HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

Matter No A23/2007

HML — APPELLANT

AND

THE QUEEN — RESPONDENT

Matter No A19/2007

SB — APPELLANT

AND

THE QUEEN — RESPONDENT

Matter No A28/2007

OAE — APPLICANT

AND

THE QUEEN — RESPONDENT

HML v The Queen
SB v The Queen
OAE v The Queen
[2008] HCA 16
24 April 2008
A23/2007, A19/2007, A28/2007

ORDER

Matter No A23/2007

Appeal dismissed.

Matter No A19/2007

Appeal dismissed.

Matter No A28/2007

1. Special leave to appeal granted.

2. Appeal treated as instituted, heard instanter and dismissed.

On appeal from the Supreme Court of South Australia

Representation

Matter No A23/2007

T A Game SC with C S L Abbott for the appellant (instructed by Herman Bersee)

C J Kourakis QC, Solicitor-General for the State of South Australia with S A McDonald for the respondent (instructed by Director of Public Prosecutions (SA))

Matter No A19/2007

A L Tokley with C S Gallagher for the appellant (instructed by Gallagher & Co)

A P Kimber with K G Handshin for the respondent (instructed by Director of Public Prosecutions (SA))

Matter No A28/2007

N M Vadasz for the applicant (instructed by Kyrimis Lawyers)

M G Hinton QC with K G Handshin for the respondent (instructed by Director of Public Prosecutions (SA))

CATCHWORDS

HML v The Queen
SB v The Queen
OAE v The Queen

Criminal law – Evidence – Similar facts – Sexual crimes – "Uncharged acts" – Relevance – Admissibility – Applicability of test in *Pfennig v The Queen* (1995) 182 CLR 461.

Criminal law – Evidence – Similar facts – Standard of proof – Whether "uncharged acts" must be proved beyond reasonable doubt – Directions to jury.

Practice and procedure – Application to amend notice of appeal – Whether leave should be granted to amend notice of appeal to raise issue of admissibility of evidence, to which no objection was taken at trial.

Words and phrases – "context", "guilty passion", "propensity evidence", "relationship evidence", "relevance", "similar fact evidence", "uncharged acts".

Evidence Act 1929 (SA), ss 34CA, 34I.

1 GLEESON CJ. These matters raise issues concerning the admissibility at a criminal trial of a certain kind of similar fact evidence, and the proper directions to be given to a jury in the event that such evidence is admitted. In each matter, the evidence was that of a complainant who, in addition to giving an account of specific acts the subject of the charge or charges in an indictment, testified that other such acts had taken place between the accused and the complainant. This was described in argument as evidence of uncharged acts. I am content, for the purpose of stating my reasons, to adopt the description used in argument, although I do not suggest that it would always, or even usually, be a helpful phrase in a trial judge's directions to a jury. Of course, evidence of uncharged acts might come from a source other than the complainant; and uncharged acts of the same kind as the charged acts are themselves a particular example of evidence that reveals criminal or discreditable conduct of an accused other than the conduct with which he or she is charged. There are wider issues involved.

2 In cases of alleged child sexual abuse, it is not uncommon for a complainant to assert that the incidents the subject of charges against the accused were part of a pattern of behaviour that extended over a period of time, perhaps many years. There is nothing new about this kind of evidence, although in recent years the increase in reporting of, and prosecution for, child sexual abuse has drawn wider attention to some of the problems involved. In *KRM v The Queen*[1], McHugh J pointed out that, in cases of sexual offences, evidence of uncharged acts between the accused and the complainant has long been admitted[2]. He said that such evidence tended to explain the relationship of the parties or made it more probable that the charged acts occurred. In a footnote, he referred to a number of authorities, the first of which was *R v Ball*[3], a decision of the House of Lords in 1910. In that case, which concerned incest, the Lord Chancellor referred to the law "which is daily applied in the Divorce Court ... to establish ... the existence of a sexual passion"[4]. His Lordship was referring to evidence of "guilty relations between the parties" in aid of proof of what was then the matrimonial offence of adultery. In *R v Hartley*[5], the English Court of Criminal Appeal said, of a complainant in a case of a sexual offence, that "where a person alleges that an offence such as that with which we are concerned here has been committed against him and that the occasion was not an isolated one, he is entitled to give evidence that the offence was indulged in habitually." The

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1 (2001) 206 CLR 221; [2001] HCA 11.

2 (2001) 206 CLR 221 at 230 [24].

3 [1911] AC 47.

4 [1911] AC 47 at 71.

5 [1941] 1 KB 5 at 6-7.

reasons why, and the circumstances in which, that is so must be examined in order to decide the present matters.

3 In some Australian jurisdictions, there are statutory provisions governing these questions. The matters before the Court (two appeals and an application for special leave to appeal) come, however, from South Australia, where it is the common law that must be applied[6]. Since there is a question of the admissibility of evidence, the logical starting point is relevance.

Relevance and proof

4 Evidence is information which, according to certain governing general principles and more detailed rules, will be received by a court for the purpose of deciding issues of fact that arise for its decision. The issues in civil cases are defined by the pleadings or other corresponding procedure. They are determined by the principles of substantive law that apply to the dispute, and by choices made by the parties within the boundaries set by those principles. In a criminal trial of an indictable offence, the indictment identifies the alleged offence. The prosecution sets out to prove the elements of the offence, that is to say, the specific offence alleged to have been committed by the accused. The jury will be directed, as a matter of law, that for a verdict of guilty it is necessary to be satisfied beyond reasonable doubt of those elements[7]. The elements of the offence, to the extent to which they are disputed, identify the facts in issue, which may be refined by particulars[8]. Depending upon the way in which the prosecution seeks to prove its case, or the way in which the defence is conducted, it may appear, as a matter of fact, that an element of the offence charged will not be established beyond reasonable doubt unless some subsidiary fact, relevant to a fact in issue, is proved to that standard. However, the legal requirement as to onus and standard of proof is related to the elements of the offence charged. In some cases, there may be only one available path to a conclusion of guilt, but often that is not so. Jurors are commonly instructed that they may be selective in their approach to the evidence, and even in their approach to different parts of the evidence of the one witness.

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6 See, for example, *R v Nieterink* (1999) 76 SASR 56.

7 *Shepherd v The Queen* (1990) 170 CLR 573 at 579-580; [1990] HCA 56. The elements, or what Dawson J described as the "essential ingredients" of the elements, of an offence are identified by statute and/or common law, and by the terms of the indictment.

8 It is unnecessary, for present purposes, to go into the question of the circumstances in which the prosecution will be limited by particulars of a charge or by the conduct of its case.

5 The basic principle of admissibility of evidence is that, unless there is some good reason for not receiving it, evidence that is relevant is admissible[9]. Evidence that is not relevant is inadmissible; there is then no occasion to consider any more particular rule of exclusion. Reasons for not receiving relevant evidence may relate to its content, or to the form or circumstances in which it is tendered. 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 proceedings[10]. That directs attention, in a criminal case, to the elements of the offence charged, the particulars of those elements, and any circumstances which bear upon the assessment of probability. The prosecution may set out to establish that an accused had a motive to commit an offence charged. Motive may rationally affect the assessment of the probability of the existence of one or more of the elements of an offence. Evidence that tends to establish motive, therefore, may rationally affect such assessment. If so, it is relevant. When the prosecution sets out to establish motive, that is often a step in the prosecution case that is not indispensable. If it is established, motive may support (sometimes powerfully) the prosecution case, but juries are often told that failure to establish motive does not mean the case must fail. The legal necessity is to establish beyond reasonable doubt the elements of the offence. What that entails as a matter of fact may depend upon the circumstances of the particular case. Some of the statements made in *Chamberlain v The Queen [No 2]*[11] could have been interpreted as abrogating the fundamental legal principle, but what was there said was subsequently clarified in *Shepherd v The Queen*[12].

6 Information may be relevant, and therefore potentially admissible as evidence, where it bears upon assessment of the probability of the existence of a fact in issue by assisting in the evaluation of other evidence. It may explain a statement or an event that would otherwise appear curious or unlikely. It may cut down, or reinforce, the plausibility of something that a witness has said. It may provide a context helpful, or even necessary, for an understanding of a narrative. An example is some evidence given in *R v Wickham*[13]. A female complainant in a child sex abuse case gave an account, directly relevant to a charge, of a sexual encounter she had with her father when she was 14 years old. She said that her

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9 This principle is reflected in s 56 of the *Evidence Act* 1995 (Cth).

10 *Washer v Western Australia* (2007) 82 ALJR 33 at 35-36 [5]; 239 ALR 610 at 612; [2007] HCA 48; *Goldsmith v Sandilands* (2002) 76 ALJR 1024 at 1025 [2]; 190 ALR 370 at 371; [2002] HCA 31; cf *Evidence Act* 1995 (Cth), s 55.

11 (1984) 153 CLR 521; [1984] HCA 7.

12 (1990) 170 CLR 573.

13 Unreported, New South Wales Court of Criminal Appeal, 17 December 1991.

father entered her bed, and had sexual intercourse with her. After some brief conversation, they both went to sleep. The father denied that any such event occurred. There was other evidence to show a history of similar sexual activity before the occasion in question. In the absence of that evidence, the complainant's account of what otherwise would have been presented as a single, and apparently isolated, act might have been regarded by the jury as difficult to believe. The complainant expressed no surprise when her father came to her bed. She made no protest. She behaved as though this was a common occurrence. She said that, in fact, it was a common occurrence. If she had not been permitted to say that, her evidence could have appeared hard to believe. To have put her evidence forward as though she were describing an isolated incident would have been misleading, and, it might be added, unfair. Jurors are told that, in evaluating evidence, they should use their common sense and their experience of life. Whether or not expressly invited to do so, jurors are likely to assess competing versions of events or conduct by reference to their ideas of normal or predictable behaviour. In *R v Boardman*[14] in a passage later cited with approval in this Court, Lord Cross of Chelsea said that there are cases in which to exclude evidence of the kind presently in question would be an affront to common sense. The law must apply a more definite test, but common sense and relevance are closely related. A jury's assessment of some kinds of evidence is likely to be based more upon common sense than upon scientific method.

7 Evidence of uncharged acts in child sexual abuse cases may also be relevant because of a matter mentioned above, that is, motive. As both Deane J[15] and McHugh J[16] have said, evidence which tends to show that a father has treated a daughter as an object of sexual gratification may tend to show a motive for committing the offence charged. If it appears that a parent has a sexual desire for a child, then that may make more credible the child's allegation that a particular alleged sexual incident occurred.

8 There may be little difficulty in establishing the relevance of uncharged acts, although that is by no means the end of the question of admissibility. Specifying the nature of the relevance may bear both upon admissibility and upon the appropriate directions to a jury. Words such as "relationship" and "propensity" may cover both aspects of potential relevance already mentioned, but they may cover more, and may require closer definition before their application to the circumstances of a given case. Evidence of a sexual interest of a father in a child is evidence of a certain kind of propensity, a kind of propensity

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14 [1975] AC 421 at 456.

15 *B v The Queen* (1992) 175 CLR 599 at 610; [1992] HCA 68.

16 *KRM v The Queen* (2001) 206 CLR 221 at 230 [24].

that jurors may regard as bearing upon the probability that the testimony of the child as to a particular act is true.

9 As to the potential use of uncharged acts to evaluate a complainant's evidence by furnishing an explanation for apparent lack of surprise, or protest, Gaudron J said, in *Gipp v The Queen*[17], that evidence of general sexual abuse is relevant and admissible on that basis, but only if the conduct of the defence case raises such considerations. I regret that I am unable to agree. Questions of admissibility of a complainant's evidence of uncharged acts usually arise for decision either before the trial or during the evidence-in-chief of the complainant. There may be no relevant conduct of the defence case by reference to which a decision can be made. Furthermore, the conduct of the defence case may not be a fixed point of reference. It is important not to overlook the legitimate opportunism that may be involved in the conduct of a defence under an accusatorial system of trial. It is one thing to require a prosecutor to give particulars. It is another thing to bind defence counsel to a certain line of argument. It should also be remembered that jurors, in assessing probabilities, are not bound by the conduct of defence counsel. When jurors evaluate the evidence of a complainant they are not limited to considering arguments advanced by the lawyers. If the complainant's evidence concerning a charge were given as though it were an account of an isolated event, then regardless of the line taken by the defence it might create a false impression, and that impression could colour the jury's assessment of the evidence. In some cases, the possibility is too obvious to be ignored, regardless of the line adopted in defence. An example is provided by the evidence, in the first of these three matters, concerning the method of persuasion that the complainant was required to use in order to obtain permission to go shopping. If she had described the conduct involved in that transaction as if it were an isolated incident it might have sounded like fantasy. Jurors bring their ideas of normal behaviour to the assessment of probabilities. Trial judges and advocates cannot ignore that fact, and the law of evidence must take account of it.

10 It is the tendency of evidence that determines its relevance. The trial judge decides whether evidence could rationally affect the jury's assessment of the probability of the existence of a fact in issue. The ultimate effect of the evidence is a question of fact to be decided by the jury.

11 The kind of similar fact evidence in question, that is, a complainant's evidence of uncharged acts, even when received and used as evidence of motive, is unlikely to compel, as a matter of logic, a conclusion that the charged offence or offences occurred. To prove that a person did something many times does not compel a conclusion that he did it again. However, it might make it more likely

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17 (1998) 194 CLR 106 at 113 [12]; [1998] HCA 21.

that sworn testimony that he did it again is true. People do not act in accordance with all their inclinations at every opportunity, but proof of a person's inclinations may provide strong support for direct testimony as to that person's conduct. Decisions as to the relevance of evidence are made by asking how, if accepted, it bears on the assessment of the probability of a fact in issue. Assessments of probability are rarely the subject of syllogistic reasoning.

Exclusion

12 Whatever the purpose for which similar fact evidence is adduced, it has an effect which the law regards as capable of providing a good reason for excluding it: if accepted, it shows a disposition or tendency to engage in crime or other discreditable conduct. If that is all it shows, and the prosecution adduces the evidence for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried, then the law excludes such evidence as a matter of fundamental principle[18]. The purpose just described is often referred to as propensity, although that itself is ambiguous. The reason for the exclusion is not the irrelevance of propensity, but its prejudicial effect. In this context, prejudice means the danger of improper use of the evidence. It does not mean its legitimate tendency to inculpate. If it did, probative value would be part of prejudicial effect. It is the risk that evidence of propensity will be taken by a jury to prove too much that the law seeks to guard against.

13 In addition to the possibility of prejudice just mentioned, which is common to most similar fact evidence, there is a further prejudicial effect of the kind of similar fact evidence with which we are presently concerned, that is, a complainant's evidence of uncharged acts. Typically, as in the present matters, the uncharged acts will be disputed, and sometimes the only evidence of them will be that of the complainant. The form in which the evidence emerges may create a serious risk of unfairness. It may range from a general assertion that conduct similar to that the subject of the charges had occurred on other occasions, perhaps over many years, to a detailed account of other specific acts. The accused is on trial for the charged offences. He may seek to deal with the charges by obtaining particulars, and testing the complainant's evidence by all available forensic methods. His capacity similarly to test the evidence of the uncharged acts may be limited. The adversarial process by which charges are laid, particularised, and contested may be ill-adapted to an investigation of these other allegations. This problem is not limited to a complainant's evidence of uncharged acts in sexual abuse cases. It may arise in other forms of similar fact evidence where the alleged facts are disputed. Questions of form, as well as content, need to be taken into account.

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18 *Makin v Attorney-General for New South Wales* [1894] AC 57 at 65.

14 The common law excludes evidence if its probative value is outweighed by its prejudicial effect. Examples of prejudicial effect are given above. The concept of probative value involves relevance and weight. The probative value of evidence must be considered by reference to the purpose or purposes for which it is used. In *Pfennig v The Queen*[19], McHugh J pointed out that prejudicial effect and probative value are incommensurables. So, it might be said, are many other forms of competing considerations that judges routinely "weigh". A great deal of judicial and other decision-making involves forming a judgment about where the balance is to be struck between competing considerations that are not amenable to any fixed standard of comparison.

15 To require a judgment as to what is just by taking into account probative value and prejudicial effect is the way in which the common law in England, Canada and New Zealand still deals with propensity evidence. The authorities before 1995 were discussed by this Court in *Pfennig v The Queen*[20]. In *Pfennig*, the High Court accepted the same general principle, but refined its application to similar fact evidence in an attempt to ensure that what is to be applied is a rule of law, not a discretion, and that the rule of law provides an adequate response to the danger of unfair prejudice. In *Pfennig* the issue was identity. The truth, as distinct from the admissibility, of the similar fact or propensity evidence was not in dispute. It was a murder case. The accused was charged with abducting and murdering a young boy. The evidence in question showed that he had admitted abducting and indecently interfering with another young boy on a separate, subsequent occasion. The evidence also established that the accused met the murder victim shortly before the victim disappeared. When the pattern of similarity, underlying unity or "signature" common to both incidents was taken into account, the later incident was cogent, circumstantial evidence pointing to the accused's guilt of murder of the first boy[21]. The propensity revealed by the second incident was used as circumstantial evidence in relation to the first incident.

16 The plurality judgment, of Mason CJ, Deane and Dawson JJ, accepted that the underlying necessity was to make a judgment about probative value and prejudicial effect. They quoted what was said by Lord Cross of Chelsea in *Boardman*[22]:

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19 (1995) 182 CLR 461 at 528; [1995] HCA 7.

20 (1995) 182 CLR 461 at 476-480.

21 (1995) 182 CLR 461 at 488-489.

22 [1975] AC 421 at 457.

> "The question must always be whether the similar fact evidence taken together with the other evidence would do no more than raise or strengthen a suspicion that the accused committed the offence with which he is charged or would point so strongly to his guilt that only an ultra-cautious jury, if they accepted it as true, would acquit in face of it."

17 They also quoted Lord Mackay of Clashfern LC who said, in *Director of Public Prosecutions v P*[23]:

> "[T]he essential feature of evidence which is to be admitted is that its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime."

18 However, accepting that underlying principle, the plurality judgment went on to formulate a more specific test, which had its origin in the use of circumstantial evidence to convict. It should be remembered that the case in *Pfennig* was entirely circumstantial, and the (undisputed) evidence of propensity formed part of the circumstances. It revealed a propensity to abduct young boys for sexual purposes, a propensity which, when added to the other circumstances, was held to be conclusive of guilt of murder. Without the circumstance of propensity, the other circumstances were inconclusive. As noted above, other evidence in the case showed that the accused met the victim at or about the time of his disappearance. The propensity evidence showed that the accused was a child molester. It was thought to be very unlikely that there were two child molesters in the particular area at the time, and that the other one also had met the victim. This, it may be noted, involves certain societal assumptions, not syllogistic reasoning.

19 The refinement of the general principle advanced in the plurality judgment in *Pfennig* was encapsulated in the following passage[24]:

> "Because propensity evidence is a special class of circumstantial evidence, its probative force is to be gauged in the light of its character as such. But because it has a prejudicial capacity of a high order, the trial judge must apply the same test as a jury must apply in dealing with circumstantial evidence and ask whether there is a rational view of the evidence that is consistent with the innocence of the accused."

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23 [1991] 2 AC 447 at 460.

24 (1995) 182 CLR 461 at 482-483 (reference omitted).

20 Since they had earlier accepted Lord Cross of Chelsea's identification of the question as one concerning the value of the similar fact evidence taken together with the other evidence, their Honours must have been speaking of "the evidence" as the similar fact evidence taken together with the other evidence[25]. That, indeed, is the way their reasoning in relation to the case before them proceeded. If there were any uncertainty as to what their Honours meant, the surest guide to their meaning is to be found in the way they applied it to the facts.

21 An earlier passage in the plurality judgment stated[26]:

> "In other words, for propensity or similar fact evidence to be admissible, the objective improbability of its having some innocent explanation is such that there is no reasonable view of it other than as supporting an inference that the accused is guilty of the offence charged."

The reference to "its having some innocent explanation" was elliptical. The question was whether, when the propensity evidence was taken into account, there was no reasonable view of the totality of the evidence other than as supporting, with the degree of strength described in other passages, an inference that the accused was guilty of murder.

22 McHugh J criticised the reasoning in the plurality judgment, saying that the test propounded was impossible to relate to many well-known cases, including similar fact evidence in sexual offences. He distinguished between cases where the use of the evidence was for a reason other than the accused's propensity and cases where the prosecution relied on propensity reasoning. Cases in the first category, he said, such as cases where evidence of relationship simply explains other evidence that directly implicates the accused, could not be subject to the "no rational explanation" test. The correctness of that observation seems to have been assumed in *Gipp v The Queen*[27], as McHugh J pointed out in *KRM v The Queen*[28]. In any event, there is no logical answer to this point. *Pfennig* was not a case about evidence that happened to reveal propensity; it was a case about the use of the fact of propensity as circumstantial evidence in proof of the offence charged. The use of propensity as circumstantial evidence was the key to the formulation of the refined test. What was said in *Pfennig* must be understood in its context.

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25 *Phillips v The Queen* (2006) 225 CLR 303; [2006] HCA 4.

26 (1995) 182 CLR 461 at 481-482 (reference omitted).

27 (1998) 194 CLR 106.

28 (2001) 206 CLR 221 at 228-233 [20]-[31].

23 There are commonplace examples of admissible evidence that reveals a criminal tendency, or discreditable behaviour, but that is not tested by reference to what might be described as the *Pfennig* refinement of the general principle concerning probative value and prejudicial effect. The most obvious example is evidence of bad character that is received to contradict evidence of good character. There are also examples of admissible evidence of motive which reveals criminal acts but has nothing to do with propensity reasoning. Suppose D is charged with the murder of X. Suppose the prosecution sets out to prove motive, the alleged motive being that X was blackmailing D because X had became aware that D had engaged in criminal or other discreditable conduct. Evidence that D, to the knowledge of X, had engaged in such conduct would be relevant, as supporting the alleged motive, but the propensity revealed by such conduct may be completely irrelevant.

24 The *Pfennig* refinement upon the general principle as stated, for example, in *Boardman* does not supplant the general principle in all cases of evidence which reveals the commission of criminal offences other than the charged offences. Where evidence of uncharged acts is introduced for the common, and acceptable, purpose of explaining that a complainant, in giving an account of conduct the subject of a charge, is not purporting to describe an isolated event, so that the account of the event may properly be evaluated by the jury, the test to be applied in determining admissibility is whether the probative value of the evidence outweighs its prejudicial effect. Evidence may have probative value in the assistance it gives in assessing other evidence. What is sometimes called "relationship evidence" may have value in this way. So also may evidence of what are sometimes called *res gestae*. The evidence that was held to be admissible in *O'Leary v The King*[29], of similar acts prior to and after the events charged, helped to explain or make intelligible the course of conduct pursued[30].

25 In a sexual abuse case, a complainant's evidence of uncharged acts, admitted only for the purpose of explaining or making intelligible her account of the charged acts, or to show that she was not purporting to describe an isolated event where otherwise her account may appear implausible, need not offend rules against investigation of collateral matters or impermissible attempts to bolster a witness's credit. It is, however, subject to the general principle concerning probative value and prejudicial effect, and the possible potential unfairness resulting from both form and content earlier discussed may affect its admissibility.

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29 (1946) 73 CLR 566; [1946] HCA 44.

30 See also *Martin v Osborne* (1936) 55 CLR 367 at 375; [1936] HCA 23.

26 Evidence of uncharged acts has another potential use as evidence of motive. The form of particular propensity involved in a sexual interest of a parent in a child could be regarded as providing a motive for conduct of the kind alleged in the charge. This form of propensity reasoning might not be relied on, in which case it may be necessary for a trial judge to warn a jury against employing it. Where, however, it is pursued, then the *Pfennig* reasoning, that is, reasoning about propensity as a circumstantial fact making more likely the offence charged, is in point.

27 *Pfennig* was a case about the legitimate use of propensity reasoning, and the probative value, in such a context, of the evidence of propensity. It expressed a test for deciding whether the evidence of propensity reached a certain level or standard of probative value. The concept of probative value is about assessment of probabilities, which includes the reasonableness of inferences. In deciding admissibility, the trial judge assesses the probative value of the evidence in question upon the assumption that it is accepted[31], and in the context of the other evidence. It is a test of admissibility of evidence, not a test of the reasonableness of a jury verdict. In the present matters, unlike *Pfennig*, there was direct testimony that the accused had engaged in the acts alleged in the charges. In each case, if the evidence of the complainant about the uncharged acts were accepted, when added to the other evidence, including the direct testimony, it would have eliminated any reasonable doubt that might be left by the other evidence. The observations of Hodgson JA in *WRC*[32] are in point. The nature of the issues in each case was not such as to require a different conclusion. There may be cases in which the nature of the dispute about the complainant's testimony, considered as a whole, is such that acceptance of the evidence of the uncharged acts is inconclusive. These cases are not of that kind. In each case, the probative value of the evidence of uncharged acts would have satisfied the *Pfennig* standard. However, as will appear, the evidence was not left to the jury as evidence of motive, and warnings were given against propensity reasoning. In those circumstances, while the *Pfennig* refinement did not apply, it was still necessary to consider whether probative value was outweighed by prejudicial effect.

28 One further observation should be made about prejudicial effect. The forms of prejudice earlier discussed are in some cases amenable to management by limiting the use to which evidence may be put, controlling the form in which it may be adduced, and giving suitable directions and warnings to juries. If a trial judge concludes that the risk of prejudice is such as to put it beyond reasonably effective management, then the evidence should be excluded. There may be

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31 *Phillips v The Queen* (2006) 225 CLR 303.

32 (2002) 130 A Crim R 89 at 101-102 [26]-[29].

cases in which fairness is best served by confining the evidence of uncharged acts to brief and general evidence that the occasion the subject of an alleged offence was not an isolated instance. In *Gipp v The Queen*[33], McHugh and Hayne JJ referred to the possibility of a defence preference for evidence of sexual history that was given shortly and without detail. The circumstances of particular cases will vary, and the appropriate judicial response to the requirements of fairness cannot be anticipated by a general rule save that, as already mentioned, both form and content will require consideration.

Standard of proof

29 It is the elements of the offence charged that, as a matter of law, must be proved beyond reasonable doubt. (I leave aside presently irrelevant cases where insanity or some other defence is raised.) If evidence of a fact relevant to a fact in issue is the only evidence of the fact in issue, or is an indispensable link in a chain of evidence necessary to prove guilt, then it will be necessary for a trial judge to direct a jury that the prosecution must establish the fact beyond reasonable doubt; generally, however, the law as to standard of proof applies to the elements of the offence, not particular facts. The decisions of this Court concerning corroboration in *Doney v The Queen*[34], and proof of lies as evidence of consciousness of guilt in *Edwards v The Queen*[35], illustrate the point. Trial judges commonly, and appropriately, direct juries in terms of their possible satisfaction of particular matters relied upon by the prosecution, without referring to a standard of proof in relation to each such matter. To do otherwise would risk error.

30 Where evidence is adduced for the purpose of explaining a context or similarly assisting the evaluation of the evidence of a witness, no separate question of the standard of proof of such evidence arises. Thus, if a complainant, giving direct evidence of the facts which constitute the elements of the offence charged, says that it was not an isolated incident but part of a wider pattern of behaviour, and does so either generally or with specificity, no separate question of a standard of proof in relation to the latter evidence ordinarily would arise.

31 There is no general principle that whenever, at a criminal trial, the prosecution sets out to prove, as a fact relevant to a fact in issue, that some criminal conduct occurred, that fact must be established beyond reasonable doubt. In the example earlier given, where certain behaviour by D is relied upon

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33 (1998) 194 CLR 106 at 132 [75].

34 (1990) 171 CLR 207 at 211; [1990] HCA 51.

35 (1993) 178 CLR 193 at 210; [1993] HCA 63.

in support of an alleged motive on the part of D to murder X who was said to be blackmailing D, it would make no difference in principle whether the behaviour was criminal or whether it was otherwise discreditable. Unless it was indispensable in the sense earlier mentioned, it would not have to be proved beyond reasonable doubt. In the recent case of *Washer v Western Australia*[36], evidence was admitted to show that an accused, who was charged in connection with a certain drug importation, was in the business of drug dealing. This was circumstantial evidence relevant to the alleged intent to supply the drugs involved in the importation. It was not an indispensable fact; it was part of a web of circumstances. It did not have to be established beyond reasonable doubt, or at all.

32 Where a complainant's evidence of uncharged acts is relied upon by the prosecution as evidence of motive in order to support the complainant's evidence of the charged acts, two considerations may arise. First, if that evidence is an indispensable step in reasoning towards guilt then it may be necessary and appropriate to give a direction about the standard of proof in respect of such evidence. Secondly, it may be unrealistic, in cases such as the present, to contemplate that any reasonable jury would differentiate between the reliability of the complainant's evidence as to the uncharged acts and the complainant's evidence as to the charged acts. That will not always be so. There may be cases where some parts of a complainant's evidence are corroborated and others are not, or where an accused's response to part of the evidence is different from the response to other parts. Generally speaking, however, the indispensable link case apart, it is ordinarily neither necessary nor appropriate for a trial judge to give separate directions about the standard of proof of uncharged acts.

33 The views expressed by Doyle CJ in *R v Nieterink*[37], which were acted upon by the trial judges in these three matters, are consistent with what is said in the preceding paragraph.

The present matters

34 The facts and the issues in each matter are set out in the reasons of Hayne J and Heydon J.

35 In *HML v The Queen*, the trial judge left the evidence of the uncharged acts to the jury, not as evidence of motive, but only as evidence of the context in which the complainant's evidence of the charged acts was to be evaluated. I have already referred to her evidence as to asking the accused for permission to go

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36 (2007) 82 ALJR 33; 239 ALR 610.

37 (1999) 76 SASR 56.

shopping and his response. The trial judge referred to the father's confidence to offend, and the complainant's lack of surprise or complaint. The judge gave warnings against the use of propensity reasoning. The evidence of the uncharged acts was admissible, and the directions were adequate. I agree, for the reasons given by Hayne J, that the action or inaction of the Victorian authorities in relation to the uncharged acts in Victoria was irrelevant[38].

36 In *SB v The Queen*, the evidence in question was not the subject of objection at trial. Leave to amend the notice of appeal to raise the question of admissibility should be refused in accordance with the principles referred to in *Crampton v The Queen*[39]. The trial judge told the jury that the evidence was potentially helpful in evaluating the complainant's evidence of the charged acts which "may otherwise appear to be unreal or not fully comprehensible." He directed the jury not to use propensity reasoning. The evidence was not received or used as evidence of motive. The directions involved no error or unfairness.

37 In *OAE v The Queen*, the prosecution, as sometimes happens, charged the accused with the first and the last of a series of happenings. Presumably this is done because a complainant may have a clearer recollection of the first and the last such acts, unless there is something particularly memorable about the intervening occasions. Here again, the trial judge did not admit the evidence as evidence of motive, and warned the jury against propensity reasoning. The directions to the jury referred to the permissible use of the evidence only as establishing a context for the evidence of charged acts. The evidence was admissible, and the jury directions were sufficient. In particular, for the reasons given earlier, there was no occasion to tell the jury that they could not rely on the evidence in question unless they found it established beyond reasonable doubt.

Conclusion

38 In each of *HML v The Queen* and *SB v The Queen* the appeal should be dismissed. In *OAE v The Queen*, special leave to appeal should be granted but the appeal should be dismissed.

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38 cf *Washer v Western Australia* (2007) 82 ALJR 33; 239 ALR 610.

39 (2000) 206 CLR 161; [2000] HCA 60.

39 GUMMOW J. The appeals by HML and by SB were heard together and with the special leave application by OAE. Special leave should be granted and the appeal by OAE treated as having been heard instanter.

40 All these appeals are brought from the South Australian Full Court sitting as the Court of Criminal Appeal. The issues of the law of evidence which have been argued in this Court turn upon the common law, with one qualification. This is the belated attempt, which should not succeed, made in oral argument on the appeal by HML to rely upon s 34I of the *Evidence Act* 1929 (SA).

41 I agree with what is written by Hayne J respecting matters of general principle. In particular, I agree with what appears in his Honour's reasons under the heading "*Pfennig v The Queen*".

42 I agree with the reasons given by Hayne J for the disposition of the appeals by SB and by OAE. With respect to the appeal by HML, my agreement has the reservation respecting the treatment of the laying of charges in Victoria which is developed by Kirby J in his reasons. I agree with what Kirby J has written on that aspect of the appeal by HML, including the application of the proviso. The upshot is that in this, as in the other appeals, I agree with the orders proposed by Hayne J.

43 KIRBY J. Three proceedings are before this Court. Two are appeals, by special leave already granted, from orders of the Court of Criminal Appeal of South Australia[40]. The other is an application for special leave to appeal from orders of the same court[41]. The application was directed to be heard with the appeals because of the similarity of some of the issues raised[42]. I agree that special leave should be granted in the third matter.

44 The appeals have been considered together because of uncertainties that have arisen in trial and intermediate courts in respect of evidence in criminal trials involving accusations of sexual offences committed against under-aged children, commonly by family members. In particular, the appeals present controversies relating to:

(1) The rulings to be made in such trials in respect of the relevance and admissibility of evidence of discreditable sexual conduct involving the accused, apart from that alleged in the specific charges brought by the prosecution; and

(2) The directions or warnings that should be given to a jury by a trial judge in such a trial, where such evidence is ruled admissible. Such directions or warnings might relate to: (a) the potential uses of such evidence; (b) the standard of proof to be applied by the jury in deciding whether or not they accept such evidence and whether they should use it in reasoning to their conclusion about the guilt of the accused of the offence(s) charged; and (c) the dangers of propensity reasoning based upon such evidence.

45 So much has been written about the foregoing questions in earlier decisions of this Court[43], and now in these proceedings, that I hesitate to add to the elaboration lest what I write ends up contributing to the uncertainties. Rulings on evidence of this type must often be made by trial judges on the run, in the course of the criminal trial. Of its nature, such a trial will often be fraught and emotional. In addition, trial judges face great burdens in framing their directions and warnings to juries in cases of the present kind. Such directions or warnings must be framed so as to be understood by a jury of ordinary Australian

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40 In *R v H, ML* [2006] SASC 240 and *R v S, B* [2006] SASC 319.

41 See *R v O, AE* (2007) 172 A Crim R 100.

42 *OAE v The Queen* [2007] HCATrans 473.

43 See in particular *Gipp v The Queen* (1998) 194 CLR 106; [1998] HCA 21; *KRM v The Queen* (2001) 206 CLR 221; [2001] HCA 11; *Tully v The Queen* (2006) 230 CLR 234; [2006] HCA 56.

citizens who do not have the luxury of hours (still less months) of cogitation. Therefore, this is a case where, if at all possible, this Court should make a particular effort to speak with a clear voice.

46 In so far as there are differences between the opinions expressed in the reasons of Gleeson CJ, Hayne J, Heydon J, Crennan J and Kiefel J, I prefer and endorse (as Gummow J does) the principles stated by Hayne J. I do so because I agree with Hayne J, for reasons that I will detail, about:

(1) the purposes for which, in trials of this character, evidence of "uncharged acts" may be admitted[44];

(2) the applicability to the admissibility of such evidence[45] of the holding of this Court in *Pfennig v The Queen*[46]; and

(3) the necessity, where such evidence is admitted, for the trial judge to instruct the jury that they must be satisfied beyond reasonable doubt about the truth of such evidence if they are to use it to reason towards guilt[47].

47 In particular, I agree in what I take to be Hayne J's insistence upon conformity with what was said by this Court in *Pfennig* (observed, for example, in the approach of the Court of Appeal of Victoria in *R v Vonarx*[48]) in preference (where it is different) to the approach adopted by the Court of Criminal Appeal of South Australia in *R v Nieterink*[49]. It was the reasoning in *Nieterink* that influenced the Court of Criminal Appeal of South Australia in deciding, in the ways that it did, the three appeals that are now before this Court.

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44 Reasons of Hayne J at [103]-[111]; cf reasons of Gleeson CJ at [5]-[11]; reasons of Heydon J at [274]-[336], [364], [387], [390]-[394]; reasons of Crennan J at [423]-[433]; reasons of Kiefel J at [491]-[501].

45 Reasons of Hayne J at [106], [112]-[118]; cf reasons of Gleeson CJ at [24]-[27]; reasons of Heydon J at [289], [364], [387]; reasons of Crennan J at [455]-[467]; reasons of Kiefel J at [502]-[511].

46 (1995) 182 CLR 461.

47 Reasons of Hayne J at [132], [244]; cf reasons of Gleeson CJ at [29]-[32]; reasons of Heydon J at [339], [376], [395]; reasons of Crennan J at [477]; reasons of Kiefel J at [512]-[513].

48 [1999] 3 VR 618.

49 (1999) 76 SASR 56 at 66 [48]-[49].

48 With one exception, I also agree with Hayne J about the proper application of the relevant principles to the present appeals. The exception relates to the exclusion, on grounds of relevance, of evidence that the appellant HML sought to tender concerning the then current state of criminal proceedings against him in Victoria. However, this error does not affect the outcome of that appeal. The "proviso"[50] is applicable. HML's appeal should be dismissed.

49 I will also offer some additional comments about the serious inadequacies in the directions given to the jury in the appeal of OAE, both as to the use that the jury in that case might make of "uncharged acts" as part of the "context" and as to the want, there, of a sufficiently clear indication that evidence of the uncharged acts had to be proved beyond reasonable doubt. I agree with Hayne J that the defect is not one to which the "proviso" applies. Alike with his Honour, I would allow OAE's appeal.

50 In relation to the appeal of SB, I have nothing to add to what Hayne J has written. I agree with the reasons and conclusions of Hayne J (including on the application for leave to enlarge the grounds of appeal). It follows that that appeal should be dismissed.

51 These reasons will therefore explain why:

(1) I agree with Hayne J as to the applicable general principles;

(2) I differ, in one respect, from Hayne J as to their application in the appeal of HML, but without dispositive consequences; and

(3) I agree with Hayne J as to the disposition of the appeal of OAE.

52 The analysis in these reasons adopts the assumption, inherent in much appellate examination of jury decision-making, that members of a jury reach their conclusions by a process of deliberation from evidence to verdict by way of an accurate application of judicial directions on the law[51]. Such empirical evidence as there is casts serious doubts upon such assumptions[52]. Indeed, psychological

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50 *Criminal Law Consolidation Act* 1935 (SA), s 353(1); cf *Liberato v The Queen* (1985) 159 CLR 507 at 518; [1985] HCA 66; *Gillard v The Queen* (2003) 219 CLR 1 at 15 [29], 32-33 [94]-[97], 41-42 [133]-[134]; [2003] HCA 64.

51 cf reasons of Heydon J at [353], reasons of Kiefel J at [488].

52 See *Zoneff v The Queen* (2000) 200 CLR 234 at 260-261 [65]-[67]; [2000] HCA 28. See also Cush and Goodman-Delahunty, "The Influence of Limiting Instructions on Processing and Judgments of Emotionally Evocative Evidence", (2006) 13 *Psychiatry, Psychology and Law* 110 at 113.

research applied to judicial or other decision-making, including investigations based on the cognitive reflection test, suggests the very large role played by intuition in such decisions. In such matters, the human brain has a tendency to make automatic, snap judgments[53]. However, in default of contrary argument, these reasons will continue to make the law's assumptions, however dubious they may be in scientific terms.

