SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCR 2022 0118

LUKE SHARMAN (A PSEUDONYM)[1] Applicant

v

THE KING Respondent

JUDGES:	BEACH, KYROU AND T FORREST JJA
WHERE HELD:	Melbourne
DATE OF HEARING:	2 March 2023
DATE OF ORDERS:	2 March 2023
DATE OF REASONS:	17 March 2023
MEDIUM NEUTRAL CITATION:	[2023] VSCA 56
JUDGMENT APPEALED FROM:	DPP v Sharman (a pseudonym) (County Court, Judge Carlin, 16 August 2022)

CRIMINAL LAW – Interlocutory appeal – Applicant charged with intentionally causing injury, recklessly causing injury and common assault – Alleged offending spanned multiple complainants and incidents – Prosecution sought to adduce tendency evidence – Judge reformulated tendency alleged – Whether circumstances of reformulated tendency resulted in procedural unfairness to the applicant – Leave to appeal granted – Appeal allowed.

Evidence Act 2008, ss 97 and 101.

TL v The King (2022) 96 ALJR 1072 referred to.

Counsel

Applicant:	Ms J Condon KC with Ms B Kelly
Respondent:	Mr P Kounnas

Solicitors

Applicant:	Tony Hargreaves & Partners
Respondent:	Ms A Hogan, Solicitor for Public Prosecutions

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[1] To ensure that there is no prejudice to the proper administration of justice, this judgment has been anonymised by the adoption of pseudonyms in place of the names of the applicant and various witnesses.

BEACH JA
KYROU JA
T FORREST JA:

Introduction

1 At the conclusion of oral argument, we allowed this interlocutory appeal and remitted the matter to the County Court for rehearing and determination. What follows are our reasons for adopting this course.

2 The applicant is currently facing trial in the County Court on an indictment containing eleven charges, relating to seven complainants. The following table sets out a summary of those charges.

Charge	Offence	Date	Complainant
1	Intentionally causing injury	2 March 2018	SJ
2	Recklessly causing injury[2]	2 March 2018	SJ
3	Common assault[3]	2 March 2018	SJ
4	Common assault	31 March 2018	SM
5	Common assault	31 March 2018	CL
6	Common assault	31 March 2018	JS
7	Common assault	31 March 2018	ST
8	Common assault	27 May 2018	HD
9	Common assault	27 May 2018	JH
10	Recklessly causing injury	27 May 2018	JH
11	Common assault[4]	27 May 2018	JH

3 The applicant sought leave under s 295 of the *Criminal Procedure Act 2009* to dispute the judge's ruling that asserted tendency evidence sought to be led at trial ought not be excluded from evidence, either under s 97(1) or s 101 of the *Evidence Act 2008* (**'the Act**'). The grounds of appeal were:

> **Ground 1:** That her Honour erred in concluding that the tendency evidence of each of the charged acts, and one uncharged act, had significant probative value in relation to all other charged acts, in particular:
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> (a) in finding that the evidence significantly increased the likelihood that each of the charged acts occurred in the 'manner' alleged by the prosecution.

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2 Charge 2 is an alternative to Charge 1.
3 Charge 3 is an alternative to Charges 1 and 2.
4 Charge 11 is an alternative to Charge 10.

(b) in finding that the accused's use of the OC spray and cannister as 'a weapon' against young males who were not posing any physical threat was a 'single common feature' capable of making allegations concerning one complainant probative of the charges of another complainant.

(c) in finding that acting in a 'brazen fashion' was a feature of the accused's conduct which had the capacity to remove doubts that might otherwise attend the charges.

Ground 2: That her Honour erred in finding that the probative value of the tendency evidence substantially outweighed the prejudicial effect on the accused.

Ground 3: That her Honour erred by failing to sever the charges on the [i]ndictment as follows:

(a) The charges regarding [SJ] be severed from the other complainants.

(b) The charges regarding [SM], [CL], [JS] and [ST] be severed from the other complainants.

(c) The regarding charges *[sic]* of [HD] and [JH] be severed from the other complainants.

Ground 4: That her Honour erred by deciding the application by the prosecution to adduce tendency evidence on the basis of the 'reformulated tendency,' in circumstances where that created unfairness to the accused.

Prosecution case

4 The charges faced by the applicant concern his actions in three separate incidents, alleged to have occurred in 2018. The alleged incidents occurred when the applicant was employed as a uniformed police sergeant in a country town in Victoria ('the town'). A summary of the prosecution case in relation to those three incidents is set out below.

The first incident – 2 March 2018

5 The first event occurred following a birthday party in the town. The party was held at a hall diagonally opposite the railway station. Between the hall and the station is a plantation as well as a car parking area. The station was fitted with a number of closed-circuit cameras which captured some of the events described below. No audio exists of these events.

