IN THE COURT OF APPEAL
OF THE SUPREME COURT **S APCR 2013 0118**
OF VICTORIA

BETWEEN:

ORDAN VELKOSKI

Appellant

- v -

THE QUEEN

Respondent

SHORT MEMORANDUM OF ADVICE

1. I have been briefed in this matter to advise as to whether or not the Crown ought institute an application for special leave to appeal to the High Court against the decision of the Court of Appeal in Velkoski v R [2014] VSCA 121. In this case, the Court of Appeal set aside the 15 convictions sustained by the Appellant, entered two verdicts of acquittal and directed that the Appellant be re-tried on 13 charges.

2. In order to provide the advice sought, I have today closely re-read the Reasons for Judgment dated 18 June, 2014 ("the Reasons"). I have also read the Tendency Notice dated 5 April, 2013.

3. The Appellant was convicted on 15 charges of sexual offences. Those offences concerned three separate complainants. Of importance for present purposes, the evidence of each complainant was admitted and permitted to be used by the Crown as tendency evidence when considering each charge on the Indictment.

4. Within the Reasons, the Court engaged in an extensive analysis of the Victorian authorities concerning the admissibility of tendency evidence; see the Reasons at paras. [70] & ff, but see esp. at paras. [89] – [141].

5. Subsequently within the Reasons, the Court engaged in an analysis (which could hardly be described as "extensive") of the New South Wales authorities concerning the admissibility of tendency evidence; see the Reasons at paras. [142] – [161].

6. The Court then concluded (and, in my view, correctly concluded) that the threshold for the admission of tendency evidence is lower in New South Wales than in Victoria; see the Reasons at paras. [163] – [165]. The Court stated that the difference in the threshold is referrable to the Victorian requirement that there be some degree of similarity or commonality of features within the tendency evidence before it may be admitted, and thereby support tendency reasoning; see the Reasons at para. [163] – [164].

7. Subsequently within the Reasons, the Court set out some principles which ought be adopted and applied by trial judges in Victoria with respect to the determination of the admissibility of tendency evidence and coincidence evidence; see the Reasons at paras. [166] – [179]. I will assume for the purposes of this Memorandum that those principles are materially different from those which are applied by trial judges in New South Wales.

8. The Court then considered whether or not the tendency evidence was admissible. This was the subject of Ground 4. More precisely, the Court considered whether or not the acts relied upon by the Crown were admissible as tendency evidence; see the Reasons at paras. [180] – [185].

9. The Court concluded that the acts the subject of Charges 1, 3, 4, 5, 6, 8 & 16 were admissible as tendency evidence; see the Reasons at paras. [180] - [182].

10. The Court also concluded that the acts the subject of Charges 2, 7, 9, 10, 11, 12, 13, 14, & 15 were <u>not</u> admissible as tendency evidence; see the Reasons at paras. [182] – [185]. In reaching this conclusion, the Court expressly applied the principles set out in the Reasons at paras. [166] – [179]; also see at paras. 6 - 7 above.

11. The Court nevertheless concluded, however, that this Ground of appeal failed; see the Reasons at paras. [186] – [221]. More precisely, the Court concluded that in

circumstances where defence counsel at the trial had not only failed to object to the admission of the tendency evidence, but had positively agreed to the subject evidence being admitted as supporting tendency reasoning, thereby waiving any objection to the admission of this evidence as tendency evidence, the admission of the evidence on this basis could not be challenged on appeal; see the Reasons at para. [217].

12. In these circumstances, although having determined that some of the tendency evidence was not admissible because it had not satisfied the Victorian threshold, the Court refused to grant leave to appeal on Ground 4. In other words, the challenge to the admissibility of the tendency evidence thereby failed.

13. By reason of the matters set out in paras. 11 – 12 above, any challenge to the conclusion reached by the Court and summarised in para. 10 above could not be made unless that conclusion affected (or, perhaps, infected) some other holding of the Court which was itself of consequence to the making of the order made by the Court quashing the Appellant's convictions and directing that there be a re-trial. This is so, notwithstanding the fact that on the basis of the assumption made by me and set out in para. 7 above, the conclusion reached by the Court and summarised in para. 10 above would probably not have been reached had the New South Wales authorities concerning the admissibility of tendency evidence (see at paras. 5 - 6 above) been applied by the Court.

14. I now turn to consider the only other holding of the Court which might be said to be relevant for present purposes. It is that holding which led directly to the quashing of the Appellant's convictions and the Court's direction that there be a re-trial; see at paras. 15 – 29 below.

15. The Court determined that it was necessary for the trial judge's directions concerning the use to which the jury might put the tendency evidence to be correct; see the Reasons at paras. [222] & ff. In this regard, it is to be noted that, on the appeal, the Crown accepted that the trial judge was obliged to provide the jury with adequate directions in order to enable the jury to determine whether tendency reasoning would assist them in their consideration of each particular charge; see the Reasons at para. [224].