The facts and legislation

53 *The facts*: The facts of each appeal are set out in considerable detail in other reasons. Those reasons disclose the relevant objections to, and rulings on, the evidence at trial, the grounds of appeal and dispositions in the Court of Criminal Appeal in each case, and the arguments advanced in this Court. It will be necessary for me to add a little more detail concerning the error in the trial of HML just mentioned. However, otherwise, I am content to rely on the detailed expositions by my colleagues.

54 *The legislation*: As Heydon J explains in a note to his reasons, this Court's expression of the law in these appeals is substantially confined to those jurisdictions of Australia in which the common law rule stated in *Pfennig* survives[54]. Other than in South Australia, the Northern Territory, and to some extent Queensland, the rule in *Pfennig* has been amended, either by the adoption of the Uniform Evidence Acts[55] or by the enactment of particular State legislation[56]. Subject to any constitutionally protected principles of due process, it is competent for the Parliaments of Australia to regulate the substantive and evidentiary law that is in issue in these proceedings. No constitutional argument has been raised by any party.

55 In several jurisdictions, including South Australia, an attempt has been made to address the issues arising in these proceedings by the creation of so-

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53 Guthrie, Rachlinski and Wistrich, "Blinking on the Bench: How Judges Decide Cases", (2007) 93 *Cornell Law Review* 1 at 19.

54 Reasons of Heydon J at [288], fn 227.

55 See ss 97 and 98 of the Uniform Acts. These Acts are applicable in federal courts and in the Australian Capital Territory, New South Wales, Tasmania and Norfolk Island. See reasons of Heydon J at [288], fn 227.

56 *Evidence Act* 1977 (Q), s 132A; *Crimes Act* 1958 (Vic), s 398A; *Evidence Act* 1906 (WA), s 31A. See *Washer v Western Australia* (2007) 82 ALJR 33 at 46 [58]; 239 ALR 610 at 625-626; [2007] HCA 48.

called "relationship crimes"[57] and by the enactment of special evidentiary rules for cases involving sexual offences[58]. As explained in other reasons, none of these special legislative provisions is determinative of the present appeals.

Admissibility of relationship evidence

56 *Factors favouring admission*: I accept that, as a matter of legal principle or policy, several considerations tend to support the reception of evidence by complainants of alleged acts of sexual abuse different from, and additional to, those identified in the charges preferred against the accused by the prosecution:

(1) Although criminal trials address specific charges alleged in an information or indictment, the experience of the courts shows that sexual abuse of young persons is often, or typically, manifested in multiple and repeated incidents over a period of time. It is commonly impracticable, or even impossible, to include them all among the formal charges. The repeated character of the events may render them individually unmemorable either to the complainant or to the accused. A court process directed to eliciting a truthful description of what has happened to a complainant will take account of such practical considerations;

(2) Where sexual assault cases are not prosecuted under the new provisions establishing "relationship crimes", a practice is often observed by prosecutors of charging the first, or earliest, alleged incident of a sexual offence remembered by the complainant and also the most recent incident that can be described[59]. Others may be included because of special features in the facts or surrounding circumstances which are said to trigger the memory of the complainant and to permit particularity. However, almost inevitably, and whatever the wishes and precautions of lawyers, evidence may emerge of other incidents not made the subject of charges. This may be due to factual links between such incidents and the matters charged[60], or because such incidents are allegedly remembered whilst the complainant's evidence is being adduced. Alternatively, the complainant,

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57 See eg *Criminal Law Consolidation Act* 1935 (SA), s 74. See reasons of Heydon J at [259]. A similar provision was considered in *KBT v The Queen* (1997) 191 CLR 417; [1997] HCA 54.

58 See eg *Evidence Act* 1929 (SA), s 34I. See reasons of Hayne J at [185]-[187]; reasons of Heydon J at [337]. See also s 34CA of that Act; cf reasons of Heydon J at [310].

59 Reasons of Gleeson CJ at [37].

60 As was the case in the trial of HML; see reasons of Heydon J at [318].

unaware of (or impatient with) the conventions of the criminal trial, may assert that many other similar instances occurred, leaving it to the trial judge to deal with the admissibility of such evidence and with the directions that should then be given. Attempts to quarantine the charged acts may, in practice, be both artificial and futile;

(3) From the point of view of the complainant, and respecting his or her entitlement to provide a truthful version of what is recalled, it is important for legal procedure to facilitate, so far as basic principle permits, the giving of a "fair and coherent account"[61] of what has allegedly occurred resulting in the criminal prosecution[62];

(4) The law has an important obligation to protect truthful complainants about sexual abuse. It is an appreciation of the significance of this consideration that led Lord Hope of Craighead to observe in *R v A (No 2)*[63] that "the balance between the rights of the defendant and those of the complainant is in need of adjustment if [complainants] are to be given the protection under the law to which they are entitled against conduct which the law says is criminal conduct". This observation has particular force where the abuse has allegedly been suffered by children as a result of the conduct of family members who owe the child special duties of trust and protection;

(5) Self-evidently, sexual assault against children is a very serious crime both in terms of its incidence in our society and in its impact on the victim, the victim's family and the community. There is compelling evidence of historical "under-enforcement" in this area[64]. The increase in prosecutions for offences of the present kind observed by the courts in recent years is, in part, a reflection of changing community, police and prosecutorial attitudes. These developments ought not to be permitted to be frustrated by unjustifiably restrictive court procedures; and

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61 *White v The Queen* [1999] 1 AC 210 at 217 cited reasons of Heydon J at [299].

62 cf reasons of Crennan J at [474]-[475].

63 [2002] 1 AC 45 at 71 [55]. See also *DS v Her Majesty's Advocate* [2007] UKPC D1 at [5].

64 See Hamer, "Similar Fact Reasoning in *Phillips*: Artificial, Disjointed and Pernicious", (2007) 30 *University of New South Wales Law Journal* 609 at 634-635. Hamer cites Australian Bureau of Statistics figures published in 2005 suggesting that 80% of women victims of sexual assault do not report the assault, and remarks that "[d]ata is unavailable, but under-reporting is likely to be higher still for sexual offences against children".

(6) The retention of jury trial for most contested allegations of such offences in Australia suggests a continuing acceptance of the need to entrust decision-making in such cases to "the ordinary experiences of ordinary people"[65]. Juries resolve disputed issues and distinguish false or unproved accusations from those which they consider to have been proved to the requisite standard by applying their collective experience of life and of their fellow human beings[66]. In recent years, the House of Lords, in *Director of Public Prosecutions v P*[67] and *R v H*[68], has demonstrated a greater willingness to trust juries with sensitive evidence than, for example, was apparent in the earlier case of *R v Boardman*[69]. Thus, Lord Griffiths, in the case of *H*[70], suggested that a "less restrictive form" of the rules excluding relevant evidence was appropriate given today's "better educated and more literate juries". So far as the common law of Australia is concerned, the result may also be a greater willingness in this country to permit jury access to relevant but sensitive, and potentially prejudicial, evidence[71]. The fact that potential prejudice may be susceptible of limitation through careful directions and warnings is an additional factor that tends to favour reposing greater trust in juries in cases such as the present.

57 *Factors favouring exclusion*: As against the foregoing considerations, a number of others need to be kept in mind:

(1) In general, criminal trials of serious offences in Australia observe an accusatorial form[72]. As a matter of law, the accused is ordinarily entitled to put the prosecution to proof of its allegations. In the usual case, it is essential that an accused person should be informed in advance of the trial not just of the "legal nature of the offence with which he is charged but

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65 *Doney v The Queen* (1990) 171 CLR 207 at 214; [1990] HCA 51.

66 cf *R v Best* [1998] 4 VR 603 at 611 per Callaway JA.

67 [1991] 2 AC 447.

68 [1995] 2 AC 596.

69 [1975] AC 421. See reasons of Crennan J at [443].

70 [1995] 2 AC 596 at 613.

71 cf reasons of Crennan J at [473].

72 See *RPS v The Queen* (2000) 199 CLR 620 at 632-633 [27]-[29], 653-654 [101]; [2000] HCA 3. See also *Thompson* (2002) 130 A Crim R 24.

also of the particular act, manner or thing alleged as the foundation of the charge"[73]. In Australia, this has led to rules of law and practice requiring a high degree of specificity of accusations and of criminal charges[74]. To the extent that uncharged accusations or generalised "relationship evidence" intrude upon such a trial, they have a tendency to impair the right of the accused to know in advance, and to prepare to test and to meet, the particular charges alleged. This, in turn, has the tendency to endanger a fundamental feature of the criminal trial;

(2) From the viewpoint of the accused, the foregoing elements of the criminal trial afford important protections. They permit the accused to prepare for the trial; to test the accusations; to assemble a defence; and (if so decided) to gather rebutting, alibi and other evidence. They also permit the accused to object to evidence as it is tendered where it is not relevant to the issues for trial, as those issues are defined by the information or the indictment, supplemented perhaps by particulars. To the extent that a complainant introduces other accusations and allegations that are not contained in the charges or particulars, serious prejudice may sometimes arise which it is difficult, or impossible, to cure on the run in the course of the trial;

(3) Although the foregoing features of the accusatorial trial are particularly important in common law countries, it is arguable that a clear delimitation of criminal accusations before the beginning of any trial is a universal requirement of international human rights law. Thus, Art 14 of the International Covenant on Civil and Political Rights states a number of basic rights by reference to the "determination of any criminal charge" against a person. The determination of a "criminal charge" apparently postulates a degree of particularity and notice to the person accused of the exact allegation that is made;

(4) Whilst proper attention must be addressed to the protection of complainants, so that they may place relevant testimony before the trial without artificial or irrational impediments, it is the accused, and not the complainant, who is on trial. Ordinarily, in cases involving allegations of repeated child sexual assault, the accused faces, if convicted, serious (commonly custodial) punishment. It is therefore the duty of courts, and of prosecutors, to ensure the fairness of the trial, especially so because accusations of criminal offences against children are specially likely to

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73 *Johnson v Miller* (1937) 59 CLR 467 at 489 per Dixon J; [1937] HCA 77.

74 *Walsh v Tattersall* (1996) 188 CLR 77; [1996] HCA 26. See *KBT* (1997) 191 CLR 417 at 429.

arouse feelings of prejudice and revulsion in the community which will normally be shared by jurors[75];

(5) Uncontested evidence sometimes later proves that accusations earlier made to police about a sexual assault are false, resulting in the initial conviction of an innocent person[76]. Cases also arise where such accusations are withdrawn and disclaimed after the accused has been convicted[77]. It is not correct to assume that all such accusations are accurate and reliable; and

(6) Although criminal appeals are necessarily conducted on the assumption that the jury understand and observe directions given to them about the law[78], there are risks, once certain evidence becomes known to the jury, that they may treat that evidence as disclosing a general disposition on the part of the accused to act as alleged in the charges. To the extent that the common law retreats from rules withholding particular evidence from the jury, and to the extent that the law permits the jury to receive and consider such evidence although not the subject of any charge, there may be a commensurate need to enlarge the judicial obligation to direct and warn the jury about the dangers of pure propensity reasoning.

58 *Conclusion on admissibility*: When all of the foregoing considerations of legal principle and policy are given their due weight, I am prepared to retreat from opinions that I earlier expressed in *KBT v The Queen*[79], *Gipp v The Queen*[80] and other cases as to the admissibility of propensity evidence, including "relationship evidence" and evidence of "uncharged acts".

59 I defer to what Hayne J has written on these subjects[81]. I do so because only Hayne J's approach in these appeals gives appropriate significance, in my view, to all of the considerations of principle and policy mentioned above. Thus,

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75 cf *De Jesus v The Queen* (1986) 61 ALJR 1 at 3; 68 ALR 1 at 4-5; [1986] HCA 65.

76 See *R v Button* [2001] QCA 133; Edwards, "Ten things about DNA contamination that lawyers should know", (2005) 29 *Criminal Law Journal* 71 at 73.

77 See eg *W* (1989) 44 A Crim R 363.

78 *Gilbert v The Queen* (2000) 201 CLR 414 at 420 [13]; [2000] HCA 15.

79 (1997) 191 CLR 417.

80 (1998) 194 CLR 106.

81 Reasons of Hayne J at [102]-[133].

I agree that, in cases such as the present where sexual offences have been charged, "relationship evidence", including evidence about "uncharged acts", may be received as relevant to the charges against the accused provided such evidence meets the requirements of the test stated by this Court in *Pfennig*[82]. Where that evidence relates to other offences, different from those that are the subject of the charges concerning the same accused and complainant, the *Pfennig* test will ordinarily apply to such a case.

60 The wider foundations propounded for the admission of such evidence (such as to bolster the credibility of the complainant, or to provide evidence of the general "context") would not ordinarily meet the *Pfennig* standard. In my view, such evidence is not admissible simply to provide "background". If such a vague criterion were adopted, virtually any evidence of discreditable conduct, uncharged in the information or indictment, would arguably be relevant and admissible in such a trial, because every alleged crime has a "context". Such a rule would be destructive of the particularity of the accusatorial trial. It would potentially be most unfair to the accused. It would undermine the proper discipline required of prosecutors in framing accusations. It would be damaging to the jury's central function, namely to return verdicts on the specific charges presented rather than to condemn the accused as a "nasty" or "disreputable" person.

61 Once the linchpin for admissibility of such evidence is accepted as being that stated in the test expressed in *Pfennig*, the foundation for the reception of "relationship evidence" and evidence of "uncharged acts" becomes clearer. Such evidence may only be admitted if relevant to a permitted step in reasoning towards the accused's guilt of the charges framed in the information or indictment. Once this is clear, the requirement for directions or warnings to the jury to apply the criminal standard of proof becomes plain. That course is justified whether one invokes a metaphor and classifies the "relationship evidence" or evidence of "uncharged acts" as "links in a chain" of reasoning to guilt of the charges brought[83], or whether one views such evidence as "so intertwined with the charged acts" as to necessitate satisfaction to that standard[84]. In any such case, "the trial judge must direct the jury that they must be satisfied that the uncharged acts have been proved beyond reasonable doubt"[85].

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82 (1995) 182 CLR 461.

83 cf *Shepherd v The Queen* (1990) 170 CLR 573 at 579; [1990] HCA 56.

84 *O, AE* (2007) 172 A Crim R 100 at 108 [38].

85 *O, AE* (2007) 172 A Crim R 100 at 108 [38].

62 Standing back from the mass of decisional authority mentioned in other reasons, much of it difficult to reconcile, the approach endorsed by Hayne J achieves, in my view, an appropriate adjustment of the competing considerations of legal principle and policy that I have identified. It departs, to some extent, from the strict particularity favoured by the accusatorial tradition. However, it acknowledges the need, where relevant, for a clear direction as to the standard of proof to be applied to uncharged acts in cases of this kind. As well, there will often be a need for a clear warning from the judge about the dangers of pure propensity reasoning, that is, reasoning from a conclusion that the accused is a bad type of person to the conclusion that he or she is guilty of the particular offences charged.

63 In approaching the issues raised by these three appeals in jurisdictions where the common law applies unaffected by statutory modification, Australian judges should apply the principles expressed in the reasons of Hayne J. Specifically, for the reasons Hayne J has given, a trial judge should instruct a jury "that they must only find that the accused has a sexual interest in the complainant if it is proved beyond reasonable doubt"[86].

Application of principles in *HML v The Queen*: a question of relevance

64 *A particular but relevant issue*: Questions of relevance can sometimes arise in cases involving accusations against the same accused of multiple sexual offences. An instance is *Phillips v The Queen*[87]. There, this Court said[88]:

> "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."

65 The decision in *Phillips*, and the way in which the issue of relevance arose in that case, have been criticised[89]. It is neither necessary nor appropriate in these appeals to address the criticism. The circumstances in which the issues of relevance arose here were quite different. They were argued at trial in the case of HML. They were pressed on appeal, including in this Court. The particular point in issue is a small and discrete one. Because it is one upon which I depart

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86 See reasons of Hayne J at [247].

87 (2006) 225 CLR 303; [2006] HCA 4.

88 (2006) 225 CLR 303 at 311 [26] (footnote omitted).

89 Hamer, "Similar Fact Reasoning in *Phillips*: Artificial, Disjointed and Pernicious", (2007) 30 *University of New South Wales Law Journal* 609.

from the conclusion of Hayne J, I will explain how it arises; why I disagree; and why the consequence is not ultimately determinative of the disposition.

66 *A point reserved at trial*: The prosecution case against HML was that, whilst the two charges contained in the information concerned sexual offences against his natural daughter that occurred in Adelaide in September/October 1999, other and different sexual misconduct had begun years earlier (and continued afterwards) during visits made by the complainant to her father, then living in Victoria[90].

67 The prosecutor expressly opened to the jury with the fact that HML had been interviewed by Victoria Police "in relation to the allegations of what had been taking place in Victoria". The jury were told that they would "have an opportunity to see that interview played on a video player later in the trial". So indeed the jury did. On the prosecution case, the reference to the Victorian events was justified on the basis that they showed that the alleged offences in Adelaide:

> "didn't just happen out of the blue; there had already been inappropriate behaviour toward her and indeed sexual offending continued afterward. Without knowing that, it might seem odd that the accused would suddenly commit the offences in a hotel in Adelaide. It puts the Adelaide offending into context. … [I]t demonstrates that the accused was someone who actually had a sexual interest in [the complainant]; he was sexually attracted to her. The evidence of the ongoing sexual conduct might explain the reasons for this offending. He offended against her because he found her sexually gratifying and that sexual interest in her continued over a number of years."

68 Quite detailed evidence was then given in HML's trial, including by the complainant, about the sexual offences that allegedly occurred in Victoria. Those offences were said to have happened both before and after the charged (Adelaide) events. The only offences that were the subject of the trial in South Australia were those alleged to have happened in Adelaide.

69 On an initial voir dire, counsel for HML had indicated that he wished to question Detective G J Beanland of Victoria Police, to be called in the prosecution case, as to "whether or not charges [had] been laid in Victoria". The prosecutor opposed this course on the basis that the answer would not be relevant to a fact in issue. In his submissions to the trial judge, counsel for HML explained:

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90 See reasons of Hayne J at [136]; reasons of Heydon J at [251].

> "I would not be asking him as to why the charges didn't proceed. But if, as the prosecution's issues [suggest], the jury are going to be hearing about uncharged acts, then it should be very plain that that's exactly what they are, otherwise it would be unfair to the accused."

In response, the prosecutor submitted that the admission of such evidence would encourage speculation, and open "a can of worms". The trial judge indicated that he was inclined to agree with the prosecutor, stating that "[t]here shouldn't be any questions to elicit the fact that nothing occurred in Victoria". However, the trial judge expressly left it open to counsel for HML to make further submissions on the issue.

70 Thus it was that counsel for HML renewed his application to adduce the contested evidence when Detective Beanland was called to give evidence. However, following short argument, the trial judge refused the application. He stated what was, in effect, his conclusion on this point as follows:

> "The fact that [HML] wasn't charged in Victoria is not probative of the fact that he was charged here or probative as to what the outcome of this proceeding might be. That's propensity reasoning at its worst. … I will be telling the jury that they are not to speculate and … I am entitled to assume that they will do as I tell them".

71 Thus, although Detective Beanland was permitted to give evidence that he had questioned HML in August 2003 at the Mount Gambier Police Station in South Australia, he was not allowed to tell the jury that, to the date of the trial in March 2006, no charges based on the alleged Victorian offending had been laid by police.

72 *Suggested irrelevance of evidence*: Other members of this Court have concluded that the trial judge's ruling was correct and that the evidence that trial counsel sought to adduce was rightly excluded as irrelevant[91]. An identical conclusion was reached by the Court of Criminal Appeal[92]. With all respect to those of that view, I disagree.

73 *Reasons for relevance*: Evidence is relevant to an issue if the acceptance of it could bear on the demonstration of a matter in contention at the trial. It is not uncommon for courts to disagree over questions of relevance[93]. Judges must

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91 Reasons of Gleeson CJ at [35]; reasons of Hayne J at [190]; reasons of Heydon J at [353]; reasons of Crennan J at [478]; reasons of Kiefel J at [515].

92 *H, ML* [2006] SASC 240 at [12]-[13]. See reasons of Heydon J at [351].

93 As this Court did in *Smith v The Queen* (2001) 206 CLR 650 at 656 [12]; cf at 657-659 [19]-[24]; [2001] HCA 50.

commonly reach and express their conclusions on contested questions of relevance quickly and intuitively. On this issue I certainly acknowledge the respect that is owed to the opinion of the trial judge, affirmed on appeal. However, for several reasons, I regard that conclusion as erroneous:

(1) Statements in the trial of HML about the Victorian allegations (and the serious criminal offences that those allegations suggested) were made in the prosecutor's opening to the jury. Evidence about those allegations was given in the complainant's testimony. The issue was revived in the prosecutor's closing address and in the judge's summing up. The allegations therefore constituted an important and repeated theme in the trial. They were deliberately introduced into the trial by the prosecution, allegedly to provide "context". Yet although (as this Court holds) evidence of them was receivable for that purpose, the ruling of the trial judge denied HML the opportunity that he sought to attempt to neutralise the Victorian allegations as best he could;

(2) The Victorian allegations related to alleged incidents both before and after the Adelaide visit. According to the complainant, HML, in Victoria, would place one or two fingers in her vagina in the morning, doing so "regularly", and would also kiss her goodnight, trying to insert his tongue into her mouth in an inappropriate and suggestive fashion. Allegedly, on at least one occasion after the Adelaide visit, HML penetrated his daughter's vagina with his penis and, separately, performed an act of cunnilingus upon her[94]. Having regard to the time when these offences were alleged to have occurred in Victoria, the report about them to Victoria Police, the investigation of the complaints by those Police, the interview of HML by Detective Beanland at Mount Gambier (conducted in conjunction with South Australian Police), and the subsequent lapse of time, a jury would arguably have been entitled to assume that (in the ordinary course of events) a decision would have been made, one way or the other, on whether or not to prosecute the offences, or at least the most significant of them. From silence, the jury might conclude that HML had been charged, and perhaps was awaiting trial or had even been convicted upon them;

(3) The relevance of the alleged Victorian offences was clearly regarded as established. But if they were relevant, it was strongly arguable that the failure in the available time to prosecute such offences was also relevant. Fairness suggests that HML should have been afforded the chance to attempt (so far as he could) to deal with such potentially prejudicial, and effectively unanswerable, evidence and statements. The only means

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94 Reasons of Heydon J at [256].

available to him to do so rested on the fact (undisputed in the absence of the jury) that no charges had been brought in Victoria. There was a distinct element of inequality in permitting the Victorian evidence to be led by the prosecution but precluding HML from establishing the current status of the accusations;

(4) The trial judge's direction to the jury that they should not "speculate" about the outcome of the Victorian allegations (which he incorrectly described in his charge as "offences") did not, in my view, neutralise the Victorian evidence. On the contrary, such a direction was almost bound to attract the jury's curiosity about the outcome, in consequence of the specific mention of it. Whilst it is true that a decision on the prosecution of HML in respect of the Victorian allegations depended on decisions by officials absent from the trial in South Australia, it would not have been difficult to frame a factual explanation to the jury to the effect that no Victorian charges had been brought; but that this did not prevent them being brought in the future; and that the jury should focus their attention strictly on the alleged Adelaide offences which were the only charges upon which the jury's verdicts were to be returned. When the "uncharged" Victorian acts were given such attention in the trial, they were clearly treated as relevant to the issues in some way. Basic fairness should then have led to acceptance of HML's submission and to permission to procure evidence on the issue from Detective Beanland. It is difficult to deny that HML's attempted response was relevant without accepting that the entire evidence of the Victorian allegations was irrelevant and should have been excluded on that basis. The one was an attempted qualification, albeit partial, of the other. Rejection of HML's application was, in my view, erroneous. The resulting error was only compounded by the direction that the judge then gave.

74 *Application of proviso*: It follows that I differ in my conclusion on this issue. The exclusion of the evidence which HML sought to tender on this issue amounted to a "miscarriage of justice". Prima facie it enlivens a right to have the jury's verdicts quashed and a retrial ordered.

75 Nevertheless, under the "proviso" in South Australia it is necessary for a court, reaching such a conclusion, to proceed to consider for itself whether "no *substantial* miscarriage of justice" has "*actually* occurred". This familiar language[95] requires this Court either to express its own conclusion on the point or to remit the question to the Court of Criminal Appeal for its decision on the

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95 See *Liberato* (1985) 159 CLR 507 at 520 citing *Mraz v The Queen* (1955) 93 CLR 493 at 514; [1955] HCA 59; *Weiss v The Queen* (2005) 224 CLR 300; [2005] HCA 81.

issue[96]. Given the extensive consideration of the evidence by this Court, I consider that the decision on the application of the proviso can and should be made immediately.

76 The submissions of HML at trial on this point could not have resulted in the complete exclusion of the evidence of the Victorian allegations from consideration by the jury. For the reasons already given, the jury properly had access to that evidence, being evidence of other offences admissible on the *Pfennig* test to demonstrate HML's sexual interest in the complainant.

77 All that HML therefore lost by the incorrect ruling on the question his counsel propounded was the chance to present to the jury a factual integer indicating that no prosecutions had "yet" been brought in respect of any Victorian allegations. Had such evidence been adduced from Detective Beanland, it would have been necessary for the trial judge to qualify it by explaining to the jury that no one (including Detective Beanland) knew if, or whether, any such prosecution would, or would not, be brought by the Victorian prosecution authorities, not themselves members of the police force. The most that would have been added was a factual ingredient that would have made the instruction to the jury not to "speculate" appear more rational and understandable.

78 Given the nature of the matters in issue in HML's trial, the absence of that integer is not a cause of a substantial miscarriage. Nor am I convinced that, in consequence of the omission, an actual miscarriage of justice has occurred. This issue could, and should, have been handled better. But in the context of the ultimate focus of the trial on the Adelaide offences, it is not necessary, on this ground, to set aside the convictions based on the jury's verdicts. Those convictions should stand.

Application of principles in *OAE v The Queen*: direction on standard of proof

79 *Standard of proof: general principles*: In his reasons, Hayne J concludes (as I also would) that whether or not evidence of "uncharged" acts is admissible is not to be determined[97]:

> "by asking whether the evidence in question will put evidence about the charges being tried 'in context', or by asking whether it describes or proves the 'relationship' between complainant and accused".

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96 cf *Mahmood v Western Australia* (2008) 82 ALJR 372 at 379 [31]; 241 ALR 606 at 614; [2008] HCA 1.

97 Reasons of Hayne J at [106].

80 The mistake involved in this approach is that, if it were endorsed, it would effectively allow any relevant discreditable facts to be tendered against an accused simply because such evidence threw some light on the "context" of the offences. The risks of unfairness inherent in such an approach are obvious. The purpose of adopting the more stringent approach set out in *Pfennig* is to obviate, or at least minimise, such risks in cases of the present kind.

81 It is because the *Pfennig* approach is correct that, in relation to any "uncharged" acts (at least in cases of sexual offending), the jury must be charged that they have to be satisfied beyond reasonable doubt that the prosecution has proved the "intermediate facts" propounded as constituting an indispensable step on the way to an inference of guilt of the offences charged[98].

82 Other members of this Court have concluded that the directions given to the jury in the trial of OAE were adequate and conformed to law. However, they come to their conclusions by different ways. Thus, Gleeson CJ would hold that, because the relevant evidence was provided for the explicit purpose of explaining "context", and not as comprising an "indispensable link" in proof of the elements of an offence charged, no separate treatment of the standard of proof was warranted[99]. Heydon J considers that it is unnecessary to decide whether the criminal standard of proof has a wider application in cases such as the present, because whatever the case, the judges' summing up in each of the three appeals included a direction incorporating the criminal standard[100]. This is so, notwithstanding that the ostensible purpose of these appeals was to settle that issue with an authoritative statement by this Court. Crennan J endorses a principle similar to that stated by Gleeson CJ[101], although she ultimately relies on the conclusion of Heydon J that directions incorporating the criminal standard were in fact given in the trial of OAE[102]. It is apparent from the analysis of Kiefel J[103] that her Honour considers that, because the relevant evidence was relied upon for a purpose other than "disclosing [OAE's] sexual interest" in the complainant[104], a direction as to the criminal standard of proof was not required.

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98 See reasons of Hayne J at [196].

99 Reasons of Gleeson CJ at [29]-[32], [37].

100 Reasons of Heydon J at [339], [376], [395]-[396].

101 Reasons of Crennan J at [477].

102 Reasons of Crennan J at [483].

103 See reasons of Kiefel J at [512]-[513].

104 Reasons of Kiefel J at [517].

83 I support the conclusion of Hayne J. It is necessary and desirable for this Court to resolve the issue concerning directions to be given on the standard of proof applicable to evidence of "uncharged acts" for the guidance of trial judges and intermediate courts still observing the common law in this respect. I would hold that wherever such evidence has been admitted under the *Pfennig* test and is propounded as relevant to a step in reasoning towards the accused's guilt of an offence charged, the jury must be told that they are to be satisfied beyond reasonable doubt that such evidence has been proved before they reason that the accused is guilty on the basis of it[105]. This is the essential *quid pro quo* for allowing such evidence to be placed before the jury at all. It is mandated by considerations of law but also of basic fairness, considered in the context of an accusatorial trial that still observes rules of particularity as to the offences charged.

84 *Defective direction in OAE*: I agree with Hayne J that, taking their directions as a whole, the trial judges in the cases of HML and SB made it adequately clear that the jury were to apply a criminal standard of proof in deciding whether or not to accept and use the evidence of "uncharged acts" relied on by the prosecution. In each of those cases, this conclusion hinges upon recognising the effectiveness of a generalised definition statement (to the effect that where the trial judge spoke of "proof" he meant to the criminal standard) as colouring later directions specific to the contested evidence. The use of such a statement passes muster (although only just, in my view) in the context of the jury charges given in the trials of HML and SB.

85 Nevertheless, like Debelle J in dissent in the Court of Criminal Appeal, and alike with Hayne J[106] and Gummow J[107], I am of the view that the direction given to the jury in the trial of OAE was inadequate.

86 As Heydon J notes[108], the trial judge in the case of OAE told the jury, towards the beginning of his summing up, that:

> "If, in the course of my summing up, I speak of matters being proved or being established to your satisfaction, or if I use some other expression relating to proof of matters in issue, then you will understand that I shall always mean proof beyond reasonable doubt."

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105 Reasons of Hayne J at [132], [244].

106 Reasons of Hayne J at [245].

107 Reasons of Gummow J at [42].

108 Reasons of Heydon J at [395].

87 However, when the trial judge later turned to address what he described as "the evidence of the uncharged acts", he did not use any of these terms, or any terms analogous, to indicate that satisfaction to the criminal standard, as earlier described, was a prerequisite to making positive use of that evidence. It is true that he warned the jury that "you cannot convict the accused of any count contained in the information simply because you are satisfied that he committed one or more of these uncharged acts". But this was in the context of a negative direction, properly given, against pure propensity reasoning. As Debelle J concluded, when subsequently describing the "permissible use to be made of the uncharged acts", the trial judge made "no reference *of any kind* to the standard of proof of [those] acts"[109].

88 *Contrasting directions in three trials*: A contrast may be drawn with what was said by the respective judges in the trials of HML and SB. In the trial of HML, the judge said "I direct you that you may not act upon the evidence of the uncharged acts *unless and until you are satisfied as to it*" (emphasis added). This expressly picked up an earlier direction to the effect that "if I use words like … 'satisfied' … what I always mean is proved beyond reasonable doubt". Similarly, in the case of SB, the trial judge gave instructions to the jury as to how they could use the "uncharged acts" evidence admitted in that case if they were "satisfied that it is proved, or … satisfied any of the [uncharged] acts referred to in [the complainant's] evidence are proved". The condition thus placed on use of the evidence was clearly referable to the trial judge's earlier statement that "when I use those words ['proved' and 'satisfied'], I mean proof or satisfaction beyond reasonable doubt". No similar link can be drawn between different parts of the trial judge's directions in the case of OAE. I agree with Debelle J, for the reasons that his Honour gave, that subsequent remarks made by the trial judge in connection with a *Longman* warning[110] were inadequate, and indeed inapplicable, to cure this defect[111].

89 *General statements about standard of proof*: Heydon J (with whom Crennan J agrees on this issue[112]) also relies on other general statements made by the trial judge as to the issue of the standard of proof elsewhere in his summing up[113]:

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109 *O, AE* (2007) 172 A Crim R 100 at 108-109 [39] (emphasis added).

110 See *Longman v The Queen* (1989) 168 CLR 79; [1989] HCA 60.

111 *O, AE* (2007) 172 A Crim R 100 at 110 [41].

112 Reasons of Crennan J at [483].

113 Reasons of Heydon J at [395].

> "The trial judge directed the jury about the duty of the prosecution to 'prove the charge and every ingredient of the charge beyond a reasonable doubt'. He also said that an 'accused person cannot be convicted of a crime unless the jury is satisfied of his guilt beyond a reasonable doubt'."

90 In my respectful opinion, it is not a safe assumption that the jury would have taken such generalised directions as those described by Heydon J as indicating anything in particular when it came to the task of evaluating the evidence of the "uncharged acts". The lack of clarity in the trial judge's directions in this connection was compounded by the extreme vagueness of his instruction that the "only legitimate use" of the "uncharged acts" evidence was to "put the charged offences … in their proper context"[114]. Who can say, for instance, whether or not the jury would have taken evidence said to be available for the sole purpose of providing "context" as comprising an "ingredient of [one of] the charge[s]" obliging proof to the criminal standard? If the trial judge intended his initial and general directions on the matter of proof to infuse his later and particular directions on the "uncharged acts", the links made between them were no more than implicit and extremely tenuous. At the very least, they should have been repeated, amplified and made explicit.

91 Heydon J then notes[115]:

> "The trial judge also said: 'You cannot convict the accused unless you are satisfied beyond a reasonable doubt about the truth and accuracy of her evidence.' In this passage he did not limit the 'evidence' of the complainant to that relating to the incidents underlying the counts charged."

92 This proposition, however, is also questionable given that, in the same paragraph of his summing up, the trial judge indicated that "you cannot find [the accused] guilty of a charge unless you are satisfied beyond reasonable doubt that [the complainant] gave a truthful account and an accurate account *in respect of the incident upon which the charge is based*" (emphasis added). This may or may not be regarded as a qualification to the passage quoted by Heydon J. At the very least, it is unclear whether that passage speaks, in any meaningful sense, to the standard of proof with regard to the "uncharged acts". It cannot be assumed that the jury would have discerned any intended connection. To attribute such sophisticated reasoning to a jury is to indulge in an unconvincing fiction. The indeterminacy of the trial judge's later direction on the use of the "uncharged acts" evidence is a further source of difficulty. It leaves entirely ambiguous the degree to which information providing "context" ought to be regarded as integral

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114 cf *O, AE* (2007) 172 A Crim R 100 at 109 [40].

115 Reasons of Heydon J at [395].

to "the incident upon which the charge is based" (and therefore subject to the same standard of proof as other facts founding that charge).

93 *Adequate reservation at OAE's trial*: Finally, Heydon J points to an exchange between trial counsel for OAE and the trial judge, which took place at the conclusion of the summing up, as establishing that counsel considered that a proper direction as to the standard of proof had been given[116]. That exchange, which I will reproduce in full, is recorded in the transcript as follows:

> "[COUNSEL]: … [I]n relation to the uncharged acts I may have missed your Honour's direction as to the standard of proof with respect to those acts. I would submit that the jury would need to be satisfied of the totality of those very vague allegations beyond reasonable doubt before they can use them in any contextual sense.
>
> HIS HONOUR: I disagree."

94 Heydon J would take counsel's request for a direction to the jury that they must be satisfied "*of the totality*" of the uncharged acts beyond reasonable doubt as indicating his satisfaction that the jury had already been instructed that they must be satisfied that the *individual* uncharged acts had been proved to that standard, if they were to use them. However, it is not at all clear that counsel intended those words to colour the entirety of his request. The reference to the "totality" appears to be a request that each and every element of the evidence comprising the "very vague allegations" of uncharged acts should be subject to an express instruction to apply the criminal standard of proof. The natural implication of counsel's statement that he "may have missed" the direction as to the standard of proof was that he had not perceived that such a direction had been given at all, or at least given clearly. Because there was no significant argument on this point, and because the trial judge did not elaborate his reasons for refusing counsel's request, it would be unwise to read too much into the exchange.

95 At this stage, this Court is at risk of relying on trifles to rebuff a point that was adequately reserved before the trial judge. As this Court and intermediate courts know only too well, in the highly charged circumstances of criminal trials, the problem for accused persons is to secure counsel who are vigilant enough to detect a possible error and forward enough to raise it for a ruling by the trial judge. Trial counsel sufficiently did this in the trial of OAE. And in any case, the contestable subjective belief of counsel at the trial is not determinative of whether an error in fact occurred, demanding appellate intervention. Inescapably, the responsibility of deciding that question falls on appellate judges

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116 Reasons of Heydon J at [396].

whose touchstones in criminal appeals are legal accuracy and the prevention of miscarriages of justice.

96 Ensuring the application of the correct standard of proof is fundamental to the proper conduct of a criminal trial. This Court should not encourage directions that invoke that standard only through implicit or indirect formulae linked to generalised statements as to the nature of "proof". Where such formulae are employed, terminological precision is required to ensure, at the very least, that the points at which the generalised definition is being referred to during the course of the summing up are adequately clear. Juries cannot reasonably be expected on their own initiative to make the kind of logical leap that is postulated to redress deficiencies of the kind evident in the directions in the trial of OAE.

97 *Conclusion: a serious omission*: Once it is accepted that the jury, in a case of this kind, are to be instructed that relationship and "contextual" evidence and evidence of uncharged acts, where admitted, must be established to the jury's satisfaction beyond reasonable doubt if it is to be accepted, it is necessary that an appropriate direction be given with clarity. It is dangerous for the instruction to be wrapped up in a general definition of the meaning of "proof". Whilst, in the setting of the entire charge, with some hesitations on my part, that course suffices to save the directions given by the trial judges in the cases of HML and SB, it is not adequate to sustain the directions in the case of OAE. Counsel at trial was correct to perceive and reserve the point. The trial judge erred in failing to clarify his directions.

98 Because what is involved in the directions to the jury concerning OAE is an instruction on the standard of proof to be applied to the evidence, a fundamental matter, this is not an instance, inadequacy of direction being found, in which the "proviso"[117] might be applied. The primary rule in criminal appeals therefore applies. The appeal must be allowed and a retrial of OAE ordered.

Orders

99 In all three appeals, I agree in the orders proposed by Hayne J.

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117 *Criminal Law Consolidation Act* 1935 (SA), s 353(1).

HAYNE J.

The issues

100 An accused is charged with sexual offences against a complainant. Absence of consent is not an element of the offences charged. The complainant can give evidence of other sexual acts directed at the complainant by the accused. First, is that evidence relevant and admissible? Second, if admitted, what directions should the trial judge give about that evidence?

