HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND HEYDON JJ

DANIEL CRIS PHILLIPS APPELLANT

AND

THE QUEEN RESPONDENT

Phillips v The Queen [2006] HCA 4
Date of Order: 9 December 2005
Date of Publication of Reasons: 1 March 2006
B58/2005

ORDER

1. Appeal allowed.

2. Set aside the orders of the Court of Appeal of the Supreme Court of Queensland made on 24 September 2004, and in place thereof order that:

(a) the appeal to that Court be allowed;

(b) the convictions in respect of counts 2, 4, 5, 6, 7 and 8 of the indictment are quashed; and

(c) there be retrials, conducted separately, on each of the following counts:

(i) count 2 for rape;

(ii) count 4 for rape;

(iii) count 5 for unlawful carnal knowledge;

(iv) count 6 for unlawful carnal knowledge and count 7 for rape; and

(v) count 8 for assault with intent to rape.

On appeal from the Supreme Court of Queensland

Representation:

A J Glynn SC with J D Henry for the appellant (instructed by Robertson O'Gorman)

L J Clare with S G Bain for the respondent (instructed by Director of Public Prosecutions (Queensland))

CATCHWORDS

Phillips v The Queen

Criminal Law – Information, indictment or presentment – Joinder of counts – *Criminal Code* (Q), ss 567, 597A – Series of offences of same or similar character – Whether admission of evidence of each complainant in relation to all counts prejudicial to appellant such that separate trials should have been ordered.

Criminal Law – Evidence – Admissibility of similar fact evidence – Appellant charged with eight counts of sexual offences against six complainants –Whether evidence in relation to counts involving one complainant admissible in relation to counts involving other complainants – Whether similar fact evidence admissible on the issue of consent – Whether similar fact evidence admissible on issues other than consent – Application of principles for admissibility of similar fact evidence stated in *Pfennig v The Queen* (1995) 182 CLR 461 – Whether similar fact evidence has strong degree of probative force sufficient to outweigh prejudicial effect.

Criminal Law – Jury – Verdict – Unreasonable verdicts – Whether verdicts only explicable as the product of compromise between jurors – Whether intervention required to prevent injustice.

Criminal Law – Retrial – Appellant acquitted on one count of rape – Whether admission of closely related evidence at retrial on different counts would fail to give full effect to that acquittal.

Criminal Code (Q), ss 567, 597A.

1 GLEESON CJ, GUMMOW, KIRBY, HAYNE AND HEYDON JJ. After a trial by jury conducted in the District Court of Queensland (White DCJ), the appellant, Daniel Cris Phillips, was convicted on three counts of rape, two counts of unlawful carnal knowledge, and one count of assault with intent to commit rape. An appeal against conviction to the Queensland Court of Appeal was dismissed[1]. An appeal against sentence succeeded in part. By special leave, the appellant appeals to this Court against his convictions.

The proceedings at first instance

2 The appellant stood trial on eight counts. The first seven related to complaints made by five teenage females. The incidents complained of allegedly took place in the period August 2000 to November 2001. The conduct allegedly occurred in and around Innisfail, a small country town in the north of Queensland. In relation to BS, the appellant was charged with indecent assault and rape. These eventually became counts 1 and 2. In relation to TK, he was charged with rape (count 3). In relation to ML, he was charged with rape (count 4). In relation to SW, he was charged with rape (count 5). In relation to MM, he was charged with two rapes (counts 6 and 7).

3 Well before the trial the defence unsuccessfully applied for separate trials in relation to the charges supported by the five complainants. The prosecution then presented a new indictment joining a further charge of assault with intent to rape JD, a female aged 18, on 11 May 2003 in Brisbane. This became count 8. A further defence application for separate trials was rejected. A third application was made and rejected just before the appellant was arraigned.

4 The jury convicted the appellant on counts 2, 4, 7 and 8. He was acquitted on counts 5 and 6, but convicted on an alternative charge of unlawful carnal knowledge in each case. He was acquitted on counts 1 and 3.

The nature of the appeal

5 The appeal is brought on the ground that the Queensland Court of Appeal failed to comply with s 668E(1) of the *Criminal Code* (Q), which relevantly provided that the Court of Appeal is to allow the appeal "if it is of opinion … that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law".

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1 *R v PS* [2004] QCA 347.

6 The question of law which the appellant contended was wrongly decided arose from s 567 of the *Criminal Code*. It relevantly provided:

> "(1) Except as otherwise expressly provided, an indictment must charge 1 offence only and not 2 or more offences.
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> (2) Charges for more than 1 indictable offence may be joined in the same indictment against the same person if those charges are founded on the same facts or are, or form part of, a series of offences of the same or similar character or a series of offences committed in the prosecution of a single purpose."

The appellant contended that the offences of which each complainant gave evidence did not comprise "a series of offences of the same or similar character". The appellant also relied on s 597A of the *Criminal Code* which provided relevantly:

> "(1) Where before a trial or at any time during a trial the court is of opinion that the accused person may be prejudiced or embarrassed in the person's defence by reason of the person's being charged with more than 1 offence in the same indictment or that for any other reason it is desirable to direct that the person should be tried separately for any 1 or more than 1 offence charged in an indictment the court may order a separate trial of any count or counts in the indictment.
>
> (1AA) In considering potential prejudice, embarrassment or other reason for ordering separate trials under this provision in relation to alleged offences of a sexual nature, the court must not have regard to the possibility that similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, may be the result of collusion or suggestion."

Section 597A(1AA) is congruent with a modification to the common law rules relating to similar fact evidence effected by the *Evidence Act* 1977 (Q), s 132A, which provided:

> "In a criminal proceeding, similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, must not be ruled inadmissible on the ground that it may be the result of collusion or

suggestion, and the weight of that evidence is a question for the jury, if any."[2]

7 The appellant argued that the evidence of one complainant was admissible only on the charge or charges relating to that complainant, and not on the charges relating to other complainants, because the rules for the reception of "similar fact" evidence were not satisfied[3]. Hence to try the eight charges against the appellant in a single trial was prejudicial or embarrassing to his defence. It was not in controversy that if the evidence of each complainant were admissible on the charges relating to incidents narrated by other complainants, there would be a "nexus or connection" between the charges sufficient to make them a series within the meaning of s 567; and if the evidence were not admissible, there would not be a series, and unacceptable prejudice would arise within the meaning of s 597A[4].

8 Counsel for the appellant contended that the police had failed to record their investigations properly and that there were opportunities for collusion or

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2 Section 597A(1AA) and s 132A were introduced by the *Criminal Law Amendment Act* 1997 (Q), s 110 and Sched 2 respectively, after the decision of this Court in *Hoch v The Queen* (1988) 165 CLR 292. In that Queensland appeal, similar fact evidence was held inadmissible on the ground that it was reasonably explicable on the basis of concoction. This legislation, despite the fact that it was enacted after *Pfennig v The Queen* (1995) 182 CLR 461 was decided, made no other change to the law stated in *Hoch v The Queen* or *Pfennig v The Queen*. For a provision similar to s 132A, see *Evidence Act* 1906 (WA), s 31A(3). Section 31A(1)-(2) made wider changes, as did *Crimes Act* 1958 (Vic), s 398A. *R v Best* [1998] 4 VR 603 at 610 construed s 398A(3)-(4) as having an effect which is similar to, but perhaps broader than, s 132A.

