HIGH COURT OF AUSTRALIA

12 September 2018

THE QUEEN v DENNIS BAUER (A PSEUDONYM)
[2018] HCA 40

Today the High Court unanimously allowed an appeal from a decision of the Court of Appeal of the Supreme Court of Victoria which had quashed the respondent's convictions for sexual offences.

The respondent was charged with 18 sexual offences committed against the complainant over a period of about 11 years. The Crown applied to adduce a recording of the complainant's evidence from a previous trial ("the recording"). It also applied to adduce as tendency evidence: evidence of the complainant of the acts comprising Charges 1 and 3 to 18; evidence of a witness, TB, of the act comprising Charge 2 and an uncharged sexual act involving the complainant; and evidence of the complainant of several uncharged sexual acts ("the tendency evidence"). The Crown sought to adduce the tendency evidence in order to establish that the respondent had a sexual interest in the complainant and a willingness to act upon it. The Crown further sought to call evidence of a complaint made by the complainant to another witness, AF, in which the complainant disclosed that she had been sexually assaulted by the respondent ("the complaint evidence"). The respondent objected to the admissibility of the recording, the tendency evidence, and the complaint evidence. He also contended that Charge 2 should be severed from the indictment and tried alone. The trial judge allowed the recording, the tendency evidence, and the complaint evidence, to be admitted and rejected the respondent's application that Charge 2 be severed and tried alone. The respondent was convicted of all charges.

The respondent appealed against conviction to the Court of Appeal, arguing that each of the trial judge's rulings in respect of the recording, the tendency evidence, the complaint evidence, and severance was wrong. The Court of Appeal allowed the appeal, holding that the trial judge had been wrong: to admit the recording, because it had not been shown that the claimant was unwilling to give evidence; to admit the tendency evidence, because neither the complainant's evidence nor TB's evidence had any "special feature"; not to order that Charge 2 be severed and tried alone, because TB's evidence of Charge 2 was not cross-admissible in relation to the other charges; and to admit the complaint evidence, because there was no evidence that the relevant facts were fresh in the complainant's memory when she made the complaint, and, in any event, because the probative value of the evidence was so slight as not to outweigh the risk of unfair prejudice. The Court of Appeal found that a substantial miscarriage of justice had been occasioned by the admission of the tendency evidence and the complaint evidence. The Court of Appeal quashed the respondent's convictions and ordered that a new trial be had.

By grant of special leave, the Crown appealed to the High Court. In respect of the recording, the Court held that, in view of the complainant's strong preference to avoid giving evidence again if at all possible, and in the absence of competing considerations, no error had been shown in the trial judge's conclusion that it was in the interests of justice that the recording be admitted. The Court further held that the trial judge had been correct to conclude that the complainant's evidence was admissible as tendency evidence. All of the charged and uncharged acts were alleged to have been committed against the one complainant, and none of them was far separated in point of time or far different in nature and gravity from the others. These characteristics meant that there was no need

Please direct enquiries to Ben Wickham, Senior Executive Deputy Registrar
Telephone: (02) 6270 6893 Fax: (02) 6270 6868
Email: bwickham@hcourt.gov.au Website: www.hcourt.gov.au

for the evidence to have any "special feature" in order to render the evidence of one charge cross-admissible in proof of the other charges, or to render the evidence of uncharged acts admissible in proof of the charged acts. The complainant's evidence had very high probative value because it showed that the respondent was sexually attracted to the complainant and that he acted upon that attraction by engaging in sexual acts with her, making him more likely to seek to continue to give effect to the attraction by engaging in further sexual acts with the complainant as the opportunity presented. Nor was the complainant's evidence productive of unfair prejudice to the respondent. The complainant's evidence of each charged and uncharged act was cross-admissible in proof of each of the charges. The Court also held that TB's evidence of Charge 2 had significant probative value and was admissible in relation to each other charged act as evidence of the respondent's sexual attraction to the complainant and his tendency to act upon it when the opportunity presented, and that there was no real risk of the jury using that evidence in an unfair way as to justify its exclusion. Therefore, the trial judge had been correct to hold that there was no basis for Charge 2 to be severed and tried alone. Finally, the Court held that the complaint evidence was admissible as there was evidence from which it could be inferred that the facts were fresh in the memory of the complainant when she made the complaint and the probative value of the evidence sufficiently outweighed its prejudicial effect.

- *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.*