101 The appellants in the first two matters (HML and SB), and the applicant for special leave to appeal in the third matter (OAE), seek to raise both of the questions just identified. The appellants in the first two matters, HML and SB, require leave to amend their grounds of appeal to raise the first question about reception of evidence of other sexual conduct. That leave should be granted in the case of HML, but refused in the case of SB.

Relevance and admissibility

102 It is neither necessary nor desirable to consider questions of the relevance or admissibility of evidence of this kind in a case where the only offence being tried is one in which absence of consent is an issue. What is said in these reasons is directed only to cases in which absence of consent is not an element of an offence being tried.

103 The evidence, in the cases of HML and OAE, of other sexual acts directed at the complainant by the accused, which were not acts the subject of the charges being tried, was relevant. If accepted, that evidence would show that the accused had a sexual interest in the complainant which he had demonstrated by those other acts. Proving that the accused not only had that sexual interest, but had given expression to that interest by those acts, made it more probable that he had committed the charged acts. Proof of the other acts would thus constitute an element in the circumstantial proof of the offences charged.

104 The question of admissibility of the evidence of other sexual acts directed at the complainant by the accused is to be resolved by first recognising that the evidence, if accepted, proves acts of the accused which are not the subject of a charge being tried but which are at least discreditable to the accused. In many cases the evidence, if accepted, would show not just discreditable conduct, it would show the commission of other offences.

105 Because the evidence shows other discreditable conduct, or in many cases the commission of other offences, it is generally inadmissible. The prosecution cannot "adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal

conduct or character to have committed the offence for which he is being tried"[118]. But that rule is not absolute.

106 Admissibility of evidence of other sexual acts directed at the complainant by the accused, which are not acts the subject of charges being tried, is to be determined by applying the test stated in *Pfennig v The Queen*[119]. It is not to be determined by asking whether the evidence in question will put evidence about the charges being tried "in context", or by asking whether it describes or proves the "relationship" between complainant and accused.

107 Evidence of other sexual conduct which would constitute an offence by the accused against the complainant will usually satisfy the test stated in *Pfennig*. It will usually satisfy that test because, in the context of the prosecution case, there will usually be no reasonable view of the evidence, if it is accepted[120], which would be consistent with innocence. That is, there will usually be no reasonable view of the evidence of other sexual conduct which would constitute an offence by the accused against the complainant other than as supporting an inference that the accused is guilty of the offence charged.

108 In *Pfennig*[121], the relevant question is stated as "whether there is a rational view of the evidence that is *consistent* with the innocence of the accused" (emphasis added). Elsewhere, the relevant question has been put negatively – whether there is a rational view of the evidence of other conduct that is *inconsistent* with the guilt of the accused[122]. The test, no matter whether it is stated positively (consistent with innocence) or negatively (inconsistent with guilt), does not require that the evidence of other conduct, without more, *prove* guilt of the charged offence. Rather, as the reference made in *Pfennig*[123] to the remarks of Dawson J in *Sutton v The Queen*[124] demonstrates, the inquiry is

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118 *Makin v Attorney-General for New South Wales* [1894] AC 57 at 65.

119 (1995) 182 CLR 461; [1995] HCA 7.

120 *Phillips v The Queen* (2006) 225 CLR 303 at 323-324 [63]; [2006] HCA 4.

121 (1995) 182 CLR 461 at 483.

122 *Sutton v The Queen* (1984) 152 CLR 528 at 564 per Dawson J; [1984] HCA 5; *R v Vonarx* [1999] 3 VR 618 at 623 [17].

123 (1995) 182 CLR 461 at 483.

124 (1984) 152 CLR 528 at 564. See also *Hoch v The Queen* (1988) 165 CLR 292 at 296; [1988] HCA 50; *Harriman v The Queen* (1989) 167 CLR 590 at 602; [1989] HCA 50.

whether the evidence in question supports an inference that the accused is guilty of the offence charged, and is open to no other, innocent, explanation.

109 In cases of the present kind, evidence of other sexual conduct which would constitute an offence by the accused against the complainant shows that the accused had then demonstrated a sexual interest in the complainant, and had been willing to give effect to that interest by doing those other acts. The strength of the connection between the offences being tried and the other acts will be affected by the temporal proximity of one to the other and the frequency of occurrence of the other acts. Generally speaking, however, there usually will be no reasonable view of other sexual conduct which would constitute an offence by the accused against the complainant, even if it is an isolated incident and temporally remote, which would do other than support an inference that the accused is guilty of the offence being tried.

110 If a comparison between probative value and prejudicial effect must be undertaken, the probative value of evidence tendered to establish other sexual conduct which would constitute an offence by the accused against the complainant would work a disadvantage to the accused. It would work a disadvantage to the accused because it could constitute a step in reasoning towards guilt. But its admission would work no prejudice to the accused over and above what the evidence establishes.

111 Evidence of other conduct which did not constitute any offence, but which it is alleged demonstrated the accused's sexual interest in the complainant (as was the case with HML), may present more difficult issues. It may be harder to decide whether, in the context of the prosecution case, there would be no reasonable view of that evidence consistent with innocence. Deciding whether the evidence, if accepted, demonstrated the accused's sexual interest in the complainant will, in some cases, turn upon the construction put on the conduct in question. That conduct may be equivocal. If interpreting that conduct as showing sexual interest depends upon the prior acceptance of other evidence of separate events demonstrating that interest, evidence of the conduct would not be admissible.

Pfennig v The Queen

112 Because the admissibility of evidence of the kind in question in the present cases is to be determined by applying the test stated in *Pfennig*, it is as well to say something more about that decision and about its application.

113 *Pfennig* establishes the rule that governs the admission of evidence that will reveal an accused person's commission of discreditable acts other than those that are the subject of the charges being tried. The rule takes as its premise that evidence of other discreditable acts of the accused is ordinarily inadmissible. The foundation for the rule excluding evidence of other discreditable acts of an

accused is that, despite judicial instruction to the contrary, there is a risk that the evidence will be used by the jury in ways that give undue weight to the other acts that are proved. That is why the exception to that general rule of exclusion is drawn as narrowly as it is by *Pfennig*. It is why *Pfennig* requires that evidence of other acts may be admitted only if it supports the inference that the accused is guilty of the offence charged, and the evidence of those other acts is open to no other, innocent, explanation. But it also follows from the considerations that have just been mentioned that the exclusionary rule is not to be circumvented by admitting the evidence but directing the jury to confine its uses.

114 There are several points to make about attempts to divide the uses to which evidence of other discreditable acts of an accused may be put. The division suggested may be variously expressed, but its general nature is captured by expressions like "propensity", "disposition", or "tendency" on the one hand, and "context", "explanation", or "intelligibility" on the other. There are at least two reasons not to attempt any such division.

115 First, it may greatly be doubted that a division of uses expressed in those or similar terms will provide any useful guidance to jurors. The meaning and application of the expressions is anything but readily apparent, even to lawyers.

116 Secondly, and more fundamentally, the foundation of the general exclusionary rule is that uses of the evidence cannot be segregated in the manner suggested. The very risk to which the general rule of exclusion is directed is the risk that the evidence will be *misused*. Judicial directions about use of such evidence have not hitherto been seen, and should not now be seen, as solving that problem. The possible uses to which evidence of other acts (which does not meet the *Pfennig* test) may be put are inevitably so intertwined that they cannot be sufficiently disentangled to give useful instructions to the jury. And even if the various uses of such evidence could be disentangled, that would leave unaddressed and unanswered the further difficulty that the jury may attach more significance to the evidence of other acts than they should. That is why the solution that has been adopted for so long by the common law, reflected in this Court's decision in *Pfennig*, is to limit the circumstances in which evidence of other discreditable acts of an accused will be received in evidence.

117 If the evidence of other discreditable acts does not meet the *Pfennig* test, it is not to be admitted. It is unnecessary then to consider any division of uses to which the evidence may be put. And if the evidence of other acts does meet the *Pfennig* test, it is neither necessary nor desirable to attempt a division of uses of the kind described earlier.

118 In deciding the question of admissibility presented by *Pfennig*, the trial judge is not called on to decide whether the evidence which the prosecution intends to adduce does or does not establish the accused's guilt. In most cases, perhaps all, that inquiry could not be undertaken. To ask whether evidence

proves guilt would not be possible because the trial judge will usually be required to decide disputed questions of admissibility before any, or at least all, of the evidence to be called by the prosecution has been adduced. That is why, as the Court pointed out in *Phillips v The Queen*[125],

> "the test [in *Pfennig*] 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*[126]." (emphasis added)

Rather, as the Court went on to say[127] in *Phillips*, *Pfennig* requires 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. And as thus appears from what was said in *Phillips*, the trial judge is not called upon to make some separate or sequential assessment of evidence to be led at the trial in which it is necessary or relevant to ask whether the evidence, with or without the material whose admissibility is being considered, would support a verdict of guilt. Rather, the determinative question is whether there is a reasonable view of *the similar fact evidence* which is consistent with innocence. And as explained earlier, in cases of the kind now under consideration (in which absence of consent is not an issue) there usually will be no reasonable view of other sexual conduct which would constitute an offence by the accused against the complainant which would do other than support an inference that the accused is guilty of the offence being tried.

Jury directions

119 The directions that should be given where a complainant gives evidence of sexually improper conduct, other than the conduct which is the subject of the charges preferred against the accused, will vary from case to case. What follows in these reasons is not put forward as a model direction. It is not expressed in terms that are suitable to that purpose. Not all of the matters mentioned later as appropriate for consideration in framing suitable directions will find express

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125 (2006) 225 CLR 303 at 323-324 [63].

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

127 (2006) 225 CLR 303 at 324 [63].

reflection in what the jury are told. And, of course, there may be additional matters that should be reflected in the directions that are given.

120 Further, and more fundamentally, any suggested forms of direction put forward as "standard" or "model" directions will very likely mislead if their content is not properly moulded to the particular issues that are presented by each particular case. Model directions are necessarily framed at a level of abstraction that divorces the model from the particular facts of, and issues in, any specific trial. That is why such directions must be moulded to take proper account of what has happened in the trial. That moulding will usually require either addition to or subtraction from the model, or both addition and subtraction.

121 The fundamental propositions stated by the Court in *Alford v Magee*[128], which have since been referred to many times[129], must remain the guiding principles. First, the trial judge must decide what are the real issues in the particular case and tell the jury, in the light of the law, what those issues are. Second, the trial judge must explain to the jury so much of the law as they need to know to decide the case and how it applies to the facts of the particular case.

122 Neither purpose is adequately served by the bare recitation of forms of model directions. Not only are the real issues not identified for the jury, no sufficient explanation is given to the jury of how the relevant law applies to the facts of the particular case. But the particular facts and circumstances of these three cases reveal that it may be necessary for trial judges to consider at least the following matters in framing the directions to give to a jury about evidence of other sexual conduct of an accused directed at the complainant but which is not conduct the subject of charges being tried.

123 First, framing appropriate directions self-evidently depends upon how the trial has proceeded. Accordingly, in most cases it will be desirable, before evidence is led, to ask the prosecutor to identify (a) what evidence will be

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128 (1952) 85 CLR 437 at 466; [1952] HCA 3.

129 See, for example, *Libke v The Queen* (2007) 81 ALJR 1309 at 1327-1328 [86]; 235 ALR 517 at 540; [2007] HCA 30; *Clayton v The Queen* (2006) 81 ALJR 439 at 444 [24]; 231 ALR 500 at 506; [2006] HCA 58; *Tully v The Queen* (2006) 230 CLR 234 at 256-257 [75]-[76]; [2006] HCA 56; *Nicholls v The Queen* (2005) 219 CLR 196 at 321-322 [372]; [2005] HCA 1; *Doggett v The Queen* (2001) 208 CLR 343 at 373 [115]; [2001] HCA 46; *KRM v The Queen* (2001) 206 CLR 221 at 259 [114]; [2001] HCA 11; *Azzopardi v The Queen* (2001) 205 CLR 50 at 69 [49]; [2001] HCA 25; *Zoneff v The Queen* (2000) 200 CLR 234 at 256-257 [56]; [2000] HCA 28; *RPS v The Queen* (2000) 199 CLR 620 at 637 [41]; [2000] HCA 3; *Melbourne v The Queen* (1999) 198 CLR 1 at 52-53 [143]; [1999] HCA 32.

adduced which may demonstrate sexual conduct towards the complainant, other than the conduct founding the charges being tried, and (b) how it is alleged the evidence is relevant. It will usually be necessary, and helpful, to have the prosecutor describe each step along the path (or paths) of reasoning from the intended proof of other sexual conduct which it is expected that the prosecutor will submit that the jury may follow. The evidence may be relevant for more than one reason.

124 The kinds of use to which it is possible to put evidence of offences or other discreditable acts other than those being tried are indicated in r 404(b) of the United States Federal Rules of Evidence[130] with its reference to "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident". In 1994, the Federal Rules of Evidence were amended[131] to make special provision[132] governing evidence of similar crimes and similar acts in cases concerning sexual assault and child molestation. It is not necessary to examine those provisions. For the moment it is sufficient to confine attention to r 404(b) as indicating possible kinds of use of evidence of offences or other discreditable acts other than those being tried. It is as well to add, however, that it may be doubted that the list given in the rule is exhaustive[133] and that, in any event, leading American commentators point out that the decision whether to admit the evidence "is not to be made simply by labeling the evidence"[134].

125 As the plurality reasons in *Pfennig* rightly pointed out[135]:

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130 Rule 404(b) provides:

> "Other crimes, wrongs, or acts. — Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial."

131 *Violent Crime Control and Law Enforcement Act* of 1994.

132 rr 413-415.

133 See, for example, Imwinkelried, *Uncharged Misconduct Evidence*, (1984).

134 Wright and Graham, *Federal Practice and Procedure*, (1978), vol 22 at 538 §5249.

135 (1995) 182 CLR 461 at 464-465 per Mason CJ, Deane and Dawson JJ.

> "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 term 'similar fact' evidence is often used in a general but inaccurate sense." (emphasis added)

It is because shorthand terms like "relationship evidence" are inexact, that the purpose or purposes for which it is sought to adduce the evidence will seldom be sufficiently expressed by simply using that or some other shorthand description. It is the identification of each step along the path of reasoning that is necessary and useful.

126 Second, as is often the case in relation to disputed questions of admissibility of evidence at a criminal trial, comparisons between prejudicial effect and probative value may be invited when considering reception of the evidence of sexual conduct other than the offences being tried. In drawing such comparisons, the important consideration is what prejudice, distinct from what the evidence proves, the accused may suffer if the evidence is adduced. In this regard it is important to recall that in cases of the kinds now under consideration the other acts and events which it is sought to prove will seldom be of a kind or quality that is radically different from the conduct which is charged. Further, the evidence of other acts and events will often not have the specificity and particularity of evidence led about the charged acts. This lack of specificity will be unlikely to constitute prejudice to an accused of a kind that outweighs the probative value properly attributed to the evidence of other conduct.

127 If it is submitted that a comparison must be made between the probative value and prejudicial effect of evidence of other conduct it would be rare that the *comparison* will be important in framing directions to the jury, but possible forms of prejudice that are identified, and are distinct from what the evidence proves, may inform consideration of what the jury should be told about use of the evidence.

128 Third, if not by the end of the evidence, then certainly by the end of counsel's addresses, it will be apparent what use the parties have sought to make of the evidence of other sexual conduct. And in any event, the trial judge will then have to decide what are the real issues in the case and what is the law that the jury need to know to decide those issues. Both the relevance of the evidence of other events, as that relevance was identified at the outset of the trial, and any possible forms of prejudice that were said to follow from its admission, will very likely bear upon how the directions should be framed. And proper identification of the real issues in the case may mean that it is unnecessary to give any direction

to the jury about some of the uses to which the evidence might be put (in particular its use in providing the context within which events the subject of charges are said to have occurred).

129 Fourth, in framing directions to the jury about evidence of events of a sexual kind other than those that are the subject of charge it will seldom, if ever, be helpful to speak of "propensity" or "disposition". "Propensity" and "disposition" are words that jurors are not likely to find helpful. And as pointed out in *Pfennig*[136], the evidence of other criminal acts or other discreditable conduct *is* propensity evidence. Further, it will usually be better not to describe the evidence of other events of a sexual kind as evidence of "uncharged acts". "Uncharged acts" suggests that what is described could have been the subject of charges. That may not be right. The conduct described may not be criminal; the description of the conduct may not be sufficiently specific to found a charge. Describing the events as "uncharged acts" may invite speculation about why no charges were laid.

130 Fifth, the jury must be told to consider separately each charge preferred against the accused. The jury must be told to consider all of the evidence that is relevant to the charge under consideration. The jury must be told that they may find some evidence of a witness persuasive and other evidence not. And the jury must be told, therefore, that they must consider all of the evidence that the complainant gave and, if the accused gave evidence, all of his or her evidence, but that, like the evidence of every witness, they may accept or reject parts of the evidence each gave.

131 Sixth, it may be appropriate, in some cases, to tell the jury that they do not have to decide whether the other sexual conduct occurred. That is, it may be appropriate to tell the jury that they may be persuaded of the accused's guilt of one or more charges even if they are unable to decide, or do not find it necessary to consider, whether any of that conduct occurred. Conversely, if they are persuaded that the other conduct did occur they may entertain a reasonable doubt of guilt in respect of any of the charges.

132 Seventh, the directions about how the evidence may be used by the jury will reflect not only what uses the parties have sought to make of it in argument, but also the legal basis for its admission. The evidence of other acts is admissible if it meets the test in *Pfennig*. That being so, it will be necessary to tell the jury that if, on all the evidence, they are persuaded beyond reasonable doubt that some or all of the other acts did occur, that conclusion may help them in deciding whether the charge under consideration is established. It may help them because showing that the accused had acted in that sexual way towards the

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136 (1995) 182 CLR 461 at 464-465.

complainant on one or more other occasions may show that the accused had demonstrated that he had a sexual interest in the complainant and had been willing to give effect to that interest by doing those other acts. If persuaded of those facts, the jury may think that it is more likely that the accused did what is alleged in the charge under consideration.

133 But whether any of the other events happened, and if any did, whether their occurrence makes it more likely that, on a different occasion, the accused did what he is charged with doing, are matters for the jury. And even if the other events did happen, the conclusion that the accused did what is charged is not inevitable. The jury must always decide whether, having regard to all the evidence, they are persuaded beyond reasonable doubt that the charge they are considering has been proved.

HML v The Queen

134 HML was charged in the District Court of South Australia with two counts of unlawful sexual intercourse with a person under 12 years contrary to what was then s 49(1) of the *Criminal Law Consolidation Act* 1935 (SA). The offences were alleged to have occurred between 27 September 1999 and 4 October 1999 at Adelaide and in the one case were said to be constituted by causing the complainant to perform an act of fellatio upon him and in the other by inserting his penis into her anus. At the time of the alleged offences the complainant was aged about nine. She was 15 at the time of the appellant's trial.

135 The complainant was the appellant's daughter, but the relationship between complainant and appellant was not an element of the offences charged against him. The complainant's parents were separated from the time she was a baby. At the times material to the present matter the appellant lived in Victoria and the complainant lived in South Australia but visited the appellant from time to time. The offences were alleged to have taken place in an Adelaide hotel. The complainant had travelled to Adelaide with the appellant when the appellant went to Adelaide in connection with some surgery.

136 On the prosecution case the offences charged were part of a long course of conduct by the appellant that started when the complainant was about seven years of age and finished when she was about 12. Many of the events which the complainant described in evidence occurred in Victoria and were not (and could not have been) the subject of prosecution in the courts of South Australia. Although Victoria Police investigated the complainant's allegations of offences committed in Victoria, charges were not brought against the appellant in that State.

137 At trial, the appellant was convicted on both counts. By leave, he appealed to the Full Court of the Supreme Court of South Australia against the convictions. A number of grounds were advanced. The principal focus of his

appeal to the Full Court was that, at trial, he should have been permitted to adduce evidence that he had not been charged with offences in Victoria. The Full Court (Nyland, Vanstone and White JJ) dismissed[137] his appeal.

138 By special leave, the appellant appealed to this Court. He maintained his contention that he should have been permitted to adduce evidence that no charges had been laid in Victoria and he alleged that the trial judge's directions given about police investigations into events in Victoria were inadequate. He further alleged that the Full Court should have held that the directions given by the trial judge "as to the use to which the jury could and could not use the uncharged acts were inadequate". In the course of the hearing of the appeal to this Court he sought leave to add additional grounds of appeal alleging that "the evidence of the uncharged acts" was inadmissible. The application for leave to amend was not opposed. It should be granted.

139 It is convenient to deal first with the questions about admission of "the evidence of the uncharged acts" and to begin with the procedures that were followed in deciding its admissibility.

Evidence of other sexual conduct

140 Section 285A of the *Criminal Law Consolidation Act* permits a court before which a person has been arraigned, if it thinks fit, to hear and determine "any question relating to the admissibility of evidence, and any other question of law affecting the conduct of the trial, before the jury is empanelled". The relevant Rules of the District Court[138] required the giving of notice of objections to evidence that it was expected that the prosecution would lead and the appellant gave notice that he would object to evidence of uncharged acts.

141 There was, therefore, argument before the jury was empanelled about the admissibility of evidence which the complainant's statements to police indicated she could give about other conduct of the appellant, of a sexual kind, directed towards her. There was no voir dire in relation to this evidence. Argument proceeded by reference only to the complainant's written statements to police.

142 After hearing argument, the trial judge ruled that "the evidence can be led". No reasons were given for the ruling. It is necessary, therefore, to say something more about the parties' arguments.

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137 *R v H, ML* [2006] SASC 240.

138 District Court (Criminal and Miscellaneous) Rules 1992, r 9.01.

143 Trial counsel for the prosecution began her submissions by accepting that it was "difficult to follow" what the complainant was alleging had happened, and when it had happened. In part, perhaps in large part, this was because the complainant's statements appear to have exhibited uncertainty about when various events occurred. So, for example, one of her statements described an incident where the appellant got into the shower with her and rubbed his penis against her body, but the complainant said of that incident that she did not remember "when this was or how old I was". Yet it was plain that the complainant would, if permitted, give evidence to the effect that "most of the time" when she stayed with her father in Victoria "he would finger me, stick his tongue in my mouth, [and] sometimes when he was fingering me he would try and stick his penis in my bum".

A single body of material?

144 At the pre-trial hearing, the proposed evidence of other events was treated as a single body of material about "uncharged acts" which either was all to be admitted or was all to be rejected. This treatment of the matter leads to some difficulty in deciding the ambit of the objection. In particular, it is not clear whether the objection extended to evidence of all forms of sexual conduct allegedly directed at the complainant, regardless of whether that conduct would have constituted an offence. It will be necessary to return to this question.

145 In other respects, treating the evidence of other conduct as a single body of material reflects the great practical difficulty that there may be in dividing that evidence into separate parts. The difficulty stems from the fact that the charged incidents necessarily take their place against a background formed by all of the sexual conduct of the accused towards the complainant. So, for example, in the present case, the complainant's evidence about the first count charged (the count alleging fellatio) was that she asked her father whether she could go shopping in Adelaide, that he had replied by saying that she could if she sucked his penis, and that she had complied. Her evidence about the second count (alleging anal penetration) was that the appellant had said immediately after the incident: "Why isn't it working? It's worked before." This evidence about the charged acts would probably have made little sense without reference to what had gone before. But it shows how difficult it may be to cut up an account of events of this kind and confine evidence to particular charged incidents.

146 That difficulty was not explored in the courts below. The assumption which underpinned the pre-trial argument about admissibility was that the evidence of "uncharged acts" (as a whole) could be separated from the complainant's evidence about the matters charged.

Bases for admission at trial

147 Trial counsel for the prosecution submitted that there were several bases upon which the evidence of "uncharged acts" was relevant and admissible. Four were identified.

148 First, it was said that the continuing course of conduct created the context in which the alleged offences occurred and that, without evidence of that context, "the jury would be left thinking what occurred in Adelaide just occurred out of the blue". The second basis was said to be that from the evidence the jury might conclude that the appellant was confident enough to offend against the complainant in the manner in which it was alleged he had in Adelaide and that it would explain why the complainant "simply ... submitted to that particular conduct". Thirdly, it was said that the evidence of uncharged acts before and after the events charged was capable of demonstrating that the appellant "was someone who had a sexual attraction for the complainant". Trial counsel for the prosecution submitted that this was different from "propensity-type reasoning" but that it did "tend to provide an explanation as to why it is that the offending in Adelaide may have occurred". Finally, trial counsel for the prosecution submitted that the evidence might explain why it was that the complainant did not make a complaint immediately about the offending which had taken place in Adelaide.

149 Trial counsel for the appellant submitted that the evidence of other events was unnecessary for any of the purposes identified by trial counsel for the prosecution. But those submissions, though elaborated, did not distinctly deny the relevance of the evidence. Instead, emphasis was given to the imprecision of the proposed evidence.

150 The course of argument about the admissibility of evidence about the appellant's other sexual conduct towards the complainant is explained by reference to what had been held by the Full Court of the Supreme Court of South Australia in *R v Nieterink*[139]. In that case, Doyle CJ, with whose opinion the other members of the Court agreed, said[140] that the evidence of "uncharged acts" in issue in that case was admissible on a number of bases:

> "First, it could explain how the first charged incident came about, because it showed what might be called a lead up to the first charged incident. It could also explain the lack of surprise on the part of [the complainant]. It could explain the confidence that the appellant might have had in

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139 (1999) 76 SASR 56.

140 (1999) 76 SASR 56 at 72 [76].

> repeating his conduct when committing each of the alleged offences. The submission of [the complainant] to him over a period of time would give him confidence that she would submit again. It might help to explain the fact that [the complainant] did not complain to her mother. The evidence could also establish a sexual attraction by the appellant towards [the complainant]."

It is evident that trial counsel for the prosecution in the present matter adopted the analysis reflected in this part of the reasons of Doyle CJ in *Nieterink* as founding admission of the disputed parts of the complainant's evidence. It will be necessary to return to that analysis.

The prosecution case

151 The evidence having been ruled admissible, trial counsel for the prosecution opened the case to the jury indicating that it was the prosecution case that "what happened in Adelaide was not just a one-off incident but that the [appellant] had in fact been engaged in a course of sexually inappropriate behaviour with respect to [the complainant] for a number of years, which took place both before and after that particular trip". Trial counsel for the prosecution concluded her opening by telling the jury what use she submitted could be made of the evidence of the other events of which the complainant would give evidence. As she had indicated in the course of the pre-trial hearing about admissibility of the evidence, four uses of the evidence were proposed: context, confidence to offend, sexual attraction, and explanation for delay in complaint.

152 In examination-in-chief, the complainant was asked whether, before she went to Adelaide, and while staying with the appellant in Victoria, he had behaved in any inappropriate way towards her or in a way that made her feel uncomfortable. She gave evidence of his walking around the house naked, of his kissing her goodnight and trying to "stick his tongue in my mouth" and of his "regularly" getting into bed with her in the morning and digitally penetrating her vagina. She also gave evidence of his asking her to take her clothes off and do cartwheels while he filmed her.

153 Counsel for the prosecution then asked the complainant some questions about g-string underwear. The complainant said that the appellant had bought her this underwear without her asking him to do so. In his evidence, the appellant did not dispute that he had bought the items, but he said that he had done so at the complainant's request. Both at trial and in this Court, a deal of emphasis was given to the complainant's evidence about these items. It was submitted that the evidence, if accepted by the jury, showed that the appellant had a sexual interest in his daughter. Giving these items to the complainant was not unlawful. It was not an "uncharged act" if that expression is understood as referring only to other conduct which, if proved, would constitute an offence.

154 Argument in this Court proceeded on the premise that the pre-trial objection to evidence of uncharged acts extended to the evidence about underwear. Neither the transcript of the pre-trial argument nor the notice of objection to evidence made specific reference to this subject. Taken as a whole, the record of the proceedings at trial was consistent with the evidence having been adduced without objection. It is nonetheless useful to consider its relevance and admissibility in the course of considering those questions more generally.

The relevance of other sexual conduct

155 It is essential to examine the question of relevance separately from the question of admissibility. Usually, the relevance of the evidence is readily demonstrated. Evidence showing that an accused had a sexual interest in the complainant is relevant at the trial of that accused for committing sexual offences against that complainant because it rationally affects the probability of the existence of a fact in issue[141], namely, whether the charged acts occurred.

156 Evidence that shows the accused had a sexual interest in the complainant may also be important in assessing the credibility and coherence of the complainant's evidence generally and, in particular, the account of the events that constitute the offences charged. But the relevance of the evidence of other sexual conduct or events lies in its proof of demonstrated sexual interest in the complainant. The relevance of such evidence in a particular case may or may not be sufficiently captured by describing it as evidence about the nature of the relationship between the complainant and the accused. To describe the evidence as "relationship evidence" or evidence of "guilty passion" is to assert the relevance of the evidence.

157 Although the conclusion about relevance is a conclusion of fact, it is important to expose the steps in reasoning which show the relevance of the evidence. The other conduct described by the complainant in this matter might be divided into three – committing other sexual assaults on her, filming her, and buying the particular style of underwear. All these forms of conduct were tendered to show the expression of a sexual interest of the appellant in the complainant. That interest was said to have been demonstrated by translation of that interest into action, in some cases sexual acts of the kind which constituted the offences being tried.

158 Demonstrating the appellant's sexual interest in the complainant would demonstrate his motive to act as the charges being tried alleged he had acted. Demonstrating that he had done acts of the kind charged on other occasions

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141 *Martin v Osborne* (1936) 55 CLR 367 at 375-376 per Dixon J; [1936] HCA 23; cf *Evidence Act* 1995 (Cth), s 55.

would make it more likely that he did the charged acts. The extent to which the conduct was repeated, and the temporal proximity of the other conduct to a charged act, would bear upon the probability of the occurrence of that charged act.

159 The evidence was relevant. Was it admissible?

Admissibility

160 The proposition for which *Makin v Attorney-General for New South Wales*[142] has so often been quoted, that evidence "merely" demonstrating disposition to crime is inadmissible, points strongly against the utility of argument about admissibility from a premise that has assigned one of the expressions "propensity" or "disposition" to the evidence in issue, without giving the closest attention to the meaning assigned to those words. In particular, as this Court's decision in *Pfennig* demonstrates, the use of these expressions must not be allowed to set up false dichotomies between evidence that establishes disposition or propensity and evidence that has some other use. Often evidence will not only reveal a disposition to commit criminal or other discreditable acts but also have other uses at trial. That is why, as Julius Stone pointed out 70 years ago[143], the relevant root principles are more likely to be found in comparisons of probative value and prejudicial effect than they are in the attribution of labels like "propensity" or "disposition". But whether or not that is right, identifying evidence as showing "propensity" or "disposition" does not conclude an inquiry about the admissibility of that evidence.

161 Understood as the expression of sexual interest in the complainant, all of the evidence of other conduct towards the complainant was discreditable to the appellant. Some of the acts that were not unlawful (such as buying the underwear) may or may not attract less opprobrium than conduct which would constitute an offence. But all of the conduct, whether it showed no more than the expression of sexual interest, or went further and demonstrated a willingness to use the complainant as the object of gratification of that interest, was evidence discreditable of the appellant. It was discreditable because of their relationship as parent and child.

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142 [1894] AC 57.

143 "The Rule of Exclusion of Similar Fact Evidence: America", (1938) 51 *Harvard Law Review* 988. See also Stone, "The Rule of Exclusion of Similar Fact Evidence: England", (1933) 46 *Harvard Law Review* 954.

162 Because the evidence showed the commission of offences by the appellant or other discreditable acts on his part, its admissibility was to be determined by applying the test in *Pfennig*.

163 Until now there may have remained some uncertainty about what test should be applied to decide the admissibility of evidence of other sexual acts or events directed by an accused to a complainant. The nature and extent of that uncertainty can be indicated by comparing the decision of the Full Court of the Supreme Court of South Australia in *Nieterink* with the decision of the Court of Appeal of Victoria in *R v Vonarx*[144]. The focus of debate in *Nieterink* was upon the several uses which have been identified earlier in these reasons as uses to which the evidence of other sexual conduct could be put: context, confidence to offend, sexual attraction, and explanation for delay in complaint. Because the evidence could be used in these various ways, it was held in *Nieterink*[145] that the evidence was admissible even if it did not meet the test stated in *Pfennig*.

164 Three of the four uses identified in *Nieterink* as permissible uses of the evidence (context, confidence to offend, and explanation for delay in complaint) take their chief significance from their use in assessing the coherence and credibility of the complainant's evidence. If those were the only uses to which the evidence could be put, it may be doubted that it would be admissible. Each of these three uses, if they were the only uses to which the evidence could be put, might be said to deal only with collateral issues that should not be explored at trial[146]. But as was recognised in *Nieterink*[147], the fourth identified use (proof of sexual attraction) could provide a step in reasoning towards guilt. And that is why, in *Nieterink*, it was held[148] that "to the extent that the evidence of uncharged acts were circumstantial evidence explaining [the complainant's] conduct, and the circumstances of the offences, proof beyond reasonable doubt was not required" but that, if used as proof of sexual attraction, proof to that standard was required.

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144 [1999] 3 VR 618.

145 (1999) 76 SASR 56 at 66 [48]-[49].

146 *Attorney-General v Hitchcock* (1847) 1 Ex 91 at 105-106 per Rolfe B [154 ER 38 at 44-45].

147 (1999) 76 SASR 56 at 72-73 [83].

148 (1999) 76 SASR 56 at 72-73 [83].

165 By contrast, in *Vonarx* it was held[149] that the evidence of other sexual acts was led "for the purpose of proving an improper sexual relationship or guilty passion which existed between the accused and the victim, *tending to make it more likely that the offence charged in the indictment was in fact committed*" (emphasis added). And admission of the evidence for this use was seen in *Vonarx*[150] as consistent with the proper application of the test in *Pfennig*.

166 Subsequently, in *KRM v The Queen*, McHugh J examined[151] these issues in some detail and concluded[152] that "[u]ntil this Court decides to the contrary, courts in this country should treat evidence of uncharged sexual conduct as admissible to explain the nature of the relationship between the complainant and the accused".

167 If there has been uncertainty about what test should be applied in determining whether evidence of other sexual conduct or events should be admitted, the uncertainty may have stemmed from a failure to differentiate sufficiently between questions of relevance and admissibility, and from using shorthand terms like "relationship", "guilty passion", "propensity" and "disposition" in ways that obscure more than they illuminate. It is not profitable, however, to examine further the extent or causes of that uncertainty.

168 In considering questions of admissibility of the evidence of other conduct, it is important to recall that several counts of sexual offences against the one complainant may be joined in a single information or indictment and tried together. The charges are joined, and the information or indictment is not severed, because proof of the accused's commission of a sexual offence against the complainant on one occasion, may make it more likely that the accused committed another similar sexual offence against that complainant which is charged in the one information or indictment[153]. Evidence of commission of one offence is relevant to and admissible in the trial of the other similar offence

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149 [1999] 3 VR 618 at 622 [13]. See also *R v Pearce* [1999] 3 VR 287 at 297-298 [30]; *R v Loguancio* (2000) 1 VR 235 at 239-240 [12]; *R v BJC* (2005) 13 VR 407 at 415-418 [21]-[28].

150 [1999] 3 VR 618 at 622-623 [11]-[17].

151 (2001) 206 CLR 221 at 230-233 [24]-[31].

152 (2001) 206 CLR 221 at 233 [31].

153 *Sutton v The Queen* (1984) 152 CLR 528; *De Jesus v The Queen* (1986) 61 ALJR 1; 68 ALR 1; [1986] HCA 65.

charged. Together, the offences charged constitute "a series of offences of the same or a similar character"[154].

169 In the end, however, the admissibility of the evidence of sexual conduct other than that charged turns on the fact that the evidence shows conduct other than the charges being tried, that is illegal, or at least discreditable to the accused. It is because the evidence reveals illegal or discreditable conduct of the accused on occasions *other* than those giving rise to the charges, and is tendered, at least in part, as proof of a step in reasoning towards guilt, that the question of its admissibility is to be resolved by applying the test stated in *Pfennig*[155].

170 As was noted in the reasons of the plurality in that case[156]:

> "Propensity evidence (including evidence of bad disposition and prior criminality) has always been treated as evidence which has or is likely to have a prejudicial effect in the sense explained."

That is, evidence of criminal or discreditable conduct other than that charged may have an undue impact, adverse to the accused, on the minds of the jury over and above the impact that it may be expected to have if consideration were confined to its probative force[157]. And thus the plurality said[158] that a trial judge, considering the admissibility of such evidence,

> "must recognise 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)

But as pointed out in *Phillips v The Queen*[159], due weight must be given to the necessity to view the similar fact evidence in the context of the prosecution case,

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154 *Criminal Law Consolidation Act* 1935 (SA), Sched 3, r 3.

155 (1995) 182 CLR 461.

156 (1995) 182 CLR 461 at 488 per Mason CJ, Deane and Dawson JJ.

157 (1995) 182 CLR 461 at 487-488.

158 (1995) 182 CLR 461 at 485.

159 (2006) 225 CLR 303 at 323-324 [63].

and the test of admissibility of that evidence must be applied by the trial judge on certain assumptions. In particular, when considering admissibility, 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.

Applying *Pfennig*

171 When such a test is applied to evidence of sexual *offences* committed by an accused against the complainant (other than the offences being tried) the test stated in *Pfennig* will usually, if not invariably, be satisfied. Seldom, if ever, would evidence of the commission of generally similar sexual offences *against the complainant* other than those charged, when viewed in the context of the prosecution case, be consistent with innocence. Or, as the plurality reasons in *Pfennig* put the same point[160] (by reference to *Hoch v The Queen*[161]), "the objective improbability of its [the evidence in question] having some innocent explanation is such that there is no reasonable view of it *other than as supporting an inference that the accused is guilty of the offence charged*" (emphasis added). If the language of propensity or disposition is to be adopted, it is "evidence of a particular distinctive propensity demonstrated by acts constituting particular manifestations or exemplifications of it"[162] which is directly connected with the issues for decision in the instant case. It has that "specific connexion with or relation to the issues for decision in the subject case"[163] because it shows the accused's willingness to use the complainant as the object of gratification of a sexual interest or attraction that is directed at the complainant.

172 Applying the test stated in *Pfennig* to evidence of acts which do *not* constitute sexual offences, but are alleged to disclose the accused's sexual interest in the complainant, may be more difficult. The difficulty lies in deciding whether, and to what extent, the evidence does disclose sexual interest. The evidence tendered in this case about the appellant filming the complainant and buying a particular kind of underwear for her reveals at least some of the issues that will require examination in connection with evidence of that kind.

173 Even if it is assumed that filming the complainant in the circumstances she described constituted no offence, the event, as the complainant described it, had

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160 (1995) 182 CLR 461 at 481-482.

161 (1988) 165 CLR 292 at 294-295 per Mason CJ, Wilson and Gaudron JJ.

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

163 *Pfennig* (1995) 182 CLR 461 at 483 per Mason CJ, Deane and Dawson JJ.

such sexual overtones as to admit only of the conclusion that it demonstrated the appellant's sexual interest in her. By contrast, the evidence about the underwear was equivocal.

