



HIGH COURT OF AUSTRALIA

17 April 2024

DIRECTOR OF PUBLIC PROSECUTIONS v BENJAMIN RODER (A PSEUDONYM)
[2024] HCA 15

Today, the High Court granted special leave to appeal and unanimously allowed an appeal from a decision of the Court of Appeal of the Supreme Court of Victoria. The principal issue was whether a proposed direction, to the effect that a jury could only use evidence of charged acts to support an alleged tendency on the part of an accused if they were satisfied such acts had been proven beyond reasonable doubt, could be given by a trial judge in Victoria.

The respondent 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 ("the complainants"). The applicant served a tendency notice on the respondent stating an intention to adduce evidence that the respondent has a tendency to a particular state of mind and to act in a particular way. The alleged tendency included the respondent having "an improper sexual interest" in the complainants and using his "position of trust, physical proximity to and relationship with [them] to engage in sexual activity". The tendency notice relied on evidence of both uncharged and charged acts, the latter being alleged incidents that were also the subject of the charges on the indictment to support the alleged tendency. Prior to the trial, the respondent applied for a ruling on the direction to be given to the jury regarding the standard of proof when considering the evidence of the charged acts for the purpose of determining whether the alleged tendencies were established. The trial judge ruled that the jury would be directed that they must find that conduct to be proved beyond reasonable doubt before they could use the charged acts for tendency purposes ("the proposed direction").

In the application for leave to appeal, the Court of Appeal considered the observations of the High Court in *R v Bauer* (2018) 266 CLR 56 that trial judges in New South Wales should not ordinarily direct a jury that before acting on evidence of uncharged acts relied on to support an alleged tendency, they must be satisfied of proof of such acts beyond reasonable doubt. Upholding the proposed direction, the Court of Appeal found that the principle in *Bauer* was limited to single complainant sexual offences cases where evidence of uncharged acts was relied on for tendency purposes. It found to direct the jury otherwise would invite the jury to engage in "impermissible circular reasoning" and "apply a less rigorous standard of proof to the charges".

The applicant applied for special leave to appeal to the High Court, contending that the proposed direction was precluded by s 61 of the *Jury Directions Act 2015* (Vic) and, in any event, that it would be erroneous for the trial judge to give the direction. Section 61 relevantly provides that "[u]nless an enactment otherwise provides, the only matters that the trial judge may direct the jury must be proved beyond reasonable doubt are ... the elements of the offence charged".

Allowing the appeal, the High Court found that s 61, properly construed, requires that juries only be instructed that the "elements of the offence", not the evidence that supports the proof of such elements, must be proved beyond reasonable doubt. As the proposed direction concerned the latter, it was precluded by s 61. The Court also held that the principle in *Bauer* applied to evidence of *charged* acts relied on to support an alleged tendency and affirmed recent decisions of the Court of Criminal Appeal of New South Wales to that 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.