6 The party was attended by approximately 90 people and commenced at 6:00 pm. One of the guests was a man named SJ. SJ has stated that during the party he had consumed a six-pack of Bourbon and Coke drinks and taken a small amount of the drug methylamphetamine. At 11:22 pm several guests left the hall and mingled in the car park where a number of fights broke out. Evidence at the committal proceedings given by other partygoers was that SJ helped to break up a number of these fights.

7 At 11:45 pm a partygoer made a triple-zero telephone call and asked for the police to attend the scene. Just after 11:48 pm a police car arrived carrying the applicant and another police officer. A second police car then arrived carrying three more officers. The applicant and another police officer were walking towards the hall entrance when SJ said 'fuck the cops'. Afterwards SJ walked towards a parked Toyota Hilux vehicle and called out 'fuck the police'. The applicant and the other police officer then approached SJ who had his back to the Hilux. The applicant told SJ to 'move on'. SJ heard a voice say 'what the fuck did you say' to which he replied 'I said fuck the police'. The applicant then threw SJ face-first into the bonnet of the Hilux. The applicant then turned SJ over and sprayed him in the face with oleoresin capsicum ('**OC**') spray[5] which entered SJ's eyes and mouth. The applicant then struck the left side of SJ's head with his right hand (which held the canister of OC spray). During this incident SJ's arms were held out in a gesture of surrender. The applicant then pulled SJ down to the ground and handcuffed him. These events are relied on by the prosecution to establish Charges 1–3.

8 Shortly afterwards SJ was pulled into a standing position and was walked to the police divisional van. While SJ was standing at the rear of the van the applicant struck him on the head with the OC spray canister. SJ was then secured in the van. SJ initially shouted abuse but became unconscious and was taken out of the van and placed on the ground in the coma position. The police called an ambulance for SJ that arrived at 12:53 am. At that point SJ was on the ground handcuffed while police officers poured water over him. The ambulance took him to the local hospital where his injuries were examined by a doctor. On Monday 5 March SJ attended the local police station. His injuries were photographed at the police station and he lodged a misconduct complaint against the applicant.

The second incident – 31 March 2018

9 On the afternoon of 30 March 2018 four young men met up in another country town. They were SM, CL, JS and ST. The men met at CL's home and all (with the exception of ST) drank alcohol. The men then attended a local sports club where they consumed more alcohol (again with the exception of ST) before walking to a local McDonalds restaurant.

10 At 2:43 am a police divisional van was called to attend the McDonalds following a report of 'youths causing trouble'. The van contained police officers GC and AD. GC and AD obtained the details of the four men. The details of all men were checked on a police computer. All details were in order except for SM who had a warrant for arrest against his name for a previous failure to appear at court. DC and AD called another police car to attend the scene to assist with SM's arrest. That particular car was being driven by the applicant. Upon arriving at the scene the applicant disembarked and approached GC and AD carrying a canister of OC spray. GC advised the applicant that they needed to arrest SM and return him to the local police station.

11 SM and CL questioned why the applicant had arrived, referring to him as a 'bald-headed cunt'. Upon being advised of the outstanding warrant SM walked to the rear of the

5 OC spray is commonly referred to as 'capsicum spray'.

divisional van and stood at its open door. SM was informed that he would need to undergo a pat-down search to which he expressed disgust. JS and CL then approached the van with JS moving closer to ask why SM was being arrested.

12 GC and DA each held one of SM's arms and were in the process of attaching handcuffs when the applicant said 'get back'. JS began to move away while CL remained stationary. The applicant repeated 'get back' before spraying both JS and CL in the face with OC spray. The now fully– handcuffed SM, without attempting to break free, turned towards the applicant and called him a 'bald-headed cunt'. The applicant proceeded to spray SM in the face with capsicum spray, before SM was placed in the van. ST then walked towards the applicant saying 'you might as well spray me too'. The applicant sprayed ST in the face with OC spray. These events are relied on by the prosecution to establish Charges 4–7.

13 SM was given OC spray after-care in the divisional van before being taken to the local police station where he was processed and then released from custody.

The third incident – 27 May 2018

14 On 26 May 2018 four men met up at a hotel in the town. They were GM, HA, HD and JH. They had been drinking at JH's house beforehand. Both HD and GM continued drinking at the hotel. Once the hotel closed the men walked to another hotel in the town. By the time they reached their destination JH was intoxicated.

15 Approximately half-an-hour after their arrival HD became aware of some 'commotion'. HD and HA exited the hotel and saw a man lying on the street screaming. The man had been sprayed with OC spray. The four men left the hotel on the request of the venue's crowd controller before being asked by police to move on from their position near the hotel's rear. The men were then approached by four police officers (one of whom was the applicant) who told the men to 'move on'. A fifth man named HM approached and commented he was going to take a taxi. He was told by the applicant to keep moving to the nearby taxi rank. HM walked between the police officers to the taxi rank before the applicant grabbed him, told him he was under arrest and assigned another officer to take his details. HD moved towards the police and was told to 'stop' or 'get back'. He stopped moving.