174 At least in hindsight, the complainant saw the appellant's purchase of the underwear as demonstrating sexual interest in her. That view of the event was consistent with the complainant's account of the appellant's conduct generally. The evidence about the purchase of the underwear did not stand alone in the case. Its admissibility was to be judged in the context of the prosecution case and to be judged without knowing what explanation or answer the appellant would make to the evidence. The prosecution case was that the purchase was an objectively verifiable event which revealed sexual interest. (It was objectively verifiable in the sense that a photograph had been taken of two of the three items that were said to have been bought and the photograph was tendered in evidence.) In the context of the prosecution case, *if* the evidence bore the interpretation asserted, it was a step in proving that the appellant had committed the offences charged. But that step depended upon the interpretation given to the evidence of purchase and gift. And on the complainant's account of the event (an unsolicited gift following her inquiry about what the garments were) it would be open to the jury to interpret it as evidence of sexual interest.

175 But that conclusion was not inevitable. It was not inevitable because the evidence revealed nothing more having been said about or done with the items. The evidence was, therefore, equivocal and the resolution of the equivocation necessarily depended upon proof of the other events described by the complainant. Evidence of the purchase of underwear, though relevant, was not admissible in proof of the appellant's sexual interest in the complainant.

176 No objection having been made at trial to the reception of the evidence, presumably on the basis that it would provide a context for the complainant's account of events, there was no ruling about its admissibility. There was no wrong decision in this respect of a point of law at trial. In this appeal the question that then arises in relation to the evidence about the gift of underwear is confined to the sufficiency of the trial judge's directions about using this evidence and the other evidence of sexual conduct and events other than those charged.

Gipp v The Queen

177 The conclusions reached about the application of *Pfennig* to evidence of the kind in issue in this matter do not accord with the views expressed by

Gaudron J in *Gipp v The Queen*[164]. In that case, Gaudron J concluded[165] that general evidence of sexual abuse of the complainant on occasions other than those charged did not have "that special probative value which renders evidence admissible as 'similar fact' or 'propensity' evidence" and suggested[166] that evidence of sexual abuse on other occasions to explain lack of surprise or failure to complain was admissible only if the defence made either an issue in the case. It is necessary to deal with each of these points.

178 First, the "special probative value", which renders admissible the evidence of other sexual conduct which, if proved, would constitute one or more offences committed by the accused against the complainant, lies in the identity of parties. The central question in the trial is whether the accused committed the charged sexual act or acts. Questions of consent do not arise because absence of consent is not an element of the offence or offences. If accepted, the evidence of other sexual acts would show the commission of other generally similar offences. But if accepted, the evidence would demonstrate that *this* accused had used *this* complainant as the object of sexual gratification. It is the particularity of that conclusion which gives the evidence its "special probative value".

179 Secondly, treating evidence of other sexual conduct or events as relating to a lack of surprise or failure to complain, and admissible only if the defence expressly raises such an issue, would inevitably lead to the fragmentation of a complainant's evidence. A complainant could give any evidence of other sexual conduct or events only after the accused had cross-examined in a way that raised the issue. Such fragmentation of the evidence would be very undesirable. But it is necessary to recognise and give due weight to more fundamental considerations about circumstantial proof.

Context, completeness, circumstantial proof

180 A complainant's evidence of what happened on a particular occasion will often make little sense (or at least convey a very different picture) if evidence of the occasion in question is not set in its proper factual context. In cases where the complainant and accused are related by blood or marriage, it is not to be doubted that evidence of that relationship is relevant and admissible. It is relevant because it provides an important part of the context within which the events are said to have occurred, and without which the complainant's evidence

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164 (1998) 194 CLR 106 at 112-113 [11]-[12]; [1998] HCA 21; cf *KRM v The Queen* (2001) 206 CLR 221 at 231-233 [27]-[31] per McHugh J.

165 (1998) 194 CLR 106 at 112 [11].

166 (1998) 194 CLR 106 at 113 [12].

would be incomplete. And at least in cases where the complainant alleges that the accused sexually assaulted the complainant before the events giving rise to the charges, the account of what happened on the charged occasions would be incomplete without relating what had gone before.

181 But describing the evidence of other events as simply providing a factual "context" for, or "completing", the complainant's evidence about events that are charged may suggest that the evidence of other events lies only at the fringes of relevance, or that it is admitted as some exception to evidentiary rules that seek to limit the agitation of collateral issues[167]. That is not right. The evidence of other conduct and events is tendered as circumstantial evidence of the kind described by Dixon J in *Martin v Osborne*[168]. That is, "[t]he circumstances which may be taken into account in this process of reasoning include all facts and matters which form constituent parts or ingredients of the transaction itself or explain or make intelligible the course of conduct pursued"[169]. And it is *because* it is circumstantial evidence of that kind that the test in *Pfennig* is to be applied. The evidence of other events and conduct is tendered in proof of the *charged* acts.

Circularity

182 The appellant submitted that to use the complainant's evidence of conduct, other than the conduct that was charged, as evidence of the appellant's sexual attraction towards the complainant would "inappropriately [elevate] one part of the complainant's testimony in support of an inference of guilt when that part has no higher status [than] the other evidence it seeks to prove true". There was, so it was submitted, "a circular reliability" in which the evidence of other acts "relies on itself for support, and on nothing else".

183 It is right to observe that the evidence of the offences charged and the evidence of the appellant's other conduct all came from the complainant. It by no means follows, however, that the jury are invited to adopt circular reasoning. The jury must be told that they may accept parts of a witness's evidence and reject other parts. Some evidence of a witness may be found to be inaccurate because it is exaggerated; other evidence of the same witness may be found not to suffer from that or any other relevant defect.

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167 *Attorney-General v Hitchcock* (1847) 1 Ex 91 at 105-106 per Rolfe B [154 ER 38 at 44-45].

168 (1936) 55 CLR 367 at 375.

169 (1936) 55 CLR 367 at 375.

184 It was not essential for the jury to be persuaded of the complainant's account of other events before accepting her account of the events charged. It may well be that rejecting the account of other events would be regarded as putting in doubt the reliability of the account of the charged events. But that is a question for the jury to decide. Neither the existence of this possible differentiation between parts of the complainant's evidence nor the prosecution's invitation to accept the whole of her evidence bears upon either the relevance or admissibility of the evidence.

A relevant statutory provision?

185 In the course of the oral argument of the appeal to this Court, reference was made to s 34I of the *Evidence Act* 1929 (SA). That section provided, so far as now relevant, that:

> "(1) In proceedings in which a person is charged with a sexual offence, no question shall be asked or evidence admitted—
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> ...
>
> *(b)* except with the leave of the judge, as to the alleged victim's sexual activities before or after the events of and surrounding the alleged offence (other than recent sexual activities with the accused).
>
> (2) In deciding whether leave should be granted under subsection (1)*(b)*, the judge shall give effect to the principle that alleged victims of sexual offences should not be subjected to unnecessary distress, humiliation or embarrassment through the asking of questions or admission of evidence of the kind referred to in that subsection and shall not grant leave unless satisfied that the evidence in respect of which leave is sought—
>
> *(a)* is of substantial probative value;
>
> ...
>
> and that its admission is required in the interests of justice."

186 No reference was made to this section in the proceedings at first instance, or on appeal to the Full Court. There having been no objection at trial to reception of the complainant's evidence of other sexual acts by the appellant, on the basis that this section was engaged, it is now too late to raise the matter as a ground of appeal and the appellant did not seek to do so.

187 It is, therefore, not necessary to decide whether s 34I may be engaged in relation to evidence of the kind in issue in this appeal. It may be observed,

however, that if that provision is engaged, satisfaction of the test in *Pfennig* would likely provide a basis for concluding that the evidence of other sexual acts "is of substantial probative value" (s 34I(2)*(a)*) and that to ask the complainant about those acts would not subject him or her to *unnecessary* distress, humiliation or embarrassment.

No charges in Victoria?

188 For the reasons given earlier, apart from the evidence about the underwear, the complainant's evidence of other sexual conduct towards her was relevant and admissible in proof of the charged offences. Much of that evidence related to events in Victoria. And evidence was given at trial by a Detective Senior Constable of Victoria Police who had investigated those events of an interview he had conducted with the appellant.

189 During the pre-trial hearing about admissibility of evidence, trial counsel for the appellant had submitted to the trial judge that he should be permitted to ask the Victoria Police officer whether charges had been laid in Victoria and elicit evidence that no charges had been laid. The trial judge ruled that that evidence, if given, would not be relevant and that to ask the question would encourage the jury to speculate. The appellant submitted, in this Court, that the trial judge's ruling was the wrong decision of a question of law.

190 Evidence that no charges had been laid in Victoria was not relevant to any issue in the case. If given, that evidence made it neither more nor less probable that the Victorian events described by the complainant had occurred. As the trial judge's reference to speculation suggests, significance could be attached to the absence of charges only if it was known why charges had not been laid. A collateral inquiry of that kind was irrelevant.

Jury directions

191 The appellant's complaints in this Court about the directions given at trial centred upon two distinct aspects of the directions: first, what the jury were told about conduct in Victoria that had been investigated by Victoria Police; and, secondly, the directions given about the uses to which evidence of other sexual conduct could be put.

192 The trial judge told the jury that the prosecution case depended entirely upon the evidence of the complainant and that there was no other evidence to support her evidence. Accordingly, he told the jury to "examine her evidence with careful scrutiny". Having described the evidence of "the sexual activity which is alleged by [the complainant], but which is not the subject of any separate counts on the information", the trial judge told the jury that all of those acts were said to have occurred in Victoria. His Honour went on to say that the

jury knew "that these Victorian offences were investigated, but you do not know the outcome of that investigation" and that:

> "You must not speculate about what that outcome may have been. Whatever may have occurred in Victoria, if, indeed, anything did, cannot in any way help you here. You must decide this matter on the evidence which you have heard and seen in this courtroom during this trial. Nothing from outside it may be used to decide if the onus of proof has been discharged. Any such information is not relevant, as it cannot be helpful to you in that task."

The appellant contended, in this Court, that this direction was inadequate. That contention should be rejected. Once it was decided (correctly) that evidence showing that no charges had been laid in Victoria was irrelevant, there was nothing more that could be said to the jury than was said here.

Jury directions – other sexual events – standard of proof

193 The trial judge went on to discuss the evidence of other sexual events in a way which reflected what trial counsel for the prosecution had said to the jury about that subject when opening the case. And as pointed out earlier, that treatment of the subject owed much to what had been said in *Nieterink*[170]. Thus the trial judge told the jury that the evidence was led by the prosecution "so that you may have an understanding of what is said to have been the relationship between the accused and [the complainant] when the visit to Adelaide was undertaken"; that "[t]he further use of the evidence" was that it may show why it was that the appellant "was confident enough to ask for oral sex and then to penetrate [the complainant] in Adelaide"; that it may also show "why she acquiesced in Adelaide"; that it may also indicate that "both before and after the visit to Adelaide the [appellant] had an ongoing sexual attraction to [the complainant] and sought gratification for that attraction by his conduct"; and finally "that this inappropriate behaviour continued late into 2002 may go some way to explain why there was no earlier complaint". The trial judge then said:

> "I direct you that you may not act upon the evidence of the uncharged acts unless and until you are satisfied as to it. Only then, if so satisfied of the truth of it, or of any part of it, may you use that evidence of which you are so satisfied when you consider the credibility of [the complainant] in relation to each count on the information and whether you are satisfied beyond reasonable doubt that either or both of them occurred.

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170 (1999) 76 SASR 56 at 72 [76].

> I must also tell you how you cannot use this evidence. You must not use this evidence, if you are satisfied about it, or any part of it, to reason that because of it the [appellant] is the type of person likely to have committed these offences. To so reason would be wrong and you must not do it. The fact that allegations are made about a number of occasions does not absolve you from the task of determining whether the charges themselves are made out.
>
> If you accept any of the evidence concerning the uncharged acts you may use that evidence when you consider [the complainant's] evidence as to the charges on the information and whether you are prepared to accept that evidence or any part of it."

194 The appellant submitted that the directions just set out (the "other sexual conduct directions") were inadequate because the jury were not told what degree of satisfaction had to be reached. But at an earlier point in his directions the trial judge had said to the jury that:

> "If, in what I am about to say to you, I speak of matters being proved to your satisfaction, or if I use words like 'proved' or 'satisfied' or 'established' or 'accepted' or any other sort of word, what I always mean is proved beyond reasonable doubt."

Given that this particular instruction was given as part of the general directions given to the jury about burden and standard of proof there is no basis for thinking that what was said was not impressed on the minds of the jury. That being so the particular complaint made about the other sexual conduct directions, that the jury were not told not to act upon the evidence of other sexual conduct unless satisfied of it beyond reasonable doubt, was not made good.

195 It is important, however, to go on to consider the respondent's submission that the direction was unduly favourable to the appellant because proof beyond reasonable doubt of other sexual conduct was not necessary. In this respect the respondent placed considerable emphasis upon what was said in *Shepherd v The Queen*[171] and the distinction drawn in that case[172] between intermediate facts which are an indispensable step upon the way to an inference of guilt, and inferences drawn from a combination of facts, none of which viewed alone would support the inference.

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171 (1990) 170 CLR 573; [1990] HCA 56.

172 (1990) 170 CLR 573 at 581 per Dawson J.

196 It was pointed out in *Pfennig*[173] that the purpose of evidence of other discreditable or criminal conduct that is admitted at trial is to establish a step in the proof of the prosecution case; if the evidence is not capable of doing that, it is to be rejected as inadmissible. Because this is the basis for admitting the evidence (that the jury may use it as a step towards inferring guilt) the jury may use it in that way only if persuaded of its truth beyond reasonable doubt. The direction in this case about what standard of proof was to be applied was correct.

Jury directions – the use of evidence of other sexual events

197 It will be recalled that the trial judge concluded the other sexual conduct directions by speaking of the jury "act[ing] upon the evidence" of the other sexual events, and "us[ing] that evidence of which you are so satisfied when you consider the credibility of [the complainant] in relation to each count on the information". This direction picked up only some of the possible uses that the trial judge had told the jury that the prosecution sought to make of the evidence. It would have been understood as picking up those uses that were described earlier in these reasons as context, confidence to offend, and the absence of early complaint.

198 The other sexual conduct directions did not refer, however, to the prosecution's contention that the other events demonstrated not only "an ongoing sexual attraction" to the complainant but also the willingness to give effect to that desire by conduct. Yet it is those conclusions that would found a step in the reasoning towards guilt of the charged offences and it was the availability of those conclusions that founded the admissibility of the evidence.

199 Of course, the jury's assessment of the credibility of the complainant's evidence would have to take account of all of her testimony. The matters to which the judge pointed were arguments that were open to be made about the assessment of her credibility and they were arguments that had been made by the prosecution. But the central points to be addressed in the directions about other sexual events were how the evidence might and might not properly be used in determining whether the offences charged had been proved beyond reasonable doubt. This the directions did not do.

200 As will be apparent from what has been said already, the directions about how the evidence of other sexual conduct and events might properly be used should have focused upon whether the evidence established, beyond reasonable doubt, that the appellant had a sexual interest in the complainant and had given effect to that desire by his actions. The manner of expressing that direction will, of course, depend upon the way the case has proceeded. In particular, the way in

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173 (1995) 182 CLR 461 at 483.

which the accused's sexual interest is described may depend upon the ways in which the parties have chosen to describe it. Words like "passion", "desire" or "attraction" have often been used to describe what moves the accused in a case like those now under consideration. Sometimes epithets like "guilty" or "illicit" or "unnatural" have been used to embellish the description. There is no one formula which must be used. As a general rule the use of embellishing epithets is neither helpful nor desirable. What is important is that the jury's attention is focused upon whether the evidence of other sexual conduct or events proves the accused had a *sexual* interest in the complainant and had carried that interest into effect.

Jury directions – a miscarriage of justice?

201 In the particular context of this case, the failure to give the jury a direction about how the evidence might be used as a step towards reasoning to a guilty verdict did not establish the ground of appeal described in the common form criminal appeal provisions[174] as "on any ground there was a miscarriage of justice". The omission of this direction occasioned no miscarriage of justice for two reasons. First, the jury were directed that they might act upon the evidence of other sexual conduct and events only if satisfied of that evidence beyond reasonable doubt. Second, the jury were directed that "if so satisfied of the truth of it, or of any part of it" they were *not* "to reason that because of it the [appellant] is the type of person likely to have committed these offences". This latter direction was evidently intended to guard against any form of propensity reasoning. As is apparent from what has been said earlier in these reasons, that was a direction that took away from the jury the consideration of that chain of reasoning identified in *Pfennig* as the basis for admission of evidence of this kind. But the chain of reasoning which the jury were forbidden to consider was reasoning towards guilt. That being so, the directions, taken as a whole, occasioned no miscarriage of justice.

202 No ground of appeal being established, no question about the application of the proviso need be considered.

203 The appeal should be dismissed.

SB v The Queen

204 SB was charged in the District Court of South Australia with three counts of indecent assault and two counts of incest. The offences were alleged to have occurred in 1983 and 1986. The first count, of indecent assault, identified the date of the offence as between 1 January 1983 and 31 December 1983. Two

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174 *Criminal Law Consolidation Act* 1935 (SA), s 353(1).

other counts of indecent assault, and one count of incest, were alleged to have occurred between 11 October 1983 and 17 October 1983. The last count, of incest, was alleged to have occurred between 1 October 1986 and 31 December 1986. The complainant was the appellant's daughter.

205 The appellant pleaded not guilty to all counts but, after deliberating for about five hours, the jury, by majority, returned verdicts of guilty to all five counts. The appellant appealed to the Full Court of the Supreme Court of South Australia against his convictions. Six grounds of appeal were advanced, all relating to the judge's directions to the jury. The Full Court (Duggan, Sulan and David JJ) dismissed[175] the appeal.

206 By special leave, the appellant appeals to this Court on the single ground that the Full Court erred "in not considering that the directions given by the trial Judge concerning the evidence of uncharged acts were inadequate".

207 In the course of the hearing of the appeal to this Court, the appellant sought leave to amend his notice of appeal by adding grounds alleging that the Full Court erred in failing to find that "all or some of the evidence of the uncharged acts" was either inadmissible or "not admissible on any or all of the various bases adverted to by the Prosecutor". No objection was taken at trial to the reception of any of the evidence which it is now sought to say should not have been admitted. It is only in an exceptional case that this Court will give special leave to appeal from a decision of a Court of Criminal Appeal affirming a conviction when the point the applicant seeks to raise was not taken either at trial or in the Court of Criminal Appeal[176]. This is not such a case.

The prosecution case

208 In opening the case to the jury, trial counsel for the prosecution told the jury that it was alleged that the appellant had "started to sexually abuse [the complainant], when she was in her first year at high school". Counsel said that the first incident that the complainant could recall was after dinner one night when the appellant exposed himself to her after he had had a shower. Counsel said that the appellant "did this to her on a number of occasions".

209 Counsel went on to say that the appellant started to have the complainant help him at night on the rural property where they were living, going outside to check on the animals and put things away. Counsel continued:

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175 *R v S, B* [2006] SASC 319.

176 *Giannarelli v The Queen* (1983) 154 CLR 212; [1983] HCA 41; *Crampton v The Queen* (2000) 206 CLR 161; [2000] HCA 60.

> "It was whilst they were doing the rounds around the house, that he first started to touch her and to kiss her. He started to kiss her on the lips and from there it progressed to touching, firstly on the outside of her clothing, and then underneath her clothing, in the area of her breasts and her vagina. The Crown alleges that he was, in fact, grooming her for what was to come later; that he was getting her ready for the sexual advances that he was to make to her at a later time."

Counsel then told the jury what evidence it was expected that the complainant would give of the particular events giving rise to the charges against the appellant. In addition, however, trial counsel for the prosecution told the jury that the complainant would say that after the commission of the first offence charged (an offence of indecent assault) the appellant had given her a dildo and told her that "she should start to use it".

210 It follows that in this case (like *HML*) the evidence of so-called "uncharged acts" was evidence of sexual conduct by the appellant directed at the complainant which in some respects was criminal, but others not. All of the evidence of the events other than those charged was, however, discreditable to the appellant.

The relevance asserted at trial

211 After the evidence in the case was complete, the trial judge asked trial counsel for the prosecution what she would say to the jury about the relevance of the complainant's evidence of other conduct of the appellant. Counsel said that the other events

> "put the sexual activities in context; that they provide the starting point for the sexual contact that unfolds from there and without using the particular word of 'grooming' ... they are precursors to what comes later and put in context the behaviour that comes later".

The trial judge responded by telling counsel that he would tell the jury that "they are not to rationalise from that evidence *anything that would suggest* that [the appellant is] guilty of the other offences, or that the [appellant] is the sort of person who would commit these offences" (emphasis added).

Jury directions

212 Ultimately, the trial judge directed the jury that the "evidence of other alleged criminal conduct" was "potentially helpful to you in evaluating [the complainant's] evidence". It might "better enable" the jury to assess her evidence. "The whole of the alleged course of events provides a context in which it is said that the charged acts occurred."

213 The trial judge told the jury that the prosecution presented the evidence as "explaining the background against which the first offence charged came about" and the other offences which are alleged to have followed where the complainant's evidence "may otherwise appear to be unreal or not fully comprehensible". The trial judge concluded this section of the directions in the following terms:

> "Now, those two discrete matters which I have mentioned are the only ways in which you are permitted to use the evidence of the uncharged acts which were stated by [the complainant] in her evidence. Having directed you on the permissible manner in which you may use the evidence, I now turn to direct you on how you cannot use the evidence.
>
> If you find proved that the [appellant] was involved in any of the uncharged acts I have already described, *you must not reason that the [appellant] must have committed any of the sexual acts, the subject of the charges in the Information*. That would be totally wrong. Such reasoning is not permissible.
>
> Furthermore, *it would be wrong to conclude,* if you find proved that the [appellant] engaged in any of the uncharged acts related by [the complainant] in her evidence, *that the [appellant] is the sort of person who would be likely to commit the offences for which he is charged*. Remember, it is the evidence presented in proof of each of the charges, which is the critical evidence in this Trial. The evidence of the uncharged acts has only been presented for the purpose of the permissible uses to which I have referred.
>
> Of course, the first step in the process is to determine whether you are satisfied that any of the uncharged acts have been proved before you can use any of them in the permitted ways I have described. I will, again, refer to this evidence, and what you should do in the course of evaluating it shortly." (emphasis added)

214 As foreshadowed, the trial judge returned to the subject of "uncharged acts". He warned the jury of the need to scrutinise the complainant's evidence about these events with great care and that "it would be dangerous to act upon her evidence of any of the uncharged acts unless, bearing in mind the warning I have given you, you are satisfied of the truth and accuracy of the evidence". (At an earlier point in the directions, the trial judge had told the jury that when he spoke of the jury being "satisfied of something in respect of the Crown case" he meant "proof or satisfaction beyond reasonable doubt".)

215 Taken as a whole, the trial judge's directions to the jury confined the jury's consideration of conduct and events other than those charged to using it for "evaluating" the complainant's evidence. The jury were directed that they could

not use the evidence of other conduct and events to "reason that the [appellant] *must have committed* any of the sexual acts, the subject of the charges in the Information" or that he was "the sort of person who would be *likely to commit* the offences for which he is charged" (emphasis added).

The effect of the directions

216 By confining the jury's use of the evidence in this way, the trial judge denied the jury's use of it for purposes for which the evidence was both relevant and admissible in support of the prosecution case. In particular, the directions precluded the jury using the evidence of other conduct and events as circumstantial evidence which, if established beyond reasonable doubt, could be used as a step in the proof of commission of the charged acts.

217 It may greatly be doubted that telling the jury that the evidence of other conduct and events might be helpful in "evaluating" the complainant's evidence provided any useful assistance or guidance to the jury. It neither identified any issue in the case nor told the jury what law they needed to know to resolve that issue.

218 It may equally be doubted that telling the jury that the evidence explained the "background against which the first offence charged came about" told the jury anything that was not apparent from the evidence itself. But in assessing whether the directions occasioned any miscarriage of justice, chief weight must be given to the strength of the negative directions given by the trial judge.

219 The directions about how the jury could *not* use the evidence require the conclusion that the uncertainties and ambiguities inherent in the directions about "evaluating" the complainant's evidence and providing "background" to the charged offences occasioned no miscarriage of justice.

220 No ground of appeal being established, no question about the application of the proviso need be considered in this case.

221 The appeal should be dismissed.

OAE v The Queen

222 OAE was charged in the District Court of South Australia with one count of indecent assault and one count of rape. A count of unlawful sexual intercourse contrary to s 49(3) of the *Criminal Law Consolidation Act* was charged as an alternative to the count of rape. The count of indecent assault was alleged to have occurred in 1999, when the complainant was aged 12. The count of rape, and the alternative count of unlawful sexual intercourse, alleged that the applicant had digitally penetrated the complainant when she was aged 16. The

offence of digital penetration was alleged to have occurred between May and August 2003.

223 At the time of the alleged offences, the complainant lived with her foster mother, a sister of the applicant. The complainant's foster mother and the applicant lived in separate houses on the same rural property. The applicant was a horse trainer and, at the times of the alleged offences, the complainant worked with the horses and around the stables.

The disputed evidence

224 The prosecution case at trial was that the charge of indecent assault was the first in a series of sexual assaults by the applicant on the complainant and that the alleged digital penetration in 2003 was the last of that series. Trial counsel for the applicant objected to the reception of any evidence of sexual conduct alleged to have occurred in the intervening period. Trial counsel for the prosecution submitted that, if the jury did not hear evidence of a history of sexual misconduct between the alleged indecent assault in 1999 and the incident of digital penetration in 2003, they would be left with the impression that the 2003 incident happened out of the blue.

225 The trial judge ruled that the evidence was admissible holding first, that the evidence was more probative than prejudicial, secondly, that it was relevant to show the nature of the relationship between the applicant and the complainant, and thirdly, that it was relevant to show that the counts alleging events in 2003 "did not happen out of the blue". Whether, as trial counsel for the prosecution then urged, the evidence was also admissible for the purpose of showing "sexual attraction" or "sexual passion" was left for further debate in light of the complainant's evidence.

226 The complainant's evidence of other sexual conduct was not precise. So, for example, when speaking about other occasions when the applicant had touched her, the complainant said "[i]t happened quite often and, yes, it all just kind of blurred into one". She said that the conduct she described occurred "[e]very couple of days" and that "[i]t basically continued, continued right up until I left when I was between 13 and 15". And although the complainant's evidence in relation to the events which were the subject of the charges against the applicant was more precise, her evidence of other sexual misconduct was given at a level of generality which could admit of no more precise answer than bare denial. So, for example, when asked whether the particular event of digital penetration which founded the alternative charges of rape or unlawful sexual intercourse "was the first time he'd ever done the act of inserting his fingers into your vagina", the complainant said that it was not the first time, that he had previously done it "[q]uite a few times", that she had "lost count" of the number of times he had done it, and that he may have done it "40, 50 times between from when I was 12 until I was 16".

The decision below

227 The jury returned a verdict of not guilty on count 1, the count of indecent assault, but a verdict of guilty on count 2, the count of rape.

228 The applicant appealed to the Full Court of the Supreme Court of South Australia against his conviction. He submitted that the evidence of other sexual misconduct should not have been admitted and alleged that the trial judge should have directed the jury, but did not, that they could use the evidence of other sexual misconduct only if satisfied beyond reasonable doubt that those acts had occurred.

229 By majority (Doyle CJ and Layton J; Debelle J dissenting) the Full Court dismissed[177] the appeal. All members of the Court agreed that the evidence of other sexual misconduct was admissible, but the Court divided about whether the directions to the jury would have been understood as requiring them to be satisfied of the occurrence of the other sexual misconduct beyond reasonable doubt before using that evidence. Further, Doyle CJ, with whose reasons Layton J agreed, said[178] that "[i]t was not necessary for the Judge to direct the jury that they had to be satisfied beyond reasonable doubt of the course of conduct constituted by the uncharged acts". His Honour went on to say[179], however, that:

> "It has been accepted in other cases that evidence of uncharged acts, evidence of the kind and quality led here, and for the purpose relied upon here, need not support a conclusion beyond reasonable doubt before it can be used. But the safer course is for the judge to tell the jury that they should be satisfied of the truth of the evidence, or something like that, even though that will suggest to the jury that this means satisfaction beyond reasonable doubt: see *Nieterink*[180], *R v Kostaras*[181] and *R v Sciberras*[182]. That avoids introducing the complication of differing standards of proof."

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177 *R v O, AE* (2007) 172 A Crim R 100.

178 (2007) 172 A Crim R 100 at 108 [33].

179 (2007) 172 A Crim R 100 at 108 [34].

180 (1999) 76 SASR 56 at 72-73 [83].

181 (2002) 133 A Crim R 399 at 407 [51].

182 (2003) 226 LSJS 473 at 482 [39].

230 By contrast, Debelle J was of the view[183]

> "that where evidence of uncharged acts consists of allegations of repeated sexual misconduct which is so intertwined with the charged acts, the trial judge must direct the jury that they must be satisfied that the uncharged acts have been proved beyond reasonable doubt. In the particular circumstances of this case, it would have been sufficient if the jury was satisfied beyond reasonable doubt that the [applicant] had a sexual attraction for the complainant."

231 The applicant now seeks special leave to appeal to this Court. The application for special leave was referred for argument as on appeal, at the same time as the argument of the appeals in *HML* and *SB*.

Admissibility

232 The applicant's submission that the complainant's evidence of other sexual misconduct by the applicant in the period between the two events charged should not have been received should be rejected. As explained earlier in these reasons, evidence of other sexual misconduct was both relevant and admissible. Further, although the generality of the evidence to be given by the complainant was said, at first instance, to require close attention to whether the prejudicial effect of the evidence outweighed its probative value, it is not shown that the trial judge erred in rejecting the applicant's contention to that effect.

233 An accused person faced with evidence of the generality which the complainant in this case gave about other sexual misconduct by the applicant is unable to meet the allegations with more than a bare denial. But when balancing probative value and prejudicial effect it is important to recognise the limits of the probative value of evidence when it is given at the level of generality of the evidence given by the complainant in this case. Her evidence was that the applicant had interfered with her sexually many times. She described what forms that interference took. She did not say that she could identify when these events occurred, and she did not say that she could give any accurate estimate of how often these events occurred. By contrast, she did give more particular evidence about the events that founded the charges preferred against the applicant.

234 If the complainant's evidence of other sexual events and conduct was wholly accepted, it would show that the applicant had committed serious offences against her very many times. Those other offences were of the same kind as those for which the applicant was being tried. As explained earlier in these reasons, the frequency of commission of that other conduct would bear

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183 (2007) 172 A Crim R 100 at 108 [38].

upon the likelihood of the applicant having committed the charged offences. Thus, if the complainant's evidence about other conduct was accepted, it could have constituted a step in reasoning towards guilt, there being no reasonable view of it which would be consistent with innocence. But it would be a step where it would be the probative value of the evidence that worked a disadvantage to the applicant. Its admission would work no prejudice to the applicant over and above what the evidence established.

235 But in this case, these considerations must be put aside because of the directions the trial judge gave the jury.

The impugned directions

236 The trial judge told the jury that it would be wrong to use the evidence of other sexual misconduct "as establishing a propensity or tendency on the part of the [applicant] to commit the charged offences". He went on to say:

> "That does not mean that the evidence of the uncharged acts is irrelevant. The evidence is relevant. On the prosecution case, the uncharged acts show the nature of the relationship which existed between the [applicant] and [the complainant] during the four years leading up to the feed shed incident, which is the subject of the second and third counts.
>
> Without that evidence – without the evidence relating to the uncharged acts – the circumstances of the feed shed incident might appear quite artificial or unrealistic. It would have appeared that after committing the first offence the [applicant] – on the Crown case – did not sexually interfere with [the complainant] for another four years, though she attended his home on a daily basis.
>
> Putting it another way, it would have looked as if the feed shed incident had happened out of the blue, so to speak.
>
> So that is the permissible use to be made of the uncharged acts, ladies and gentlemen. The evidence is relevant to put the charged offences, and in particular counts 2 and 3, in their proper context, but that is the only legitimate use to be made of this evidence.
>
> I repeat, it would be wrong for you to reason – and you must not reason – that the [applicant] must be guilty of the charged acts simply because you happen to be satisfied that he committed one or more of the uncharged acts."

237 The trial judge had, at an earlier stage in his directions, told the jury that if, in the course of the summing-up, he spoke of matters being "proved or being established to your satisfaction" then the jury were to understand that he always meant proof beyond reasonable doubt. But as Debelle J rightly pointed out in the

Full Court[184], "[t]his part of the direction contained no reference of any kind to the standard of proof of the uncharged acts". Rather, the trial judge told the jury that they could *not* reason in a particular way if satisfied that the applicant had committed "one or more of the uncharged acts"; the trial judge nowhere told the jury that the use he had identified as *permitted* was a use that could be made only if the jury were satisfied beyond reasonable doubt of some conclusion drawn from that evidence.

238 It will be recalled that the trial judge told the jury that there was only one permissible use to which "the evidence relating to the uncharged acts" could be put – "to put the charged offences, and in particular counts 2 and 3, in their proper context". All other uses of the evidence were prohibited. In particular, the jury were told not to reason "that the [applicant] must be guilty of the charged acts simply because you happen to be satisfied that he committed one or more of the uncharged acts".

239 In the particular circumstance of this case, it was not appropriate to deal with the complainant's evidence of other sexual misconduct on the footing that it disclosed the commission of identified, separate, acts. It did not. References to "one or more of the uncharged acts" were, therefore, inappropriate.

240 Although use of the evidence of other sexual misconduct as showing sexual interest or attraction was mentioned after the pre-trial ruling about admissibility the point was not further agitated at the trial. Rather, as the passages quoted earlier from the trial judge's directions reveal, the evidence of other sexual misconduct was treated as going only to put the charged offences "in context".

241 To say that the evidence of other conduct may be used to put the charged offences "in context" masks a fundamental ambiguity. The ambiguity is revealed by considering how a direction about the standard of proof of that other conduct would be framed.

242 The generality of the complainant's evidence of other sexual misconduct made it difficult to frame a direction about the standard of proof. To speak, in only general terms, of the evidence that the complainant had given about other conduct would not specify sufficiently what conclusion the jury were being invited to consider. But the "context" that the other conduct could provide was to provide evidence of the applicant's sexual interest in the complainant and his willingness to give effect to that interest by doing one or more of the acts described by the complainant. And if that was the way the evidence of other conduct was to be used, the jury had to be satisfied beyond reasonable doubt that

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184 (2007) 172 A Crim R 100 at 109 [39].

the evidence of the other conduct proved the applicant's sexual interest in the complainant and his willingness to give effect to it in the ways described by the complainant.

243 That is why, in his reasons, Debelle J correctly spoke[185] of the allegations of other sexual misconduct as being so "intertwined" with the charged acts as to require a direction that the jury not act on the evidence of other sexual misconduct unless satisfied of it beyond reasonable doubt.

244 As appears from what has been said earlier in these reasons, evidence of sexual conduct other than the offences charged is a form of circumstantial evidence. Because its relevance lies in the identity of the parties concerned in both the charged and the other conduct, it is inevitable that all of the evidence is "intertwined", at least to that extent. But evidence of other sexual conduct is not to be divided into categories according to the nature or extent of that intertwining. The evidence may not be admitted unless it meets the test in *Pfennig*. If it meets the test in *Pfennig*, it may, but need not, be used by the jury as a step in reasoning towards guilt. If it is used by the jury as a step in reasoning towards guilt, the jury must be satisfied beyond reasonable doubt of the premise for that chain of reasoning. As explained earlier, the premise for such reasoning will usually have to be spelled out in terms of demonstrated sexual interest and demonstrated desire or willingness to use the complainant as the object of gratification of that interest.

245 The directions given in this case were deficient. It is not possible to say by reference only to the written record of the trial that the deficiency caused no substantial miscarriage of justice. Without seeing and hearing the witnesses it is not possible for an appellate court to conclude that the evidence adduced at the applicant's trial proved his guilt of the offences charged beyond reasonable doubt[186].

246 The application for special leave should be granted, and the appeal treated as instituted and heard instanter and allowed. The orders of the Full Court of the Supreme Court of South Australia should be set aside and in their place there should be orders that (a) the appeal to that Court is allowed, (b) the convictions quashed and (c) a new trial had.

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185 (2007) 172 A Crim R 100 at 108 [38].

186 *Weiss v The Queen* (2005) 224 CLR 300; [2005] HCA 81.

Conclusion

247 Although all members of the Court agree that evidence of other sexual conduct that has taken place between an accused and the complainant is relevant, the Court is divided in opinion about further questions that I consider then arise. The reasons of each member of the Court must be read as a whole. It is not appropriate for me to attempt to summarise the effect of the Court's reasons. It is important to recognise, however, that at least a majority of the Court[187] is of the opinion that "[i]n the ordinary course a jury would be instructed by the trial judge that they must only find that the accused has a sexual interest in the complainant if it is proved beyond reasonable doubt"[188].

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187 Gummow J at [41], Kirby J at [63], Kiefel J at [506] and these reasons at [132].

188 Kiefel J at [506].

248 HEYDON J. Before the Court are two appeals and an application for special leave to appeal. They relate to a field of controversy marked out by the overlap between two non-identical areas: "evidence of uncharged acts" and "relationship evidence"[189]. Each of the accused persons was a mature man who was convicted of sexual crimes against a young female relative after a jury trial in the District Court of South Australia. Each challenges an order of the Court of Criminal Appeal of South Australia dismissing his appeal against conviction. Counsel for each of the accused persons exposed some difficulties in the reasoning of the courts below. However, while special leave should be granted, the appeals must be dismissed for the following reasons.

HML v The Queen: the background

249 HML and his wife had a daughter on 21 July 1990, but separated while the daughter was still a baby. HML and his daughter then lost contact. The mother and daughter lived in Mount Gambier, South Australia. After some years, HML came to live in Drik Drik, Victoria, which can be reached from Mount Gambier by car in about 45 minutes. From time to time the daughter visited HML at Drik Drik on access visits.

HML v The Queen: the trial

250 HML was charged with two counts of unlawful sexual intercourse with his daughter, a person under the age of 12 years, contrary to s 49(1) of the *Criminal Law Consolidation Act* 1935 (SA). Each offence was alleged to have occurred between 27 September and 4 October 1999. The daughter was then aged nine. The offences were alleged to have occurred during a visit HML was undertaking to Adelaide for the purpose of eye surgery. The first count charged fellatio and the second anal intercourse. The daughter alleged that on the morning on which the eye surgery was to take place, HML and his daughter were in their shared bedroom after breakfast. She said she wanted to have a look around and go shopping. He said that he would comply with her wishes if she carried out fellatio on him. She complied briefly, twice. On the morning of the following day, he had anal intercourse with her briefly. He then said: "Why isn't it

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189 The expression "relationship" normally connotes reciprocity and mutuality. From that point of view a state of affairs existing between a child and a much older relative or acquaintance which centres on unsolicited, unencouraged and unwanted sexual overtures by the latter towards the former is not very aptly called "a relationship". The expression "uncharged acts evidence" is used below, although it has applications wider than the type of circumstance described above, for it can apply to conduct taking place between a defendant and a person other than the witness proving the charged acts.

working? It's worked before." She testified that she knew what he meant by that, because he had done it to her before.