3 In *Pfennig v The Queen* (1995) 182 CLR 461 at 464-465 Mason CJ, Deane and Dawson JJ said: "There is no one term which satisfactorily describes evidence which is received notwithstanding that it discloses the commission of offences other than those with which the accused is charged. It is always propensity evidence but it may be propensity evidence which falls within the category of similar fact evidence, relationship evidence or identity evidence. Those categories are not exhaustive and are not necessarily mutually exclusive." The present appeal concerns propensity evidence within the category of similar fact evidence. These two terms are used indifferently below.

4 See *De Jesus v The Queen* (1986) 61 ALJR 1 at 3; 68 ALR 1 at 4-5.

suggestion between various of the complainants and other witnesses. But these contentions, even if sound, could not bear on the admissibility of the evidence (by reason of s 132A of the *Evidence Act*) or on whether separate trials should have been ordered (by reason of s 597A(1AA) of the *Criminal Code*). Accordingly, the outcome of the appeal turns on the application of the common law rules relating to similar fact evidence independently of questions of collusion or suggestion.

The test applied in the courts below

9 Since at least 1995 it has generally been thought that the admissibility of similar fact evidence depends on the test stated in *Pfennig v The Queen*[5]: it is inadmissible unless, viewed in the context of the prosecution case, there is no reasonable view of the similar fact evidence consistent with the innocence of the accused. However, trial counsel[6] reached an agreement that the trial judge should apply a reformulation of that test as stated by Thomas JA in the Queensland Court of Appeal in *R v O'Keefe*[7]. His Honour asked:

> "(a) Is the propensity evidence of such calibre that there is no reasonable view of it other than as supporting an inference that the accused is guilty of the offence charged? …
>
> (b) If the propensity evidence is admitted, is the evidence as a whole reasonably capable of excluding all innocent hypotheses? This would have to be answered on the assumption of the accuracy and truth of the evidence to be led. If the judge thought that the evidence as a whole was not reasonably capable of excluding the possibility that the accused is innocent, then the accused should not be exposed to the possible risk of mis-trial by a jury that might give undue prejudicial weight to propensity evidence. The exercise is to be undertaken with special care because of the potential danger of misuse of such evidence by the jury."

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5 (1995) 182 CLR 461.

6 The relevant counsel for the prosecution did not appear in the Court of Appeal or in this Court. The relevant leading counsel for the accused appeared in the Court of Appeal, but not in this Court.

7 [2000] 1 Qd R 564 at 573-574 (Pincus and Davies JJA agreeing).

The trial judge treated *R v O'Keefe* as authoritative at all stages throughout the trial. The Court of Appeal said that it was a case to which it was necessary to have particular regard.

10 On one view, the problems presented by the tender of similar fact evidence are merely problems of relevance[8]. On another view, evidence tendered as similar fact evidence must first be assessed for relevance, and, if that hurdle is overcome, must satisfy some additional test based on probative force[9]. Whichever approach is the sounder, it is not possible now to avoid setting out a summary of the evidence tendered by the prosecution on each count. The trial judge proceeded by referring to what was said in the written submissions of the prosecution and the depositions. These materials were not before this Court, but it may be assumed that they corresponded with the evidence in chief, and it is that which is summarised below. It is not necessary for present purposes to consider any other evidence or to take into account the jury verdict on each charge.

Counts 1 and 2: BS's complaint about events at the appellant's residence

11 BS was a social acquaintance of the appellant. According to her, in August 2000, shortly after they had both turned 16, she received a telephone call around 8.30pm in which she was invited to a party. The caller was a young man, an acquaintance of hers named BM. He was also a friend of the appellant. She said she did not have transport, and in later calls BM said he would arrange transport. He and the appellant then turned up around 9.15pm. They drove to a farm at Cowley, outside Innisfail, where the appellant lived with his parents. The group arrived at 9.30-9.45pm. There they found another young man, SS, but no party. BS was told that the party was only to start at 1.00am, but no one else ever arrived.

12 After the young men played table tennis and drank beer for a couple of hours, the appellant suggested that everyone should go to bed, and that BS should

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8 *Martin v Osborne* (1936) 55 CLR 367 at 375 per Dixon J; *R v Boardman* [1975] AC 421 at 451 per Lord Hailsham of St Marylebone LC; Hoffmann, "Similar Facts After *Boardman*", (1975) 91 *Law Quarterly Review* 193 at 206.

9 For example, in *Hoch v The Queen* (1988) 165 CLR 292 at 294 Mason CJ, Wilson and Gaudron JJ said: "Assuming similar fact evidence to be relevant to some issue in the trial, the criterion of its admissibility is the strength of its probative force."

sleep upstairs in a room which he described as his sister's bedroom. BS entered it. She locked the door. She then heard someone outside it. The door opened. The appellant came in. After some conversation, he asked her several times for a kiss. He then asked her to commit fellatio and forced her mouth onto his penis by holding her hair. That was the subject of count 1. Then, over her protests, he twice placed his penis inside her vagina. That was the subject of count 2.

13 The appellant's evidence was that an act of oral and an act of vaginal intercourse had occurred, but that they were consensual.

Count 3: TK's complaint about events at her birthday party

14 On 21 February 2001, TK turned 16. A party was held at her house to celebrate the event. The appellant, a former boyfriend of hers, was one of the guests. Around 5.00am, after the party had broken up and TK's brother had gone to work, the appellant asked to talk to TK alone. He told her he liked her and tried to kiss her. He then picked her up and took her to her brother's room. He threw her on the bed. He began kissing her. Despite her protests he twice inserted his penis into her vagina. The episodes were separated by him getting up to close the door. He only terminated the second episode when she rang a friend.

15 The appellant's evidence admitted some consensual sexual activity earlier in the evening, but denied the sexual intercourse alleged.

Count 4: ML's complaint about a party at East Innisfail

16 In March 2001, ML, then aged nearly 16, attended a party held at a friend's house at East Innisfail. The appellant, whom she knew, was another guest. They had a conversation which concluded by him telling her to look after a bottle of soft drink for him, and, if he did not return within a certain time, to bring it to him across the road. In due course she did. She asked him to take her back to the party because she felt very drunk. He took her to a nearby house. He sat her on a ledge and began to kiss her and rub her arms. She protested, but passed out. When she woke up, she found that the appellant was having vaginal intercourse with her. She shouted at him repeatedly and he stopped and walked away.

17 The appellant's evidence largely admitted the activity alleged, but contended that it was consensual and was initiated by ML.

Count 5: SW's complaint about events at a party at her sister's flat

18 In June 2001, when she was 14, SW attended a party at her sister's flat in Innisfail. Originally those attending were to be SW and a friend of hers, KW. KW suggested that BM attend. This was the same BM who was a witness in relation to counts 1 and 2. BM arranged for the attendance of the appellant and another male. SW had not met the appellant before. After a game in which KW, BM and the appellant removed items of clothing, the males were left wearing nothing and KW was left wearing only a g-string. They then partially dressed themselves, and the appellant told SW he wanted to talk to her and guided her to a bedroom. There, with her consent, he massaged her breasts. She then engaged in fellatio. He pushed her onto a bed, inserted a finger into her vagina, and had vaginal intercourse. He stopped when KW sought to enter the room, but resumed when she left, despite SW's protests. He desisted only when BM said to him that he had to go.

19 The appellant's evidence admitted a modified version of the conduct described, but contended that it was consensual, and that SW had fetched a condom which he used until it split.