16. The Court then concluded that those directions were not adequate; the directions were unsatisfactory, being such that it was highly unlikely that the jury could properly have employed tendency reasoning; see the Reasons at para. [227]. (The directions which were given to the jury are set out within the Reasons at para. [225].)

17. The Court then explained how those tendency directions were inadequate and contained serious errors. In other words, the Court identified the bases upon which those directions were wrong; see the Reasons at para. [228] – [237].

18. (Although the reader of this Short Memorandum ought himself/herself read the Reasons at paras. [228] – [237], I venture to suggest that three of the bases identified by the Court (see the Reasons at paras. [230], [231] & [232]) involved nothing other than the trial judge having failed to follow the model charge as set out within the Victorian Criminal Charge Book (and associated bench notes and model directions).)

19. One of the bases identified by the Court was that the trial judge had not identified the evidence of pattern or similarity, or the circumstances that constituted the tendency; see the Reasons at para. [230].

20. Another of the bases identified by the Court was that the trial judge had not directed the jury to scrutinise the tendency evidence in order to determine whether it did demonstrate a pattern of conduct or similarity of circumstances; see the Reasons at para. [231].

21. Another of the bases identified by the Court was that the trial judge had not directed the jury to consider the act from each charge which was in issue, and to which that tendency evidence might relate in order to determine whether such pattern or similarities as they found existed made it more likely that the act was committed; see the Reasons at para. [232].

22. Just pausing there, and returning to the issue raised by me in para. 13 above, the three bases identified by the Court and described in paras. 19 – 21 above might well be said to be referrable to and/or dependent upon the conclusion reached by the Court and

summarised in para. 10 above. It might therefore be said that the conclusion reached by the Court concerning the inadmissible tendency evidence was of consequence to the holding of the Court that the directions to the jury concerning the tendency evidence were inadequate and wrong.

23. That is not, however, the end of the matter for there were additional reasons given, or additional bases identified, by the Court for its holding that the tendency directions were wrong; see at paras. 24 – 25 below.

24. First, the Court held that the directions given by the trial judge to the jury amounted to an instruction that the jury might reason that if the Accused had the tendency to commit an act of a sexual nature with one complainant, then it was more likely that he committed the sexual acts alleged by the complainants; see the Reasons at para. [228].

25. Secondly, the Court held that the trial judge had erred in instructing the jury to the effect that the tendency upon which the Crown had relied was the Accused's willingness to act upon his sexual interest in the complainants and commit the offences charged; see the Reasons at para. [233].

26. Just pausing there, having given much consideration to the directions given by the trial judge, I am of the view that the Court was correct in the two holdings summarised in paras. 24 – 25 above.

27. Moreover, and returning to the issue raised by me in para. 13 above, the two holdings of the Court summarised in paras. 24 – 25 above are <u>not</u> referrable to, or dependent upon, the conclusion reached by the Court and summarised in para. 10 above.

28. Put simply, the conclusion reached by the Court concerning the inadmissible tendency evidence was of no consequence whatsoever to either of the two holdings of the Court summarised in paras. 24 – 25 above. No aspect of those two holdings turned on the conclusion reached by the Court and summarised in para. 10 above.

29. In the light of paras. 17 – 28 above, only three of the five reasons given by the Court for concluding that the tendency directions were inadequate and wrong could be said

to be referrable to and/or dependent upon the conclusion reached by the Court concerning the inadmissible tendency evidence. And in circumstances where I am of the view that the other two of the five reasons given by the Court are correct, and would most probably have been sufficient in themselves to cause the Court to quash the Appellant's convictions, I must conclude that, notwithstanding my assumption (see at para. 7 above), even if the Crown could convince the High Court that the Court had erred in concluding that some of the tendency evidence was inadmissible, the High Court would nevertheless most probably not then proceed to decide that the Court had erred in holding that the tendency directions were wrong.

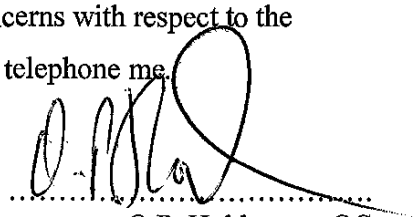
30. In these circumstances, I am of the view that there is no sound and sufficient basis upon which the Crown might institute an application for special leave to appeal to the High Court in this matter.

31. And I so advise.

32. I have also been asked to express my views concerning the comments (in the nature of criticisms) within the Reasons concerning the content or drafting of the Tendency Notice; see the Reasons at paras. [21] – [22] & [233], but see esp. at para. [22].

33. I regret that I am not in a position at present to express any concluded views concerning the Tendency Notice. In order to be in a position to express such views, I would first need to spend quite a number of hours researching the New South Wales authorities which deal with this issue. In addition, I would be much assisted by conferring upon this matter with Glenn Barr.

34. Should my instructing solicitor have any queries or concerns with respect to the matters dealt with above, then she ought not hesitate to telephone me.



O.P. Holdenson, QC
Aickin Chambers

Wednesday 25 June, 2014