251 During 2003 the daughter's allegations came to the attention of the police. On 21 August 2003, HML was questioned at Mount Gambier by a Victorian detective and a South Australian detective about those allegations. Later that day the Victorian detective questioned him about other sexual incidents which allegedly took place in Victoria, some before and some after the alleged offences in Adelaide. HML has never been charged in relation to the conduct alleged in Victoria, and it will be described as "the uncharged acts".

252 On 22 March 2006, after a trial presided over by Judge Anderson, a jury convicted HML on both counts. The daughter was then aged 15. An objection to her evidence about the uncharged acts was rejected by the trial judge.

HML v The Queen: the Court of Criminal Appeal

253 An appeal by HML to the Court of Criminal Appeal (Nyland, Vanstone and White JJ) was dismissed[190]. HML took no point about the admissibility of the uncharged acts. He did complain that the trial judge erred in rejecting evidence that no charges had been laid in Victoria about the uncharged acts, leaving open the possibility that HML had been convicted of the uncharged acts. He also complained that the judge failed to direct the jury that they should not find that the uncharged acts had been committed unless satisfied beyond reasonable doubt.

HML v The Queen: the appeal to this Court

254 In this Court HML contended, in addition, that the jury had been inadequately directed about the uses to which the evidence of uncharged acts could be put. He also sought leave to amend the notice of appeal to challenge the admissibility of the uncharged acts. It is logical to begin with the last question.

HML v The Queen: admissibility of the uncharged acts: their nature

255 Before the trial commenced counsel for HML applied for an order excluding evidence of the uncharged acts. Those uncharged acts were described in three statements by the daughter (dated 31 July 2003, 28 February 2006 and 10 March 2006), a statement by a female friend of the daughter (dated 30 August 2003) and a statement by a male friend of the daughter (dated 3 September 2003). The daughter had made complaints about her father's conduct to each of these friends. The debate about admissibility before the trial

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190 *R v H, ML* [2006] SASC 240.

judge was conducted on the assumption that the daughter's evidence would correspond with the statements. The evidence she actually gave was somewhat more specific. Indeed HML submitted in this Court that even if the evidence were otherwise admissible, it had been given in unnecessary detail.

256 The uncharged acts were of eight kinds.

(a) At least before the Adelaide visit, HML would walk around his house naked for the majority of each day unless he was going outside to work.

(b) Both before and after the Adelaide visit, HML, on kissing his daughter goodnight, would try to insert his tongue into her mouth.

(c) Both before and after the Adelaide visit, HML placed one or two fingers in his daughter's vagina "regularly", "most mornings", "some mornings" and "more than once".

(d) On one occasion, the time of which is not clear, HML offered his daughter a small toy to perform acrobatics and cartwheels naked, and filmed her doing this.

(e) Before the Adelaide visit, and once or perhaps twice after it, HML had anal intercourse with his daughter.

(f) On one occasion after the Adelaide visit, HML penetrated his daughter's vagina with his penis.

(g) After the Adelaide visit, HML performed an act of cunnilingus on his daughter.

(h) Either before or after the Adelaide visit, HML offered to buy for his daughter items of "the type of underwear known as G-strings", bought three of them and gave them to her.

257 To call all of this conduct "uncharged acts" could be a misnomer, because HML contended that incidents (a), (d) and (h) were not necessarily crimes.

258 HML gave evidence. Although this does not affect the admissibility of the uncharged acts evidence, he denied all of it, save that he admitted he occasionally went from his bedroom to the bathroom naked, and said that although he bought G-string underwear for his daughter, he did so at her request.

HML v The Queen: admissibility of the uncharged acts: the problem

259 Where a child complains of a long course of sexual abuse, and the authorities decide to prosecute, difficulties can arise. It may be impossible to draft charges covering all the abuse.

> "[A] defendant is entitled to be apprised not only of the legal nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge. The court hearing a complaint or information for an offence must have before it a means of identifying with the matter or transaction alleged in the document the matter or transaction appearing in evidence."[191]

The complainant may be incapable of differentiating each incident sufficiently to satisfy this test[192]. Even if it is possible to draft charges covering all the abuse, it may be undesirable to do so. It is therefore common to select only a relatively small number of incidents as the subject of charges. What is the status of those parts of the complainant's story which are not made the subject of charges? Are they admissible? If so, to establish what? How should the jury be directed? What is the standard of proof in relation to the uncharged acts? This appeal throws up difficulties of these kinds. They are difficulties which can be reduced where the legislature has created an offence of maintaining a sexual relationship with a child. Thus s 74 of the *Criminal Law Consolidation Act* 1935 (SA) provides in part[193]:

> "(1) A person may be charged with and convicted of the offence of persistent sexual abuse of a child.
>
> (2) Persistent sexual abuse of a child consists of a course of conduct involving the commission of a sexual offence against a child on at least three separate occasions (whether the offence is of the same nature on each occasion or differs from occasion to occasion).
>
> (3) A person does not however commit the offence of persistent sexual abuse of a child unless the occasions on which a sexual offence is committed against the child fall on at least three days."

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191 *Johnson v Miller* (1937) 59 CLR 467 at 489-490 per Dixon J; [1937] HCA 77.

192 See *S v The Queen* (1989) 168 CLR 266; [1989] HCA 66.

193 See also *Crimes Act* 1900 (NSW), s 66EA; *Crimes Act* 1958 (Vic), s 47A; *Criminal Code* (Q), s 229B; *Criminal Code* (WA), s 321A; *Criminal Code* (Tas), s 125A; *Criminal Code* (NT), s 131A; *Crimes Act* 1900 (ACT), s 56.

However, this provision was not employed in relation to the complaints of the daughter in this case: there were only two acts which could be charged since the uncharged acts were not alleged to have taken place in South Australia.

HML v The Queen: admissibility of the uncharged acts: pre-trial proceedings

260 Counsel for HML objected to the uncharged acts evidence on the ground of irrelevance: that it did not legitimately explain any aspect of the evidence given about the Adelaide incidents. Counsel for the prosecution supported her tender of the uncharged acts evidence on the following grounds and in the following order.

261 First, events occurring before the Adelaide incidents provided a "context" for those incidents. Without that context the unrealistic impression would be left that they "just occurred out of the blue".

262 Secondly, events occurring before Adelaide explained why HML was "confident enough to ... offend" in Adelaide in the manner alleged.

263 Thirdly, events occurring before Adelaide explained why the daughter "acquiesced" in HML's conduct in Adelaide. This was said to be the "flipside" of the second point, although strictly speaking it is not exactly so.

264 Fourthly, the uncharged acts, both before and after Adelaide, were capable of demonstrating that HML had a "sexual attraction" for his daughter, and that this tended "to provide an explanation as to why it is that the offending in Adelaide may have occurred"[194].

265 Fifthly, counsel for the prosecution argued that the offending after Adelaide explained why the daughter did not make immediate complaint about the occurrence of the charged acts in Adelaide.

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194 When supporting the tender of the evidence, counsel for the prosecution also said: "What I am not intending to lead evidence about is because of his sexual attraction the defendant is someone who is more likely than not to have committed the charges acts, that sort of propensity-type reasoning is not the basis upon which I say the evidence of sexual attraction is relevant." However, this qualification was omitted when counsel made her opening and closing speeches to the jury, and it was also omitted from the judge's summing up. The evidence was thus left to the jury as evidence demonstrating HML's disposition to gratify his sexual attraction for his daughter: cf [35], [455] and [515].

266 Sixthly, counsel for the prosecution submitted that the extent and duration of the conduct might explain any inability in the complainant to remember the dates and order of events.

267 Counsel for HML dealt with the first five points by denying that there was anything which the uncharged acts could cast light on. He said of the sixth point that the uncertainties in the daughter's evidence related only to the uncharged acts, not the charged ones. This argument succeeded in the sense that neither prosecution counsel nor the trial judge thereafter said that the evidence could be used in the manner described in the sixth point. Counsel for HML also complained about the fact that the daughter's third statement, made in March 2006 just before the admissibility argument, had suddenly become more specific, to which the trial judge responded that that did not affect admissibility.

268 The trial judge then held the evidence admissible. Apart from his interventions in argument, he gave no reasons for that conclusion. Although he was not asked to give reasons, it would have been desirable to do so if he thought that the evidence was admissible on some bases but not others, for that conclusion could have affected the conduct by counsel of the trial. But the trial judge's failure to give reasons is not advanced as a ground of appeal. And the trial appears to have been conducted largely[195] on the assumption that the uncharged acts were admissible for the first five purposes described by prosecution counsel in opposing the objection. Those five purposes were described by prosecution counsel in her opening and closing addresses to the jury, and by the judge in summing up. Despite all this, as counsel for HML submitted in this Court, and as can commonly happen, the failure of the trial judge to give reasons may have caused him to fail properly to analyse the grounds for admitting or rejecting the evidence.

HML v The Queen: admissibility of the uncharged acts: amendment application

269 In this Court HML sought leave to amend his notice of appeal by adding a ground contending that the Court of Criminal Appeal erred in:

> "failing to find that the evidence of all or some of the uncharged acts was:
>
> 2.5.1 inadmissible;
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> 2.5.2 in the alternative, not admissible on all of the various bases advanced by the prosecutor in her submissions on admissibility."

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195 See n 194 above.

Although the points underlying this ground were not taken in the Court of Criminal Appeal, the leave sought should be granted. The case does not fall within the area where an appeal will only exceptionally be entertained, namely where the points were not taken either at the trial or in the intermediate court of appeal[196]: the evidence which HML now says is inadmissible was objected to at trial, although most of the arguments now relied on were not put at that time.

HML v The Queen: admissibility of the uncharged acts: the issues

270 In assessing the admissibility of uncharged acts evidence, two primary issues arise. First, was the evidence relevant? Secondly, did any rule operate to render it inadmissible? A third issue which could arise is whether the evidence ought to have been excluded in the discretion of the court.

HML v The Queen: admissibility of the uncharged acts: history

271 For a long time, with few exceptions[197], on a charge against an accused of committing a sexual crime against a particular victim, the courts have admitted evidence of uncharged sexual acts by the accused against that victim. Thus in 1861 in *R v Jones*[198] evidence of uncharged rapes by a father of his daughter was admitted to establish a "reign of terror" causing the daughter not to resist. This idea is among those which have been employed more recently. Sometimes the evidence has been admitted independently of the principles regulating similar fact evidence[199]. At other times the evidence is said to be admitted in conformity with those principles[200].

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196 See *Crampton v The Queen* (2000) 206 CLR 161; [2000] HCA 60.

197 Eg *R v Robinson* (1909) 9 SR (NSW) 728; *R v Herbert* [1916] VLR 343; *R v Organ* [1925] St R Qd 95. These decisions have been disapproved: see *R v Gellin* (1913) 13 SR (NSW) 271; *R v Allen* [1937] St R Qd 32.

198 (1861) 4 LT 154. See also *R v Rearden* (1864) 4 F & F 76 at 80 [176 ER 473 at 476].

199 Eg *R v Whitehead* (1897) 23 VLR 239 at 241.

200 See, for example, *R v Horne* (1903) 6 WAR 9; *R v Stone* (1910) 6 Cr App R 89 at 93-94; *R v Ball* [1911] AC 47; *R v Gellin* (1913) 13 SR (NSW) 271; *R v Shellaker* [1914] 1 KB 414; *R v Rogan* [1916] NZLR 265 at 291; *R v Langdon* [1920] NZLR 495; *R v Parkin* (1922) 37 CCC 35; *R v Young* [1923] SASR 35; *R v Hewitt* (1925) 19 Cr App R 64; *R v Allen* [1937] St R Qd 32; *R v Power* [1940] St R Qd 111; *R v Hartley* [1941] 1 KB 5; *R v Witham* [1962] Qd R 49; *S v The Queen* (1989) 168 CLR 266.

HML v The Queen: admissibility of the uncharged acts: nature of sexual acts

272 Although over the last 150 years, and particularly in the many relatively recent cases of this kind, other bases for the reception of uncharged sexual acts evidence have developed, one fundamental basis has been that the evidence proves sexual attraction which was acted on. That basis rests on the very high probative value of the evidence in the light of what are thought to be the lessons of human experience. The same basis underlies the reception of evidence of sexual behaviour on some occasions to prove consensual sexual conduct on a particular occasion, such as adultery[201]; or to prove intercourse leading to the birth of a child in respect of which support is sought by the mother[202]; or to prove a promise of marriage[203]. The Roman-Dutch writer Matthaeus described presumptions of fact as "nothing other than an inference of common sense, based upon what usually happens or is assumed to happen". He gave the following example[204]:

> "Clodius and Pompeia are found naked in bed together. A sufficient time for sexual relations to have taken place has elapsed. He has been in love with the girl for some time, and has written letters inviting her to have intercourse with him. Who would hesitate to condemn them both for adultery? Who is so lacking in common sense that he would be unaware of the usual consequences of night, wine, love, and a girl and boy together?"

These consequences are inferences of consensual conduct based on reciprocated affection. But the same reasoning about "what usually happens or is assumed to happen" underlies proof of unilateral, unreciprocated desires of the type manifested and acted on according to the evidence under consideration. The reception of this type of evidence has come to be routine and unsurprising. Thus no question was raised about it in the leading English similar fact case of *R v Boardman*[205]. Two complainants gave evidence against the accused. There was no objection to the admissibility of evidence of each complainant about uncharged acts tendered on the charges on which that complainant gave

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201 Eg *Boddy v Boddy* (1860) 30 LJ P & M 23; *Wales v Wales* [1900] P 63; *McConville v Bayley* (1914) 17 CLR 509; [1914] HCA 14.

202 Eg *Cole v Manning* (1877) 2 QBD 611.

203 *Wilcox v Gotfrey* (1872) 26 LT 481.

204 Quoted by Hoffmann, *South African Law of Evidence*, 2nd ed (1970) at 369: *De Criminibus Ad D* 48.15.6 (the translations are Hoffmann's).

205 [1975] AC 421.

evidence. The only objection was to the use of the evidence of each complainant about conduct charged of which he was the victim to support the prosecution case in relation to the conduct charged of which the other complainant was the victim.

273 However, evidence of uncharged sexual acts can be used for other purposes. Hodgson JA analysed the matter thus in a case on s 97 of the *Evidence Act* 1995 (NSW), which creates for what it calls "tendency evidence" a statutory version of the common law rules about similar fact evidence used to prove disposition[206]:

> "[W]here a man is charged with particular sexual assaults against a complainant, evidence that he committed similar assaults against the complainant on other occasions could be relevant in at least three different ways, only one of which would be as tendency evidence:
>
> (1) It may be relevant to the extent of removing implausibility that might otherwise be attributed to the complainant's account of the assaults charged *if* these assaults were thought to be isolated incidents, in particular implausibility associated with the way each party is said to have behaved on these particular occasions.
>
> (2) It may be relevant in supporting an inference that the accused was sexually attracted to the complainant, so that he had a motive to act in a sexual manner towards the complainant.
>
> (3) It may be relevant in supporting an inference that the accused not only had the motivation of sexual attraction, but also was a person who was prepared to act on that motivation to the extent of committing sexual assaults." (emphasis in original)

He said that evidence used for purpose (1) is "relationship evidence"[207]. Its use for that purpose in the present case is discussed below[208]. Hodgson JA said that

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206 *R v Leonard* (2006) 67 NSWLR 545 at 556 [49].

207 *R v Leonard* (2006) 67 NSWLR 545 at 556 [51].

208 At [316]-[335].

use for purpose (3) is use as "tendency evidence", ie disposition evidence[209]. He said that use of the evidence for purpose (2)[210]:

> "is not use as tendency evidence: it is rather evidence supporting an inference that the accused had motivation to act as charged. Evidence of a similar kind could be provided by a letter from the accused declaring sexual attraction to the complainant, in the absence of evidence that the accused had actually done anything to or with the complainant. Evidence used in this way might be called relationship evidence or it might be called motivation evidence."

He distinguished use for purpose (2) from use for purpose (3) in the following way[211]:

> "[T]endency evidence against an accused is evidence to the effect that the accused is a person who by reason of his or her character is more likely than others to act in a particular way or have a particular state of mind. Evidence that an accused actually has an ordinary human motive to do something, such as sexual feelings towards someone else, is not as such that kind of evidence. I do not think it could be said that, because a married man feels sexually attracted towards a woman other than his wife, he therefore has a tendency to commit adultery with her, even if he never does so."

However, as Hodgson JA indicated, there are even greater possibilities of refinement, and this is illustrated by the approaches of prosecution counsel at HML's trial[212].

<u>*HML v The Queen*: admissibility of the uncharged acts: relevance test</u>

274 Subject to any exclusionary rule, or to the operation of any discretion to exclude evidence, evidence is admissible *either* if it is relevant to a fact in issue, *or* if it is relevant to a fact which is relevant to a fact in issue. One category of the latter kind is circumstantial evidence, of which uncharged acts evidence is an example. "Facts in issue" are of two kinds – those which may be called "main facts in issue", and those which may be called "subordinate or collateral facts in

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209 *R v Leonard* (2006) 67 NSWLR 545 at 556 [51].

210 *R v Leonard* (2006) 67 NSWLR 545 at 556 [52].

211 *R v Leonard* (2006) 67 NSWLR 545 at 556-557 [53].

212 See also the much cited analysis of Doyle CJ in *R v Nieterink* (1999) 76 SASR 56 at 65 [43] and 72-73 [83].

issue". In civil cases the "main facts in issue" are those which are commonly defined by the pleadings or by some other technique of definition, but which, whether so defined or not, are those which the applicable legal principles require to be proved if some cause of action or some defence or some answer to a defence is to be made out[213]. In criminal cases the "main facts in issue" are those which the prosecution is obliged to prove if guilt is to be established, or which the defence must prove if some positive defence is relied on. Examples of "subordinate or collateral facts in issue" are those which affect the credibility of a witness, or the admissibility of particular items of evidence.

275 What, then, is "relevance"? Stephen said[214]:

> "The word 'relevant' means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other."

276 The jury were told there were five bases on which they could consider the uncharged acts evidence. On which, if any, was the evidence relevant? If so, for what purpose? Was it admissible?

<u>*HML v The Queen*: admissibility of the uncharged acts: sexual attraction gratified</u>

277 *General.* The fourth basis on which the trial judge directed the jury that the uncharged acts evidence could be used was that it "may ... indicate that both before and after the visit to Adelaide the accused had an ongoing sexual attraction to [his daughter] and sought gratification for that attraction by his conduct". Were this use limited to proving a sexual attraction, it would have amounted only to evidence of a motive to engage in sexual misconduct, which might or might not be acted on, and if acted on, might or might not be acted on frequently. But the use went beyond supporting a motive to engage in sexual misconduct; it showed a disposition to act on that motive, and to do so nearly as frequently as opportunity permitted[215]. This use of the evidence is not relevant

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213 *Goldsmith v Sandilands* (2002) 76 ALJR 1024 at 1025 [2] per Gleeson CJ; 190 ALR 370 at 371; [2002] HCA 31.

214 *A Digest of the Law of Evidence*, 12th ed (1936), Art 1, adopted by McHugh J in *Palmer v The Queen* (1998) 193 CLR 1 at 24 [55]; [1998] HCA 2 and *Goldsmith v Sandilands* (2002) 76 ALJR 1024 at 1029-1030 [31]; 190 ALR 370 at 377.

215 Among many examples of this reasoning, see *B v The Queen* (1992) 175 CLR 599 at 601-602, 605, 610 and 618; [1992] HCA 68.

only to the complainant's credit: it is relevant to the issue of whether the charged acts took place.

278 In substance counsel for HML conceded that the uncharged acts were relevant for this purpose, save that he contended that evidence of the G-strings purchase was irrelevant. Secondly, he submitted that the uncharged acts could not be left to the jury as "independently supporting an inference of guilt". And, thirdly, he submitted that the evidence was similar fact evidence which failed to satisfy the test for receiving that type of evidence. It is necessary to deal with these three submissions in turn.

279 *The relevance of the G-strings purchase.* The relevance of the G-strings purchase depended on what view HML's circle, and HML himself, had of their appropriateness as underwear for a girl of 9 or 10, for that view might cast light on whether HML's role in their purchase revealed him to have the disposition in question. Her mother thought them "quite disgusting". HML himself testified that he opposed the purchase and said that his daughter could never be allowed to wear them at school. In that sense it is common ground that the G-strings were not appropriate items for the daughter to wear. Counsel for HML relied on differences between the evidence of the daughter, her mother, HML and HML's current wife. The principal differences related to whether HML forced the purchase on his daughter, or whether she demanded that he make the purchase against his wishes. But those differences go only to the question whether the daughter's evidence should be accepted, not to whether that evidence was admissible. Counsel for HML also contended that the purchase of the G-strings probably occurred one year after the Adelaide trip: but even if it did, it could not affect its relevance, for evidence of sexual attraction can be relevant whether it relates to a period before the crime charged or after it[216]. However, had the G-string evidence been the only uncharged acts evidence, its admissibility may have been very questionable. By itself it was only probative, and then not strongly, of motive in the sense of sexual desire, as distinct from a propensity to act on it. It may therefore arguably not have been relevant. But an assessment of its relevance is not to be undertaken in isolation from the other evidence. Taken with all the other uncharged acts evidence, it was relevant to prove a disposition to act on the sexual attraction experienced by HML.

280 *"No independent support".* Counsel for HML submitted that where evidence of uncharged acts comes solely from a complainant, it is "inappropriate to leave this as evidence of 'sexual attraction', as independently supporting an

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216 In *R v Beserick* (1993) 30 NSWLR 510 at 523 Hunt CJ at CL said that in general the weight to be given to subsequent sexual activity will be less than that afforded to previous sexual activity. However, this must turn on the particular facts. See generally *R v VN* (2006) 15 VR 113 at 123-125 [35]-[41].

inference of guilt", for it rested in circularity. And he said that admitting the evidence carried "danger". The danger was that it "inappropriately elevates one part of the complainant's testimony in support of an inference of guilt when that part has no higher status [than] the other evidence it seeks to prove true". This submission plays on an ambiguity in the word "independently". It is true that there is a lack of independence in the sense that all the evidence depended solely on the complainant's account. But that does not make the evidence irrelevant or inadmissible. There is no rule that it had to be corroborated. There was no such rule[217] even before s 34I(5) of the *Evidence Act* 1929 (SA) abolished the need for corroboration warnings in sexual cases and s 12A abolished the need for corroboration in relation to the sworn evidence of children. Once admitted, the evidence was capable of being used as an "independent" – a separate – element in a course of reasoning towards guilt. This process did not elevate one part of the complainant's testimony over another.

281 *Proof of propensity and the similar fact rule.* Counsel for HML contended that it was important to clarify whether use of the uncharged acts evidence involved propensity reasoning or not.

> "If it does not involve propensity reasoning, then ... you can use that evidence to assist in drawing an inference about whether or not the accused was sexually attracted and was prepared to act on his sexual attraction with respect to the complainant, but on no account infer that ... because of that fact alone, the fact that he was alone with her in a room in Adelaide meant that it was more likely that he would commit such an offence."

282 Counsel for HML submitted that the evidence could not be employed to support propensity reasoning because it could not be assumed that HML's attraction for his daughter was so constant and so uncontrollable that it was always acted on whenever an opportunity presented itself. Counsel distinguished the present case from *R v Ball*[218], which he said was a case where acts of incest (which were uncharged because they were not crimes at the time of their commission) were received to demonstrate sexual attraction between a brother and his sister with a view to proving, not that they committed the crime of incest on a particular day, but that they did so on some day within a range of dates. In contrast, here the evidence was tendered as part of an enterprise of establishing that on a particular day in Adelaide HML procured his daughter to carry out fellatio on him, and that on the next day he penetrated her anally. This submission exaggerates the difference between *R v Ball* and the present case.

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217 *R v Bloodworth* (1913) 9 Cr App R 80.

218 [1911] AC 47.

There were two charges against the Balls. One charged an act of incest on a specific date, 20 September 1910. While the other charge related to a range of dates, it was a relatively narrow range – 1-14 July 1910. There was other evidence: the Balls represented themselves to be man and wife; they shared the main bedroom in their residence; on 20 September 1910 at 11.20pm the front door was opened by the sister wearing a nightdress; the brother came out of the main bedroom half dressed; that bedroom contained a double bed with bedding on it which bore signs of two persons having occupied it; while their residence had another bedroom, it had no bedding; the brother wrote to his sister in terms more affectionate than would be appropriate if he were writing to her quoad sororem. But in one respect the present case affords a stronger argument for admissibility than those available in *R v Ball*: in that case there was no direct evidence of the crimes alleged, but here there is. However, the fundamental weakness in counsel's submission was that it downplayed excessively the strength of HML's disposition, as revealed by the uncharged acts evidence, to act on his sexual desire for his daughter frequently, indeed on almost all occasions on which they met.

283 *The Pfennig test.* In *Pfennig v The Queen*, Mason CJ, Deane and Dawson JJ said[219]:

> "[B]ecause [similar fact evidence] has a prejudicial capacity of a high order, the trial judge must apply the same test as a jury must apply in dealing with circumstantial evidence and ask whether there is a rational view of the evidence that is consistent with the innocence of the accused."

284 In *Phillips v The Queen*, Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ said of the *Pfennig* test[220]:

> "[T]he 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."

The need to assume that the similar fact evidence will be accepted is supported by the following passage in *Hoch v The Queen*[221]:

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219 (1995) 182 CLR 461 at 483; [1995] HCA 7 (footnote omitted).

220 (2006) 225 CLR 303 at 323-324 [63]; [2006] HCA 4 (footnote omitted).

221 (1988) 165 CLR 292 at 294 per Mason CJ, Wilson and Gaudron JJ; [1988] HCA 50.

> "The basis for the admission of similar fact evidence lies in its possessing a particular probative value or cogency by reason that it reveals a pattern of activity such that, *if accepted*, it bears no reasonable explanation other than the inculpation of the accused person in the offence charged". (emphasis added)

But there is a second assumption which must be made, this time in favour of the accused. This second assumption is that the evidence in the case other than the similar fact evidence may be accepted, but that the jury could conclude that it is insufficiently strong to exclude a reasonable doubt[222]. That assumption is necessary because if the contrary assumption were made – that the evidence in the case other than the similar fact evidence excluded any reasonable doubt – it would be impossible to carry out the task, required by many authorities[223], of examining the admissibility of the similar fact evidence in the light of the other evidence, and in view of that examination assessing whether the evidence as a whole would remove a reasonable doubt.

285 These propositions have been explained by Hodgson JA in a case to which counsel for HML referred, *R v WRC*[224]:

> "[I]f it first be assumed that all the other evidence in the case left the jury with a reasonable doubt about the guilt of the accused, the propensity evidence must be such that, when it is considered along with the other evidence, there will then be no reasonable view that is consistent with the innocence of the accused. That is, the propensity evidence must be such

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222 *R v Cahill (No 2)* [1999] 2 VR 387 at 392 [24] (the trial judge "must accept at the least the possibility of the truth of the [accused's] account in determining whether there is a rational explanation of all the evidence consistent with innocence") per Buchanan JA (Winneke P and Charles JA concurring).

223 Eg *R v Boardman* [1975] AC 421 at 457; *Harriman v The Queen* (1989) 167 CLR 590 at 633; [1989] HCA 50; *Pfennig v The Queen* (1995) 182 CLR 461 at 482-483 and 485.

224 (2002) 130 A Crim R 89 at 102 [29]. This was a dictum, since in New South Wales it is the *Evidence Act* 1995 (NSW), not the common law, which applies. But Hodgson JA was of the view that the common law test expounded in *Pfennig v The Queen* applies under that legislation. That view has since been held erroneous: *R v Ellis* (2003) 58 NSWLR 700, approved by this Court in *Ellis v The Queen* [2004] HCATrans 488 in the course of rescinding special leave. Neither that fact, nor the fact that Hodgson JA was speaking obiter, affected the soundness of his exposition of the common law as a matter of principle.

> that, when it is added to the other evidence, it would eliminate any reasonable doubt which might be left by the other evidence."

In another case Hodgson JA said of the *Pfennig* test[225]:

> "[C]ertainly [it] does not require the judge to reach the view that the jury acting reasonably must convict: the judge must form his or her own view as to whether there is no rational view of the evidence, as it then appears to the judge, which is consistent with innocence, and the judge does not need to speculate as to how precisely that evidence may be affected by the way it is presented at the trial or by cross-examination, or how other minds might view it."

In *R v WRC*, Hodgson JA added that the test[226]:

> "does not mean that the judge must look at the propensity evidence in isolation, and not admit it unless there is no reasonable view of the evidence so considered that is consistent with the innocence of the accused of the offence with which the accused stands charged. That approach would be quite inconsistent with the correct approach for considering circumstantial evidence ... and the [test is sourced in] the character of propensity evidence as circumstantial evidence."

286 *HML's test for admissibility.* Counsel for HML contended that the test for admissibility was "whether or not, *absent* the complainant's evidence of the charged acts, one would inevitably reason that [the] accused must have sexually abused [his daughter] (and in a particular way) on the charged occasion[s]" (emphasis in original). But that is not the *Pfennig* test. It depends on assuming that the uncharged acts evidence is correct and examining whether that evidence, *taken with the daughter's evidence about the charged acts*, leaves open a rational view that while he was alone with her in a room in Adelaide he did not behave as she said he did. In assessing admissibility, one does not assume that there is no evidence of HML's guilt beyond the fact that he was alone with his daughter in a room in Adelaide, for there is her evidence about what took place. Counsel for HML argued for a test even harder to satisfy than the *Pfennig* test. This must be rejected.

287 *The Pfennig test applied.* It is necessary first to assume that the daughter's evidence about the charged acts could leave the jury with a reasonable doubt. It is necessary also to assume that her evidence about the uncharged acts, whether they took place before or after the charged acts, will be accepted. On these

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225 *R v Folbigg* [2003] NSWCCA 17 at [28] (Sully and Buddin JJ concurring).

226 (2002) 130 A Crim R 89 at 101-102 [27].

assumptions, the question is whether the evidence of uncharged acts, when considered with the evidence of charged acts, would eliminate any reasonable doubt which might be left by the evidence of the charged acts considered by itself. In assessing this issue of admissibility, it is necessary to take the daughter's evidence of the uncharged acts at its highest, and that involves assuming a considerable amount of sexual activity with a young child over quite a long time. The answer to the question is that the evidence is admissible. That is because, on the assumptions required by the test, a long and persistent campaign of seduction by HML is revealed. During it he endeavoured to excite his daughter into a sexual interest in him, and to pander to it. He revealed himself to be under the influence of a strong sexual attraction to her, and he endeavoured to gratify it in a variety of ways on numerous occasions when he might easily have been interrupted and detected by his daughter's half brother. This renders it almost inevitable that her testimony, that he did so while alone with her away from home in a shared hotel room, was correct. The uncharged acts evidence is sufficient to remove the reasonable doubt which must be assumed to exist in relation to the evidence of charged acts by itself. Hence, although there is no suggestion in the record that the trial judge explicitly applied the *Pfennig* test, or was invited to do so, on that test the uncharged acts evidence was admissible.

288 *The applicability of the Pfennig test.* Counsel for the prosecution in this Court put four arguments about the *Pfennig* test. First, while disavowing any direct attack on it, they launched numerous criticisms of it. Secondly, they contended that the fact that the state of mind of an accused person is dominated by sexual attraction for a complainant can be used in a way not requiring any assessment of that accused person's propensity. Thirdly, they submitted that even if the second submission were not correct, the *Pfennig* test did not apply. Fourthly, they submitted that if the *Pfennig* test was applicable, it could usually be satisfied[227].

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227 The terms of what South Australia said in these appeals about *Pfennig v The Queen* without applying for leave to have it overruled cause the imagination to wonder at the prospect of what it will say if it ever makes that application. If the executive of South Australia is hostile to *Pfennig v The Queen*, its energies, so fully harnessed in this case in criticising it, might be better employed in procuring its reversal by the legislative branch. It has been reversed, together with the qualification for the possibility of contamination through collusion enunciated in *Hoch v The Queen* (1988) 165 CLR 292, in Victoria (*Crimes Act* 1958, s 398A, especially s 398A(3)) and Western Australia (*Evidence Act* 1906, s 31A). The *Hoch* qualification has been abandoned in Queensland (*Evidence Act* 1977, s 132A). *Pfennig v The Queen* does not apply in federal courts and the Australian Capital Territory (*Evidence Act* 1995 (Cth), ss 97 and 98); New South Wales (*Evidence Act* 1995, ss 97 and 98); Tasmania (*Evidence Act* 2001, ss 97 and 98); and Norfolk Island (*Evidence Act* 2004, ss 97 and 98). Thus the common law as stated in *Hoch v The Queen* and

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289 It is sufficient to deal with the fourth point by saying that if the *Pfennig* test applies in this appeal, it is satisfied. Accordingly it is not necessary to consider the third issue of whether it in fact applies. Nor is it necessary to consider the second issue, for in this and the other two cases the prosecution was correctly relying on the conduct of the accused persons towards the respective complainants as showing not only a sexual attraction, but a propensity to act on it very frequently by various forms of sexual assault. And it is not necessary to discuss the prosecution criticisms of the *Pfennig* test.

HML v The Queen: admissibility of the uncharged acts: explanation for failure to complain

290 *The assigned basis for admissibility.* The fifth basis on which the uncharged acts evidence was tendered against HML was put thus by the trial judge to the jury: "[T]hat this inappropriate behaviour continued late into 2002 may go some way to explain why there was no earlier complaint, particularly no complaint in or about October 1999 upon [the daughter's] return from Adelaide."[228]

Pfennig v The Queen survives only in South Australia and the Northern Territory, and the common law stated in *Pfennig v The Queen* without the *Hoch* qualification survives only in Queensland. This narrows the significance of debates about how far *Pfennig v The Queen* extends and whether it is wrong. Incidentally, only Western Australia deals in terms with "relationship evidence" ("evidence of the attitude or conduct of the accused person towards another person, or a class of persons, over a period of time"), which it treats in the same way as "propensity evidence" ("similar fact evidence or other evidence of the conduct of the accused person" or "evidence of the character or reputation of the accused person or of a tendency that the accused person has or had"): *Evidence Act*, s 31A. In England the *Criminal Justice Act* 2003, s 101(1)(d), renders evidence of the defendant's bad character admissible if "it is relevant to an important matter in issue between the defendant and the prosecution", while s 101(1)(c) renders it admissible if "it is important explanatory evidence". Section 102 provides that evidence is "important explanatory evidence" if, without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and its value for understanding the case as a whole is substantial.

228 Reasoning of this type has been employed in other cases: *Gipp v The Queen* (1998) 194 CLR 106 at 113 [12] per Gaudron J and 131 [73] per McHugh and Hayne JJ; [1998] HCA 21; *R v Nieterink* (1999) 76 SASR 56 at 65 [43] per Doyle CJ ("The evidence of uncharged acts may also disclose a series of incidents that make it believable or understandable that the victim might not have complained about the incidents charged until much later in the piece, if at all. They may show a pattern of behaviour under which the accused has achieved the

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291 *A factual difficulty.* Counsel for HML correctly submitted that there was one flaw in this reasoning. The last words quoted suggest that the question is: "Why didn't the daughter complain to her mother the first time she saw her on returning from Adelaide in October 1999?". Events that took place after the daughter saw her mother in October 1999 are irrelevant to that question. Another possible question is: "Why did the daughter delay until 2003 before complaining about the incidents said to have taken place in Adelaide in 1999?". Post-Adelaide misconduct, depending on its detail, might explain the delay described in that question, and hence might have relevance as going to establish a subordinate or collateral fact in issue. Contrary to a submission by counsel for HML, that is so despite the daughter's failure to give evidence in chief stating that she did not complain until 2003 because of her father's behaviour towards her after Adelaide, for an inference could be drawn from the nature of that behaviour that it explained her failure to complain.

292 *Self-bolstering: HML's submission.* But counsel for HML submitted that even if the evidence were relevant to explain delay in complaining, there is a further and fundamental difficulty which affects its admissibility.

293 The background to the submission is that under certain conditions a complaint of a sexual crime made "at the earliest reasonable opportunity"[229] can be received in the prosecution's case[230]. Usually it is proved by calling evidence of the complaint from both the victim and the person to whom the victim complained[231]. At common law, when the complaint is received, it goes only to credit: it can support the credibility of the victim but it is not evidence of the facts stated in the complaint about the acts charged. At common law the accused

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submission of the victim. The evidence may establish a pattern of guilt on the part of the child, that could also explain the submission and silence of the child."); *R v GAE* (2000) 1 VR 198 at 217 [64] per Chernov JA; *R v G, GT* (2007) 97 SASR 315 at 324 [35] per David J.

229 For example, *R v Gallagher* (1986) 41 SASR 73 at 76 per King CJ (Millhouse J concurring).

230 *R v Peake* (1974) 9 SASR 458.

231 There is a controversy about whether, at common law, it is permissible to prove a complaint by the evidence of the complainant alone: among recent authorities *R v Kincaid* [1991] 2 NZLR 1 at 9 and *White v The Queen* [1999] 1 AC 210 at 216 assert that it is not, while *R v J (No 2)* [1998] 3 VR 602 and *R v GAE* (2000) 1 VR 198 at 228-229 [93]-[96] assert that it is. It is not necessary to resolve this controversy in the present cases.

is entitled to rely on evidence of non-complaint or late complaint[232]. That evidence also goes only to credit: it can undermine the credibility of the victim but it is not evidence contradictory of the victim's testimony about the acts charged.

294 HML's daughter gave evidence in chief as follows: she had never told anyone about her father's conduct while it was going on; the reason she had not was that "I didn't know how they would react, what would happen afterwards"; she "eventually" told "someone about what was happening"; and thereafter she told the police. Although this evidence was not objected to, counsel for HML in this Court correctly submitted that the evidence of these complaints was inadmissible because the complaints were not made "at the earliest reasonable opportunity"[233] and that hence the evidence should not have been led.

295 Counsel for HML then submitted that so far as the evidence of the post-Adelaide uncharged acts was relied upon to explain a failure to complain, it was "pure credit bolstering"[234]. Counsel for the prosecution in this Court joined issue and submitted:

> "Outside the context of the rule against prior consistent statements and the rule against hearsay, terms such as 'credit bolstering' and 'self-serving' are merely pejorative and say nothing about the relevance or admissibility of the evidence. There is no rule against 'self-serving' evidence."

This collision raises important issues. Neither side did much to support its position beyond flagging it by recourse to the slogans just set out. However, the position adopted by HML's counsel has much force. In essence that position was that unless a challenge to credibility based on lateness in or absence of complaint

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232 *Kilby v The Queen* (1973) 129 CLR 460 at 472 per Barwick CJ (McTiernan, Stephen and Mason JJ concurring); [1973] HCA 30. Barwick CJ denied that "lack of complaint is probative of consent". The charges relating to the Adelaide incidents did not turn on consent, but Barwick CJ's reasoning is otherwise applicable: complaint is "a buttress" to the complainant's credit, and non-complaint tells "against the consistency of the woman's account and accordingly is clearly relevant to her credibility in that respect".

233 *R v Gallagher* (1986) 41 SASR 73 at 76.