16 Without warning the applicant then sprayed HD in the face with OC spray. JH was heard shouting at the applicant before the applicant moved forward and sprayed him in the face with OC spray. The applicant then told JH he was under arrest. The applicant tried to take hold of JH's arm but JH pushed him away and fled, pursued by the applicant and another officer. The officers eventually caught up with JH, temporarily restraining him before he ran away again. Both officers then went down on JH's back with the applicant striking JH on the head with the OC spray canister, causing a laceration to JH's scalp. The canister was damaged and all three men were struck with OC spray foam. JH was then handcuffed. He was taken to the local police station where he received OC spray after–care and his injuries were photographed. He returned the following day to lodge a misconduct complaint. These events are relied on by the prosecution to establish Charges 8–11.

The interlocutory ruling

Background

17 On 7 March 2022 the prosecution filed the first tendency notice in the County Court advising of its intention to adduce tendency evidence in the applicant's trial.[6] Relevantly, the tendency notice provided that:

> 2. The Prosecution seek to rely on the tendency of the Accused to:
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> 2.1 Act in a particular way, namely;
>
> 2.1.1. Acting with unjustified and/or excessive force towards members of the public in the course of exercising his duties as a police officer.

18 The first tendency notice listed charges 1–9 (the OC spray charges) as the evidence relied upon. However, the prosecution filed an amended tendency notice (dated 7 July 2022) which added charges 10 and 11 but was otherwise materially unchanged.

19 Both notices set out the relevant evidence relied upon. They specified that the issue in the case to which tendency reasoning applied was 'whether the accused acted unreasonably and without lawful excuse'. The defence filed a response to the Summary of Prosecution Opening dated 22 March 2022. In this response the applicant admitted using OC spray against each of the complainants but denied that he acted with unjustified or excessive force in those interactions. The defence opposed the proposed admission of the tendency evidence. This matter came before the trial judge for a pre-trial hearing on 5 and 7 July 2022.

Defence submissions

20 The defence filed submissions objecting to the purported tendency evidence on two grounds: (1) that the evidence did not have strong probative value; and (2) that the probative value did not outweigh the prejudicial effect that the evidence may have on the applicant. Under the first ground, the defence submitted that the evidence only offered weak support for the tendency alleged. It was argued that the ability of two separate incidents to demonstrate a tendency to act in a particular way was dubious given that there was a total of three incidents. The use of the charge itself to prove the tendency, the defence submitted, would result in circular reasoning. The defence further argued that the tendency as expressed in the notices was very broad and lacking in specificity, stating that the tendency notice does not specify the nature of the force used (rather the notice simply stated very broadly that it was 'unjustified and/or excessive'). The defence argued that the contention that the purported assault occurred when the subject was 'non-threatening' involved circular reasoning as it assumed a fact that the jury would need to determine. The defence then listed key differences in each of the three incidents (such as the level of surrounding violence, the capacity in which the applicant attended the scene, the making of verbal threats and the applicant's position in relation to other officers). Finally, the defence submitted that there was no need for

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6 This notice was filed under s 97(1)(a) of the Act.

inferential reasoning in this case, and therefore there was no relevant role for tendency evidence.

21 For the second ground the defence submitted that the evidence was unfairly prejudicial due to a real risk that it would distract jurors from their primary task of assessing the credibility and reliability of each complainant. The evidence may have a powerful subconscious effect and may lead to an irrational or emotional response, or be given disproportionate weight. It was asserted that the prejudice could not be overcome via judicial direction.

Prosecution submissions

22 In response the prosecution argued that the defence reliance on dissimilarities between the three incidents ignored High Court authority[7] to the effect that there was no need for the prosecution to show striking similarity, underlying unity or a pattern of conduct. The prosecution argued that factual differences in the applicant's behaviour in the three incidents was immaterial. The prosecution further submitted that any prejudice attached to the interaction of the tendency evidence was not unfair, that no uncharged or related acts would be led, and any prejudice could be addressed via judicial direction. In written submissions dated 6 July 2022 the prosecution reformulated the tendency alleged in the original tendency notice. The reformulated tendency was that the accused:

> *had a tendency over a two month period, in the company of other police officers, without justification, to use OC spray and other physical force in dealing with young men late at night who had been drinking and were verbally abusive but otherwise not behaving illegally*.

23 This reformulated tendency ('**the reformulated tendency**') was never the subject of a fresh tendency notice, and it will be recalled that on 7 July 2022, the prosecution filed an amended tendency notice with a tendency alleged that was identical to that alleged in the original notice. Notwithstanding this, argument proceeded on 7 July on the basis of the reformulated tendency.

24 We shall examine further the genesis of the final tendency in our consideration of ground 4 — the procedural fairness ground.