Counts 6 and 7: MM's complaints about the appellant's behaviour at a vacant house on his parents' farm

20 On or about 19 November 2001, when she was 15, MM decided to cease living at the house of her then boyfriend, PP, his father and brother. She knew the appellant, having been at the same school. He and MS, a friend of the appellant, arrived at PP's house. MM said she wanted to go to her mother's house at Mission Beach. The appellant said he might be able to give her a lift. He left, but later rang and arranged to pick her up and take her home. Soon afterwards, MS drove MM away while the appellant distracted PP's attention. MS drove her to a friend's house, and thereafter dropped her at the property owned by the appellant's parents. On it were two houses. One of them was the house where BS had gone in August 2000, and in which the appellant and his parents resided. The other one was vacant, and the appellant was waiting there. The appellant then departed and returned with his mother, bringing food, drink and additional bedding. The mother then departed.

21 For some time the appellant and MM rode a motor bike, ate dinner and drank alcohol. When darkness fell the appellant expressed a desire to go to sleep. In the living room there were two beds, some distance apart. The appellant asked for a goodnight kiss, but MM refused. In response to the appellant's repeated threats to use a baseball bat, MM began to undress. The appellant asked for

fellatio, and against her will, she complied. The appellant then penetrated her twice with his penis. MM was crying throughout. That was the subject of count 6.

22 The circumstances relating to count 7, as narrated by MM, began after she and the appellant smoked a cigarette. Over her expressed objections, and in compliance with the appellant's wishes, she performed fellatio again. Again the appellant had vaginal intercourse with MM twice. The appellant then threw the baseball bat outside the window and filmed MM for a short time.

23 The appellant's evidence admitted that there had been consensual kissing, touching and fellatio, but denied intercourse.

Count 8: JD's experience in Brisbane

24 On a long weekend in May 2003, when she was 18, JD went to a hotel in Brisbane with a few male friends. There they met some friends who had with them the appellant. The appellant was not previously known to JD. After some time at the hotel, the appellant invited the group back to a house owned by his mother. The group played pool and smoked marijuana. A few days later the appellant telephoned JD and invited her to a party at his house. The appellant's mother and the appellant picked her up and took her to the mother's house. No other guests were present. The appellant and JD played some pool, smoked some marijuana and drank some alcohol. The appellant touched her against her will, offered her money to remove her shirt, and menaced her with a thick chain. She then endeavoured to leave, over opposition from the appellant. He then manhandled her to a nearby shed and tried to push her through a window. His mother approached them and questioned his behaviour. After a couple of minutes, JD managed to push him away and escaped.

25 The appellant's evidence denied that he had grabbed the appellant or pushed her through or towards a window of the shed.

The trial judge's reasoning before arraignment

26 *To what issue was the similar fact evidence relevant?* It is essential at the outset to identify the issues at the trial on which the similar fact evidence is tendered, for this is central to the identification of relevance, and to the

assessment of probative force on which the admissibility of similar fact evidence depends[10].

27 On the three occasions before arraignment on which the trial judge ruled the similar fact evidence admissible, there was only one factor suggesting any limitation of the issues arising. The trial judge proceeded on the basis that, since the appellant either was known to each complainant to some degree, or, in the case of SW, was readily identifiable for other reasons, identity was not a live issue. That is, it was not open to the appellant plausibly to contend that, whatever events happened to the complainants, he was not the person responsible for them. Beyond that, for all the prosecution and the trial judge knew, the appellant might (a) deny the acts alleged, or (b) admit those acts and allege consent, or (c) admit those acts and say he made an honest and reasonable mistake of fact about consent. In his first judgment rejecting the application for separate trials, the trial judge denied that the similar fact evidence was limited in its relevance to issues (b) and (c), and said it was potentially relevant to (a) as well. But he did not say how it was relevant.

28 *Points of universal similarity.* The trial judge listed five points of similarity in the evidence of the first five complainants:

> "(a) All of the girls were aged in their early to mid teens.
>
> (b) All of the incidents included penis/vagina intercourse.
>
> (c) All of the girls were within the accused's extended circle of friends.
>
> (d) In all cases each of the girls was readily able to identify the accused, and he must have known that.
>
> (e) In all cases the accused did not immediately commence to treat the girls violently. He made sexual advances to each of the girls of such a nature that it left the way open for them to engage in sexual activity of their own free will. In the case of Count [5][11] the girl

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10 *Hoch v The Queen* (1988) 165 CLR 292 at 301 per Brennan and Dawson JJ. For the issues in this class of case see generally *Director of Public Prosecutions (NT) v WJI* (2004) 219 CLR 43.

11 At the time of the trial judge's first ruling count 2 had not been separately charged, nor had count 7. The numbering employed by the trial judge has been adjusted in

(Footnote continues on next page)

actually did consensually engage in some sexual activity. In every case there is a common thread indicating a preference for consensual sexual intercourse and then little or no hesitation in resorting to the use of force to achieve his ultimate desire when the girl resists."

29 *Points of partial similarity.* The trial judge also listed six additional points of similarity between some, but not all, of the evidence given by the complainants:

"(f) In Counts 1, [5] and [6] the accused indicated a desire to have the complainant perform oral sex upon him. In fact in Count [5], the complainant did voluntarily perform oral sex upon the accused before she indicated her unwillingness to continue with the sexual activity.

(g) In Counts 1 to [5] inclusive, there were other people relatively close by to whom the accused's conduct could have been revealed had the girl chosen to be more vigorous and vocal in her resistance. This factor, in conjunction with (e) above, indicates some desire and hope on the part of the accused that the girls would consent to engaging in consensual sexual activity culminating in the intercourse.

(h) In Counts [3, 4 and 5] the incidents occurred in association with parties attended by both the accused and the complainant.

(i) In Counts 1, [4, 6 and 7] the accused was instrumental in engineering an opportunity to have the complainant alone with him. This is not to say that they demonstrate a conscious intention to rape prior to the girl offering resistance, but it does at least indicate a degree of premeditation in the accused's desire to have sexual intercourse with them.

(j) The five incidents occurred within the space of 16 months. There is of course significant temporal separation between each incident, so that they cannot be said to be temporally connected. However, they are sufficiently close in time to indicate an ongoing state of

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the light of that circumstance, and the count numbers referred to are those which the counts considered by the jury bore.

mind in the accused that if he gets the opportunity to have a sexual encounter with a girl and the girl displays an unwillingness to join in he is immediately prepared to continue the sexual encounter without the girl's consent.

(k) In spite of the similarities which I have mentioned above, some of the facts in relation to [Counts 6 and 7] are somewhat different from the earlier incidents. In relation to the complainant in that instance the accused behaved as a sympathetic friend which resulted in him taking her to the isolated unoccupied home at Cowley. He could just as easily have taken her to his parents' home as he did with the complainant in Count 1. Also in [Counts 6 and 7] he resorted to much more significant violence than in the earlier incidents by the use of a weapon to make threats to the complainant. These differences may be explained simply as an increase in the level of violence to which he was prepared to resort to achieve his aim."

30 The trial judge did not see it as fatal to admission that there was nothing unusual about the first five features. He said it was not essential to demonstrate striking similarity, unusual features, underlying unity, system, pattern or signature in the evidence[12]. He said that those qualities were only essential when identification is a critical issue and the similar fact evidence is the only evidence to link the accused to the offence charged.

31 Further, the trial judge did not see it as fatal that the last six features were not common to each complaint. He said that an examination of the list compiled by the trial judge in *Hoch v The Queen*[13] revealed that "it is not necessary for the similarities to exist in every case".

32 The trial judge concluded by saying that "the probative value of the complainants in this case in relation to each count is strong both individually and collectively". He said, employing par (a) of the tests stated in *R v O'Keefe*, that he was "satisfied that there is no reasonable view of it other than as supporting an inference that the accused is guilty of each of the offences charged". He said that par (b) of those tests was principally applicable to a circumstantial case and the

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12 See *Pfennig v The Queen* (1995) 182 CLR 461 at 482 per Mason CJ, Deane and Dawson JJ.

