separation of the rape charges concerning EB and HL[5] from the indecent assault charges related to other complainants raises whether the indecent assault charges concerning EB and HL[6] should be prosecuted with the indecent assault charges for the other complainants, or on separate indictments containing only the charges related to EB and HL, respectively. The resolution of those questions in due course if retrials are ordered, does not alter whether a miscarriage of justice has occurred by reason of the rape counts having been jointly tried with the other 18 counts.

5. Similarly, the fact that the applicant applied pre-trial for a separation of the indecent assault charges into certain groups, which was noted below,[7] but does not now press for that same degree of separation, does not alter whether a miscarriage of justice occurred by reason of the rape counts having been jointly tried with the indecent assault counts.

The dissenting reasons of Justice Boddice should be preferred

6. At [23] of the Respondent's submission it is noted that Boddice J "did not express any conclusion that the evidence of the counts in each group of sexual assault offences, as his Honour had approached the offences, was of probative value (and therefore admissible) as concerns the counts in the other group." This, it is argued, leaves the applicant in "a middle-ground between the conclusion reached by the Court of Appeal majority and that expressed in the reasons of Boddice J in dissent" [24]. With respect, that proposition is not correct.

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[3] Applicant's submissions at [24].
[4] Applicant's submissions at [25].
[5] Count 15, and Counts 16 and 17, respectively.
[6] Count 6, 13 and 14, and Counts 18 to 20, respectively.
[7] See for example, *R v Davidson* [2019] QCA 120 at [220] and [229]; AB 241-242.

7. Justice Boddice's division at [229] of the indecent assault counts according to the extent of the alleged conduct in each charge is merely a restatement of the applicant's pre-trial concessions. At [235], however, his Honour appears to delineate "the lack of cross-admissibility" of the evidence of the alleged rapes[8] from the "differing nature of the appellant's conduct in respect of" some of the indecent assault counts, namely "in respect of the touching of the vaginal, groin, pubic and buttock areas, of MQ, FE, KA, RJ and EB".[9] That delineation, and the conclusion at [236] that "the ground of appeal that the pre-trial hearing judge ought to have ordered a separate trial of some of the counts, has been made out", do not include a conclusion that any one or more of the indecent assault counts should be tried separately to any other indecent assault count. To the extent that Boddice J has grouped the indecent assault counts according to the "differing nature of the appellant's conduct" in discussion, that does not demonstrate error.

There are "obvious and significant differences"

8. At [49] of the respondent's outline there appears to be, with respect, a misunderstanding of [61] of the applicant's submissions. It is not contended by the applicant that "the obvious and significant differences" to which Boddice J was referring included what the defence case may be on the different types of offences. When speaking of "obvious and significant differences" his Honour was referring to the differences between the rape charges that are set out in his Honour's summary of the evidence of those three counts.[10]

9. At [61] of the applicant's outline, however, reference is made to the differences between the rape counts *and* the indecent assault counts, and the phrase "obvious and significant differences" is deployed to include not only the factual differences, but also the different defence case in respect of each type of offence. It is not argued that Boddice J extended the phrase in the same manner.

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[8] Counts 15, 16, and 17.
[9] Counts 1, 4, 9, 10, 11, and 13.
[10] *R v Davidson* [2019] QCA 120 at [79] to [80] in relation to Count 15; AB 219, and at [120] to [125] in relation to Counts 16 and 17; AB 225-226.

10. As discussed at [63] of the applicant's outline, the applicant contends that the indecent assault evidence lacked the necessary "specific connection" with or in relation to the issues for discussion in each rape case, including the defence case on each count.[11]

11. Justice McMurdo, however, expressed the decisive finding by reference to a "sufficient link" and/or common features", which appear to be taken from *R v Bauer*[12] and preconditioned on a finding that the evidence had "strong probative" value.[13] That finding was, according to McMurdo JA, such "as to make the evidence of one offence strongly probative in the proof of another". However, that phraseology was deployed by this Court in *R v Bauer*[14] for distinctly different purposes, namely the need for "significant probative value" under section 97 of the *Uniform Evidence Legislation*; a statutory criterion which is "less demanding" than the common law basis for admission.[15]

12. The Respondent also submits at [55] to [57] of the Respondent's outline that Boddice J did not identify what were the "obvious and significant differences" between the rape counts. With respect, the differences are, as his Honour's characterisation asserts, apparent on the facts.