The judge's ruling

25 The trial judge noted at the outset of the interlocutory hearing that the defence accepted that an argument for severance would fall away if the tendency notice was allowed. Her Honour stated that the prosecution indicated that the tendency notice was intended to include (or would be amended to include) a subsequent and presently uncharged act where the applicant allegedly struck SJ on the head with the OC canister near the back of the police divisional van.[8]

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7 The prosecution referred to *Hughes v The Queen* (2017) 263 CLR 338; [2017] HCA 20.

8 *DPP v [Sharman (a pseudonym)]* (Unreported, County Court of Victoria, 16 August 2022, Judge Carlin), [8] ('**Reasons**').

26 The judge observed, correctly, that the purported tendency — to act 'with unjustified and/or excessive force towards members of the public in the course of exercising his duties as a police officer' — was expressed very broadly. Her Honour stated that the proposed tendency asserted as a fact the very issue that it sought to prove (which was also the main issue in the case): that the applicant acted with unjustified force. Further, the judge observed that the purported tendency failed to mention the most unifying factor in all the charges — that each instance of force involved the use of an OC canister to spray or strike the complainant.[9] Her Honour noted the importance of an alleged tendency being identified with precision and cited several authorities to that effect.[10] Her Honour then said the following:[11]

> It is notable that even after receipt of detailed defence submissions pointing to the lack of specificity, the amended notice made no change to how the tendency was expressed. That said, the features of the evidence set out in the table as establishing the tendency did serve to refine and clarify the tendency, as did [the prosecutor's] written and oral submissions. The reformulated tendency can be expressed thus:
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> > *a tendency over a three-month period in the company of other police officers to use OC spray and other physical force in dealing with young men late at night who are standing on the street mouthing off and/or abusing police but not behaving in a physically aggressive or threatening manner.*

27 Her Honour then stated:[12]

> I have omitted the words 'without justification' which appeared in [the prosecutor's] written submissions as, like the original wording, they rather beg the question. I have also replaced the words 'otherwise not behaving illegally' with 'not behaving in a physically aggressive or threatening manner' as that is the essence of the allegation. Finally, I have changed the period from two-months to three-months to reflect the dates of the charges, being 2 March, 31 March and 27 May 2018.

28 The judge noted that defence counsel's primary submission was that the judge should rule on the tendency as articulated in the notice, however on analysis counsel submitted that the additional detail added little and addressed argument in respect of it. Her Honour stated that it was 'undesirable and unfair for defence to have to meet an evolving tendency notice on the run.' However, Her Honour stated that as the trial was at least six months away and argument had proceeded on the reformulated tendency, it would not be unfair to rule on the tendency in that form.[13]

29 The judge noted that there were seven occasions where the applicant is alleged to have used OC spray without lawful justification — therefore the prosecution can call on six other occasions to prove any one charge (without considering the instances where the

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9 Ibid, [9].

10 Ibid, [10]. Her Honour cited *Hughes v The Queen* (2017) 263 CLR 338, 363 [64] (Kiefel CJ, Bell, Keane and Edelman JJ); [2017] HCA 20 as well as *Dempsey (a pseudonym) v The Queen* [2019] VSCA 224 [60] (Beach, Kaye and Ashley JJA).

11 Ibid, [10].

12 Ibid, [11].

13 Ibid, [12].

OC canister was used to strike a complainant).[14] The judge considered that each of the seven occasions in isolation provided support for the existence of the asserted tendency and any six occasions in combination provide strong support for that tendency — and that this support is even stronger when the two 'striking' charges are considered.[15]

30 The judge then turned to the argument that there were 'marked differences' between the incidents. Her Honour stated that it was not the fact that the applicant used OC spray, but rather the manner in which he used the spray and the canister that was the unifying feature — and that it was that manner that rendered the conduct 'extraordinary.'[16] Further, the judge rejected the argument that unfair prejudicial effect would outweigh significant probative value, and stated that the risk of an emotional response from the jury could be cured by relatively simple directions.[17]

31 Ultimately, her Honour held that the proposed tendency evidence did in fact establish the reformulated tendency and was not just evidence of generalised bad conduct. Her Honour held that the tendency had significant probative value in respect of each charge on the indictment and that the evidence of all charges (and the one uncharged act) was cross-admissible. Her Honour found that the evidence should not be excluded due to the risk that the jury may use the evidence in some unfair way.[18] Her Honour held that the prosecution were entitled to use the evidence of all charges in the manner proposed in their tendency notice. Further, her Honour found the evidence of all charges to be cross-admissible and therefore held that there was no reason to order severance.[19]

This application for leave to appeal

32 Grounds 1, 2 and 3 concern asserted substantive errors in the judge's reasoning towards allowing the prosecution to lead the impugned tendency evidence. A step in that reasoning process was the judicial reformulation of the tendency notice into what the judge found was an admissible form. It is that refashioning of the notice that underpins ground 4, which can be characterised as the procedural unfairness ground. For reasons that will become apparent we have considered ground 4 first and have determined to allow it. We shall briefly repeat the evolution of the further reformulated tendency alleged against the applicant.