13 (1988) 165 CLR 292 at 298-299.

case before him was not a circumstantial case. He said, however: "I am satisfied that if the propensity evidence is admitted the evidence as a whole is reasonably capable of excluding all innocent hypotheses."

33 *Reasons for rejecting the second application.* The trial judge's key reason for rejecting the second application for a separate trial in relation to count 8 was put thus:

> "[T]he common feature which gives the evidence of the complainant in count [8] substantial probative value in respect of counts 1 to [7] (particularly counts 1, [2, 3 and 6]) and vice versa is that in all cases in spite of the ability of all complainants to be able to identify the accused and in spite of their resistance, the accused persisted in attempting to have intercourse against the complainant's will almost to the point of reckless disregard of the consequences. This feature, if believed, shows a particular attitude or propensity on the part of the accused."

He also said that the "absence of a striking similarity or signature is of little significance. The probative value of the evidence is its ability to show the improbability of similar lies by each of the complainants."[14]

34 What was the subject of these "similar lies"? Which of the three matters of fact described above did they relate to – the acts alleged, consent or honest and reasonable mistake of fact as to consent, or a combination of them? The answer "all" is suggested by the immediately succeeding passage:

> "One could almost imagine that if each of these counts were tried separately, at the conclusion of the case defence counsel would be urging the jury to have doubts about the truthfulness of the complainant's evidence or its reliability because it would be highly unlikely that the accused, knowing that he was able to be identified, knowing that he was proceeding to sexual intercourse against the complainant's will, would do such a thing because of the potential consequences."

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14 The trial judge understandably gave no reasons for rejecting the third application for separate trials: it was essentially a pro forma application arising from formal amendments to the indictment.

The basis on which the evidence was left to the jury

35 *The summing up.* Between the start of the trial and its conclusion the trial judge moved towards a much narrower answer to the question. This was no doubt caused by a narrowing in the issues as the trial proceeded. This narrowing came to be revealed by the lines taken by the appellant's counsel in cross-examining the complainants and eventually by the opening address delivered on the appellant's behalf after the prosecution case had closed. The shifting view of the trial judge is to be seen in numerous passages in the transcript of the trial to which counsel for the appellant referred – in the absence of the jury before the evidence closed, before, during and after addresses, and during and after the summing up. Thus in the summing up the trial judge relied on a formula embodied in the question:

> "[W]hat are the probabilities that all six girls have lied when they say they did not consent to [the appellant] dealing with them sexually[?]"

That formula was limited to lies on the issue of consent, for the trial judge said of the similar fact evidence:

> "[Y]ou can only use it in judging the reliability of the girls when they say they did not consent to [the appellant] dealing with them sexually. You cannot use it to decide whether or not there was penetration; you cannot use it to decide whether or not [the appellant] knew any particular girl was not consenting, that is, whether he might or might not have made an honest mistake."

The fact that the jury were told to use the similar fact evidence on the issue of consent alone meant that it could not be used, in considering those counts where the appellant merely denied the complainant's evidence of the acts alleged (counts 3 and 6-8), on that issue. On those counts it could only be used if the jury rejected the appellant's denial of the acts alleged and had to turn to the question of consent.

36 The trial judge also told the jury that, in considering any charge, the evidence on other charges could not be used in a piecemeal way: the evidence of other complainants had to be considered in combination, or not at all. The trial judge said:

> "[Y]ou cannot say to yourself, 'Oh, well, they can't all be telling lies, therefore, they must all be telling the truth'; you cannot decide, for instance, that you believe one or two girls and then say, 'Well, we're

satisfied he's raped on two occasions, therefore, he's more likely to have raped on the other occasions, therefore, we'll find him guilty of the lot'."

37 The trial judge made one other matter plain at the end of his summing up. He said that his references to the six complainants all lying included the question whether their evidence was reliable or unreliable, or untrue but not deliberately so.

38 The direction that the jury could use the similar fact evidence only for a limited purpose meant that it was only admitted for that limited purpose.

39 *Remarks after the summing up.* The trial judge confirmed his approach in some remarks after he had completed the summing up and the jury had retired. He said:

"Out of an abundance of caution I want to place on record some further explanation for my belief that there is no serious question about the admissibility of the evidence of all of the girls in one trial."

He said that while the evidence showed a "propensity in [the] accused person to commit … similar crime", this "propensity theory" was "not the basis for its admissibility and that is not the basis upon which [the] jury may use it". Rather the basis for admissibility was what he called "the probability theory". On that theory:

"[T]he strength of [the] probative value [of the evidence] lies in its ability to demonstrate the improbability of similar lies. That is, one girl might deliberately make up a lie that [the appellant] dealt with her sexually without her consent; two might possibly make up a lie to that effect; but the chances or the probability that all six have made up such a lie, in my view, becomes remote in the extreme in the absence of any real risk of concoction."

He then discussed some authorities, and criticised the "propensity theory" for its over-emphasis on a search for similarities. He said:

"The propensity theory can be, in a case like this, completely discredited by the approach of the accused.

If one were to imagine a case of four girls complaining of being raped by the same man all in a very similar fashion, perhaps all even in the same place, the propensity theorists would say, 'This evidence is clearly of great strength because of these similarities'."

(As the trial judge had noted while the appellant was being cross-examined, before the trial he had assumed that the commission of the acts alleged on each charge was in issue, but as the trial proceeded it became apparent that that was not so. That is, to use the trial judge's expression, the conduct of the defence by the appellant partly "discredited" the propensity theory.) He continued his explanation of the position at the end of the summing up thus:

> "But if the accused were to say, 'Yes, I did have sex with all those girls. And I did have sex with all those girls in the same place. And all those similarities exist. But they consented, every time.' In my view there can be no propensity in a situation like that.
>
> But the power – the power and strength of the value of those girls' evidence lies in the fact of the substantial improbability that all of those girls would willingly, and perhaps eagerly, take part in an act of sexual intercourse and then complain that it was rape."

On the approach that the trial judge adopted, it did not matter that there were no striking similarities between the accounts of the complainants, as the trial judge pointed out several times in argument with counsel.

40 *Trial judge's approach to BM and SS.* The strictness of the trial judge's thinking is revealed by his approach to the evidence of two witnesses called in relation to counts 1 and 2. BM gave evidence that before he telephoned BS, the appellant had said he wanted sex, and had rung up numerous girls. The appellant asked BM whether he had had sex with BS, whether she was easy and whether the appellant looked good enough to get sex. BM also gave evidence that the following day the appellant told him he had had both oral and vaginal intercourse with BS. SS in his evidence reported an admission by the appellant that he had had sex with BS.

41 The trial judge said, after that evidence had been given and while TK's evidence on count 3 was being given, that while the evidence of the complainants was cross-admissible, that of BM and SS was not:

> "It seems to me whilst perhaps their evidence might be relevant to the credibility of [BS], it can't really be looked at as evidence which would be admissible, for instance, on the trial of the accused in relation to [TK]."

These remarks reveal that the trial judge had begun his process of narrowing the basis of admissibility early in the trial. The evidence of BM and SS would be relevant on a "propensity theory", but not on the trial judge's "probability theory".

