WEB.0112.001.0160

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[2014] HCATrans 209

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Sydney

No S70 of 2014

B e t w e e n -

PD

Applicant

and

THE QUEEN

Respondent

Application for special leave to appeal

BELL J
GAGELER J

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY ON FRIDAY, 12 SEPTEMBER 2014, AT 2.02 PM

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MR T.A. GAME, SC: If the Court pleases, I appear for the applicant with **MS G.A. BASHIR** and **MS P.L. DWYER**. (instructed by Uther Webster and Evans)

MS S.C. DOWLING, SC: Your Honours, I appear with **MS S. HERBERT** for the respondent. (instructed by Director of Public Prosecutions (NSW))

BELL J: Yes, Mr Game.

MR GAME: Thank you, your Honours. Shortly I will come back to the statutory provisions in the Victorian decision of *Velkoski* which was handed down at the very time we filed our reply, but had it been available when we put it on we would have submitted that there was a direct conflict between the States on the very question with respect to the very case, that is to say, *PD* is actually directly challenged in the judgment in *Velkoski*. But I will return to that in a moment because - - -

BELL J: Can I just raise with you this?

MR GAME: Yes.

BELL J: There would seem to be some difference as between New South Wales and Victoria in relation to tendency and coincidence evidence. The debate, much of it, would go, would it not, to the question of admissibility? That is not a matter with which we are concerned in this case, so the question really, Mr Game, if I can suggest it to you, is to focus on what is wrong with the conclusion of the Court of Criminal Appeal that the directions that were given were adequate in this case?

MR GAME: Quite, but admissibility in directions are inextricably linked and *HML* is a very good demonstration of that because use follows from admission and in fact in *HML* we were dragged into complaining about admission and it turned out to be a complete dead end because the actual submissions go to the very same question which is how do you use the evidence (a); and, (b), on a careful examination of *Velkoski* the ground that was upheld was the ground in relation to the directions and the directions are in very similar terms to here and they have the same fault, the same fault of inexorable circularity and a failure to appreciate the significance of time and sequence in relation to how you use tendency evidence.

So properly examined, *Velkoski*, which I was going to come to is, in our submission, directly on point and I will show why shortly. But I do want to take your Honours directly to show you what has happened in – I should also say in *Velkoski* the court said that the failure to object was – in

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fact there was a waiver was not fatal. If one thinks back to cases like *Sutton* and *De Jesus* where Justice Brennan said if you are going to have joint trials, admissible or not admissible, you have to give proper directions on how this material is used in relation to each other and in this case the Chief Justice said that because they amount to, if we were right, misdirections of law then rule 4 would not have been applied against us.

So the shortest way to come into how this was actually dealt with in this trial can be seen if one goes first to page – and I will try to do this as quickly as I can, but it is not straightforward and on proper examination it is much more complicated than uncharged acts in *HML* because it is easy to see how you independently have to establish uncharged acts. *HML* was seen to be complicated because they were uncharged. Once you look at charged acts, it becomes much more difficult to work out how to actually analyse and direct on the subject.

In our submission, ultimately the way it is left here involves the very same circularity that arises in relation to the falsity of lies where the falsity is established through a chain of reasoning involving establishing guilt which was so trenchantly criticised in *Edwards*. Now, I take your Honours to 214 to 215. A number of points can be extracted from what one sees in – these are part of the terms of the tendency notice and there was a tendency notice and the Crown eschewed coincidence reasoning which means that under section 95 the jury had to be told that they could not use coincidence reasoning.

BELL J: Does that submission carry with it a view that the jury would have been likely to reason by reference to coincidence reasoning as defined in the Act as distinct from tendency reasoning?

MR GAME: Absolutely, because they were told over and over again things like the sheer number of complainants and independent complainants making these allegations, how come so many complainants have come forward making the same allegation - that is coincidence reasoning but it is also – that is credibility-based reasoning where what looks like circulatory can actually work because what you are saying is a boy comes out of a room and says the teacher did X. Another boy comes out of the room and says teacher did X. Another boy comes out the room and says the teacher did X, that is coincidence reasoning but it is credibility reasoning so you can look at all of the accounts but that is the only circumstance in which you can look at all of the accounts - - -

BELL J: Can I direct your attention to the terms of section 98?

MR GAME: Yes, your Honour.

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BELL J: One is looking there at a line of reasoning in which one looks to two or more events occurring and the rule is evidence that two or more events occurred is not admissible to prove that a person did a particular thing or had a particular state of mind on the basis of what I will describe as coincidence reasoning, unless the two preconditions are satisfied. That is very different from reasoning that says "We assert that the accused has a tendency to engage in sexual misconduct with young male employees. One of the reasons you will find that tendency proved beyond reasonable doubt is that there is evidence that a number of young boys have said that that is what he did to them".