7 March 2022

33 We have set out the original form of the 7 March 2022 notice in para [17] of these reasons. It will be recalled that the impugned notice was drafted as follows:

> *to … [a]ct … with unjustified and/or excessive force towards members of the public in the course of exercising his duties as a police officer.*

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14 Ibid, [21] (citations omitted).
15 Ibid, [22].
16 Ibid, [35].
17 Ibid, [46].
18 Ibid, [47].
19 Ibid, [48].

It was said to relate to the issue of 'whether [the applicant] acted unreasonably and without lawful excuse' in relation to charges 1 to 9.

34 This tendency only has to be stated to be revealed as extraordinarily broad and thus unlikely ever to demonstrate a probative value of any weight, let alone any significant weight.[20]

5 July 2022

35 The judge was entitled to, and did, point out some of the deficiencies in the tendency alleged. There is a very fine line, however, between identifying and crystallising areas of dispute between the parties, and resolving an area of dispute by refashioning one party's contentions. Very early in argument on this issue on 5 July 2022 the following exchanged occurred:

> HER HONOUR: … if the Crown wants to leave it the way it is that's fine. I also wanted to ask you about your tendency notice. Was it intentional that you did not include Charges 10 and 11 on it or was that an oversight?
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> [THE PROSECUTOR]: I mean if they are not Your Honour it is an oversight. I didn't draft the notice and if that is correct then I will seek to file an amended notice. Excuse me a moment Your Honour. Yes, I will file an amended notice this afternoon Your Honour.
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> HER HONOUR: When we are talking about the notice and I am saying this just to try and make sure that we understand the issues and really to assist with the way the matter is to proceed. Not to give any guidance or instruction to the Crown but paragraph 2.1.1 acting with unjustified and/or excessive force towards members of the public in the course of exercising his duties as a police officer. I mean, shouldn't it be really whilst purportedly exercising his duties as a police officer or something to that effect in the sense that it sort of begs the question whether he was in the course of exercising his duties as a police officer. Because you would be saying he was actually going beyond and not acting in accordance with his duties.
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> [THE PROSECUTOR]: I understand the point Your Honour and I will consider redrafting that when I file a new notice.
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> HER HONOUR: Okay, now the only other thing was paragraph 42 of the prosecution opening summary that is a striking of (indistinct) to the head with the OC spray cannister that's quite separate from paragraph 36. Now, so at the moment that remains as an uncharged act as far as I can determine and I think that is what your paragraph 3 of the prosecution opening summary refers to. That is, I think paragraph 3 of the opening summary refers to paragraph 42, that separate incident. I noticed in the defence response that they questioned the relevance of that. My question again and I don't want to be drafting or redrafting anything or telling the prosecution how to run its case but is there any reason why that's an uncharged act rather than a charged act?

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[20] See s 97(1) of the Act.

6 July 2022

36 In written submissions dated 6 July 2022 the prosecutor proposed a modified tendency — he submitted that '*…the accused had a tendency over a two-month period, in the company of other police officers, without justification, to use O.C. spray and other physical force in dealing with young men late at night who had been drinking and were verbally abusive, but otherwise not behaving illegally.*'

7 July 2022

37 An amended tendency notice was filed on 7 July 2022. The prosecutor confirmed that the tendency alleged was largely identical to that alleged in the 7 March 2022 notice but had expanded the reach of the notice to include charges 10 and 11, as suggested by her Honour. It bore no resemblance to the modified tendency proposed only the day before.

38 On 7 July the following exchange then occurred:

> HER HONOUR: Okay. And I don't think I asked about this yesterday specifically, I did ask about the uncharged act with the canister allegedly striking [SJ] on 2 March, and at the moment it still remains an uncharged act, is that intended not to be included in the tendency notice?
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> [THE PROSECUTOR]: Your Honour - - -
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> HER HONOUR: Whether it's charged or uncharged?
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> [THE PROSECUTOR]: It's intended to be included in the tendency notice either as an uncharged or a charged act. I haven't resolved with the Crown prosecutor whether the indictment needs to be amended to include that as part of the charges, or whether it should stay as an uncharged act, but I'll do that before the end of this week.
>
> HER HONOUR: All right. Well, just so we know, the notice will have to be amended again one way or another to include that particular act, and that's set out in your opening paragraph 42, that is the act we're talking about. While standing at the rear of the divisional van with the door open, [the accused] struck [SJ] to the head again with the OC spray canister.