234 This approach would also render inadmissible the explanation for failure to complain elicited immediately before the evidence of complaints, for similar principles must apply: counsel did not concentrate on this, no doubt because of the insignificance of the express explanation for delay in complaining compared to the damaging impact of the uncharged acts evidence considered as an explanation for that delay.

is foreshadowed before the complainant's evidence in chief is completed, an inquiry into the reasons for the lateness or absence is one which the rules of evidence do not permit the prosecution to initiate and conduct through the complainant's evidence in chief tendered solely for that purpose, whether by direct testimony to that effect of the kind the daughter gave in this case, or by giving uncharged acts evidence from which an explanation for delay may be inferred. In those circumstances, if delay in complaint is to be explained, it can only be explained by evidence given in the complainant's answers in cross-examination, or the complainant's answers in re-examination, or the subsequent evidence of some other witness.

296 *Australian authority.* So far as direct Australian authority goes, it affords some support for the position advocated by counsel for HML. Gaudron J said in *Gipp v The Queen*[235]: "[E]vidence of prior sexual abuse may explain ... failure to complain" if that is an issue "in the trial", but it "can only be made [an issue] by the way in which the defence case is conducted"[236]. And in *Bellemore v Tasmania*[237], Crawford J said, speaking of the regime established by the *Evidence Act* 2001 (Tas), ss 102-104 and 108: "[E]vidence explaining why a complainant delayed making a complaint ... will generally be relevant only to the credit of the complainant" and hence inadmissible in chief. Those legislative provisions do not suggest that they have effected any alteration of the common law position on the present point.

297 *Principle.* The position advocated by counsel for HML has support in principle. In 1974, Lawton LJ said[238]: "[I]n general evidence can be called to impugn the credibility of witnesses but not led in chief to bolster it up." He also said that this had "long been thought to be the [rule] relating to the calling of evidence on the issue of credibility". McHugh J called this "the 'bolster rule'". He said[239]:

> "That rule stipulates that evidence is not admissible if it merely bolsters the credibility of a party or witness, whether the evidence is sought to be

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235 (1998) 194 CLR 106 at 113 [12]; cf at 131 [73] per McHugh and Hayne JJ.

236 Some potential difficulties in a wider position asserted by Gaudron J are discussed at [331]-[335] below.

237 (2006) 170 A Crim R 1 at 19 [45].

238 *R v Turner* [1975] QB 834 at 842, giving the judgment of himself, Nield and Cantley JJ.

239 *Palmer v The Queen* (1998) 193 CLR 1 at 21-22 [49] (footnote omitted).

> led in evidence-in-chief or cross-examination of another witness or in re-examination of the party or witness attacked."

Thus, for example, it is not permissible for expert witnesses to be called to give reasons why another witness is reliable[240]. Here it is sufficient to concentrate on the incapacity of witnesses to accredit themselves in chief, and in particular their incapacity to anticipate attacks which may be made in cross-examination. So far as self-accreditation is permitted, it normally takes place in cross-examination to answer attacks made by the cross-examiner, or in re-examination, if the form of the cross-examiner's questions did not permit a full answer. The general rule was stated thus by Thomas J in relation to the following habit[241]:

> "A habit has developed in both criminal and civil jurisdictions whereunder the caller of a witness has the witness state a fact and thereupon asks him to state his reasons for doing the act or to say why he remembers the fact, or to say something about his own state of mind at that moment. This is asked in the expectation that the witness will give a convincing reason and make it easier for the jury or judge to accept the stated fact. Such practices lengthen trials by spawning false issues ...
>
> Only facts in issue should be led in chief. A witness may not lift himself by his own bootstraps to enhance his credit. If the fact which he states is challenged by the adverse party then that will be made apparent during cross-examination. The witness's reasons for doing the act or his purpose in doing so may then quite properly be asked, because it may help to show whether he should be believed in relation to that particular fact (ie on the question of credit). But it is for the cross-examiner, not the party calling the witness, to raise matters that go to credit. When this happens it may be permissible in re-examination to adduce evidence of the witness's state of mind when he did the act or made the observation or statement ... Unfortunately the practice of anticipation of such a challenge and the premature attempted rebuttal of the challenge has become widespread."

Thus it is not permissible for witnesses to give evidence in chief of prior statements they have made consistent with their testimony to rebut an apprehended allegation that the evidence in chief was constructed after the events it describes: the evidence of the prior consistent statement must be given only after the allegation has been made[242]. Nor is it permissible for witnesses (other than accused persons) to give evidence of their own good character in chief.

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240 *R v Nelson* [1982] Qd R 636; *R v Robinson* [1994] 3 All ER 346.

241 *R v Connolly* [1991] 2 Qd R 171 at 173-174.

242 *The Nominal Defendant v Clements* (1960) 104 CLR 476 at 479; [1960] HCA 39.

298 It is, however, true that some accreditation can take place in chief. One example is a speedy complaint. Another example relates to introductory questions going to the addresses, marital status and occupations of witnesses: the answers can tend to accredit the witnesses by locating them in a certain social milieu. In the United States "the educational background or professional status or employment position of a non-expert witness may be asked, or the witness's lack of prior contact with the side who has called him may be brought out"[243]. In Australia the former practice is less common than the latter. Further, witnesses giving opinion or other evidence for which expertise is necessary must establish that expertise, and sometimes seek to make a virtue of that necessity by giving long and boastful accounts of their achievements. Another example is refreshing memory. That process depends on a witness having recourse in the witness box to a document which the witness made, or read and accepted as accurate, while the facts were fresh in the witness's memory. That recourse may merely stimulate testimony which rests on what is in the document without reviving the witness's recollection. Alternatively, it may revive an actual recollection. Either way the process tends to accredit the witness by revealing to the trier of fact that the witness made a prior statement consistent with the case which the party who invited the witness to refresh memory wishes to propound.

299 The rule against proof of prior consistent statements in chief does not preclude proof of a victim's conduct just after an event alleged to be a crime, such as weeping or running away or going to a hospital. A further limited exception to the rule against prior consistent statements was stated thus by the Privy Council in *White v The Queen*[244] by analogy to that type of evidence:

> "Their Lordships accept that when the complainant herself is giving evidence, it may be difficult for her to give a fair and coherent account of her behaviour after the incident without allowing her to mention that she spoke to other people who may not be available to give evidence (within the sexual complaints exception) of what she actually said. Their Lordships would not suggest that the mere mention that the witness spoke to someone after the incident was inadmissible. In most cases it will be very difficult to draw any rational distinction between consistent conduct, which is plainly admissible (eg that the witness wept) and the fact that she spoke to someone such as a parent. On the other hand, it is important to avoid infringement of the spirit of the rule against previous self-consistent statements by conveying indirectly to the jury that she had given a previous account of the incident in similar terms with a view to inviting

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243 *City of Baltimore v Zell* 367 A 2d 14 at 17 (Md CA, 1977).

244 [1999] 1 AC 210 at 217.

> the jury to infer, not merely that her subsequent conduct was not inconsistent with her complaint but that her credibility was actually supported by the fact that she had told the same story soon after the incident."

300 No doubt other instances could be assembled. However, the strictness of the "bolster" rule is illustrated by the narrow, specific and scattered nature of these exceptions to it.

301 Australian law proceeds on the assumption, at least at the time a witness begins to give evidence, that the witness is creditworthy. It may be an assumption which is weakened in a particular case by clouds of doubt arising from other evidence already tendered, or by the paucity or the unsatisfactoriness of the evidence in chief. It may be an assumption which is further weakened in cross-examination. But the party against whom the witness's evidence is tendered often does not seek to destroy the creditworthiness of the witness. That party may decide not to cross-examine at all. That party may value one or two parts, perhaps more, of a witness's evidence, and wish to preserve it from taint of doubt; or may accept what a witness says in chief, but seek to add to it or to qualify it by eliciting additional answers in cross-examination. Immense waste of time could be caused if witnesses were permitted to arm themselves, in advance, with responses to attacks on their credibility which may never be made. Getting one's retaliation in first may be habitual in Welsh rugby circles; it is not encouraged by the classical common law model of trial. That model seeks to narrow tenders to what is necessary: there is no point in anticipating responses to a possible challenge which may never be made. In this respect the law is not harsh to witnesses, and in some ways it assists their credibility. For just as unsolicited excuses amount to self-accusation, so unprovoked attempts at self-bolstering may damagingly suggest a suspicious defensiveness and sensitivity.

302 *Principle as seen by Wigmore.* But do these considerations have to give way in relation to the particular problem of explaining delay in complaint? Wigmore's analysis of American law appears to assume that it is open to the prosecution to elicit explanations in chief from victims for their delay in complaint or failure to complain at all. He reasoned as follows:

(a) The failure of a party to produce evidence indicates that the party fears to do so, and "this fear is some evidence that the circumstance or document or witness, if brought [forward], would have exposed facts unfavorable to the party"[245].

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245 Wigmore, *Evidence in Trials at Common Law*, Chadbourn rev (1979), vol 2, §285 at 192.

(b) "A *failure to assert* a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact."[246]

(c) A failure "to speak when it would have been natural to do so is ... an inconsistent statement or self-contradiction"[247].

(d) The failure of a rape victim to complain soon after the rape is a self-contradiction of that kind[248].

(e) If no evidence of a complaint is given, the jury are likely to assume that none was made, and "counsel for the accused might be entitled to argue upon that assumption". Hence the prosecution is entitled to forestall that assumption by proving that a complaint was made[249].

(f) The failure to complain may be explained "as due to fear, shame, or the like, so that it loses its significance as a suspicious inconsistency"[250].

303 The difficulty with this reasoning as a matter of principle is that steps (a) and (b), from which all else is supposed to follow, are inconsistent with the common law of Australia. In civil cases the unexplained failure of a party to give evidence, call witnesses or tender material is not treated as evidence of fear that it would expose an unfavourable fact, nor as an assertion of the non-existence of the fact not proved: the only consequence is that the failure can cause an inference arising from the evidence of the opposing party to be more confidently drawn[251]. In general even this type of inference cannot generally be drawn in relation to the accused's failure to testify or call evidence[252].

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246 Wigmore, *Evidence in Trials at Common Law*, Chadbourn rev (1970), vol 3A, §1042 at 1056 (emphasis in original).

247 Wigmore, *Evidence in Trials at Common Law*, Chadbourn rev (1972), vol 4, §1135 at 298. See also vol 3A, §1042 at 1056.

248 Wigmore, *Evidence in Trials at Common Law*, Chadbourn rev (1972), vol 4, §1135 at 298.

249 Wigmore, *Evidence in Trials at Common Law*, Chadbourn rev (1972), vol 4, §1135 at 298-299.

250 Wigmore, *Evidence in Trials at Common Law*, Chadbourn rev (1972), vol 4, §1135 at 301.

251 *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8.

252 *Azzopardi v The Queen* (2001) 205 CLR 50; [2001] HCA 25; *Dyers v The Queen* (2002) 210 CLR 285; [2002] HCA 45.

304 Proposition (e) is not good law in Australia either. It would not be open to the defence to make an attack in final address on the credit of the witness for not complaining without having established the evidentiary foundation for it in cross-examination. Hence under our procedure, unless there has been sufficient questioning in cross-examination, it is not true that counsel for the accused "might be entitled to argue upon [the] assumption"[253] that no complaint was made.

305 So far as authority is concerned, the only English case cited in support of proposition (f) was *R v Rearden*[254]. There a child of nine gave evidence that the accused had committed the crime of carnal knowledge on three days – Thursday, when he "threatened to beat her if she told", Saturday and Monday. After the Monday incident she complained to her mother. The argument did not proceed by reference to the question whether the evidence of the threat was admissible in chief as evidence explaining non-complaint. Rather the argument centred on the admissibility of the second and third incidents, which Willes J upheld by treating all the incidents as "part of one and the same transaction"[255] and as having "continuity" derived from the accused's threat of violence[256]. In any event the rule against self-accreditation is probably not infringed where the witness's account of the crime charged contains a possible explanation for non-complaint[257].

306 Wigmore also cited numerous American authorities. In most of them, it does not appear whether the reason for non-complaint was elicited in chief over objection or whether it was given in cross-examination. In some of the cases cited it was held not to be an error to permit prosecution counsel to ask the victim why no complaint was made immediately after the commission of the crime[258]. However, other courts disagree. In *State v Werner*[259] the Court of Appeals of Maryland held it impermissible for the prosecution to question a witness who had

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253 See [302] above.

254 (1864) 4 F & F 76 [176 ER 473].

255 (1864) 4 F & F 76 at 76 [176 ER 473 at 474].

256 (1864) 4 F & F 76 at 80 [176 ER 473 at 476].

257 See [308] below.

258 *State v Knapp* 45 NH 148 at 150 and 155-156 (1863); *State v Shettleworth* 18 Minn 208 (1872); *People v Ezzo* 62 NW 407 (Mich, 1895).

259 489 A 2d 1119 (Md, 1985).

allegedly been sexually abused by her stepfather about his abuse of her sister in order to explain the witness's delay in complaining. It applied the principle that "a party ordinarily may not sustain the credibility of his own witness absent an attack upon credibility by the other side"[260]. It considered that evidence of reasons for a five year delay in complaint elicited in chief was inadmissible, and that the correct approach was to wait for the defence to raise the issue of a failure to make speedy complaint in cross-examination if it wished to, and then to seek to explain the delay in re-examination[261]. This corresponds with the position advocated by counsel for HML.

307 *The Australian position contrasted with Wigmore's.* It is probable, then, that the common law of Australia does not proceed on the view that the credit of a witness who has not complained is irretrievably damaged unless an explanation is given for non-complaint in chief. It treats a complaint as "merely and exceptionally constituting a buttress to the credit" of the witness[262]. It starts with the witness's evidence of the crimes charged, and treats a complaint as buttressing the witness's credit; even if there is no evidence of a complaint, the witness's credit stands, unless the testimony is manifestly questionable, until there has been cross-examination, including cross-examination about any failure to complain. The starting point is not that the witness's evidence is damaged by failure to complain until that failure is explained.

308 To that approach there is one exception. It arises where the victim's account of the crime charged contains a possible explanation – for example, a threat by the accused to kill the victim. In that instance, the witness is not giving evidence for the sole purpose of bolstering her credibility: she is merely narrating the events which make up the crime, in a manner which may have the incidental consequence of strengthening her credibility.

309 *South Australian legislation.* Counsel for HML's submission is not undermined by South Australian legislation. Two provisions relate to complaints.

310 One is found in s 34CA of the *Evidence Act* 1929 (SA):

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260 489 A 2d 1119 at 1125 (Md, 1985), quoting *City of Baltimore v Zell* 367 A 2d 14 at 16 (Md CA, 1977).

261 489 A 2d 1119 at 1125-1127 (Md, 1985).

262 *Kilby v The Queen* (1973) 129 CLR 460 at 472 per Barwick CJ (McTiernan, Stephen and Mason JJ concurring).

> "(1) Subject to subsection (2), where the alleged victim of a sexual offence is a young child, the court may, in its discretion, admit evidence of the nature and contents of the complaint from a witness to whom the alleged victim complained of the offence if the court, after considering the nature of the complaint, the circumstances in which it was made and any other relevant factors, is of the opinion that the evidence has sufficient probative value to justify its admission.
>
> (2) Such evidence may not be admitted at the trial unless the alleged victim has been called, or is available to be called, as a witness."

A young child is a child of or under 12 years of age: s 4. Section 34CA has been held to change the common law by rendering complaints evidence of the truth of the facts asserted[263]. But the section is silent on whether explanations for failure to complain can be given in chief, and the common law must be presumed to continue in these respects.

311 The other relevant provision is s 34I(6a):

> "If, in proceedings in which a person is charged with a sexual offence, any information is presented to the jury, or suggestion made in the presence of the jury, that the alleged victim failed to make a complaint, or delayed in making a complaint, about the alleged offence, the judge must –
>
> (a) warn the jury that the alleged victim's failure to make a complaint, or delay in making a complaint, does not necessarily mean the allegation is false; and
>
> (b) inform the jury that the victim of a sexual offence could have valid reasons for failing to make a complaint or for delaying in making a complaint."

These provisions about jury direction do not prevent the jury from employing the reasoning permitted by the common law: that the complainant's failure to complain or delay in complaining goes to credit. And they do not suggest that it is permissible for the prosecution to seek to make up for the absence of a recent complaint by eliciting explanations from the complainant in chief for that absence. They say nothing about the time when the "information" must be "presented", or the "suggestion made".

312 *Prior notice of a challenge to credibility because of delay in or absence of complaint.* How is notice of a challenge to the credibility of a complainant based

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263 *R v Corkin* (1989) 50 SASR 580 at 582-583 and 587.

on delay in or absence of complaint to be raised by the defence before the end of the complainant's evidence in chief? If notice has not been given by the conduct of committal proceedings or by something said or done in proceedings before the jury is empanelled, the principal formal method of giving it would be in an opening by defence counsel before the evidence begins. In Victoria the defence is obliged to make a statement immediately after the prosecutor's opening and before the prosecutor calls evidence[264]. In New South Wales[265], South Australia[266], Western Australia[267] and Tasmania[268] the defence is entitled to do so. Although these latter provisions are limited in various ways, they would ordinarily afford an opportunity to indicate that the defence is planning to take a significant point about delay in complaint. However, the South Australian provision only came into force on 1 March 2007, well after the three trials under consideration took place. At the time when the daughter gave her uncharged acts evidence in chief, it was unclear what the defence tactics in relation to the charged acts would be, and whether they would fasten on a failure to complain before 2003.

313 *Conclusion.* For the above reasons, there is much to be said for the submission advanced on behalf of HML that the daughter's evidence about the uncharged acts was not admissible if tendered for the sole purpose of explaining a failure to complain about the charged acts before 2003, because it was an impermissible bolstering of the daughter's credit in chief. It is not, however, necessary to decide the point: since the fourth basis for tendering the uncharged acts evidence is sound, the evidence is admissible, and, once admitted, it can be used on the fifth basis as well as the fourth.

HML v The Queen: admissibility of the uncharged acts: explanation of acquiescence

314 The third use which the jury were told by the trial judge they could make of the uncharged acts was to explain why the daughter "acquiesced" in HML's conduct in Adelaide. This ground of reception has been employed in other cases[269]. As counsel for HML correctly submitted, tender to show why the

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264 *Crimes (Criminal Trials) Act* 1999, s 13.

265 *Criminal Procedure Act* 1986, s 159(1) and (2).

266 *Criminal Law Consolidation Act* 1935, s 288A.

267 *Criminal Procedure Act* 2004, s 143(2) and (3).

268 *Criminal Code*, s 371(ab).

269 *R v Etherington* (1982) 32 SASR 230 at 235 ("to explain why she continued to submit to him and why he was able to commit his indecent acts upon her on the

(Footnote continues on next page)

daughter acquiesced was similar to tender to show why she did not complain: failure to acquiesce usually involves protest or complaint, and bolsters the complainant's credit; hence acquiescence undermines the complainant's credit unless that acquiescence is explained. There had been no disclosure of any planned defence tactics which could have made the evidence receivable in chief. Hence if HML's arguments about the inadmissibility of the uncharged acts evidence tendered solely on the fifth basis are correct, reliance on the third basis alone will not assist the prosecution.

HML v The Queen: admissibility of the uncharged acts: to explain confidence

315 The second basis on which the uncharged acts evidence was said to be relevant was that it might show why HML was "confident" enough to act as he was alleged to have acted in Adelaide. This too is reasoning that has been employed in some other cases[270]. Counsel for HML correctly submitted that HML's confidence can only be relevant in one of two ways. One is to show that he anticipated acquiescence – no protest and no complaint: as prosecution counsel said, because "it is known that [HML] has been able to do it without any effective complaint in the past". HML submitted that, so used, the evidence is being used as a means of bolstering the daughter's credibility. If his submission in relation to the fifth basis is sound, the second basis by itself is equally inadequate to justify reception[271]. The other way in which HML's confidence is relevant is to show that his behaviour in the past was very likely to be repeated in

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occasion charged") per Walters J; *R v Josifoski* [1997] 2 VR 68 at 77; *Gipp v The Queen* (1998) 194 CLR 106 at 130 [72] ("to explain why the complainant so readily complied with the various demands of the appellant") and 131 [73] ("to explain the complainant's apparent lack of surprise at being called ... to gratify the appellant's sexual desires") per McHugh and Hayne JJ; *R v Nieterink* (1999) 76 SASR 56 at 65 [43] (to "explain how the victim might have come to submit to the acts the subject of the first charge") per Doyle CJ; *KRM v The Queen* (2001) 206 CLR 221 at 230 [24] and 264 [134]; [2001] HCA 11.

270 *Gipp v The Queen* (1998) 194 CLR 106 at 131 [73] ("to explain ... the appellant's confidence – manifested by the omission of any threat or inducement – that the complainant would regard the incident as nothing unusual") per McHugh and Hayne JJ. See also *R v Josifoski* [1997] 2 VR 68 at 77 ("to explain why he would be confident that he could with impunity again assault her") per Southwell AJA (Phillips CJ concurring); *R v Nieterink* (1999) 76 SASR 56 at 65 [43] (otherwise "it might seem incredible to the jury that the accused would suddenly have committed the first crime charged") per Doyle CJ.

271 See [290]-[313].

future. Contrary to the submissions of HML, this latter use is permissible, because it is an instance of the fourth basis, discussed above[272].

HML v The Queen: admissibility of the uncharged acts: to provide context or background

316 *The prosecution position at trial.* The remaining basis for admitting the uncharged acts evidence is the first. On that basis, as the trial judge told the jury, the evidence revealed a "relationship" which could "provide a background against which ... you can consider [the daughter's] evidence of what she said occurred ... in Adelaide"[273]. Similarly, prosecution counsel told the jury:

> "What happened in Adelaide, on the Crown case, didn't just happen out of the blue, it was part of an ongoing course of conduct, in which [the daughter] was being sexually abused over a number of years. If you hadn't heard about that evidence, you might wonder how on earth it was that, or why on earth it was that suddenly these two acts might happen, as I say, out of the blue in a hotel room. But what happened in Victoria is important, because it gives you the context in which the charged acts occurred."

317 *Counsel for HML's position on appeal.* Counsel for HML submitted that evidence of the uncharged acts that took place after the Adelaide visit could not be admissible for the purpose under discussion. That submission is plainly correct. Counsel for HML also conceded, whether correctly or not, contrary to his predecessor's stance at trial, that up to a point the evidence was relevant on the basis described in *R v Chamilos*[274]. There O'Brien CJ of Cr D (Slattery CJ at CL and Grove J concurring) said:

> "[I]t is *by no means easy for a complainant* to describe the initiation and progress of a history of sexual gratification with her by an adult male (and especially her father) which began when she was a child of seven years

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272 See [277]-[289].

273 Counsel for HML contended that use of evidence to show "relationship" and use of evidence to show "background" were not synonymous. It is not necessary to resolve this issue. Counsel also submitted that the first use of the uncharged acts evidence relied on by the prosecution – to provide a context for the Adelaide events without which the unrealistic impression would be left that they occurred out of the blue – was not taken up in the summing up. In substance it appears to have been taken up in this passage.

274 Unreported, New South Wales Court of Criminal Appeal, 24 October 1985 at 14-15.

> and regularly persisted, according to her account, for the ensuing nine years until she left the home. *It is all the more difficult for such a witness to proceed intelligibly* when she is required to confine her attention to three incidents more or less artificially selected over such a long history. *It can make no sense for a girl in such a situation* that she be precluded from any reference to the whole basis of her complaint and it would make, I should think, **no sense for lay jurors** that she be so confined. If successful it would **leave jurors with a strange and unrealistic account** of three unrelated acts of indecency separated by periods of years. To preclude any reference to such a history counsel must resort to leading questions as to time and circumstances of the offences charged. This can only serve to **distort the evidence** and *distract the witness from a free chronological progression* of a factual narrative which accords with the best of her contemporaneous recollection. In the end it *will confuse* her in what must be for her an illogical exercise. In any event it cannot really be successfully achieved. She will inevitably make some reference, as she did in her evidence in this case, to the background from which she is required to dissociate herself." (emphasis added)

318 The several strands of thought underlying this reasoning may be found in other authorities. One strand of thought is that it is unrealistic for the witness to be limited to a description of the events relevant to the acts charged in such a way that they appear to "come out of the blue"[275] and are "viewed in total isolation from their history"[276]. Another is that without the background evidence it is "scarcely possible to present the case in an intelligible and real fashion"[277]. Another strand of thought is that to permit evidence of background facts enhances the ease with which the witness tells the story and the natural tendency of the witness to refer to other incidents should not be checked. Yet another is the reception of uncharged evidence as a means of completing the witness's story[278]. Thus in both *R v Chamilos* and the present appeal, in describing a

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275 *R v Nieterink* (1999) 76 SASR 56 at 65 [43]; *R v GAE* (2000) 1 VR 198 at 206 [22]; *Tully v The Queen* (2006) 230 CLR 234 at 278 [145]; [2006] HCA 56.

276 *R v M(T)* [2000] 1 WLR 421 at 426; [2000] 1 All ER 148 at 152, approving Birch, [1995] *Criminal Law Review* 651.

277 *R v Garner* (1963) 81 WN (Pt 1) (NSW) 120 at 122 (evidence of "a long course of cruelty and continued ill-treatment" received on a charge of assault occasioning actual bodily harm) per Sugerman J. See also *O'Leary v The King* (1946) 73 CLR 566 at 577 per Dixon J; [1946] HCA 44; *KRM v The Queen* (2001) 206 CLR 221 at 264 [134] per Hayne J; *R v Etherington* (1982) 32 SASR 230 at 235.

278 Thus in *R v Pettnam* unreported, English Court of Appeal, 2 May 1985, quoted in *R v Fulcher* [1995] 2 Cr App R 251 at 258, Purchas LJ said: "Where it is necessary to place before the jury evidence of part of a continual background of history

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charged act, the daughter made a reference to the background events. That strand of thought would permit a narrow class of uncharged acts evidence – that which explained what HML was referring to when he said: "Why isn't it working? It's worked before." That use of uncharged acts evidence would rest on the need to explain fully the details of the events taking place on the occasion of the particular act charged.

319 The thinking underlying the reception of evidence as "background" or "context", then, rests on two broad and partially overlapping bases. The first is that to exclude it is unfair to the witness: this is reflected in the italicised portions of the above quotation from *R v Chamilos*. The second is that it is inefficient for the trier of fact, and hence productive of injustice, to exclude the evidence: this is reflected in the portions of that quotation in bold type.

320 *Controversies about "background" evidence.* These are powerful points of view, but should they prevail? The principal countervailing factor is the prejudice which uncharged sexual acts evidence can cause: for whether or not it is tendered for the *purpose* of establishing the accused's disposition, it will very often have that *effect*. If its effect is to establish the accused's disposition even though it was not tendered for that purpose, some think it must comply with a similar fact admissibility test[279]; some think it need not, but that it may be excluded on the ground that the effect is prejudicial, and exceeds the probative value of the evidence[280]; some think that it may be received, subject to a warning against using the evidence to show either specific or general disposition, to which others point out that these warnings are not easy to formulate or understand. Evidence scholars seldom meet together, even for merriment and diversion, but the conversation ends in a quarrel about these questions.

321 It was common ground that triers of fact are likely to draw two inferences from sexual attraction which has expressed itself in conduct: one is that it is highly likely the attraction will persist, and the other is that there is a powerful tendency for that conduct to recur, because that is "what usually happens or is assumed to happen"[281]. The likelihood of these inferences makes uncharged acts

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relevant to the offence charged in the indictment and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence."

279 *Pfennig v The Queen* (1995) 182 CLR 461 at 513-514.

280 *R v Leonard* (2006) 67 NSWLR 545 at 557 [55]-[57].

281 See the first quotation from Matthaeus at [272] above.

evidence of that kind powerful. But it also makes it prejudicial, even if the evidence is not tendered to prove disposition, because of the risk that the trier of fact will decide particular factual controversies about what someone did by reference to the character traits displayed in past conduct rather than by reference to the particular material bearing directly on the controversy. Some think that a rule, like that in *Pfennig v The Queen*, peculiarly directed to negating the danger of prejudice, is suitable in relation to uncharged acts evidence even if it is only tendered as background.

322 *Bolstering effect of "background" evidence*. Quite apart from these controversies, counsel for HML submitted that "background" evidence can have a bolstering effect on the witness's credibility which requires scrutiny in the light of the general principle against self-bolstering. He submitted that to use the uncharged acts evidence as "background" was to use it in a manner going only to the credibility of the daughter, since it tended to make her evidence more believable, as coming less "out of the blue", and hence less implausible, and to show her to be giving evidence in relation to the charged acts which was consistent with her past experience in relation to the uncharged acts. The submission was advanced to criticise the trial judge's directions for placing excessive significance on the evidence. But if the submission is sound, it suggests that the evidence could not be received solely to provide "background". It is a submission of some force.

323 *Excessive detail?* The particular criticism which counsel for HML made about the reception of the pre-Adelaide uncharged acts evidence tendered in chief to give background or context (and indeed tendered for some of the other purposes) was that the "level of detail" given "was not needed to supply context"; more detail might have been admissible in re-examination "depending on the nature and content of the cross-examination"[282]. The basis for this submission was that background/context evidence "is not being used as evidence of guilt". Counsel submitted:

> "In respect of this evidence the jury is not being asked to make any *findings* about whether or not other incidents alleged by the complainant did or did not occur. The jury should not be asked to determine whether they are 'satisfied' about anything in this regard. No particular standard of proof applies and it is not appropriate to speak about the evidence having any 'use' if this is meant to imply an available basis of reasoning towards guilt." (emphasis in original)

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282 There are certainly earlier cases in which concern about excessive detail in "background" evidence has been expressed, eg *R v Bradley* (1989) 41 A Crim R 297 at 302; *R v Kemp* [1997] 1 Qd R 383 at 398.

This submission is reflected in the form of directions which HML submitted should have been given in relation to the uncharged acts so far as they were tendered to establish context:

> "2. This evidence is before you solely to enable the complainant's account of the allegations the subject of the two counts in the Information to be placed in context and not seen in isolation. In particular, this evidence is before you so you can assess, in context, what the complainant said about the demand for sex allegedly made by the accused following the complainant's request to go shopping (the subject of count 1) and the complainant's account about what the accused allegedly said ('Why isn't it working. It's worked before') at the time of committing the offence the subject of count 2.
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> 3. In assessing whether or not you regard the complainant's account as plausible or implausible you are entitled to have regard to the whole of her evidence including her account of the other acts of sexual impropriety said to have occurred in Victoria. Both counsel have made submissions in respect of this subject. On the one hand the prosecutor has sought to demonstrate to you that this evidence shows that the complainant's evidence hangs together and is plausible. On the other hand, defence counsel has referred to this same evidence to show you that the complainant's evidence does not hang together and, is in fact, beset by inconsistencies and exaggeration. You are entitled to make what you will of the arguments put by either counsel on this subject having regard, as I have said, to the whole of the complainant's evidence.
>
> 4. I direct you that you must not use this evidence as evidence of the accused's guilt of the two counts in the Information. It is neither necessary nor appropriate for you to consider whether or not this other alleged sexual impropriety in fact took place."

324 This submission is erroneous. To begin with, the last sentence of the quoted directions is wrong. It may be true that the mere fact that uncharged acts relied on to give background or context took place cannot be used to support a case that the charged acts took place by reasoning that the disposition revealed by HML when he carried out the uncharged acts made it likely he committed the crimes alleged in Adelaide. But the uncharged acts evidence relied on to give background or context would be irrelevant and hence inadmissible unless the evidence rendered probable the existence of the charged act, or a fact relevant to a charged act. If the daughter's evidence of the charged acts in Adelaide stood alone, her account might be highly incredible. But it is less incredible when considered against the background of her father's past behaviour towards her. Background evidence "does support the guilt of the accused, by making the

complainant's account of the assaults charged more believable"[283]. Hence the jury are asked to make findings about whether the uncharged acts occurred. The question is not whether the daughter believed or imagined they occurred. The evidence about the uncharged acts is pointless unless it tends to establish that they actually did occur. The question can be expressed by asking whether the Adelaide incidents happened "out of the blue": if prior sexual conduct by HML took place, they did not happen out of the blue; if it did not take place, they did happen out of the blue. To use the language of the proposed directions, the uncharged acts would not provide "context", nor assist in assessing the daughter's evidence as plausible or implausible or as hanging together, unless it was thought that they had taken place. There would be no point in debating the standard of proof applying to the uncharged acts (and it is another part of HML's argument that the standard of proof is satisfaction beyond reasonable doubt[284]) unless the prosecution were trying to prove the uncharged acts, and the defence trying to disprove them or cast doubt on them. Paragraph 3 of the suggested directions is thus inconsistent with par 4.

325 A further difficulty in HML's argument that the evidence of uncharged acts was too detailed is that it is internally contradictory. HML submitted that the three statements of the daughter used as the basis for debating the admissibility of her evidence were different from the actual evidence she gave. These differences would not matter unless the existence of the uncharged acts was controversial.

326 From the prosecution's point of view, the less detailed the uncharged acts evidence, the less convincing it might be. From the accused's point of view, the less detailed the uncharged acts evidence, the harder it might be for the defence to deal with the evidence, whether by searching cross-examination or by calling evidence in answer. Further, while sometimes it is the case that the less the detail the lower the prejudice, in other circumstances very general evidence might leave the minds of the jurors free to roam in an uncontrolled and dangerous way. In particular cases, counsel for the accused will make particular tactical decisions that seem most advantageous for the client: objecting to or not insisting on anything more than a general reference in some circumstances, permitting a highly detailed but unconvincing account to be given in others. Thus in *Gipp v The Queen*[285] McHugh and Hayne JJ thought that in taking the former course counsel made "the better forensic choice" in allowing the complainant to give her sexual history "shortly and without prejudicial detail" turning on "the times,

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283 *R v Leonard* (2006) 67 NSWLR 545 at 557 [54] per Hodgson JA.

284 See below at [339].

285 (1998) 194 CLR 106 at 132 [75].

places and manner of [the] sexual interferences". On the other hand, in *Tully v The Queen*[286] it was thought that it was far from irrational for defence counsel to have permitted the prosecution to tender evidence of the sexual history in detail, and herself to have explored it in cross-examination, and it was held that no miscarriage of justice arose.

327 The argument propounded in this Court finds no foothold in the conduct of counsel for HML at the trial, for no explicit objection based on the supposedly excessive detail of the evidence was ever taken. In those circumstances it would be wrong to hold the uncharged acts evidence inadmissible on the ground of its detail. In any event, once the uncharged acts evidence was held admissible to prove the particular disposition of HML, it was legitimate for the prosecution to elicit the evidence in the detail which the daughter gave.

328 *Authority in this Court.* There have been sharp divisions in this Court on the question whether uncharged acts not said to satisfy the similar fact evidence rules at common law, or their statutory equivalents[287], are admissible. Thus Callinan J suggested that it was not permissible for the prosecution to tender evidence which was "non-specific" and "highly prejudicial" merely on the basis that it formed "part of the essential background". In his opinion, unless the conduct of the defence made it admissible, its admissibility had to rest on[288]:

> "some, quite specific, other purpose, including for example, in an appropriate case, proof of a guilty passion, intention, or propensity, or opportunity, or motive. There may also be cases in which a relationship between people may be directly relevant to an issue in a trial and in those circumstances admissible as such."

He thought that "in a case ... in which there are multiple recurrent counts of the same offence or similar offences over a considerable period, any justification for the leading of 'relationship', 'contextual' or 'background' evidence will not be well founded". But he said that the position may be different where only one or a small number of offences are charged and "a truthful complainant is likely to be disbelieved if relationship evidence is excluded and in consequence the jury derive the impression that the complainant is saying that the accused molested him or her out of the blue"[289]. Callinan J assembled various arguments of a kind

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286 (2006) 230 CLR 234 at 280 [149].

287 See n 227.

288 *Gipp v The Queen* (1998) 194 CLR 106 at 168-169 [181]-[182]. See also *Tully v The Queen* (2006) 230 CLR 234 at 278 [144]-[145].

289 *Tully v The Queen* (2006) 230 CLR 234 at 278 [145], quoting *R v GAE* (2000) 1 VR 198 at 206 [22].

meriting close consideration on an appropriate occasion – the difficulty of defining "relationship evidence", "background evidence" and "contextual evidence"[290]; the difficulty of using those concepts precisely; the prejudicial character of the evidence; disputes about the standard of proof; disputes about formulating jury directions[291]; and consequential complications[292]. To those considerations can be added the extreme difficulty an accused person may have in grappling with a mass of material which may not have been particularised or fully foreshadowed before the complainant enters the box, and the difficulty of reconciling the reception of evidence tendered only to show context or background with the principle against self-accreditation.

329 Gaudron J appeared to adopt an even more restrictive approach: general evidence of sexual abuse on occasions other than those charged not admissible as similar fact evidence and not relevant to issues raised by the defence is inadmissible[293].

330 On the other hand McHugh and Hayne JJ favoured the reception of a general history of sexual interference not confined to the matters charged to explain why a complainant complied readily and without surprise with the demands of the accused; to prevent the evidence of the complainant seeming "unreal and unintelligible"; to explain the complainant's matter of fact presentation of that evidence; to explain a failure to complain; and to explain the accused's confidence that the complainant would not regard the incident charged

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290 These difficulties are also discussed by Doyle CJ in *R v Nieterink* (1999) 76 SASR 56 at 65-66 [45]-[46] and 73 [85].

291 Where uncharged acts are admitted to prove background, but not to prove disposition as similar fact evidence, it has been held necessary to give a direction that if the jury find the uncharged acts are proved, they are "not to use that finding to reason that the accused committed the offences charged": *Gipp v The Queen* (1998) 194 CLR 106 at 133 [78] per McHugh and Hayne JJ, see also at 156 [141] per Kirby J; *R v Vonarx* [1999] 3 VR 618 at 625 [21]-[24]. This is a difficult direction to give, and one which is not necessarily easy to follow: see [345] below.

292 *Gipp v The Queen* (1998) 194 CLR 106 at 166-169 [176]-[182]; *Tully v The Queen* (2006) 230 CLR 234 at 275-279 [136]-[147].

293 *Gipp v The Queen* (1998) 194 CLR 106 at 112-113 [11]-[13]. Read as a whole, [11] accepts that general evidence of sexual abuse on occasions other than those charged is admissible if "directly relevant" to guilt.

as unusual[294]. McHugh J[295] and Hayne J[296] have since agreed that until this Court decides to the contrary, Australian courts should continue to treat evidence of uncharged sexual conduct as admissible "to explain the nature of the relationship between the complainant and the accused", but should sometimes, perhaps often, warn of the limited use that can be made of evidence of that kind.

331 In this case the uncharged acts evidence was admissible to prove HML's particular disposition to gratify his sexual attraction towards his daughter with a view to concluding that he gratified it on the occasions of the charged acts. Even if Callinan J's reluctance to accept that non-specific highly prejudicial evidence can be led only as part of the essential background and not for any of the specific purposes he itemised is correct, this is not a case where there is no specific purpose. Nor, indeed, can the evidence be called non-specific or merely general evidence of sexual abuse, as counsel for HML's complaint about its supposedly excessive detail illustrates. Whether as a matter of principle the view of Callinan J or the view of Gaudron J is correct is not a question which was thoroughly examined in the arguments presented to this Court. The question is extremely difficult because to be raised against the arguments supporting their point of view are numerous arguments bearing on its unfairness to witnesses, and on the social interest in convicting those guilty of crimes against small children which are both grave and difficult to prove. Three particular difficulties said to arise on Gaudron J's view may be noted briefly at this point.