MR GAME: As soon as you say the last bit you are into - - -

BELL J: You are into coincidence, are you? Why is that because you are not saying - - -

MR GAME: Because what you are doing is you are bringing together the combination of them saying it, so the event is the saying of the thing. So that is coincidence reasoning. Now, it may not be attractive but that, in our submission, is a completely different line of reasoning than the temporal one that involves the establishment of a tendency – and establishing a tendency is establishing something in time that establishes, shall I say, a propensity to behave in a particular way.

Now, until the *Evidence Act* there was little attention given to the importance of the distinction but when you have a section like 95 and you have a case like this where coincidence is eschewed then it becomes absolutely critical. Justice Hayne's judgment in *HML*, in our submission, is the best guide to how one is in fact involved in – I cannot take your Honours through it now but - - -

BELL J: Thank you.

MR GAME: But his Honour really makes the points that we are seeking to draw out which is that it is – tendency is incremental and it is temporal. So that something that happened in 2003 is very unlikely to establish a tendency in 1980 which is how it was left in this case. It is completely impermissible to look at every single allegation in the trial which is the way – any and every allegation in the trial to infer any or every tendency and then throw that to the jury. That is an abrogation of judicial responsibility and this is a denouement of decision-making that arises in this case because what has now happened in New South Wales is that in tendency cases quite impermissibly everything is admitted to prove everything. It is legal nonsense. The Victorians have done a very good job of demonstrating that.

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BELL J: Your client was represented by senior counsel at the trial?

MR GAME: That is true, yes.

BELL J: The suggested confusion and danger associated with the way in which the trial judge directed the jury was not the subject of any complaint.

MR GAME: No, your Honour, but, in our submission, when you are talking about – when one is talking about the very thing that shows how this evidence is to be used in relation to each other it is not an omission, it is a wrong decision of law and the jury have been misdirected. The failure to take the objection is not going to stand in the way, in our submission, of success and I think the Chief Justice accepted as much but the same thing happened in *Velkoski*, if not worse, because in *Velkoski* they specifically, shall I say, disavowed a problem.

GAGELER J: Mr Game, you do not take issue, do you, with what the Chief Justice says at page 234, paragraph 127 about the direction that should have been made?

MR GAME: Page 234, 127 – it is correct and quite important that if you go back to the tendency notice the only way to establish tendency number 2 is through (j) to (o) and they are the charged offences. As soon as you have that this tendency notice and the evidence, the way which it is left is down the drain because you are proving – you are not proving - - -

BELL J: The point you are making is you do not for a moment suggest that proof of one of the charged offences would not support, by way of tendency reasoning, a conclusion of guilt on another.

MR GAME: No. What I am saying is, say you take - - -

BELL J: The failure, if I can just understand the argument, was to direct the jury that it was necessary in relation to a charged event to be satisfied beyond reasonable doubt of the happening of that event before you might reason by way of tendency in relation to the other events.

MR GAME: That is right.

BELL J: Nonetheless, overall, the jury were instructed of the need to be satisfied of the tendency beyond reasonable doubt and the need to give separate consideration to each of the - - -

MR GAME: Yes, neither of those things come close to saving it. That would be like saying, in the circular example about lies, that it was safe by saying if you established them beyond reasonable doubt. It still leads you

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to the same problem, which is you have established it through the evidence by which you have established guilt. As soon as you add to that, and you can have regard to all the evidence, you have thrown it away.

If I come back to the – yes, I need to say this. In relation to your Honour Justice Gageler's question, if you look at page 235, paragraph 131, his Honour the Chief Justice wrongly – and I think the Crown concedes this – thought that the tendency directions were only related to tendency identified as number 1. If that were the case, the jury were certainly not directed in those terms and the tendency notice would most likely have failed at first instance because it would not have got through sections 97 and 101.

BELL J: I am sorry, where do we get that from?

MR GAME: If you go to paragraph 131, the Chief Justice wrongly thought that the tendency evidence only related to tendency number 1.

BELL J: I see.

MR GAME: You can see that further on 236. It is quite important because – if you go to paragraph 143, you can see it as well. Paragraph 143 is where you can see it the most clearly. If that were the case, then the jury were dangerously misdirected because they were told they could find all three tendencies. As I say, that is wrong because the judge said the tendency evidence is to be treated in the way in which the Crown put it, and the Crown put it by reference to all of the sexual conduct and the examples went way beyond tendency number 1.

If I go back to the tendency notice, if you are looking at those three tendencies, if you applied *Velkoski* to this – and this feeds through to directions – only tendency number 2 could run, and only tendency number 2 could run defined as "other", "earlier" – I say "earlier" - not in every instance does it have to be earlier but it normally will be earlier. Complainant number three is going to be probative on complainant number four. Complainant number five is going to have no probity with respect to complainant number one. That is why I say it is, in the sense that Justice Hayne said, temporal and incremental.

Now, that is to say the thing that you are bringing is the earlier activity which establishes the tendency to act in a particular way from which you can draw an inference which you can add to the evidence. That is all it is, and the jury were never directed in anything close to those terms.