13. The alleged rape of EB is said to have been a single, sudden penetration accompanied by an unequivocal vocalisation of intention, occurring after, and not within the scope of, any massage technique.[16] The evidence of HL, however, was that penetration occurred in the course of repeated movements made during the massage itself, without any oral expression of intent.[17] The fresh complaint evidence of HL also raised, at least to some extent, a possibility that the complainant's evidence was an exaggeration. It also is noted that the jury were unable to reach a verdict on either rape count concerning HL.[18] The applicant contends that Boddice J was correct to describe Counts 15, 16 and 17 as featuring "obvious and significant differences".

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[11] *Phillips v The Queen* (2006) 225 CLR 303 at 320-321 [54] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ.
[12] *R v Bauer* (2018) 266 CLR 56 at 87 [58].
[13] *R v Davidson* [2019] QCA 120 at [16]; AB 210.
[14] (2018) 266 CLR 56.
[15] *R v Bauer* (2018) 266 CLR 56 at 84 [52].
[16] *R v Davidson* [2019] QCA 120 at [79] to [80] in relation to Count 15; AB 219.
[17] *R v Davidson* [2019] QCA 120 at [120] to [125] in relation to Counts 16 and 17; AB 225-226.
[18] *R v Davidson* [2019] QCA 120 at [44]; AB 214.

14. On that basis, his Honour was correct to hold at [235] that "[t]he lack of cross-admissibility of the evidence of the alleged rapes of EB and HL, together with the differing nature of the [applicant]s] conduct in respect of the touching of the vaginal, groin, pubic and buttock areas, of MQ, FE, KA, RJ and EB, means there was admitted into evidence at the joint trial, highly prejudicial material".

15. The purpose for which the evidence was to be deployed in *R v Bauer*[19] and *Hughes v The Queen*[20], under section 97 of the *Uniform Evidence Legislation,* was as 'tendency evidence'. In this case, however, the prosecution deployed the evidence to submit that '… there is such a similarity between the acts and the circumstances in which they occurred that it is … highly improbable that the events simply occurred by chance".[21] The reasons of McMurdo JA, with whom Gotterson JA agreed, did not apply a distinction between "probability reasoning" and "propensity reasoning".

16. In contrast, the approach, and the language used by Boddice J, is consistent with the common law principles applicable to the use of the evidence in this case, in particular the "obvious and significant differences" which "undermine the formulation of an underlying pattern of conduct".[22] Accepting that passages from a judgment should not be read like statutes, and that expressions in this context are not essential,[23] the reasons of Boddice J reflect the higher standard for the admission of similar fact evidence at common law. As was said in *Hoch v The Queen*,[24] the basis for the admission of similar fact evidence:

> "… lies in its possessing a particular probative value or cogency by reason that it reveals a pattern of activity such that, if accepted, it bears no reasonable explanation other than the inculpation of the accused person in the offence charged."[25]

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[19] *R v Bauer* (2018) 266 CLR 56.
[20] *Hughes v The Queen* (2017) 263 CLR 338.
[21] AB 15 L37-40; Applicant's Book of Further Materials: p 43-45.
[22] *R v Davidson* [2019] QCA 120 at [233]; AB 243.
[23] *Pfennig v The Queen* (1995) 182 CLR 461 at 484 per Mason CJ, Deane and Dawson JJ.
[24] (1988) 165 CLR 292.
[25] (1988) 165 CLR 292 at 294 per Mason CJ, Wilson and Gaudron JJ.

Dated: 18 December 2020

Signed on behalf of the
Senior legal practitioner presenting the
case in Court

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