332 One is that her view would prevent, for example, the evidence of HML's daughter about what he said in relation to the second charge about what had "worked before" and what she understood him to mean. The existence of that difficulty may be questioned: as counsel for HML accepted, Gaudron J's approach does not prevent the tender of evidence about what happened on the occasion of the crime charged and events expressly or impliedly referred to on that occasion.

333 A second potential difficulty is that if the defence fails until cross-examination to raise an issue about whether the evidence about the charged acts suggests an assault out of the blue, the complainant's account of all the abuse she has experienced may be offered in a fragmented way – some in chief, some in cross-examination, and some in re-examination. In jurisdictions that require no disclosure of the accused's hand before cross-examination, fragmentation remains an undesirable possibility, but it is an inevitable result of the collision

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294 *Gipp v The Queen* (1998) 194 CLR 106 at 130-131 [72]-[73].

295 *KRM v The Queen* (2001) 206 CLR 221 at 233 [31].

296 *KRM v The Queen* (2001) 206 CLR 221 at 264 [134].

between the interests of the witness and of the defence which Gaudron J's approach seeks to resolve justly.

334 A third potential difficulty is said to stem from the entitlement of jurors to think about the evidence for themselves whatever line the defence takes. That entitlement must be qualified by their duty to concentrate on the issues presented. The area of difficulty is also likely to be a narrow one. Discussion of it must assume that defence counsel has not, before the evidence closes, given any indication of reliance on the argument that the complainant's evidence is not credible because it narrates bizarre events as though they were isolated occurrences, and in particular has not cross-examined to make that point. The area is narrow because, in the first place, to cross-examine on the evidence about the charged acts so as to suggest that they never took place, without putting the proposition that they would not have happened in isolation, is likely to be a rare event in view of the extremely delicate skills and unusual capacity to control the witness which would be called for. Secondly, the area is narrow because a submission by counsel in address that the acts did not take place because their isolation made the evidence incredible would contravene the rule in *Browne v Dunn*[297] and permit the recall of the witness to deny that the acts were isolated. Thirdly, the area is narrow in that to assume that counsel would not, by question or in address, suggest a lack of credibility because of the isolated nature of the acts charged is to assume a highly artificial and unrealistic trial and very risky defence tactics.

335 But it is not necessary now to resolve the question whether either Callinan J or Gaudron J is correct, and it is not necessary now to decide whether, even if evidence tendered only to prove background but likely to have a prejudicial effect is admissible, it must first satisfy the *Pfennig* test. It is not necessary because the evidence was admissible in any event on the fourth basis.

HML v The Queen: admissibility of the uncharged acts: conclusion

336 The first, third and fifth bases for tendering the uncharged acts evidence, and from one point of view the second basis, were arguably not valid bases for admissibility in themselves. The fourth basis, properly understood, however, was: the evidence was admissible similar fact evidence capable of being used to establish HML's particular disposition to assault his daughter sexually as a step towards proving his guilt of the charged acts. In those circumstances it is not necessary to decide whether the first basis, and the other bases, could have supported the tender of the uncharged acts evidence had each been the only one relied upon. The result is that although much of the reasoning advanced by the prosecution in support of its tender of the uncharged acts evidence was

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297 (1893) 6 R 67.

erroneous, the actual decision of the trial judge to admit the evidence was correct. It follows that ground 2.5.1 of the amended notice of appeal fails[298]. Ground 2.5.2 is technically correct, but it does not lead to an order allowing the appeal. That is because the evidence was of a kind which, being admissible to prove a particular propensity, was capable of being employed for the other purposes relied on, which were incidental to and not inconsistent with the particular propensity purpose. It could be used, for example, to enhance the credibility of the daughter as much as an independently admissible and impressive account by her of the Adelaide events could have enhanced her credibility. The uncharged acts evidence here was not analogous to hearsay evidence which, once admitted for non-hearsay purposes, cannot be used for hearsay purposes; or evidence which, once admitted for credit purposes (like a prior consistent statement), is not admissible to prove the truth of the facts asserted. If the evidence were employed only for one of the other purposes, it had a potentially prejudicial effect because of the risk of its being used to establish a particular propensity, for which purpose it was not admissible. But that prejudicial effect was nullified once the evidence was properly held admissible for the purpose of establishing the particular propensity.

HML v The Queen: admissibility of the uncharged acts: *Evidence Act* 1929 (SA), s 34I.

337 At one stage counsel for HML submitted that the uncharged acts evidence was inadmissible, because it should not have been led without leave being sought by the prosecution pursuant to the *Evidence Act* 1929 (SA), s 34I. It is controversial whether s 34I applies to evidence elicited by the prosecution from a complainant in chief. Even if it does, the argument should be rejected. The point was not taken at trial, nor on appeal to the Court of Criminal Appeal. Even if it had been, the evidence was "of substantial probative value" within the meaning of s 34I(2)(a), and its admission was "required in the interests of justice" within the meaning of the tailpiece to s 34I(2). Hence, had leave been sought, it should have been granted. In any event, in the end HML did not contend that the prosecution's failure to obtain leave under s 34I rendered the evidence inadmissible.

HML v The Queen: jury directions

338 *Complaints about jury directions on uncharged acts.* Counsel for HML criticised the jury directions given by the trial judge. Apart from a complaint about the direction in relation to the standard of proof of the uncharged acts, these criticisms were not made at trial or in the Court of Criminal Appeal. However, in view of their close connection with the issue of admissibility, which

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298 See [269] above.

was raised at trial, there is no reason not to consider them to the extent necessary now.

339 *Standard of proof direction?* One complaint which counsel made was that the trial judge failed to direct the jury that they could not find the uncharged acts proved unless satisfied beyond reasonable doubt. It is not necessary to decide whether that was the appropriate standard of proof, because, read as a whole, the summing up is not open to the criticism made. At the start the judge said:

> "If, in what I am about to say to you, I speak of matters being proved to your satisfaction, or if I use words like 'proved' or 'satisfied' or 'established' or 'accepted' or any other sort of word, what I always mean is proved beyond reasonable doubt."

After discussing the potential uses of the uncharged acts, the trial judge said:

> "I direct you that you may not act upon the evidence of the uncharged acts unless and until you are satisfied as to it. Only then, if so satisfied of the truth of it, or of any part of it, may you use that evidence of which you are so satisfied when you consider the credibility of [the daughter] in relation to each count on the information and whether you are satisfied beyond reasonable doubt that either or both of them occurred."

Counsel for HML relied on a supposed contrast between "satisfied" early in the second passage and "satisfied beyond reasonable doubt" near the end of that passage. That contrast is unlikely to have misled the jury in view of what was said in the first passage.

340 *Failure to direct on how "sexual interest" evidence could be used.* HML submitted that the jury were not directed about "how sexual interest may be used in proof of guilt". This submission must be rejected. The jury were told not to act on the uncharged acts evidence unless satisfied of its correctness beyond reasonable doubt. They were then told that they could use the uncharged acts evidence of which they were so satisfied when considering the "credibility" of the daughter on each of the two counts charged – that is, in considering whether the events she alleged happened in Adelaide did happen. And they were told that they had to be satisfied beyond reasonable doubt that the Adelaide events happened as alleged. HML made no submission suggesting how the directions could have been improved. The evidence was in fact admissible, and was admitted, for a much more damaging purpose than considering the daughter's credibility – namely, proving HML's particular disposition. The summing up, in its restrained approach to that subject, was very merciful.

341 *Failure to direct about G-string evidence.* HML submitted that the G-string evidence required special treatment because it was the only "independent" evidence in the prosecution case and because counsel for the

prosecution relied on it heavily. This submission is not made out. The more damaging version of the event was not independent of the daughter, since she provided it. Nor can it be said that the prosecution address placed unduly heavy or disproportionate reliance on this item of evidence. HML submitted that the G-string evidence could only be used "in support of an allegation of ongoing sexual attraction and ultimately guilt" if the jury were satisfied that the only rational explanation for the purchase was HML's ongoing sexual attraction for his daughter, and, to be so satisfied, the jury would have to reject HML's evidence as to the circumstances of the purchase. These points were implicit in the general directions summarised in the previous paragraph: in being told that they had to be satisfied of the uncharged acts evidence beyond reasonable doubt, the jury were being told that they had to be so satisfied about the daughter's account of the G-string purchase, which involved rejecting her father's account.

342 *Support for and undermining of the daughter.* HML also submitted that the trial judge effectively suggested that the uncharged acts evidence had the same effect as corroboration. This is not so. HML also complained that the jury were not told that if they rejected any part of the uncharged acts evidence, they could use that rejection adversely to the daughter's credibility. But that went without saying.

343 *Inappropriate elevation of uncharged acts evidence.* HML submitted that if the uncharged acts evidence was admissible to give context, the directions were erroneous. He submitted that they inappropriately elevated the prosecution case in relation to the uncharged acts evidence as being evidence directly leading to guilt, when in truth it did no more than bolster the daughter's credibility in a fashion which was said to be "circular". HML also submitted: "Context being a non-propensity purpose, a very strong non-propensity warning should have been given." These criticisms proceed on erroneous assumptions. It was concluded above that the uncharged acts evidence was admissible to establish HML's propensity to act on a sexual attraction towards his daughter and that it was not necessary to decide whether it was admissible only to establish context[299]. Hence it was not admissible merely to bolster credibility. In any event the directions did not elevate the prosecution case on the uncharged acts evidence inappropriately. Nor did they support circular reasoning.

344 *Multiple bases of admissibility.* Counsel for HML submitted that "the very array of possible uses would have left the jury with an exaggerated impression of the significance" of the uncharged acts. In truth, save in one minor respect[300], they were all legitimate uses once the evidence was admissible to show a particular disposition, and it was difficult to exaggerate their significance.

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299 See [277]-[289] and [316]-[335].

300 See [291] above.

345 *Internal inconsistency?* Can the directions be criticised on the ground that while the evidence was usable to support disposition reasoning, the jury were warned against that form of reasoning? The trial judge said:

> "I must also tell you how you cannot use this evidence. You must not use this evidence, if you are satisfied about it, or any part of it, to reason that because of it the accused is the type of person likely to have committed these offences. To so reason would be wrong and you must not do it. The fact that allegations are made about a number of occasions does not absolve you from the task of determining whether the charges themselves are made out."

That warning was given at the invitation of the prosecution. Counsel for HML submitted that the warning was not detailed enough and not strong enough. If the warning did contain the error of internal inconsistency, it was an error favourable to the accused. But it did not contain that error. To speak of reasoning based on the accused being "the type of person likely to have committed these offences", or to speak of "disposition reasoning", can be to speak ambiguously. It is right to warn juries against what might be called generalised disposition reasoning – inferring guilt from the mere fact that the accused has behaved badly in the past, or has a tendency, for example, to use various victims, without scruple and against their will, as objects of sexual gratification. But this reasoning is different from using as an aid to reaching a conclusion of guilt the idea that the frequent use by the accused of his daughter as an object of sexual gratification reveals a disposition to do so. Thus in *R v Vonarx*[301] it was said that juries "should be told not to reason that the accused is the kind of person likely to commit the offence charged"; but it was also said that evidence could be led, and used, "for the purpose of proving an improper sexual relationship or guilty passion which existed between the accused and the victim, tending to make it more likely that the offence charged ... was ... committed"[302]. In this respect what juries may be told corresponds with the tests for admissibility. Thus, to use the words of Dawson and Gaudron JJ in *B v The Queen*[303]:

> "[T]he evidence of the applicant's previous offences was inadmissible if it showed *no more than* the existence of a criminal propensity or disposition on his part. It would have been admissible if it established the existence of a relationship between the applicant and his daughter *which pointed strongly in the direction of his guilt* ... Had the evidence been tendered for

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301 [1999] 3 VR 618 at 625 [22] per Winneke P, Callaway JA and Southwell AJA.

302 [1999] 3 VR 618 at 622 [13] per Winneke P, Callaway JA and Southwell AJA.

303 (1992) 175 CLR 599 at 619.

> the purpose of proving such a relationship, the onus would have rested upon the prosecution of establishing that the evidence went further than *mere* propensity or disposition and had an *additional probative value* which justified its admission despite its prejudicial effect." (emphasis added)

Hence it is often right to warn against "general" or "bare" disposition reasoning, while leaving specific disposition reasoning open. The problem, and the solution, were accurately described by Byrne AJA[304]:

> "Where evidence of uncharged acts is led in proof of sexual attraction of the accused for the complainant, it will be seen that its purpose is perilously close to the prohibited use of evidence of propensity, so that the propensity warning with respect to this evidence must be crafted in such a way so as not to make a nonsense of the direction as to its lawful use. In cases where the victim of the charged and uncharged acts is the same person, this may not be an easy distinction to make. In such a case, the essence of the logic behind the admission of the evidence in question is that the accused, being a man who lusts after the complainant, is likely to have gratified this lust, as she says he did in her evidence in support of the counts on the presentment. The jury are told that where the uncharged acts show that the accused has a sexual attraction or passion for the complainant, they might use this to conclude that her evidence, that he gratified this attraction or passion on the occasions charged, should be believed. At the same time, they are told that they may not use the evidence of uncharged acts as showing that the accused is the kind of person who was likely to have done so on the occasion charged. The point of distinction, if there be one, is indeed a subtle one. It must lie in that between *general* and *specific* propensity. The evidence is admissible, not to prove guilt of the offences charged by a *general* disposition to commit crime, but to show the nature of the relationship in a manner which bears directly upon the question of guilt.[305] In short what the jury are asked to do is to infer from evidence of uncharged acts that the accused has a disposition to commit the *particular* crime charged." (emphasis added)

346 When the trial judge directed the jury not to reason that because of the uncharged acts "the accused is the type of person likely to have committed these offences", he was warning against reasoning from general disposition, not particular disposition. That is because once the evidence was received to show an ongoing sexual attraction which HML sought to gratify, its point was to

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304 *R v BJC* (2005) 13 VR 407 at 420 [37].

305 *Harriman v The Queen* (1989) 167 CLR 590 at 630.

suggest that that attraction was very likely to be gratified in Adelaide – and hence to support a chain of reasoning which concludes that HML committed the charged acts against his daughter because of his particular disposition to commit sexual crimes against her as revealed by the uncharged acts.

347 It follows that the trial judge's direction entailed no miscarriage of justice.

348 *Conclusion on directions.* The only error in the directions, then, was the suggestion that the uncharged acts evidence after the daughter's return from Adelaide could explain her failure to complain on her return[306]. This was a small error. Counsel for HML at the trial did not consider that it merited a request for a corrective direction. Any ill-effects it may have had, if that were the only basis for receiving the evidence, were swamped by the much greater force of the particular disposition revealed by the evidence and by the trial judge's references to the standard of proof. The error was not an error of law and it did not create any miscarriage of justice.

HML v The Queen: failure to charge HML with the uncharged acts

349 *Background.* HML relied on three grounds of appeal stemming from the fact that he had not been charged with any crimes in relation to his alleged conduct in Victoria.

350 *Events at trial.* At the trial counsel for HML contended that if the uncharged acts evidence was received it would be unfair to the accused unless the jury were told that the acts were "uncharged". Later the trial judge ruled twice that evidence that no charges had been laid was irrelevant. Thereafter the trial judge appears to be recorded as twice saying that the jury would be told that the uncharged acts were uncharged. While he did not in fact do this, he did tell them:

> "You know that these Victorian offences were investigated, but you do not know the outcome of that investigation. You must not speculate about what that outcome may have been. Whatever may have occurred in Victoria, if, indeed, anything did, cannot in any way help you here. You must decide this matter on the evidence which you have heard and seen in this courtroom during this trial. Nothing from outside it may be used to decide if the onus of proof has been discharged. Any such information is not relevant, as it cannot be helpful to you in that task.
>
> And so, I direct you in the strongest terms that you must not speculate, not only as to the Victorian investigation, but as to anything

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306 See [291].

which has not been the subject of evidence. To do so would be wrong and you must not do it."

351 *Events in the Court of Criminal Appeal.* The Court of Criminal Appeal held that the decision not to charge HML in relation to the Victorian allegations was not relevant: it reflected only the opinion of an unknown person. That Court held that any prejudice to HML was sufficiently avoided by the trial judge's directions, and that the jury must be taken to have heeded the warning not to speculate. The reference by the trial judge to "offences" rather than "allegations" could not be taken in context to have conveyed that the allegations had been proved, particularly since the trial judge also used the expression "uncharged acts" several times in the immediately succeeding passages, which implied that no charges had been laid[307].

352 *HML's arguments in this Court.* HML argued that the fact he had not been charged was relevant; that the summing up was unfair in that it left open the inference that he had been convicted; and that the trial judge's warning not to speculate did not neutralise that inference or the consequential unfairness.

353 HML conceded that the reasons why no charges were laid were irrelevant. The fact that no charges were laid is equally irrelevant. Whether, unaided, the jury would have inferred, or guessed, from their ignorance about the irrelevant fact of whether there were or were not charges, that there had been, and that convictions had resulted, or whether they would have inferred, or guessed, that there had not been charges or convictions, is an open question. The fact is that they were not operating unaided. The trial judge gave a very strong warning. "The system of criminal justice, as administered by appellate courts, requires the assumption, that, as a general rule, juries understand, and follow, the directions they are given by trial judges."[308] There is no reason to think that that assumption in the present case was incorrect. The trial judge's warning was sufficient to prevent the jury contemplating either of the inferences or guesses described above.

HML v The Queen: order

354 The appeal must be dismissed.

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307 *R v H, ML* [2006] SASC 240 at [12]-[13] per Vanstone J (Nyland and White JJ concurring).

308 *Gilbert v The Queen* (2000) 201 CLR 414 at 420 [13] per Gleeson CJ and Gummow J; [2000] HCA 15.

SB v The Queen: the trial

355 After a trial before Judge Robertson and a jury, SB was convicted of three counts of indecent assault contrary to s 56 of the *Criminal Law Consolidation Act* 1935 (SA) and two counts of incest contrary to s 72 of that Act. The victim was his daughter, born on 7 June 1969. The acts alleged in relation to the first four counts were alleged to have occurred between 1 January and 31 December 1983. The acts alleged in relation to the fifth count were alleged to have occurred between 1 October and 31 December 1986. At the trial in 2006, the daughter gave evidence on the first count of attempted sexual intercourse. On the second, it was of cunnilingus. On the third, it was of fellatio. On the fourth, it was of vaginal rubbing. The events relating to the first four counts were said to have taken place while the daughter was living with her father. The fifth concerned vaginal intercourse which took place after she ceased to live with her father but while she was visiting him with her young baby. She said she did not consent to any of these acts.

356 Without objection, counsel for the prosecution elicited from the daughter five classes of uncharged acts evidence. Four of them were said to have taken place before the first charged act at a house where SB lived with his de facto wife (who was not the victim's mother) and her two children. Those four were as follows:

(a) On a couple of occasions, after a shower, SB opened his towel, revealed his penis to her and engaged in the act of "wiggling himself from side to side".

(b) SB invited his daughter to come outside at night to help him check on the welfare of certain animals and put tools away, and on several occasions gave her "a full, open mouth kiss with tongue".

(c) On later expeditions of that kind, SB held his daughter close, hugged her and rubbed his body against hers.

(d) On yet later expeditions, SB touched his daughter's breasts and vagina from outside her clothing, and then inside.

The daughter also gave evidence of a fifth uncharged act:

(e) A few days after the alleged events which underlay the first charge, SB gave his daughter a dildo and told her to start using it. She understood him to mean that she was to start inserting it into her vagina in order to prepare her to have sexual intercourse with him.

SB v The Queen: the Court of Criminal Appeal

357 SB appealed against conviction to the Court of Criminal Appeal, principally making the same criticisms of the trial judge's directions about the uncharged acts evidence as he makes in this Court. The Court of Criminal Appeal (Duggan, Sulan and David JJ) dismissed the appeal[309].

SB v The Queen: the structure of argument in this Court

358 The notice of appeal was directed to the trial judge's directions about the uncharged acts evidence. However, during oral argument counsel for SB applied for leave to amend the notice of appeal by adding a ground contending that some or all of the uncharged acts evidence was not admissible, or not admissible on the bases advanced by counsel for the prosecution at the trial. Since the issue of what directions should be given depends on what evidence was properly admitted and for what purpose, it is desirable to consider this application for leave to amend first.

SB v The Queen: application to amend notice of appeal

359 Counsel for the prosecution did not oppose the grant of leave. However, leave should be refused for the following reasons.

360 It is only in exceptional circumstances that an appellant in this Court in criminal proceedings will be permitted to rely on a point not taken either at trial or in the intermediate court of appeal[310].

361 Counsel for the prosecution at the trial said she was tendering the uncharged acts evidence to prove "the grooming process for what becomes the acts that are charged" and to "put the whole of the sexual contact into context".

362 Before the application for leave to amend the notice of appeal was made, counsel for SB submitted that tendering the uncharged acts evidence to establish "'grooming' would appear to have some judicial support as an acceptable basis upon which the evidence can be admitted"[311]. He also submitted that, if the uncharged acts evidence were so used, it would avoid the need to comply with the *Pfennig* test.

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309 *R v S, B* [2006] SASC 319.

310 *Giannarelli v The Queen* (1983) 154 CLR 212 at 221; [1983] HCA 41; *Crampton v The Queen* (2000) 206 CLR 161 at 171 [10], 185 [57], 206-207 [122] and 216-217 [155]-[156].

311 Citing *R v IK* (2004) 89 SASR 406 at 415 [48] as an example.

363 However, in the course of the application for leave to amend, counsel for SB took the opposite tack in two respects. First, he submitted that "[o]bjection could ... have been taken" to the uncharged acts evidence because it did not satisfy the *Pfennig* test. Secondly, counsel submitted that objection "could have been taken to the relevancy of some or all of the evidence of uncharged acts" to the crime charged in the fifth count, which allegedly took place three years after the first of the events comprising the uncharged acts evidence. Of course objection could have been taken, but would it have succeeded? And if it had succeeded, could the objection have been overcome by re-tender on a more precisely articulated basis?

364 Counsel supported his first submission by saying that evidence tendered to prove context or grooming could not prove a fact in issue. That may be so if the evidence showed no more than "context". But evidence tendered to prove "grooming" can prove a fact relevant to a fact in issue – it can render more likely the occurrence of that for which SB's daughter was being groomed. Hence an objection on that basis ought not to have succeeded. In addition, though the label "grooming" partly obscures this, the uncharged acts evidence demonstrated a sexual attraction for his daughter on which SB had not only acted, but on which he was planning to act in future, and the evidence was receivable on the basis that it showed that particular disposition. If, contrary to what has just been said, an objection to "grooming" had found favour, it would have been open to the prosecution to alter the basis of tender and advance different arguments for reception of the evidence. Those arguments could have centred on tender of the evidence to show SB's particular disposition to act on his sexual attraction for his daughter. The failure of the defence to object at trial, coupled with its contention in this Court that the evidence was objectionable, means that the prosecution has lost an opportunity of mending its hand which it would have had if the objection had been made at the correct time and had succeeded. Unless the defence could establish a serious injustice, that state of affairs points strongly against granting leave to amend the notice of appeal. There is no injustice. The evidence was relevant, both on the "grooming" basis and on the basis just discussed. If the test stated in *Pfennig v The Queen*[312] applies, that test was satisfied for reasons similar to those applying in relation to HML[313].

365 Hence the first submission of counsel for SB must be rejected. So must the second. If evidence is admissible as establishing "grooming", or alternatively as establishing "sexual attraction" on which SB was prepared to act, either process is one which must start somewhere, and even though it may not

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312 (1995) 182 CLR 461.

313 See above at [287].

culminate for years, the evidence of the uncharged acts, taken as it must be with the evidence of the charged acts, the evidence in relation to which was not said not to be cross-admissible, reveals a clear progression towards more and more serious crime.

366 Accordingly leave to amend the notice of appeal should be refused.

SB v The Queen: the summing up

367 The trial judge summed up as follows to the jury:

> "Ordinarily in a criminal Trial, evidence of other alleged criminal conduct does not come before the Jury. In this case, you have heard this evidence because it is potentially helpful to you in evaluating [the daughter's] evidence. That is, hearing the whole of these allegations may better enable you to assess her evidence. The whole of the alleged course of events provides a context in which it is said that the charged acts occurred.
>
> In addition, the Prosecution also presents the evidence as explaining the background against which the first offence charged came about, and the other offences which are alleged to have followed, where the evidence of [the daughter] regarding, in particular, the first offence but also the following offences, may otherwise appear to be unreal or not fully comprehensible. In other words, if you are satisfied that some or all of the uncharged acts are proved, it may assist you in understanding how the evidence regarding the incident behind the tree, contained in Count 1, could have arisen, and to understand the incidents which are the subjects of the other charges, and which it is alleged followed the incident.
>
> Now, those two discrete matters which I have mentioned are the only ways in which you are permitted to use the evidence of the uncharged acts which were stated by [the daughter] in her evidence. Having directed you on the permissible manner in which you may use the evidence, I now turn to direct you on how you cannot use the evidence.
>
> If you find proved that the Accused was involved in any of the uncharged acts I have already described, you must not reason that the Accused must have committed any of the sexual acts, the subject of the charges in the Information. That would be totally wrong. Such reasoning is not permissible.
>
> Furthermore, it would be wrong to conclude, if you find proved that the Accused engaged in any of the uncharged acts related by [the daughter] in her evidence, that the Accused is the sort of person who would be likely to commit the offences for which he is charged. Remember, it is the evidence presented in proof of each of the charges,

> which is the critical evidence in this Trial. The evidence of the uncharged acts has only been presented for the purpose of the permissible uses to which I have referred.
>
> Of course, the first step in the process is to determine whether you are satisfied that any of the uncharged acts have been proved before you can use any of them in the permitted ways I have described. I will, again, refer to this evidence, and what you should do in the course of evaluating it shortly."

368 Counsel for SB did not ask for any redirection.

SB v The Queen: SB's criticisms of the summing up

369 *Conflict in authorities?* Counsel for SB submitted that there was a conflict between the South Australian and Victorian courts as to the purpose for which uncharged acts evidence could be tendered in cases of sexual crimes. In South Australia, he said, the following bases for admissibility have been referred to in *R v Nieterink* – explaining how the "first charged incident came about", explaining "the lack of surprise" on the victim's part, explaining the accused's "confidence", explaining the failure of the victim to complain, and establishing "a sexual attraction"[314]. On the other hand, he referred to the statement in *R v Vonarx* by the Victorian Court of Appeal that the evidence should be used "only for the limited purpose of determining whether a sexual relationship existed between the complainant and the accused, thereby enabling the evidence relied upon by the Crown in proof of the offences charged to be assessed and evaluated within a realistic contextual setting"[315]. He advocated the latter approach. It is not necessary to resolve any difference which may exist[316]. Although the statement in *R v Vonarx* was made in relation to jury directions, if there is a difference in the approaches, the ultimate source of it turns on principles of admissibility. Counsel's argument in this appeal was necessarily advanced in relation to jury direction, not admissibility. The uncharged acts evidence was admissible at least to show "grooming", and that is to show a type of sexual

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314 (1999) 76 SASR 56 at 72 [76]. See also at 65 [43].

315 [1999] 3 VR 618 at 625 [22] per Winneke P, Callaway JA and Southwell AJA. See also *R v Pearce* [1999] 3 VR 287 at 295 [26]. Counsel for the prosecution submitted that *R v Vonarx* is either inconsistent with, or to be read down in the light of, other Victorian cases, citing *R v BJC* (2005) 13 VR 407 at 417 [25]-[26] and cases there referred to.

316 Any apparent difference is narrowed although not removed by consideration of the statement earlier in *R v Vonarx* [1999] 3 VR 618 at 622 [13], quoted at [345] above.

relationship based on the attraction SB had for his daughter. Contrary to a submission advanced on behalf of SB, the evidence did more than merely bolster the daughter's credibility in relation to the acts charged, although that may have been its effect.

370 *Impermissible use left to the jury?* Counsel for SB drew a contrast between what counsel for the prosecution told the trial judge the purpose of the tender was (evidence of "grooming" and putting "the whole of the sexual contact into context") and what the trial judge told the jury the purpose was (to give "context" and "background" so as "to assess" the daughter's evidence). He said that to use the uncharged acts evidence to "assess" the daughter's evidence was simply to use it to bolster the daughter's evidence on the charged acts, and that that was an illegitimate use, distinct from the only proper use – to put the evidence relating to the charged acts in context.

371 Counsel for SB thus drew distinctions between directions about a (legitimate) use of the evidence (putting the charged acts into context) and directions about (illegitimately) assessing the daughter's evidence on the charged acts. It is not necessary to decide whether these distinctions have any theoretical merit. Even if they do, they lack practical materiality in the circumstances of this case. They do not signify any miscarriage of justice. In truth, as stated above[317], the uncharged acts evidence established that SB had a sexual attraction for his daughter on which he was willing to act, and, if it had to, it satisfied the test stated in *Pfennig v The Queen*[318]. If the trial judge implicitly declined to accept the prosecution's tender of the evidence on that basis, he erred in doing so. It would have been legitimate for the trial judge to have given a much more explicit direction about how the evidence could have been used along those lines, but that would have been much less favourable to SB. The uncharged acts evidence was not mere context or background and, as in *HML v The Queen*, it is not necessary to decide whether that use alone is a sufficient passport to admissibility.

372 *Contradiction in direction?* Counsel for SB also submitted that the trial judge caused confusion in his summary of a contention by counsel for the prosecution in final address. The contention was that the conduct comprised in the uncharged acts "doesn't just happen by chance in this way, that this is in fact, a concerted effort by the accused to introduce her to the idea of sexual behaviour, and that that is indeed what he is doing, because all of that behaviour then puts in context what he does to her behind the tree on the first count". Counsel submitted that the trial judge's summary caused confusion because the argument was inconsistent with the limited purpose of the evidence left by the trial judge to

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317 At [364].

318 (1995) 182 CLR 461.

the jury. Counsel submitted that the trial judge erred when he said that the uses he said were permissible were identical with those which the prosecution contended for.

373 There are two answers to this. The first is that in debate with counsel, the trial judge had said that while he would not direct the jury along the lines of counsel's argument, she was at liberty to advance it, and all the trial judge did was summarise the argument accurately, not give a comment on it or a direction about it. The second answer is that the most defensible way in which the trial judge could have removed any supposed inconsistency would have been to put forward prosecution counsel's approach as legitimate. Had the trial judge done this he would not have been acting wrongly, for the basis advocated by prosecution counsel was legitimate. But the consequence of removing any risk of confusion in this way would have been to put SB in a worse position. This suggests that the submission does not establish a miscarriage of justice.

374 *Standard of proof?* Counsel for SB submitted, first, that the trial judge should have instructed the jury that the uncharged acts evidence "could not be used to infer that it necessarily followed that the charged acts occurred" and, secondly, "that the jury had to be separately satisfied, beyond reasonable doubt, that they did, in fact, occur".

375 The trial judge in fact did direct the jury along the lines suggested in the first of these propositions, as is revealed in the third last and second last paragraphs of the passage from the summing up quoted above[319].

376 As to the second proposition, the trial judge gave a direction that the standard of proof of the uncharged acts was beyond reasonable doubt. Early in the summing up he said:

> "[D]uring the course of my summing up I may tell you, on occasions, that something must be proved by the Prosecution, or that you must be satisfied, or you should be satisfied of something in respect of the Crown case, then you need to understand, when I use those words, I mean proof or satisfaction beyond reasonable doubt."

After summarising the uncharged acts evidence, and explaining the ways in which it could be used, he said:

> "[T]he first step in the process is to determine whether you are satisfied that any of the uncharged acts have been proved before you can use any of them".

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319 At [367].

Whether or not it was necessary to do so, by these directions the trial judge told the jury not to be satisfied that any of the uncharged acts were proved unless they were satisfied beyond reasonable doubt.

377 *Propensity direction.* Counsel seemed to criticise the trial judge for not telling the jury that they "should not reason that, if they found the uncharged acts proved, the accused was the sort of person who would [commit] the charged offences". In fact the trial judge gave that very direction – a general propensity direction[320] – in the first sentence of the second last paragraph quoted above[321].

378 *Vagueness?* Counsel for SB submitted that the trial judge's words were too vague to be understood by the jury. In the circumstances of the case, the trial judge's language was sufficiently clear to prevent any miscarriage of justice. A further factor pointing against a miscarriage of justice is that the trial judge told the jury they could not use the uncharged acts unless satisfied (beyond reasonable doubt) that they had been proved.

SB v The Queen: order

379 The appeal should be dismissed.

OAE v The Queen: the trial

380 OAE was charged with one count of indecent assault, which was alleged to have occurred between 12 May and 31 July 1999, contrary to s 56 of the *Criminal Law Consolidation Act* 1935 (SA). He was also charged on a count of rape, which was alleged to have occurred between 12 May and 31 August 2003, contrary to s 48 of that Act. After a trial presided over by Judge Millsteed, the jury acquitted him on the first count but convicted him on the second.

381 The complainant, who was the foster daughter of the applicant's sister, was born on 12 May 1987. The applicant owned a horse stud, and the complainant and her younger sister resided with her foster mother on an adjoining property from March 1993 to November 2003. In November 2003 the complainant alleged that OAE was violent to her, and she was removed from her foster mother's care. She did not complain about sexual misconduct at OAE's hands until March 2005.

382 The trial judge rejected a defence objection to evidence that OAE carried out various uncharged acts on the complainant between 1999 and 2003.

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320 See *R v BJC* (2005) 13 VR 407 at 420 [37], discussed at [345] above.

321 At [367].

Prosecution counsel submitted that they were admissible to show that the charged acts in 2003 did not come out of the blue, to show how a relationship developed in which the complainant submitted to OAE's behaviour, to show his confidence in repeating his behaviour, to explain her failure to complain, and to show sexual attraction amounting to a propensity. The trial judge admitted the evidence "to show the nature of the relationship" and to show that the conduct alleged in relation to count 2 "did not happen out of the blue". He said that the evidence was "more probative than prejudicial". And he reserved for consideration after the complainant had testified the question of whether her evidence was admissible to show sexual attraction. Eventually he concluded that it was not, for he directed the jury that the uncharged acts evidence was relevant to "show the nature of the relationship" and to repel the idea that the conduct relating to count 2 "had happened out of the blue" – that is, to put that conduct in its "proper context".

OAE v The Queen: the Court of Criminal Appeal

383 An appeal by OAE to the Court of Criminal Appeal was dismissed (Doyle CJ and Layton J; Debelle J dissenting)[322]. OAE argued two points: that the uncharged acts evidence was inadmissible; and that the trial judge had failed to direct the jury not to find the uncharged acts proven unless satisfied of them beyond reasonable doubt. The Court of Criminal Appeal rejected the first point unanimously and the second by majority.

OAE v The Queen: the application to this Court

384 In his application for special leave to appeal to this Court, OAE contended that the Court of Criminal Appeal had erred in upholding the trial judge's decision to receive the uncharged acts evidence, and in not concluding that the trial judge's direction was erroneous in relation to the standard of proof.

OAE v The Queen: evidence of charged acts and of uncharged acts

385 The complainant's evidence about the conduct underlying count 2 was summarised thus by Doyle CJ in the Court of Criminal Appeal[323]:

> "She was preparing some feed for the horses in the feed shed. [OAE] walked up to her, turned her around and pushed her head down. He held her down with his left hand on her back. [OAE] reached around to the front of her jeans with his right hand and undid them. He pulled her jeans

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322 *R v O, AE* (2007) 172 A Crim R 100.

323 *R v O, AE* (2007) 172 A Crim R 100 at 103 [12].

> and underwear down to her knees. He inserted at least one finger into her vagina, and moved a finger or fingers around and then stopped. [The complainant] said that she resisted, but was unsuccessful."

386 After the acts alleged in relation to count 1 and before those alleged in relation to count 2, according to the complainant's evidence as summarised by Doyle CJ, the following uncharged acts occurred[324]:

> "They were indecent assaults involving [OAE] touching [the complainant's] breasts and vagina on the outside of her clothes, and inside her clothes, and on occasions inserting a finger or fingers into her vagina. She said that this happened often, almost daily. [She] said that on occasions she took a meal to [OAE's] room, and sometimes he would be dressed only in his underwear, and would get her to touch his penis on the outside of his clothing. She said that on occasions when they were driving to race meetings [OAE] asked her to engage in sexual intercourse, but she always refused."

OAE v The Queen: admissibility of the uncharged acts

387 *Permissible uses.* Among the purposes for which the prosecution tendered the uncharged acts evidence was the purpose of showing that OAE was sexually attracted to the complainant. The trial judge admitted the evidence, but not for the purpose of showing sexual attraction. He erred in that latter respect. To admit the evidence to "show the nature of the relationship", but not to show sexual attraction, where the dominant aspect of the relationship was one-way sexual attraction expressed in a very large number of sexual assaults, was to draw a distinction without a difference. Indeed counsel for OAE in this Court conceded as much in argument. The Court of Criminal Appeal was correct to disagree with the trial judge on this point. If the test in *Pfennig v The Queen* had to be satisfied, it was, for reasons similar to those applying in relation to HML[325]. In those circumstances it was legitimate also for the uncharged acts evidence to be used in the manner described by the trial judge – to put the charged acts evidence in context – and it is not necessary to decide whether, had that been the only possible use of the uncharged acts evidence, it would have been admissible.

388 *Lack of particularity.* The principal attack made by counsel for OAE on the uncharged acts evidence was that it was "vague and lacked particularity". Counsel contended that the statements of the complainant on the basis of which the admissibility debate took place did not give particulars of the uncharged acts evidence. Those statements are not in evidence and it is therefore impossible to

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324 *R v O, AE* (2007) 172 A Crim R 100 at 102 [9].

325 See above at [287].

assess the validity of counsel's contention. So far as the complaint centres on a lack of particularity in the actual evidence given by the complainant, the complainant did give some circumstantial detail about one aspect of the uncharged acts evidence, and gave some more general evidence about the pattern of other aspects. Thus the complainant's description of the events which began a week after the event charged as count 1 was:

> "There were quite a few occasions. It happened quite often and, yes, it all just kind of blurred into one ... He would touch me a lot ... He would touch my breasts and my [crotch] area ... Sometimes over [clothing] and sometimes under ... Every couple of days ...
>
> [T]here was never anybody else around and it was usually any time of the day ... [a]round the stables and his house."

She also said that on four or five occasions on the way to race meetings OAE asked the complainant to sleep with him, and on four or five occasions OAE made her place her hand on his penis outside his clothes. It is difficult to describe simple and much-repeated events without describing one instance and saying that that instance was replicated on later occasions.

389 Counsel for OAE submitted that the lack of particularity in the complainant's evidence as to location, time and date prevented him from contesting her evidence with alibi evidence or evidence of persons who may have been present when the conduct was alleged to have taken place. In fact the complainant's testimony was that all the conduct took place in one of two locations – OAE's stables or his house; and that it took place at times identifiable by reference to the routine of OAE's establishment. It is true that it was imprecise as to date, but that has not been an absolute barrier to the reception of uncharged acts evidence in the past.