39 So, by 7 July, the original broad tendency had been altered to include a relationship to charges 10 and 11 but was otherwise materially unchanged. The prosecutor had floated a more focussed tendency in his written submissions, filed the day before, but it had not found its way into the subsequently filed notice. It seems nevertheless that argument proceeded on the basis of this modified 6 July tendency. Against this increasingly chaotic background the judge and the prosecutor had a further discussion about the notice, initially concerning the probative value of the tendency alleged:

> HER HONOUR: Just going to this point. You say the tendency is quite specific but in the tendency notice it's not quite specific, it's reasonably general. You've distilled it more in paragraph 7 of your submissions and it could also be – you've said he does it in the company of other police officers. It could also be said, in close proximity to other police officers who, I don't know whether it's all the occasions, but it may well be, are also captured by the spray. So is that

something you'd also rely upon, that it's a willingness or a tendency to discharge it, even when others may be affected, including other police officers.

[THE PROSECUTOR]: I agree with that, Your Honour. I think saying that it's in the company of police officers includes that possibility that other police officers will be sprayed when the accused lets go with the spray and that's obviously what happened. And the importance of the tendency notice is that, one also has to look at the evidence relied upon to prove the tendency and that is the various statements that are set out in the third column of the notice. And in each - with each charge there are a number of statements and it's the evidence within those statements that goes to show what the tendency is said to be. I've tried to distil it in my paragraph 7, but that paragraph 7 merely takes elements from various statements that are made in relation to each of the incidents by separate witnesses. So it's not as if the prosecution is expanding its case on tendency by what I've said in the prosecution submissions. It's just that I've taken bits from the statements that are part of the notice.

HER HONOUR: And the other aspect that occurs to me in terms of similarity, it's the use of the OC spray but also the use of the OC spray canister. Because it's either used to spray or it's used to strike.

[THE PROSECUTOR]: That's true, Your Honour, and that's certainly particularised in the notice when it is used to strike. I can't say that it was used to strike in every instance because it wasn't. It's on three separate occasions that it's used as a weapon in itself, rather than the spray being used as a weapon. I can't say that the tendency to use the can as a weapon is as strong a similarity in each of the incidents because, in one of the incidents, it's not used at all as a weapon in itself, it's only the spray in the second incident. And so the prosecution case isn't as strong on the use of the actual spray can as a weapon, but it's part of what happened certainly in two of the incidents but it's not in three. So I don't rely on that as the strongest part of the tendency notice at all.

HER HONOUR: All right and when you say, 'In the company of other police officers' – I've already talked about the fact that includes in close proximity, but is there some other relevance of, 'In the company of other police officers'?

[THE PROSECUTOR]: Well, Your Honour, it shows that there is a certain recklessness to the accused behaviour because he must know that other police officers are going to see what he's doing and realise that what he's doing, as Leading Senior [BC] was with the first incident, be very upset by what the accused is doing and they're going to tell other people about it. So it shows a reckless attitude towards citizens in his behaviour.

HER HONOUR: Well, you could say reckless attitude in a sense that other police officers might be sprayed, and they were, but are you also talking about something similar to Hughes, where there was the risk of detection. Now, this isn't the risk of detection but it's the risk of other police officers not approving and perhaps reporting or whatever. Is that what you're talking about?

40 Thus during discussions on the tendency sought to be alleged against the applicant the judge noted that on the prosecution case the applicant's actions:

- Were in close proximity to other police officers.

- Exhibited a willingness to discharge the OC spray even when others may be affected by the spray.
- Included the use of the OC spray canister as a weapon.
- Were performed in circumstances which exhibited an indifference to the presence of other police officers.

41 All of this discussion happened 'on the run' and while the formal amended notice alleging the tendency had effectively been abandoned for the purposes of argument. Defence counsel on 7 July 2022 pointed out the unfairness of having to make submissions about a nebulous tendency that danced from shadow to shadow.

> [DEFENCE COUNSEL]: …OC spray is perhaps the least - involves the least amount of force or risk of injury and so is perhaps the most common of the methods that a police officer has to control or subdue a subject. So it isn't that unusual after all and, certainly, the prosecution isn't relying on that as a similarity in the notice.
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> HER HONOUR: Well, not in the notice but, I mean - well, it is in the notice if you go [to] the paragraphs in the statements that are referred to. So they haven't put it there as the tendency. They haven't expressed it specifically as the tendency but have simply talked about excessive force but it's clear, from the tendency notice, that that's what they're relying on and that's clear from paragraph 7 of their submissions and also what [the prosecutor] just said.
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> [DEFENCE COUNSEL]: But it's not - - -
>
> HER HONOUR: Yes, well, mainly on the use of the OC spray, not so much on the use of the canister as a weapon.