The Court of Appeal's reasoning

42 The Court of Appeal pointed to some "additional similarities" which it perceived the totality of the evidence to reveal. These were three in number: first, "the initial clumsy attempt at seduction in each instance", secondly, "the appellant's difficulty in achieving penetration with respect to the complainants BS, TK, SW and MM", and thirdly, "the circumstance that, according to the appellant, each of BS, SW and MM initiated oral sex without any request or suggestion on his part; his evidence was to similar effect with respect to an earlier incident with the complainant TK." (As to these it may be observed in passing that there is nothing of probative significance in the first. Further, it is difficult to see the significance of the second and the third in a case where the ground for reception of the evidence was that it demonstrated the improbability of the complainants all lying about whether they consented. Indeed the trial judge, before final addresses, had indicated to counsel for the prosecution that the appellant's difficulty in achieving penetration had no probative value on the issue of improbability of lying about consent.) The bulk of the Court of Appeal's reasoning boiled down to an expression of agreement with the trial judge that the evidence was admissible. The Court of Appeal appeared to accept the narrow basis of admissibility on which the trial judge ultimately relied:

> "[T]he learned trial judge correctly assessed the situation when he observed that on separate trials the defence would ask the jury to conclude that the complainant girl was telling a highly improbable story in saying she did not consent."

However, the Court of Appeal, unlike the trial judge, thought that the similarities in the complainants' accounts were significant beyond the issue of their lack of consent.

Inadmissibility of the similar fact evidence on the issue of consent

43 Difficulties arise in this case from the narrowness of the purpose for which the similar fact evidence was admitted.

44 An initial difficulty in the trial judge's approach, as counsel for the appellant said, was that strictly speaking it was not correct to say that in a practical sense the issue in relation to all complainants was consent. For three of them it was (counts 1-2, 4 and 5); but for the other three it was whether the appellant had done the acts alleged (counts 3 and 6-8). And in relation to two of the first group of three counts there was an issue as to whether the appellant had made an honest and reasonable mistake of fact about consent (counts 4 and 5).

On counts 3 and 6-8, in theory issues of consent would arise if the evidence of the complainants that the appellant did to them what he denied doing were accepted by the jury; but if their evidence on that issue were accepted, it would be unlikely that their evidence on consent would be rejected.

45 Another difficulty is that the narrowness of the purpose limited the probative value of the evidence, but left open the risk of the evidence having a prejudicial effect on issues other than consent. The trial judge strenuously endeavoured to overcome that problem by his directions to the jury, and no complaint was made about those directions.

46 But another difficulty, to which counsel for the appellant drew attention, could not be overcome in that way. Normally similar fact evidence is used to assist on issues relating only to the conduct and mental state of an accused. Did the accused do a particular thing? Or did the accused do it with a particular mental state? But where a particular count supported by one complainant's evidence raises the issue of whether she consented to certain conduct by an accused, the issue relates much more to her mental state than his. The trial judge kept referring to "the improbability of similar lies" on that issue. That is an expression used by Mason CJ, Wilson and Gaudron JJ in *Hoch v The Queen*[15]; however, as counsel for the appellant pointed out, they used it not on the question of whether the complainants in that case consented, but on whether the accused behaved towards them as he said he did. To tell the jury that the evidence went to the improbability of each complainant lying or being unreliable about consent was to say that a lack of consent by five complainants tended to establish lack of consent by the sixth.

47 Neither the courts below nor counsel for the respondent cited any case in which similar fact evidence of complainants who said that they did not consent was led to show that another complainant had not consented. Whether or not similar fact evidence could ever be used in relation to consent in sexual cases, it could not be done validly in this case. It is impossible to see how, on the question of whether one complainant consented, the other complainants' evidence that they did not consent has any probative value. It does not itself prove any disposition on the part of the accused: it proves only what mental state each of the other complainants had on a particular occasion affecting them, and that can say nothing about the mental state of the first complainant on a particular occasion affecting her.

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15 (1988) 165 CLR 292 at 295.

48 The difficulty can be illustrated by count 5. In her evidence in relation to that count, SW admitted that, without protest, she witnessed a game in which KW removed most of her clothing and BM and the appellant removed all of theirs; she consented to the appellant massaging her breasts; and she consented to performing fellatio on the appellant, at least for a time. She contended that she did not consent to vaginal intercourse. In assessing whether the prosecution had removed any reasonable doubt on that subject, of what probative value was it that BS said that nearly a year earlier she had not consented to the appellant carrying out acts of fellatio and vaginal intercourse on her after not offering him any encouragement at all? Or that TK said that four months earlier she had not consented to the appellant carrying out acts of vaginal intercourse after not offering him any encouragement at all? Or that ML said that about three months earlier she had not consented to the appellant having vaginal intercourse with her after not offering him any encouragement at all, and passing out through drunkenness? Or that MM said that five months later she had not consented to the appellant carrying out two acts of fellatio and four of vaginal intercourse without having offered him any encouragement? Or that JD said that about two years later she had not consented to various overtures to sexual intercourse, again without having offered him any encouragement? Of what probative value in relation to whether SW consented were those five items of testimony, even taken together?

49 Evidence by other complainants that they had not consented to the sexual acts allegedly performed on them by the appellant had no more probative value than evidence by them that they had not consented to the performance of sexual acts on them by persons other than the appellant. Like the evidence of the other complainants in this case, evidence of that kind may demonstrate some "propensity" in particular complainants, but it demonstrates nothing about the appellant.

50 In short, as counsel for the appellant submitted, the evidence, tendered as it was on the issue of the consent of each complainant, was irrelevant to that issue. "Evidence is relevant if it could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceeding."[16] Evidence that five complainants did not consent could not rationally affect the assessment of the probability that a sixth complainant did not consent.

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16 *Goldsmith v Sandilands* (2002) 76 ALJR 1024 at 1025 [2] per Gleeson CJ; 190 ALR 370 at 371. See also *Smith v The Queen* (2001) 206 CLR 650 at 653-654 [6] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

Inadmissibility of similar fact evidence on issues other than consent

51 For those reasons it is necessary to reject the primary submission of the respondent in this appeal – that there was "no error in … the basis on which [the evidence] was left to the jury". But the respondent also advanced a basis for admissibility which was different from the basis on which the evidence was left to the jury. The argument was:

> "The present cluster of relevant similarities between each complainant's version becomes compelling not through any unusual hallmark but because, out of all of the infinite variety of allegations and descriptions that could be invented, this combination of features of a particular type of sexual assault is repeated by so many different women from within a defined group, but independent of each other."

These features were described as a common "pattern" or "thread", and as a "combined pattern and flavour".

52 Notwithstanding the failure of the respondent to file a notice of contention, it is desirable briefly to deal with this argument.

53 Reliance was placed on the following statement in *Pfennig v The Queen*[17]:

> "[S]triking similarity, underlying unity and other like descriptions of similar facts are not essential to the admission of such evidence, though usually the evidence will lack the requisite probative force if the evidence does not possess such characteristics."

54 Despite that passage, and despite the reformulation of the tests stated in *Pfennig v The Queen* in *R v O'Keefe*, neither of those cases departed from a fundamental aspect of the requirements for admissibility: the need for similar fact evidence to possess some particular probative quality. The "admission of similar fact evidence … is exceptional and requires a strong degree of probative force"[18]. It must have "a really material bearing on the issues to be decided"[19]. It

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17 (1995) 182 CLR 461 at 484 per Mason CJ, Deane and Dawson JJ.