BELL J: Were never directed of what, in any - - -

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MR GAME: Anything close to the terms I have just put as to how tendency evidence works. What I just gave was a very - - -

BELL J: Well, can we go to the directions?

MR GAME: I will, but I want to – yes. Just before I leave page 214, which it looks like I am never going to leave, but anyway, it really could only be number 2, but number 2 feeds into the counts and the Chief Justice said it was only one and it was not actually left that way. I wanted to show one other thing to your Honours which is that items such as (a), (b), (s), (t), (z), (aa) and (bb), they are just ordinary incidents of activity and yet they are left are things that are capable of establishing - - -

BELL J: These were particulars of the tendency asserted. It may be that the Crown is not required to go to this level of detail, but what is wrong with saying from these factors one may draw the inference beyond reasonable doubt, as the jury was instructed was the standard, that this person possesses this tendency?

MR GAME: Once you say, as these directions said, any one of these activities could establish – any one of these tendencies could establish any one of these charges you are not giving the jury - - -

BELL J: You had better take us to the directions, Mr Game.

MR GAME: Page 29 - and these directions are repeated in the written directions at 162.

BELL J: What one sees here is the judge referring to the three tendencies, not the numerous particulars of those tendencies.

MR GAME: Quite, but when he goes through the evidence he talks about how this can be used between them.

BELL J: How what can be used?

MR GAME: How the tendency evidence can – can I just come to 29. It says:

> the accused committed the particular offences set out in the indictment.

That is to say, all 38 of them over 23 years - that is line 23. Then –

> in certain cases, the Crown maybe allowed to add to the evidence –

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but they are not adding anything in this exercise. Now, allowed to prove that any or all of the charges, a pattern of behaviour, tendency to act in a particular time, then we have got its act and they have dropped state of mind, act in a particular way, then there are the three tendencies. Then the example given:

> doing acts drawn from the evidence related to all the charges –

So all 38 charges are now able to be brought to bear to prove the tendency - that is what the Crown is trying to prove, all 38 charges. This is unquestionably, inexorably circular. Then we see across the page – and the evidence and then it says – the Chief Justice must have missed the words "such as" at line 43, they are just examples.

BELL J: I am sorry, where are we? Are we on page 30?

MR GAME: On page 29. The Chief Justice must have missed the words "such as" because they were just given as examples. That is why he thought it was just the first tendency. This is not how the case was argued. The judgment was delivered seven months later and that seems to have gotten lost.

GAGELER J: Are we concerned with a slip in the reasoning of the Court of Appeal?

MR GAME: No, no, we are concerned - yes, your Honour, because in this - because the thing has gone off on a wrong basis at this point because it is quite clear that the tendency related to all of the tendencies and all of the evidence in the case.

BELL J: When you say all of the tendencies, you refer to the three tendencies particularised, not the numerous instances of how one might infer beyond reasonable doubt the existence of the tendency.

MR GAME: Yes, but it is quite wrong to go – to infer the tendency by reference to all of the evidence in the case. You are self-referring and you are referring to the very things you are seeking to prove.

BELL J: I understand the point. The other thing to bear in mind is that were an issue to be litigated respecting the capacity or the appropriateness of tendency evidence in support of any one of those counts to have been made it would be done by an application for separate trials.

MR GAME: It was, there were two trials – there was a trial and then the same counsel in the same – did the trial again, but the objection was taken at the first trial.

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BELL J: But it was not renewed.

MR GAME: It was not renewed, but the evidence by virtue of the *Criminal Procedure Act* first there was a section that said the rulings were binding unless (a) and (b) the evidence was played from the first trial to the jury over weeks and weeks and weeks - so it was not this totally different activity. If I come back to these directions, page 30, one sees one or more of the tendencies, so it is not one tendency, asks you to use, then we see one or more of those – I am now in my red light – sorry, one or more of the – then it goes, one or more of those alleged acts which I have listed in effect occurred. . So any such finding – then it goes on, do not consider each of the acts in isolation, but consider all the evidence.

There you have the circularity and there you have the entire exercise going off the rails because once you have regard to all the evidence you have killed the mental exercise that is involved. It worked in *HML* because the charged acts were completely independent things and it works in lies if they can be established independently of a line of reasoning that establishes guilt. This is bootstraps, and *Velkoski* points out that this is bootstraps and this is wrong and that this particular decision is wrong, not just on separate trials, but on the directions given.

Now, the red light is on, but just before I resume my seat I will just say that in respect of – if I may, could I just say this – in respect of complaint, the point about complaint is that section 66(2)(a) will never get in complaints made 19 years – will never make them admissible to prove the truth of the assertions. They come in under 108 to re-establish credit. If the Court pleases.

BELL J: We will not call on you, Ms Dowling.

There is no reason to doubt the correctness of the Court of Criminal Appeal's assessment of the adequacy of the directions as to the use to be made of the tendency evidence. No question suitable for the grant of special leave is raised by the application. Special leave is refused.

AT 2.24 PM THE MATTER WAS CONCLUDED

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