42 A short time later defence counsel said this:

> [DEFENCE COUNSEL]: Your Honour, of course, also has to look at the way that the tendency has been framed in the notice and that's what this argument is about. In our submission, the prosecution has sought to introduce some further specificity in paragraph 7 - and Your Honour touched on this earlier - whereby it has specified physical force in dealing with young men late at night who had been drinking. Neither of those features are included in the tendency notice that has been served by the Crown. And so, first of all, there's an unfairness in seeking to introduce those specific features at this stage in the proceedings…

And then:

> [DEFENCE COUNSEL]: And so whilst our primary submission is that Your Honour should rule on the tendency as it's articulated in the tendency notice, in our submission, the addition involving - or the incidents involving young men late at night who had been drinking, really doesn't add any meaningful specificity to the tendency that's alleged.
>
> HER HONOUR: Well, dealing with the question of any unfairness; I mean, as we discussed yesterday, any trial is not likely to get on until next year and clearly the prosecution should be clear about what tendency it is that they're relying on and I think they could've been more specific in the tendency notice.

> But the table and the features set out make it more clear what they're relying on and as do the witnesses and the pages of the depositions that they're talking about. So, I mean, really, is there any unfairness to you?
>
> [DEFENCE COUNSEL]: I was quite taken by surprise, I must say, Your Honour, to see that in the submissions but when we pick it apart, as I said, it doesn't really add much …

43 If that was where the procedural unfairness argument ended, in our view, the process adopted would have been unsatisfactory — certainly it 'should not be condoned'[21] — and largely the product of the reluctance of the prosecution to comply with s 97(1) of the Act and r 7 of the *Evidence Regulations 2019*.

44 But that is not where the procedural unfairness argument ends.

45 By the time the judge's ruling was delivered the tendency had changed again from the prosecution proposal of 6 July and in material ways. The evidence was said by the judge to disclose 'a tendency over a **three**–month period in the company of other police officers to use OC spray and other physical force in **dealing with young men at night who are standing on the street mouthing off and/or abusing police but not behaving in a physically aggressive or threatening manner**.'[22]

46 The changes identified in bold above are her Honour's. In her ruling her Honour acknowledged the changes and stated that they were necessary (to avoid circularity and/or to reflect the 'essence of the allegation'). [23]

47 Thus the judge found that this tendency reformulated by her was established by the evidence, had significant probative value to all charges, and substantially outweighed any prejudicial effect it may have.

48 In short the applicant contended at the oral hearing of this application for leave to appeal that the evolving process that led to the reformulation of the impugned tendency was manifestly unfair:

(a) The admissibility of tendency evidence is governed by strict rules. The first rule is that, before tendency evidence can be adduced and placed before a jury, the prosecution must *inter alia* identify with precision the nature of the tendency it alleges, the issue or issues to which the tendency will relate and the evidence said to prove the tendency. That obligation manifests in the tendency notice. Once its terms and scope are identified with precision its merits may be argued. That process did not occur in the applicant's proceeding.

(b) Defence counsel was made party to a process that had her playing 'catch-up' from the outset. She was forced to make submissions on a proposed tendency that was ever-changing, and which was not finalised until the trial judge 're-formulated' it in her ruling. She had to deal with the judge strengthening the case

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21 See *TL v The King* (2022) 96 ALJR 1072, 1080 [33] (Kiefel CJ, Gageler, Gordon, Steward and Gleeson JJ) [2022] HCA 35 ('***TL***').

22 Reasons, [10].

23 Ibid, [11].

> for a tendency by reference to an 'extraordinary' feature of the evidence — namely that proof of the applicant's tendency to use an OC canister to spray and/or strike non–threatening individuals in a brazen fashion 'is capable of removing doubts which might otherwise attach to the evidence about each charge…'.[24] The applicant's counsel on this application for leave to appeal noted that this 'extraordinary feature' was neither advanced nor relied upon by the prosecutor below.

49 The respondent in written submissions argued that the applicant was not denied procedural fairness. All evidence relied upon to support the tendency, the reformulated tendency in the amended notice and the further reformulated tendency found in the judge's ruling was identified in both the notice and the amended notice. It was submitted that the judge's conclusion that there were multiple (seven or nine) incidents contained within the three episodes was unremarkable and the evidence that gave rise to that conclusion was identified in the notice. Further, the respondent submitted that the judge's conclusion that the applicant's use of OC spray was 'brazen' and 'extraordinary' was evidence–based.[25] There was nothing circular in the 'reformulated tendency' which was specific and the specificity of the tendency had a direct impact on the strength of the inferential reasoning.

50 In its written case the respondent did not really come to grips with the applicant's complaint that the judge's involvement in the evolution of the tendency deprived the applicant of procedural fairness; rather the respondent contended that as the discussion developed the applicant's counsel participated in the discussion in a 'fulsome manner'.

51 In the oral hearing of this application for leave to appeal, counsel for the respondent, when pressed, accepted that defence counsel did not have any opportunity to make submissions on the admissibility of the tendency evidence informed by the tendency reformulated by her Honour. He further conceded that, to this extent, the defence were deprived of procedural fairness.

