



HIGH COURT OF AUSTRALIA

14 June 2017

HUGHES v THE QUEEN [2017] HCA 20

Today the High Court, by majority, dismissed an appeal from a decision of the Court of Criminal Appeal of the Supreme Court of New South Wales. A majority of the High Court held that tendency evidence admitted against the appellant was admissible under s 97(1) of the *Evidence Act 1995* (NSW).

The appellant was arraigned in the District Court of New South Wales on an indictment that charged him, in 11 counts, with sexual offences committed against five female children under the age of 16 years. The complainants were aged between six and 15 years at the time of the offences. The acts charged in each count and the circumstances of their commission varied. The prosecution gave notice that it would seek to adduce evidence from each complainant and from other women as "tendency evidence". The prosecution identified the tendencies of the appellant that it sought to prove as including, first, the appellant having a sexual interest in female children under the age of 16 years and, secondly, the appellant using his relationships to obtain access to female children in order to engage in sexual activities with them.

Section 97(1)(b) of the *Evidence Act* excludes evidence of the character, reputation or conduct of a person to prove that the person has or had a tendency to act in a particular way or to have a particular state of mind ("tendency evidence"), unless the court thinks that the tendency evidence will have "significant probative value". The appellant, applying for an order for separate trials, challenged the admissibility of the tendency evidence on the basis that it lacked sufficient similarity to the charged conduct to have "significant probative value". The trial judge held that the probative value of the tendency evidence was significant in circumstances in which the fact in issue in each count was whether the charged sexual conduct occurred, and so admitted the evidence. The jury returned verdicts of guilty on 10 counts. The appellant appealed his convictions to the Court of Criminal Appeal, relevantly contending that the tendency evidence did not possess "significant probative value". The Court dismissed the appeal.

By grant of special leave, the appellant appealed to the High Court. The Court held, by majority, that s 97(1) of the *Evidence Act* does not condition the admission of tendency evidence on the court's assessment of operative features of similarity between the tendency evidence and the conduct in issue. In cases where it is the occurrence of the offence charged that is in issue, the majority reasoned that evidence will likely have significant probative value where (i) the evidence, by itself or together with other evidence, strongly supports proof of a tendency, and (ii) the tendency strongly supports the proof of a fact that makes up the offence charged.

The Court further held, by majority, that the tendency evidence adduced at the appellant's trial possessed "significant probative value" in relation to each count for which it was adduced. When considered together, the tendency evidence showed the appellant's tendency to engage opportunistically in sexual activity with female children despite a high risk of detection. That evidence was capable of removing doubts about the appellant's conduct and so was significantly probative as to whether the charged offences occurred. Accordingly, the majority held the tendency evidence was admissible, and dismissed the appeal.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*