18 *R v Boardman* [1975] AC 421 at 444 per Lord Wilberforce, approved in *Markby v The Queen* (1978) 140 CLR 108 at 117 per Gibbs ACJ, Stephen, Jacobs and Aickin JJ concurring; *Perry v The Queen* (1982) 150 CLR 580 at 586, 589 per

(Footnote continues on next page)

is only admissible where its probative force "clearly transcends its merely prejudicial effect"[20]. "[I]ts probative value must be sufficiently high; it is not enough that the evidence merely has some probative value of the requisite kind."[21] The criterion of admissibility for similar fact evidence is "the strength of its probative force"[22]. It is necessary to find "a sufficient nexus" between the primary evidence on a particular charge and the similar fact evidence[23]. The probative force must be "sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused"[24]. Admissible similar fact evidence must have "some specific connexion with or relation to the issues for decision in the subject case"[25]. As explained in *Pfennig v The Queen*[26]:

Gibbs CJ; *Sutton v The Queen* (1984) 152 CLR 528 at 533 per Gibbs CJ; *Pfennig v The Queen* (1995) 182 CLR 461 at 481 per Mason CJ, Deane and Dawson JJ.

19 *R v Boardman* [1975] AC 421 at 439 per Lord Morris of Borth-y-Gest, approved in *Markby v The Queen* (1978) 140 CLR 108 at 117 per Gibbs ACJ, Stephen, Jacobs and Aickin JJ concurring.

20 *Perry v The Queen* (1982) 150 CLR 580 at 609 per Brennan J; *Sutton v The Queen* (1984) 152 CLR 528 at 548-549 per Brennan J, 560 per Deane J, 565 per Dawson J; *Harriman v The Queen* (1989) 167 CLR 590 at 633 per McHugh J; *Pfennig v The Queen* (1995) 182 CLR 461 at 481 per Mason CJ, Deane and Dawson JJ.

21 *Sutton v The Queen* (1984) 152 CLR 528 at 534 per Gibbs CJ.

22 *Hoch v The Queen* (1988) 165 CLR 292 at 294-295 per Mason CJ, Wilson and Gaudron JJ.

23 *Hoch v The Queen* (1988) 165 CLR 292 at 301 per Brennan and Dawson JJ, approving words of Lord Hailsham of St Marylebone LC in *R v Kilbourne* [1973] AC 729 at 749.

24 *Director of Public Prosecutions v P* [1991] 2 AC 447 at 460 per Lord Mackay of Clashfern LC.

25 *Pfennig v The Queen* (1995) 182 CLR 461 at 483 per Mason CJ, Deane and Dawson JJ.

26 (1995) 182 CLR 461 at 485 per Mason CJ, Deane and Dawson JJ.

> "[T]he evidence of propensity needs to have a specific connexion with the commission of the offence charged, a connexion which may arise from the evidence giving significant cogency to the prosecution case or some aspect or aspects of it."

55 In this case none of these criteria are met – either on the issue of whether in relation to any particular charge the appellant committed the acts of assault or intercourse alleged, or on the issue of whether he did so being honestly and reasonably mistaken about consent. Take count 8, assaulting JD with intent to rape her. Where is the strong degree of probative force necessary to permit the exceptional reception of evidence that in earlier years the appellant had indecently assaulted or raped five other complainants? What was the really material bearing of that evidence on the issues to be decided on count 8? What was there about the prejudicial evidence which showed that on five earlier occasions the appellant had a strong desire for sexual intercourse (with consent if he could get it, without it if he could not) which caused its probative value clearly to transcend that prejudicial effect? Did the evidence have "strength in its probative force", or was its specific probative force "sufficiently great"? Did it have "some specific connexion with or in relation to the issues for decision" giving "significant cogency" to the evidence about count 8?

56 The similarities relied on were not merely not "striking", they were entirely unremarkable. That a male teenager might seek sexual activity with girls about his own age with most of whom he was acquainted, and seek it consensually in the first instance, is not particularly probative. Nor is the appellant's desire for oral sex, his approaches to the complainants on social occasions and after some of them had ingested alcohol or other drugs, his engineering of opportunities for them to be alone with him, and the different degrees of violence he employed in some instances. His recklessness in persisting with this conduct near other people who might be attracted by vocal protests is also unremarkable and not uncommon.

57 Counsel for the appellant rightly submitted that to conclude that the similar fact evidence was correctly received in this case would mean that none of the statements set out above requiring high probative quality any longer represented the law.

58 There was no dispute about the absence of striking similarity, unusual features, underlying unity, system, pattern or signature. Although none of these features is necessary for admissibility, the high probative value required in order to overcome the prejudicial effect of the evidence was not shown to exist for any other reason. After the evidence had closed but before addresses, the trial judge

told counsel for the prosecution that, in relation to this case, she ought to shake the words "similar fact" from her mind and her vocabulary; and he said that if the probative value of the evidence depended on similarities in the way the offences were committed, he would have discharged the jury. The trial judge's statements reflect the conclusion to which he had gradually moved during the trial that features of each incident to which the complainants testified, even taken together, did not give the evidence sufficient probative value to justify its reception. That conclusion was correct.

Criticisms of *Pfennig v The Queen*

59 The trial judge from time to time referred to *Pfennig v The Queen*. But he did not apply the tests stated in that case. Rather he followed the agreement of counsel and applied the tests advanced in *R v O'Keefe*. The Queensland Court of Appeal in *R v O'Keefe* said that the tests it stated were the "only sensible resolution"[27] of passages in *Pfennig v The Queen* which were not as "workable" as the views expressed by minority judges[28], revealed "fundamental difficulty"[29] and "artificiality"[30], were "rather perplexing"[31], had led to "the expression and application of different tests" in State courts[32] and had a "dubious pedigree"[33].

60 It must be said at once that it is for this Court alone to determine whether one of its previous decisions is to be departed from or overruled[34]. Of course, in criminal cases it is often necessary for trial judges and Courts of Criminal Appeal to elaborate upon rulings of this Court; to gather together rules expressed in

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27 *R v O'Keefe* [2000] 1 Qd R 564 at 573.

28 *R v O'Keefe* [2000] 1 Qd R 564 at 569.

29 *R v O'Keefe* [2000] 1 Qd R 564 at 570.

30 *R v O'Keefe* [2000] 1 Qd R 564 at 571.

31 *R v O'Keefe* [2000] 1 Qd R 564 at 573.

32 *R v O'Keefe* [2000] 1 Qd R 564 at 569. It may be questioned whether the Court of Appeal made this proposition good for any jurisdiction other than Queensland.

33 *R v O'Keefe* [2000] 1 Qd R 564 at 565.

34 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 403 [17].

several cases; to apply rules to different facts; and sometimes to reconsider rules affected by later legislation. Within spaces left by the binding determinations of this Court, trial judges and intermediate courts retain their proper functions[35]. However, these do not extend to varying, qualifying or ignoring a rule established by a decision of this Court. Such a rule is binding on all courts and judges in the Australian Judicature.

61 There was no argument in this case specifically directed to the issue of whether *Pfennig v The Queen* should be overruled or qualified or whether, if *R v O'Keefe* differs from *Pfennig v The Queen*, it should be preferred. Nothing said in these reasons should be understood as indicating any view about whether it is necessary, or would be desirable, to revisit what is said by this Court in *Pfennig v The Queen*.

62 Having regard to the basis upon which the present appeal should be decided and to the course taken in argument, it is sufficient to make only two points. First, *Pfennig v The Queen* must be understood against the background of the decisions, especially the decisions of this Court, that preceded it. Secondly, taking sentences or parts of sentences in reasons for judgment and divorcing them from the context in which they sit is to invite error. Thus the references in *Pfennig v The Queen* to propensity evidence being a form of circumstantial evidence[36] must be understood against the background of what was said in *Martin v Osborne*[37], *Plomp v The Queen*[38], *Sutton v The Queen*[39], *Hoch v The Queen*[40] and *Harriman v The Queen*[41].