Ground 4

52 We are satisfied that the respondent's concession is fairly made and that this ground must succeed. Recently in the case of *TL* the High Court, when considering the admissibility of certain asserted tendency evidence said this:

> As has been explained, the trial judge and the prosecution imported elements into the asserted tendency in addition to those stated in the amended tendency notice. So, for example, the trial judge described it as a tendency to 'behave towards the child in an inappropriately physical and violent fashion'. The Court of Criminal Appeal described it as a tendency to 'act violently towards [the victim]'. There were two problems with that approach. The asserted tendency in the notice was too general, covering acts that did not necessarily involve violence; the prosecution accepted it could have included a smack, limiting its capacity to separate the appellant from the mother, 'who, on the appellant's evidence, had occasionally smacked the child on the leg or thereabouts'.

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24 Ibid, [39].

25 Including the evidence of Sergeant [M].

> Second, reformulation of a tendency without providing a notice under s 97(1)(a) may render evidence inadmissible. The insufficient particularisation of the asserted tendency in the amended notice, the subsequent reformulation of that tendency absent formal amendment, the absence of a separate tendency notice for the complaint evidence, and the resulting non-compliance with s 97(1)(a), should not be condoned.[26]

53 In this case we are satisfied of the following:

(a) The first tendency notice of 7 March 2022 alleged a tendency that was much too general, covering the applicant's entire police career and every alleged unjustified or excessively forceful act carried out in the execution of his duties.

(b) The amended tendency notice of 7 July 2022 suffered the same vice.

(c) The reformulated tendency of 6 July 2022 as contained in the written prosecution submission was never the subject of an amended written tendency notice as seems to be required by s 97(1)(a) of the Act.[27]

(d) The Record of Orders of the County Court dated 16 August 2022 erroneously states that 'her Honour Judge Carlin's Ruling on tendency concluded that the Crown is entitled to use the evidence of all charges as proposed in its tendency notice.' The amended tendency notice of 7 July 2022 did not propose that the evidence be admissible to support the alleged tendency reformulated by her Honour. For this reason alone the order the subject of this application for leave to appeal must be set aside.

(e) The applicant was denied procedural fairness in that his counsel was denied any opportunity to make submissions on the asserted tendency as reformulated by her Honour.[28] Further, counsel had a highly compromised opportunity to make submissions as the tendency argument developed.

54 The applicant has established this ground.

Grounds 1 – 3

55 As we have observed, these grounds contend that there were various substantive errors in her Honour's reasoning. The applicant, in his written case, submitted that we ought to proceed by reconsidering the merits of the tendency argument. In discussion, we observed that given that there was still no tendency notice extant beyond the obviously inadequate amended notice of 7 July 2022, and given that the 'current' tendency that

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26 (2022) 96 ALJR 1072, 1079 [33] (Kiefel CJ, Gageler, Gordon, Steward and Gleeson JJ) [2022] HCA 35 (citations omitted).

27 *TL* (2022) 96 ALJR 1072, 1080 [33] (Kiefel CJ, Gageler, Gordon, Steward and Gleeson JJ) [2022] HCA 35.

28 See, for example, *Stead v State Government Insurance Commission* (1986) 161 CLR 141, 145 [11] (Mason, Wilson, Brennan, Deane and Dawson JJ); [1986] HCA 54, *Re Refugee Tribunal; Ex Parte Aala* (2000) 204 CLR 82, 121 [101] (McHugh J); [2000] HCA 57 and *Amaca Pty Ltd v Doughan* [2011] NSWCA 169 [62] (Sackville AJA; Giles and McColl JJA agreeing).

seemed to be alleged by the respondent was that fashioned in part by the judge in procedurally unfair circumstances, we were not prepared to proceed as requested.

56 The proper course, we considered, was for the respondent to commit itself to a notice that complied with s 97(1) of the Act and which expressed an asserted tendency devoid of broad generalities. The argument on that tendency notice can then proceed in an orderly fashion in a remitted hearing before a different County Court judge. Nothing has been said to us which would suggest that the balance of preliminary argument, and the trial itself, could not be conducted by her Honour.

57 We repeat that in our view the cause for this unfortunate sequence of events was the extreme breadth of the tendency asserted in both the March and July 2022 tendency notices. It is not a judge's function to fashion an acceptable and precisely expressed tendency from something that resembles thin air. We have sympathy for the predicament in which the judge found herself. Modern judicial practice encourages free and open interchange between bench and bar table. In discussions such as in this case, however, where the topic involves the adequacy of an important notice in a substantial evidentiary argument, it can be a very short (and tempting) step from pointing out deficiencies to suggesting how to correct those deficiencies. Such an approach, if it were to be countenanced, would need to be carried out with great caution; a judge should be mindful that he or she is charged with adjudicating the admissibility of contested evidence and ought not be seen to have made a contribution to a document or argument which is intrinsic to the evidentiary dispute.

58 For the reasons given above, at the conclusion of argument, we granted leave to appeal and allowed the appeal under ground 4. Additionally, we ordered that the tendency argument be remitted to the County Court to be heard by a different judge. It was not necessary for us to consider grounds 1, 2 and 3 any further.