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35 cf *Nguyen v Nguyen* (1990) 169 CLR 245 at 269-270.

36 (1995) 182 CLR 461 at 485.

37 (1936) 55 CLR 367.

38 (1963) 110 CLR 234.

39 (1984) 152 CLR 528.

40 (1988) 165 CLR 292.

41 (1989) 167 CLR 590.

63 What is said in *Pfennig v The Queen*[42] about the task of a judge deciding the admissibility of similar fact evidence, and for that purpose comparing the probative effect of the evidence with its prejudicial effect, must be understood in the light of two further considerations. First, due weight must be given to the necessity to view the similar fact evidence in the context of the prosecution case. Secondly, it must be recognised that, as a test of admissibility of evidence, the test is to be applied by the judge on certain assumptions. Thus it must be assumed that the similar fact evidence would be accepted as true and that the prosecution case (as revealed in evidence already given at trial or in the depositions of witnesses later to be called) may be accepted by the jury. *Pfennig v The Queen* does not require the judge to conclude that the similar fact evidence, standing alone, would demonstrate the guilt of the accused of the offence or offences with which he or she is charged[43]. But it does require the judge to *exclude* the evidence if, viewed in the context and way just described, there is a reasonable view of the similar fact evidence which is consistent with innocence.

64 The tests advanced in *O'Keefe* are expressed differently. Because they are expressed differently it cannot be assumed that in every case they would operate identically to the tests expressed in *Pfennig*. Indeed, much that is said in the reasons in *O'Keefe* might be read as suggesting that the tests propounded there were intended to have a different operation from those stated in *Pfennig*. These are reasons enough to conclude that the *O'Keefe* tests should not be adopted or applied. Intermediate and trial courts must continue to apply *Pfennig*.

Counts 6 and 7: unreasonable verdicts?

65 Subject to other grounds of appeal, the consequence of the trial judge having erroneously received the similar fact evidence in the appellant's trial is that there should be an order for new trials on the counts of which the appellant

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42 (1995) 182 CLR 461 at 485, where Mason CJ, Deane and Dawson JJ said that "the trial judge … must recognize that propensity evidence is circumstantial evidence and that, as such, it should not be used to draw an inference adverse to the accused unless it is the only reasonable inference in the circumstances. More than that, the evidence ought not to be admitted if the trial judge concludes that, viewed in the context of the prosecution case, there is a reasonable view of it which is consistent with innocence." (Footnote omitted)

43 cf the remarks of the Supreme Court of Canada in *R v Handy* [2002] 2 SCR 908 at 945-946.

was not completely acquitted, namely counts 2, 4, 5, 6, 7 and 8. Those new trials should be separate in the sense that there should be one trial on count 2, one trial on count 4, one trial on count 5, one trial on count 6 and count 7, and one trial on count 8. Further, the retrials on counts 5 and 6 could only be on charges of unlawful carnal knowledge: that is because the appellant was acquitted of rape on those counts, and because it is not open to this Court to disturb those acquittals[44].

66 However, the appellant contends that there should be no retrial on count 7 on the ground that the different verdicts on counts 6 and 7 were unreasonable. The relevant ground of appeal stated that the combination of the verdict on these counts was "explicable only as the product of compromise between jurors, some persuaded beyond a reasonable doubt and some not". The appellant submitted that the issue on which this division took place was consent.

67 It will be remembered that MM alleged that after being threatened by a baseball bat in an unoccupied residence on the farm owned by the appellant's parents, she was raped twice (count 6); she shared a cigarette with the appellant; and she was then again raped twice (count 7). The appellant was acquitted of rape on count 6, but convicted of unlawful carnal knowledge. He was convicted of rape on count 7.

68 The verdicts on counts 6 and 7 were not strictly inconsistent. But the appellant pointed out that while MM in describing the two rapes the subject of count 6 referred to being threatened with a baseball bat, in describing the next two rapes she did not refer to any threats, and she did not recollect seeing the bat (although she knew it was there, and it was in fact there). The appellant submitted that that sequence of events would have made it more likely for him to be convicted on count 6 and acquitted on count 7, yet the jury acquitted on count 6 and convicted on count 7.

69 The appellant also contended that an explanation offered by the Court of Appeal for these verdicts – that the jury may have experienced a reasonable doubt about whether the appellant had made an honest and reasonable mistake as to consent in relation to count 6 – was unconvincing. That contention has some force, because the trial judge did not leave that issue to the jury on either count 6 or count 7, and it was not open on either of the versions of events offered to the

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44 *MacKenzie v The Queen* (1996) 190 CLR 348 at 368.

jury – the appellant denied intercourse, while MM said that she had protested and cried at all material times.

70 The appellant also rejected another explanation advanced by the Court of Appeal and the trial judge in his sentencing remarks. That explanation is that the jury may have been troubled by the unfairness of charging the appellant with two counts of raping MM where the acts were punctuated only by a brief cigarette break, while on count 3 the appellant was charged only with one count despite his acts of intercourse being interrupted by his getting up to close the door. The trial judge also said that the jury may have reasoned that, if the appellant were found guilty on two counts of rape, not one, he would have received double the punishment – which in turn would have meant that he would receive twice as much punishment for the single incident involving MM as he would receive for the single incidents involving the other complaints in relation to which they convicted. Hence the jury arrived at what the trial judge called a merciful verdict on count 6 – a conviction only of unlawful carnal knowledge. To the factors listed by the trial judge in support of that possibility may be added the fact that in relation to the only other complainant whose complaint led to two charges, BS, there was an acquittal of indecent assault and a conviction of rape.

71 Difficulties in understanding jury verdicts which are explicable on the basis that one of them is "merciful", or that they accord with the jurors' innate sense of fairness and justice, do not lead to the conclusion that the jurors have acted unreasonably[45]. The question in the present case is whether that is the explanation, or whether the jury, faced with a position in which some favoured conviction of rape on both counts and some did not, compromised by convicting only of one act of unlawful carnal knowledge and one rape. It is for the appellant to demonstrate that the latter is the case[46]. This the appellant has not done. The verdicts do not in themselves represent, on the public record, an affront to logic and commonsense. The fact that, if the jury were minded to be merciful, it would have been more logical to convict on count 6 and acquit on count 7, is an insignificant detail: from the point of view of mercy, it did not matter which count was the subject of the conviction. "It is only where the inconsistency rises to the point that the appellate court considers that intervention is necessarily

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45 *MacKenzie v The Queen* (1996) 190 CLR 348 at 367-368 per Gaudron, Gummow and Kirby JJ.

46 *MacKenzie v The Queen* (1996) 190 CLR 348 at 368 per Gaudron, Gummow and Kirby JJ.

required to prevent a possible injustice that the relevant conviction will be set aside."[47]

72 There is no injustice here. Something happened to MM which caused her to run from the isolated house owned by the appellant's parents in darkness at 4.00am. She arrived at a neighbouring farm about half a kilometre away at 4.45am. Whatever happened to MM while she was in the appellant's company was something which she must have found very unpleasant, because she was observed by the neighbours to be "panicky", "distressed", "shaking like a leaf", "crying", "shaky", "agitated", "afraid" and "upset". From the neighbouring farm she rang PP and made a complaint to him. After she was driven to PP's house she made another complaint. She went to a youth shelter, to the police and to a doctor. She made a complaint at each of these stages.

73 MM then took part in a taped telephone conversation with the appellant in the evening in which he, in effect, admitted to having threatened her into having sexual intercourse and to having thrown the baseball bat out the window. Her claim that there had been a baseball bat which had been thrown out the window was also corroborated by its discovery outside the window by the police. Her evidence also received some support from a video film made by the appellant and tendered on his behalf: it showed her to be happy and relaxed before the alleged rapes and drawn after them. The appellant's explanation for the making of that video – that it was part of a plan between himself and MM to protect her from PP and enable her to move back in with PP – was scarcely intelligible and was likely to have been found wholly unconvincing by the jury.

74 Were it not for the success of the appeal in relation to the issue of similar fact evidence, there would be no injustice in the conviction for rape on count 7 and for unlawful carnal knowledge on count 6 standing. And in spite of the success of the appeal, there is no injustice in new trials taking place on count 6 (for unlawful carnal knowledge) and on count 7 (for rape).

75 Even if the verdicts on counts 6 and 7 had been unreasonable, it would not follow that there should be no retrial on them. But the appellant urged another reason against a retrial on count 7.

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47 *MacKenzie v The Queen* (1996) 190 CLR 348 at 368 per Gaudron, Gummow and Kirby JJ.

Count 7: no retrial?

76 On the assumption that either of the challenges to the conviction for rape on count 7 succeeded, the appellant advanced a further argument in relation to the question of retrial on that count. He submitted *either* that no retrial should be ordered and that a verdict of not guilty be entered *or* that a verdict of not guilty of rape be substituted for the conviction and that any retrial be limited to a charge of unlawful carnal knowledge. The argument was that the facts on counts 6 and 7 were closely related. Having been acquitted of rape on count 6, the appellant could not be retried on that charge. It was impossible, however, for him fairly to be retried for rape on count 7, because if the evidence about the complainant being threatened with the baseball bat, which was closest in time to the count 6 events, were tendered on count 7, that would not give full value to the effect of his acquittal of rape on count 6.

77 This reasoning is unsound. The appellant did not ask this Court for an acquittal on count 6, or oppose a retrial on count 6 in relation to unlawful carnal knowledge. If there is to be a retrial on count 6, it is open to the prosecution to call evidence about the baseball bat, for to do otherwise would render the balance of MM's testimony "incomplete and artificial"[48]. The acquittal of rape on count 6, for reasons discussed above, was a merciful verdict. From the appellant's point of view, one beneficial aspect of the mercy shown is that it eliminated the possibility that MM did not consent to the appellant's conduct in relation to count 6. The appellant remains entitled to contend at any second trial, as he did at the first trial, that he did not participate in sexual intercourse. The evidence about the baseball bat is not prejudicial on that issue in relation to count 6. It is simply part of the story. And it is material on count 7. If it becomes known at any second trial that there had been an earlier trial and an acquittal – and this might arise by reason of the cross-examination of witnesses at the second trial on their evidence at the first – it can be made clear to the jury that the previous acquittal of rape cannot be challenged and that the evidence must not be taken to prove guilt on the earlier charge of rape[49].

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48 *R v Storey* (1978) 140 CLR 364 at 397 per Mason J.

49 *R v Storey* (1978) 140 CLR 364.

Conclusion: a stringent rule

78 It can be appreciated that separate trials of the several complaints by different complainants adds to the cost of the prosecutions and the defence of the accused. However, the dangers, in the trial of the appellant, of admitting the evidence relevant to all of the several allegations against him, was very great. Despite the efforts of the trial judge to give the jury precise instructions on the separate admissibility and use of different evidence, in a case such as the present, such instructions were bound to be confusing and prone to error. The prejudice to the fair trial of the appellant was substantial.

79 Criminal trials in this country are ordinarily focused with high particularity upon specified offences. They are not, as such, a trial of the accused's character or propensity towards criminal conduct. That is why, in order to permit the admission of evidence relevant to several different offences, the common law requires a high threshold to be passed. The evidence must possess particular probative qualities; a strong degree of probative force; a really material bearing on the issues to be decided. That threshold was not met in this case. It was therefore necessary that the allegations, formulated in the charges brought against the appellant, be separately considered by different juries, uncontaminated by knowledge of other complaints. This is what *Pfennig* and other decisions of this Court require. To the extent that *O'Keefe* or other authority suggests otherwise, it does not represent the law. No other outcome would be compatible with the fair trial of the appellant.

80 The appellant has already served a substantial period of imprisonment pursuant to the sentences imposed on the counts of the indictment upon which he was convicted. Although a formal order for retrial must be made, it will be for the Director of Public Prosecutions to decide whether such a retrial should be had in respect of counts for which the relevant term of imprisonment has been served.

Naming of appellant

81 At the trial the appellant was referred to by his name. In the Court of Appeal the appellant was referred to as "PS".

82 Paragraph 4 of this Court's Practice Direction No 1 of 1999 provides:

> "4. Where, in proceedings before the Court below, a party was identified by the use of initials or a pseudonym or the publication or disclosure of the name of a party was prohibited by operation of a statute or order of a Court, that party shall file an application in this Court using

> the initials or pseudonym of the party. The use of initials or a pseudonym will continue in proceedings in this Court unless a contrary order is made by the Court or a Justice."

This was not complied with and no contrary order has been made.

83 At the hearing of the appeal counsel for the appellant rejected the suggestion that "PS" should be used to refer to the appellant.

84 The solicitor for the appellant has very belatedly contended that the appellant's name should not be used in this Court and that "PS" was used in the Court of Appeal because the use of his name was prohibited by three enactments.

85 The first two are the *Child Protection Act* 1999 (Q), s 193, and the *Criminal Law (Sexual Offences) Act* 1978 (Q), s 6. These provisions deal with the protection of child witnesses and child complainants. The appellant is in neither category, and the persons who are in those categories have been referred to by initials.

86 The third enactment is the *Juvenile Justice Act* 1992 (Q), Pt 9 and Sch 4. The prohibition in that Act on the use of a child's name depends on that child being one who "is being, or has been, dealt with under this Act" (s 283(1)). A "child" is a person who has not turned 17 years. Section 283(2) provides:

> "(2) The ways that a child may be dealt with under this Act include –
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> (a) being investigated for an offence; and
>
> (b) being detained; and
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> (c) participating in a conference; and
>
> (d) being cautioned, prosecuted or sentenced for an offence."

The first complaint to the police was that of MM, made on 19 November 2001. The offences of which she complained took place on the night of 18-19 November 2001. The appellant was then 17, having been born on 28 July 1984. The other complainants did not have dealings with the police until after that date. The police had no dealings with the appellant until after MM's complaint.

87 The solicitor for the appellant has thus not demonstrated that the appellant was entitled to be referred to as "PS" in the Court of Appeal. There is no occasion now shown to amend the title of the proceedings in this Court.

Orders

88 For the reasons outlined above the orders of this Court, as pronounced on 9 December 2005, are:

1. Appeal allowed.

2. Set aside the orders of the Court of Appeal of the Supreme Court of Queensland made on 24 September 2004, and in place thereof order that:

   (a) the appeal to that Court be allowed;

   (b) the convictions in respect of counts 2, 4, 5, 6, 7 and 8 of the indictment are quashed; and

   (c) there be retrials, conducted separately, on each of the following counts:

      (i) count 2 for rape;

      (ii) count 4 for rape;

      (iii) count 5 for unlawful carnal knowledge;

      (iv) count 6 for unlawful carnal knowledge and count 7 for rape;

      (v) count 8 for assault with intent to rape.