390 *Irrelevance.* The other submission made by counsel for OAE in this Court was that the evidence was irrelevant: there was no need to rebut any inference the jury would draw from the fact that the count 2 events took place four years after the count 1 events, and, in particular, it was not unrealistic to ask them to consider that the count 2 events could come four years after the count 1 events without any other warning. He submitted: "[R]apes, by their very nature, occur 'out of the blue', and ... whether or not an [act] of this type occurred 'out of the blue' is not a material issue requiring the jury's consideration."

391 The Court of Criminal Appeal was correct to reject that argument. The complainant's evidence about count 2 was that OAE was quite rough, indeed violent, to her on that occasion. If the jury had not been told that that had been a pattern of his behaviour towards her in the previous four years they might think her evidence about count 2 was incredible. Thus the evidence was relevant on the basis on which the trial judge admitted the evidence – to "show the nature of

the relationship" and to show that the two charged acts "did not happen out of the blue". There is admittedly a question, discussed above[326], whether that basis alone was enough to make the evidence admissible even though it was relevant. In view of the admissibility of the evidence on the ground that it showed OAE's particular disposition to act on his sexual attraction to the complainant very often, that question need not be answered in this application[327].

392 *Preponderant impact of sexual attraction reasoning.* Counsel for OAE also submitted that it is "quite artificial to have a shopping list of topics or purposes for which you can admit this evidence when at the end of the day the jury ... are going to use it for one purpose [only] and that is to see whether or not the accused was sexually attracted to the complainant". He submitted that uncharged acts evidence of the present kind is only admissible for that purpose. He submitted that, whatever narrower purpose uncharged acts evidence is tendered for, its effect can only be to prove sexual attraction, and that hence directions that the jury cannot use the evidence to infer "mere propensity" are futile. These too are questions which need not be answered in this application, because, contrary to the argument of OAE and the trial judge's ruling, the evidence was admissible to show OAE's particular propensity to act on a sexual attraction.

393 *"Submission" of complainant?* The Court of Criminal Appeal said that the bases for admissibility assigned in *R v Nieterink* applied in this case. Among these bases was[328]:

> "The submission of [the complainant] to him over a period of time would give him confidence that she would submit again. It might help to explain the fact that [she] did not complain to her mother."

The Court of Criminal Appeal said that the complainant's conduct in this case "involved a kind of submission to [OAE]. She did not kick and scream, nor did she immediately complain"[329]. Counsel for OAE pointed out that the complainant's evidence was that at least twice she told OAE to stop in a "loud" voice, that she had "struggled a bit" and that she had been "resisting"; and that while she had not gone so far as to "yell out" at any stage, that was because she was "too scared". This evidence is inconsistent with the idea that the complainant engaged in a "kind of submission" to OAE, or that any significance

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326 At [316]-[335].

327 See above at [387].

328 (1999) 76 SASR 56 at 71-72 [75]-[78].

329 *R v O, AE* (2007) 172 A Crim R 100 at 104 [20].

is to be attached to her failure to "kick and scream" or "immediately complain". So far as it goes, then, this submission advanced for OAE is sound. But it does not negate the admissibility of OAE's conduct as showing a particular disposition to act on his sexual attraction for the complainant.

394 *Other aspects of the Court of Criminal Appeal's decision.* The Court of Criminal Appeal's adoption of the bases for admissibility summarised in *R v Nieterink* was reflected in another passage in Doyle CJ's reasons for judgment in this case. Doyle CJ said[330]:

> "[T]he Judge admitted the evidence of the uncharged acts on the basis that the evidence could be used to show that the incident the subject of count 2 did not 'come out of the blue'. I take that to mean that the jury could use the evidence to support a conclusion that [OAE] was prepared to seize an opportunity to engage in sexual conduct, had reason to believe that [the complainant] would submit to him if he did (even though not consenting to what he did), and that [the complainant] would not complain. If this evidence was not before the jury, they might find it difficult to accept that [OAE] would suddenly have acted as [the complainant] alleged, even though they were in daily contact."

These ideas correspond with several of the bases for admissibility stated in *R v Nieterink*[331]. Later, Doyle CJ said[332]:

> "The uncharged acts provided a background that made [the complainant's] account of the incident, and her response to it, more believable. This use of the evidence did not involve any element of propensity reasoning."

Yet if the evidence was being admitted "to support a conclusion that [OAE] was prepared to seize an opportunity to engage in sexual conduct", an element of propensity reasoning was involved.

<u>*OAE v The Queen*: jury direction</u>

395 Counsel for OAE submitted that if, contrary to the submissions just discussed, the uncharged acts evidence was admissible, the jury should have been directed that they should not take those acts into account unless they were satisfied of their existence beyond reasonable doubt. In the Court of Criminal

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330 *R v O, AE* (2007) 172 A Crim R 100 at 104 [18].

331 (1999) 76 SASR 56 at 72 [76], quoted above at [369].

332 *R v O, AE* (2007) 172 A Crim R 100 at 104-105 [20].

Appeal, the majority said that that was not the law in South Australia[333]. Despite that, the majority also said that a "safer" course was "for the judge to tell the jury that they should be satisfied of the truth of the evidence, or something like that, even though that will suggest to the jury that this means satisfaction beyond reasonable doubt ... That avoids introducing the complication of differing standards of proof."[334] But they held that even if counsel for OAE were correct, the direction he contended was required had been given. Debelle J disagreed. He said that at least in this type of case, "where evidence of uncharged acts consists of allegations of repeated sexual misconduct which is so intertwined with the charged acts", it was necessary for the trial judge to direct the jury that the uncharged acts be proved beyond reasonable doubt[335]. But the crucial difference between him and the majority was that he held that no such direction had been given[336]. It is not necessary to decide the controversy about the standard of proof – whether a direction about the standard of proof being beyond reasonable doubt need never be given, or need not be given when the evidence is admitted only to give context. That is because the majority correctly concluded that if the directions said by counsel for OAE to be required were required, it can be seen, when the summing up is read as a whole, that they were given. The trial judge directed the jury about the duty of the prosecution to "prove the charge and every ingredient of the charge beyond a reasonable doubt". He also said that an "accused person cannot be convicted of a crime unless the jury is satisfied of his guilt beyond a reasonable doubt". His direction continued:

> "I cannot keep saying that every time I deal with facts that are in issue in this trial. If, in the course of my summing up, I speak of matters being proved or being established to your satisfaction, or if I use some other expression relating to proof of matters in issue, then you will understand that I shall always mean proof beyond reasonable doubt."

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333 *R v O, AE* (2007) 172 A Crim R 100 at 107 [30] and 108 [33]-[34]. They referred to *R v IK* (2004) 89 SASR 406 at 423-424 [78]-[86], 429-430 [126]-[132] and 432-434 [143]-[152]; *R v S, B* [2006] SASC 319 at [25].

334 *R v O, AE* (2007) 172 A Crim R 100 at 108 [34]. They referred to *R v Nieterink* (1999) 76 SASR 56 at 72-73 [83]; *R v Kostaras* (2002) 133 A Crim R 399 at 407 [51] and *R v Sciberras* (2003) 226 LSJS 473 at 482 [39]. In passing, it may be said that either the standard of proof in relation to particular evidence is beyond reasonable doubt or it is not; if it is not, and if to tell the jury to be "satisfied" (without any amplifying definition) will suggest to them satisfaction beyond a reasonable doubt, they will have been misdirected.

335 *R v O, AE* (2007) 172 A Crim R 100 at 108 [38] and 109 [40], citing *R v M, RB* (2007) 172 A Crim R 73.

336 *R v O, AE* (2007) 172 A Crim R 100 at 109-110 [41].

The trial judge also said: "You cannot convict the accused unless you are satisfied beyond a reasonable doubt about the truth and accuracy of her evidence." In this passage he did not limit the "evidence" of the complainant to that relating to the incidents underlying the counts charged. The trial judge concluded his direction to the jury about the permissible use to be made of the uncharged acts by saying twice that the jury should not reason that OAE was guilty of the charged acts "simply because you happen to be satisfied that he committed one or more of the uncharged acts". The uncharged acts, flatly denied as they were by OAE, were "facts that [were] in issue in this trial" within the meaning of the general direction about the need for proof beyond reasonable doubt quoted above.

396 That conclusion is supported by the following consideration. If the direction about proof of uncharged acts evidence beyond reasonable doubt was mandatory in this case, the direction which should have been given can only have been a direction that the evidence of any uncharged act relied on by the jury be established to that standard; it cannot be the case that none of the uncharged acts can be relied on unless all of them are established to that standard. At the end of the summing up counsel for OAE did not complain about a failure of the trial judge to give a direction that any uncharged act relied on be proved beyond a reasonable doubt. He made a different complaint, which was quite unsustainable and was rightly rejected by the trial judge, that the jury should have been directed that they "would need to be satisfied of the totality of [the uncharged acts] beyond reasonable doubt before they can use them in any contextual sense". The fact that counsel did not make a narrower complaint – that there had been no direction that any uncharged act relied on be proved beyond reasonable doubt – suggests that he did not understand that direction not to have been given.

OAE v The Queen: orders

397 An appeal would not resolve any question of law which is of public importance or in respect of which it is necessary to resolve differences of curial opinion. Nor is an appeal necessary in the interests of justice. On conventional principles it would follow that the application for special leave ought to be dismissed. However, in view of the unanimous opinion to the contrary of all other Justices on this question, but their equal division of opinion on the fate of the appeal, and to enable an order commanding majority support to be made, I would grant special leave but dismiss the appeal.

398 CRENNAN J. There are three matters before the Court (two appeals and an application for special leave to appeal) which were heard consecutively. Each accused has been convicted of sexual offences against a young girl in a family relationship with him. At the trial of each of them, the prosecution led evidence of sexual misconduct between the accused and the complainant, which was not the subject of any count or charge.

399 The three matters raise issues as to the admissibility of that evidence and particularly raise the question of the directions which should be given by a trial judge to a jury when such evidence is admitted. Those issues fall to be determined by reference to the common law[337]. The term "uncharged acts" was used throughout the parties' submissions, but it was recognised that some discreditable acts, taken in isolation, might be unlikely to be the subject of charges.

HML v The Queen

400 The appellant was convicted on 22 March 2006 in the District Court of South Australia after a trial by jury of two counts of unlawful sexual intercourse with a person under 12 years of age[338]. The complainant, the appellant's daughter, was nine years of age at the time of the alleged offences. The alleged offences, one of causing the complainant to perform an act of fellatio upon the appellant and one of anal intercourse with her, were said to have taken place between 27 September 1999 and 4 October 1999 at Adelaide on an occasion when the appellant and his daughter had travelled to Adelaide and stayed together in a hotel room.

401 The appellant pleaded not guilty to each count. The complainant gave evidence of sexual misconduct between the appellant and her which was not the subject of any count or charge.

402 The prosecution case was that the two alleged offences were not "just a one-off incident" but that the appellant had been engaged in sexually inappropriate behaviour with his daughter both before and after the incidents in Adelaide from when she was seven years of age until she was 12.

403 The complainant's parents separated when she was a small baby and she did not have contact with her father for a few years. After contact was re-established the complainant visited her father from time to time where he lived in

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337 See [288] n 227 in the reasons of Heydon J for the relevant statutory provisions applicable in other jurisdictions.

338 *Criminal Law Consolidation Act* 1935 (SA), s 49(1).

Victoria, although she lived with her mother in South Australia. Acts, other than those with which the appellant was charged, which the complainant described in evidence, were that the appellant walked around naked in front of her, he filmed her when she was doing cartwheels naked, he tongue-kissed her when kissing her goodnight, he performed cunnilingus on her, he placed his fingers in her vagina, he had vaginal intercourse with her, he had anal intercourse with her, and he purchased for her three items of G-string underwear when she was about nine years of age.

404 The appellant gave evidence and denied these allegations, except for admitting that he purchased the G-string underwear which he said he had bought at the insistence of the complainant. Most, or all, of these incidents described in the complainant's evidence occurred in Victoria. The prosecutor had outlined the purposes for which it was sought to lead evidence of uncharged acts before the empanelling of the jury. The prosecutor said that the forensic uses sought to be made of the evidence did not include "propensity-type reasoning". The appellant's counsel objected and contended that the evidence of uncharged acts was "totally irrelevant". In terms of that debate, the trial judge ruled the evidence relevant and admissible.

405 The purposes which had been outlined at the outset were repeated to the jury in the prosecutor's final address. First, the prosecutor told the jury that the incidents in Victoria put the conduct charged "into context" and that the offences charged were "part of an ongoing course of conduct". Secondly, the evidence of sexual misconduct which took place before the events in Adelaide was led for the purpose of enabling the jury to understand why the appellant had "the confidence" to do what he was alleged to have done and why the complainant "submitted to the acts". Thirdly, the evidence was led for the purpose of showing that the appellant had "a sexual interest" in the complainant. Fourthly, the evidence was led for the purpose of explaining why the complainant did not complain about the conduct the subject of the charges.

406 In his summing up the trial judge said:

> "If, in what I am about to say to you, I speak of matters being proved to your satisfaction, or if I use words like 'proved' or 'satisfied' or 'established' or 'accepted' or any other sort of word, what I always mean is proved beyond reasonable doubt."

407 Of the uncharged sexual misconduct his Honour said:

> "You know that these Victorian offences were investigated, but you do not know the outcome of that investigation. You must not speculate about what that outcome may have been. Whatever may have occurred in Victoria, if, indeed, anything did, cannot in any way help you here. You must decide this matter on the evidence which you have heard and seen in

this courtroom during this trial. Nothing from outside it may be used to decide if the onus of proof has been discharged. Any such information is not relevant, as it cannot be helpful to you in that task."

408 He then directed the jury not to speculate. As to the purpose for which the evidence of uncharged acts was led the trial judge said the evidence was led to give the jury "an understanding of what is said to have been the relationship between the accused and [the complainant]", "a background" against which the jury could consider the complainant's evidence of the conduct with which the appellant was charged. His Honour also said that the evidence of the uncharged acts "may show why it was that the accused was confident enough to ask for oral sex and then to penetrate [the complainant]". The trial judge also said the evidence may show why the complainant "acquiesced" and it might indicate that the appellant had "an ongoing sexual attraction" to the complainant and "sought gratification for that attraction by his conduct".

409 The course of the appeal, by leave, to the Supreme Court of South Australia (Court of Criminal Appeal) and the grounds of appeal in this Court are set out in the reasons for judgment of Hayne J[339]. The main thrust of the argument and complaint in that Court was that evidence of the current state of criminal proceedings against the accused in Victoria should not have been excluded on the ground that it was not relevant[340]. Leave to amend the notice of appeal, which was sought and not opposed, should be granted.

SB v The Queen

410 The appellant was convicted on 8 May 2006 by majority verdict of a jury after a trial in the District Court of South Australia of three counts of indecent assault[341] (the first, second and fourth counts) and two counts of incest[342] (the third and fifth counts). The complainant, the appellant's daughter, was aged 13 or 14 at the time of the first four counts said to have occurred between certain dates in 1983 and aged 17 on the occasion of the fifth count said to have occurred in 1986. The appellant pleaded not guilty to each count.

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339 Reasons of Hayne J at [134]-[139].

340 *R v H, ML* [2006] SASC 240.

341 *Criminal Law Consolidation Act* 1935 (SA), s 56 (as it stood in 1983). The first count was attempted sexual intercourse, the second count was cunnilingus and the fourth count was vaginal rubbing.

342 *Criminal Law Consolidation Act* 1935 (SA), s 72 (as it stood in 1983 and 1986). The third count was one of causing the complainant to perform an act of fellatio on the appellant and the fifth count was one of vaginal sexual intercourse.

411 The complainant gave evidence of sexual misconduct between the appellant and her which was not the subject of any count or charge. Her sister also gave evidence. The appellant gave evidence in which he denied the evidence of sexual misconduct constituting the uncharged acts.

412 The complainant's evidence of uncharged acts included incidents of the appellant being naked under a towel which he opened and then wiggling his penis, of the appellant giving the complainant "a full, open mouth kiss with tongue", of the appellant holding the complainant close to him, hugging her and rubbing his body against her and of the appellant touching the complainant on the breasts and the vagina. Counsel for the appellant did not object to the relevance or admissibility of the evidence of the uncharged acts and no rulings as to admissibility were sought from the trial judge.

413 The complainant was born on 7 June 1969 in the United Kingdom. In about 1972 her family migrated to Australia and her parents separated. Sometimes the complainant lived with her mother and sometimes with her father. She moved around a great deal. The children of the family were separated at times and stayed with different people over varying periods of time. In the early 1980s the complainant lived with the appellant, two of her brothers, the appellant's de facto wife and two children of the de facto wife.

414 The prosecution case was that the appellant started to sexually abuse the complainant in about 1983. The prosecutor opened the case to the jury on the basis that the uncharged acts were "grooming" the complainant; that is, readying her for subsequent sexual advances. Prior to the trial judge summing up to the jury, and in the absence of the jury, the prosecutor explained the purposes for which the evidence of uncharged acts had been led. She said that evidence was led for two purposes:

> "[The uncharged acts] provide the starting point for the sexual contact that unfolds from there and without using the particular word of 'grooming' but they are precursors to what comes later and put in context the behaviour that comes later."

415 In his summing up the trial judge referred to the uncharged acts and the forensic uses to which such evidence could be put. He said:

> "In this case, you have heard this evidence because it is potentially helpful to you in evaluating [the complainant's] evidence. That is, hearing the whole of these allegations may better enable you to assess her evidence. The whole of the alleged course of events provides a context in which it is said that the charged acts occurred.

> In addition, the Prosecution also presents the evidence as explaining the background against which the first offence charged came about, and the other offences which are alleged to have followed, where the evidence of [the complainant] regarding, in particular, the first offence but also the following offences, may otherwise appear to be unreal or not fully comprehensible."

416 The trial judge not only directed the jury about the permissible use of the evidence, he went on to warn the jury about impermissible use. His Honour said:

> "Now, those two discrete matters which I have mentioned are the only ways in which you are permitted to use the evidence of the uncharged acts …
>
> If you find proved that the Accused was involved in any of the uncharged acts I have already described, you must not reason that the Accused must have committed any of the sexual acts, the subject of the charges in the Information. That would be totally wrong. Such reasoning is not permissible.
>
> Furthermore, it would be wrong to conclude, if you find proved that the Accused engaged in any of the uncharged acts related by [the complainant] in her evidence, that the Accused is the sort of person who would be likely to commit the offences for which he is charged. Remember, it is the evidence presented in proof of each of the charges, which is the critical evidence in this Trial. The evidence of the uncharged acts has only been presented for the purpose of the permissible uses to which I have referred."

417 The course of the appeal to the Court of Criminal Appeal[343] and the grounds of appeal to this Court are set out in the reasons of Hayne J[344].

OAE v The Queen

418 The applicant seeks special leave to appeal from a decision of the Court of Criminal Appeal. He was tried before a District Court judge and jury on an information alleging one count of indecent assault[345] (count 1) and one count of rape[346] (count 2). A charge of unlawful sexual intercourse was laid as an

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343 *R v S, B* [2006] SASC 319.

344 Reasons of Hayne J at [204]-[207].

345 *Criminal Law Consolidation Act* 1935 (SA), s 56.

346 *Criminal Law Consolidation Act* 1935 (SA), s 48.

alternative to count 2[347]. The applicant was convicted on the count of rape, the particulars of which were that between 12 May 2003 and 31 August 2003, the applicant had sexual intercourse with the complainant, without her consent, by inserting a finger into her vagina.

419 The complainant was the applicant's sister's foster daughter who was 16 at the time of the offence of which the applicant was convicted. She gave evidence that this was the last occasion on which the applicant interfered with her sexually. She also gave evidence of uncharged acts of sexual misconduct by the applicant towards her. This evidence was that on "quite a few occasions" when she was helping the applicant in his stables, which she did daily over a four year period, he touched her on the breasts and the crutch, sometimes over and sometimes under her clothing. She stated that after she turned 12 this conduct happened very regularly, "pretty much every day", and at times the applicant penetrated her vagina digitally.

420 The prosecution case was that the evidence of uncharged acts was admissible on a number of bases: as evidence of sexual attraction of the applicant towards the complainant, to explain both the complainant's submission to the applicant's sexual misconduct the subject of the charges, and her lack of contemporaneous complaint, and also as evidence which put the sexual contact between the applicant and the complainant "in its proper context".

421 Over the objection of the applicant's counsel, the trial judge made an interlocutory ruling that the evidence of uncharged acts of sexual misconduct of the applicant towards the complainant was admissible on the basis that the evidence of sexual misconduct towards the complainant over a period of some four years was "more probative than prejudicial" and was "relevant to show the nature of the relationship between the accused and [the complainant]". The applicant gave evidence and denied all allegations.

422 In summing up to the jury the trial judge said in relation to the uncharged acts that:

> "it would be wrong for you to use the evidence of the uncharged acts as establishing a propensity or tendency on the part of the accused to commit the charged offences. Putting it more simply, you cannot convict the accused of any count contained in the information simply because you are satisfied that he committed one or more of these uncharged acts. You cannot find the accused guilty of any count unless you are satisfied of his guilt based upon the evidence relating to that particular count.

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347 *Criminal Law Consolidation Act* 1935 (SA), s 49(3).

> That does not mean that that the evidence of the uncharged acts is irrelevant. The evidence is relevant. On the prosecution case, the uncharged acts show the nature of the relationship which existed between the accused and [the complainant] during the four years leading up to the … incident, which is the subject of the second [count].
>
> Without that evidence – without evidence relating to the uncharged acts – the circumstances of the [2003] incident might appear quite artificial or unrealistic. It would have appeared that after committing the first offence the accused – on the Crown case – did not sexually interfere with [the complainant] for another four years, though she attended his home on a daily basis.
>
> Putting it another way, it would have looked as if the [2003] incident had happened out of the blue, so to speak.
>
> So that is the permissible use to be made of the uncharged acts, ladies and gentlemen. The evidence is relevant to put the charged offences, and in particular [the second count], in [its] proper context, but that is the only legitimate use to be made of this evidence.
>
> I repeat, it would be wrong for you to reason – and you must not reason – that the accused must be guilty of the charged acts simply because you happen to be satisfied that he committed one or more of the uncharged acts."

Relevance

423 Evidence is relevant if it bears directly or indirectly on the probability of the existence of a fact in issue. The probability of the existence of a fact in issue is assessed according to common sense and the common course of events.

424 In each of these three matters the impugned evidence was evidence of an older man in a family relationship with a young girl (in *HML* and *SB*, father and daughter; in *OAE* the accused was the brother of the girl's foster mother) engaging in acts and conduct which sexualised the family relationship. By that I mean acts and conduct which adapted the family relationship into a relationship in which the older man engaged in sexual misconduct with the young girl. Viewed in isolation, acts of sexual misconduct between an adult family member and a child may seem difficult to credit.

425 Accordingly, evidence of prior (and subsequent) sexual misconduct between a child and a person accused of sexual crimes against that child may be relevant because such acts explain, or make intelligible, the offences charged by providing a context which shows that they are a part of continuing relations between the parties. Putting the same point in a different way, the uncharged acts

are an integral part of the history of the offences charged. As Deane J stated in *B v The Queen*[348], such evidence may provide:

> "the key to an assessment of the relationship between the [accused] and the [complainant] and, as such, constituted part of the essential background against which both the [complainant's] and the [accused's] evidence of the alleged offences necessarily fell to be evaluated".

426 The evidence may also be relevant on other bases. When the existence of a relationship, characterised by "sexual interest" or "sexual attraction" of an adult accused towards a child complainant, points in the direction of the accused's guilt[349], that evidence makes it more likely that the offence charged was in fact committed[350]. Such evidence may also render other evidence of the complainant more credible[351] or it may be relevant to explain subordinate incidents, such as submission of the young girl to the older man's sexual advances or delay by the young girl in complaining about sexual misconduct towards her[352].

427 There is ample authority to support the proposition that the evidence is relevant. In *McConville v Bayley*[353], evidence of prior adulterous relations was admissible against a co-respondent in a divorce case. Citing *R v Ball*[354], Griffith CJ said[355]:

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348 (1992) 175 CLR 599 at 610; [1992] HCA 68.

349 *B v The Queen* (1992) 175 CLR 599 at 619 per Dawson and Gaudron JJ.

350 *R v Ball* [1911] AC 47; *S v The Queen* (1989) 168 CLR 266 at 275 per Dawson J; [1989] HCA 66; *Harriman v The Queen* (1989) 167 CLR 590; [1989] HCA 50; *B v The Queen* (1992) 175 CLR 599.

351 As for example in *R v Wickham* unreported, New South Wales Court of Criminal Appeal, 17 December 1991.

352 *R v Josifoski* [1997] 2 VR 68 at 77 per Southwell AJA; see also *R v Nieterink* (1999) 76 SASR 56 at 65 [41] and [43] per Doyle CJ.

353 (1914) 17 CLR 509; [1914] HCA 14.

354 [1911] AC 47.

355 *McConville v Bayley* (1914) 17 CLR 509 at 512. See also *R v Gellin* (1913) 13 SR (NSW) 271 at 278 per Cullen CJ.

> "When it is a question of innocence or guilt as to the relations between a man and a woman who are not married, the whole history of the relationship is necessarily involved."

428 In *Wilson v The Queen*[356] ("*Wilson*") evidence of a pre-existing hostile relationship, between a person accused of murder and the victim, was relevant and admitted so as to ensure that the jurors were not required to decide the issues in a trial "in a vacuum"[357]. In *R v Bond*[358], in a passage approved by Barwick CJ in *Wilson*[359], Kennedy J said:

> "The relations of the murdered or injured man to his assailant, so far as they may reasonably be treated as explanatory of the conduct of the accused as charged … are properly admitted to proof as integral parts of the history of the alleged crime for which the accused is on trial."

429 Both *Wilson* and *R v Bond*, sometimes called "relationship" cases, were concerned with acts relevant to the offences charged but were not, strictly speaking, "similar fact" cases from which a jury might reason that an accused has a propensity to commit murder.

430 On occasions, evidence of a relationship between an accused and a complainant may negative defences such as accident or mistake or establish motive.

431 As with evidence which is part of a connected series of events considered as one episode, the charges in these cases cannot truly be understood if isolated from the evidence of other sexual misconduct. Acts which are not part of the offences charged may nevertheless be "closely and inextricably mixed up with the history of the guilty act itself"[360] or show "the continuing nature"[361] of the conduct complained about so that the evidence explains the offences charged. If

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356 (1970) 123 CLR 334; [1970] HCA 17.

357 *Wilson* (1970) 123 CLR 334 at 344 per Menzies J. See also *R v Andrews* [1987] 1 Qd R 21 and *R v Bond* [1906] 2 KB 389 at 401 per Kennedy J. *Wilson* has been followed in *Frawley* (1993) 69 A Crim R 208 and *R v Ritter* unreported, New South Wales Court of Criminal Appeal, 31 August 1995.

358 [1906] 2 KB 389 at 401.

359 (1970) 123 CLR 334 at 338 per Barwick CJ.

360 *R v Bond* [1906] 2 KB 389 at 400 per Kennedy J.

361 *Gipp v The Queen* (1998) 194 CLR 106 at 130 [72] per McHugh and Hayne JJ; [1998] HCA 21.

evidence is confined to the events, the subject of the charges in these cases, that evidence would be "unreal and not very intelligible"[362]. That gives the evidence of other sexual misconduct a high degree of relevance[363].

432 Commonly enough, it will not be feasible to include all incidents of continuing sexual abuse in the charges which are laid in respect of specific acts. Juries understand well enough that sexual abuse of children can involve systematic abuse when the child and the abuser are family members. Jurors would find it strange if such evidence were not put before them if it exists.

433 In these three matters the evidence of uncharged acts was relied on by the prosecution to establish the context in which the charges could be truly understood, so that the charges would not be considered in a vacuum. The context was a sexualised family relationship which was directly relevant to the proof of issues in the cases. In each case that evidence explained, and rendered intelligible, the offences charged. To exclude such evidence as irrelevant would occasion unfairness by requiring each complainant to give an incomplete account of her evidence.

Principal submissions

434 Relevance is a necessary but not sufficient condition for admitting evidence which discloses propensity. Before turning to the question of the possible exclusion of the evidence, despite its high degree of relevance, it is necessary to say something about the appellants' and the applicant's principal submissions to this Court.

HML

435 The appellant in *HML* commenced submissions with the proposition that the case raised a problem not resolved by *Pfennig v The Queen*[364] ("*Pfennig*"). The gist of the appellant's submissions, so far as I understand them, was that where the uncharged acts are acts of sexual abuse against the complainant, the evidence inevitably discloses a propensity to commit the crimes as charged, despite a prosecutor leading the evidence for purposes other than propensity purposes and even positively eschewing any use of the evidence for propensity purposes.

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362 *O'Leary v The King* (1946) 73 CLR 566 at 577 per Dixon J; [1946] HCA 44; see also *R v Chamilos* unreported, New South Wales Court of Criminal Appeal, 24 October 1985.

363 *S v The Queen* (1989) 168 CLR 266 at 275 per Dawson J.

364 (1995) 182 CLR 461; [1995] HCA 7.

436 Identifying the relevance of the evidence by reference to a "sexual interest" or "ongoing sexual attraction" between the appellant and the complainant was said to exemplify the appellant's complaint. It was contended that evidence of prior sexual misconduct with a complainant, in the context of a charge of sexual offences against a child, always discloses propensity of an egregious kind. Underlying that submission there seemed to be a recognition that sexual conduct with children is not only prohibited under various criminal laws, but it is also the subject matter of a strong taboo in our society. That made the evidence of uncharged acts and the references to "sexual interest" and "ongoing sexual attraction" so highly prejudicial, so the argument ran, that the directions given were not adequate to guard against the danger that the jury would convict the appellant on the basis of bad character, or more narrowly, the specific propensity reflected in the phrases "sexual interest" and "ongoing sexual attraction", rather than because the jurors were satisfied as to the commission of the offences charged. This point has substance and I will return to it.

437 In support of that argument there was said to be a difference, not only of emphasis, but also of principle, between *R v Vonarx*[365] ("*Vonarx*"), a decision of the Court of Appeal of the Supreme Court of Victoria, and *R v Nieterink*[366] ("*Nieterink*"), a decision of the Court of Criminal Appeal of South Australia. It was contended that *Vonarx* stood for the proposition that such evidence could only be led and relied upon for the purpose of proving a sexual relationship, whereas, it was said, *Nieterink* approved the use of such evidence for a wider range of purposes.

SB

438 Similarly, it was contended by the appellant in *SB* that the evidence of uncharged acts could only be used for the very limited purpose of showing a sexual relationship, or even more narrowly, sexual attraction. The idea was repeated that this type of evidence is inevitably propensity evidence which is so egregious that the risk is that a jury will reason that an accused has a propensity to commit the offence charged.

OAE

439 The applicant in *OAE* raised a similar complaint even more bluntly and submitted that evidence of many occasions of sexual misconduct, identified as relevant because it shows "sexual attraction", is not admissible because evidence

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365 [1999] 3 VR 618.

366 (1999) 76 SASR 56.

of sexual attraction will "show propensity and that is all it can possibly show". That submission inevitably raised the question of whether the stringent test for admissibility confirmed in *Pfennig* applies to the evidence under consideration in these three cases.

Admissibility

440 No party argued that *Pfennig* should be qualified and no contention was advanced that the uncharged acts were inadmissible because they were not, strictly speaking, similar acts. It was submitted for the respondent in each case that *Pfennig* was distinguishable and so much seems to have been generally assumed by each of the accused.

441 The background to any consideration of whether the evidence of uncharged acts in these matters should be admitted is the "thesis of English law" referred to by Dixon CJ in *Dawson v The Queen*[367] that a crime is not to be proved by "the character and tendencies of the accused". In *R v Makin*, in the Supreme Court of New South Wales, Windeyer J considered the bar on proving guilt by reference to the character and tendencies of the accused was subject to "certain exceptions and limitations" compelled by "common sense and our experience of life"[368]. That case involved leading similar fact evidence to prove the *actus reus*.

442 On appeal to the Privy Council, in *Makin v Attorney-General for New South Wales*[369] ("*Makin*"), Lord Herschell LC said:

> "[T]he mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be *relevant to an issue before the jury*, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused." (emphasis added)

443 When the theoretical underpinnings of the rule in *Makin* were re-examined in *Director of Public Prosecutions v Boardman*[370] ("*Boardman*"), it was said that the general exclusionary rule operated to exclude relevant evidence which might prejudice a fair trial by upsetting the presumption of innocence "by introducing

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367 (1961) 106 CLR 1 at 16; [1961] HCA 74.

368 (1893) 14 NSWLR 1 at 18.

369 [1894] AC 57 at 65.

370 [1975] AC 421.

more heat than light"[371]; and that jurors in many cases would think such evidence "was more relevant than it was"[372] so that the probative value of the evidence was outweighed by its prejudicial effect. However, Lord Cross of Chelsea recognised that such evidence may be "so very relevant that to exclude it would be an affront to common sense"[373].

444 Proceeding on the basis that Lord Herschell's concluding words in the passage from *Makin* set out above were only examples of the exceptions to, or limitations upon, the general prohibition respecting character evidence, the rule in *Makin* was restated in *Boardman* so as to emphasise the need to focus on the cogency of the evidence rather than seeking to assign it to a particular category of exception or limitation to the general exclusionary rule. That restatement was subsequently repeated in *Director of Public Prosecutions v P*[374] ("*DPP v P*") by Lord Mackay of Clashfern LC (with whom the other Law Lords agreed). The Lord Chancellor said that for evidence of an offence against one victim to be admitted in a trial involving another victim, it was necessary[375]:

> "that its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime".

445 After noting the restatement of *Boardman* in *DPP v P*, and referring to the need for a "clear and coherent theoretical foundation"[376] for any exclusionary rule, the plurality judgment in *Pfennig* of Mason CJ, Deane and Dawson JJ explained[377]:

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371 *Boardman* [1975] AC 421 at 454 per Lord Hailsham of St Marylebone. See also *BRS v The Queen* (1997) 191 CLR 275 at 321 per Kirby J; [1997] HCA 47.

372 *Boardman* [1975] AC 421 at 456 per Lord Cross of Chelsea. See also *Pfennig* (1995) 182 CLR 461 at 512 per McHugh J and *BRS v The Queen* (1997) 191 CLR 275 at 322 per Kirby J.

373 *Boardman* [1975] AC 421 at 456.

374 [1991] 2 AC 447.

375 [1991] 2 AC 447 at 460.

376 *Pfennig* (1995) 182 CLR 461 at 481.

377 (1995) 182 CLR 461 at 482.

> "[T]he prejudicial effect that the law is concerned to guard against is the possibility that the jury will treat the similar facts as establishing an inference of guilt where neither logic nor experience would necessitate the conclusion that it clearly points to the guilt of the accused."

446 Their Honours were considering the test to be applied in determining whether evidence of a similar offence against one victim was sufficiently probative of the identity of an offender in a trial concerning a different victim. They stated the test as follows[378]:

> "Because propensity evidence is a special class of circumstantial evidence, its probative force is to be gauged in the light of its character as such. But because it has a prejudicial capacity of a high order, the trial judge must apply the same test as a jury must apply in dealing with circumstantial evidence and ask whether there is a rational view of the evidence that is consistent with the innocence of the accused".

447 As mentioned in *Phillips v The Queen*, references to propensity in *Pfennig* "must be understood against the background of the decisions, especially the decisions of this Court, that preceded it"[379].

448 The test of the plurality set out above confirmed a test accepted by Mason CJ, Wilson and Gaudron JJ in *Hoch v The Queen*[380] ("*Hoch*"), which derived in turn from an observation by Dawson J in *Sutton v The Queen*[381] ("*Sutton*"). Both *Sutton* and *Hoch* concerned the question of whether there should have been separate trials of a number of sexual offences alleged to have been committed by an accused against several persons. *Hoch* was particularly concerned with whether concoction between multiple witnesses had occurred. Each case was concerned with applying the basic criterion of admissibility of such evidence, namely whether the probative value of the evidence outweighed its prejudicial effect.

449 In *Sutton*, Dawson J expressed his view that one matter not settled with precision in *Boardman* was the test for determining the sufficiency of the probative value of similar fact evidence. His Honour then referred to the direction, which would generally be required to be given to a jury where the

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378 *Pfennig* (1995) 182 CLR 461 at 482-483.

379 (2006) 225 CLR 303 at 323 [62] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ; [2006] HCA 4.

380 (1988) 165 CLR 292 at 294-295; [1988] HCA 50.

381 (1984) 152 CLR 528 at 563; [1984] HCA 5.

evidence relied upon is circumstantial, as the foundation for a test to determine the probative value of similar fact evidence[382].

450 The rationale underpinning the necessity for such a direction has long been understood. The direction originates in *Hodge's Case*[383], which involved a charge of murder. The report states[384]:

> "Alderson, B, told the jury, that the case was made up of circumstances entirely; and that, before they could find the prisoner guilty, they must be satisfied, 'not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person.'
>
> He then pointed out to them the proneness of the human mind to look for – and often slightly to distort the facts in order to establish such a proposition – forgetting that a single circumstance which is inconsistent with such a conclusion, is of more importance than all the rest, inasmuch as it destroys the hypothesis of guilt."

451 It is plain that the direction arose from the need to ensure that an accused received a fair trial, by directing the jury as to how it should apply the criminal standard of proof in a case turning entirely on circumstantial evidence.

452 In *Martin v Osborne*[385] there was no direct evidence of an element of the offence; similar fact evidence was sought to be led as a basis for inferring that essential element. Dixon J said[386]:

> "If an issue is to be proved by circumstantial evidence, facts subsidiary to or connected with the main fact must be established from which the conclusion follows as a rational inference. In the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved

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382 *Sutton* (1984) 152 CLR 528 at 563-564.

383 (1838) 2 Lewin 227 [168 ER 1136].

384 (1838) 2 Lewin 227 at 228 [168 ER 1136 at 1137].

385 (1936) 55 CLR 367; [1936] HCA 23.

386 (1936) 55 CLR 367 at 375.

> is so high that the contrary cannot reasonably be supposed. The circumstances which may be taken into account in this process of reasoning include all facts and matters which form constituent parts or ingredients of the transaction itself or explain or make intelligible the course of conduct pursued."

453 The juxtaposition in that passage, of the direction to be given when circumstantial facts are to be relied on to prove an element of, or fact essential to, an offence, with a reference to evidence admissible to explain an offence, or make it intelligible, makes it clear that it is not the nature of circumstantial evidence which determines whether or not it needs to be proved to the criminal standard; it is the purpose for which reliance is placed on the circumstantial evidence which is critical. So much was borne out in the reasons of Dixon CJ in *Plomp v The Queen*, when his Honour considered whether evidence of motive could be relied on to prove guilt[387]. The clarification of *Chamberlain v The Queen [No 2]*[388] to be found in *Shepherd v The Queen*[389] bears out the same point. Thus the critical importance of identifying the purposes for which evidence of uncharged acts is to be tendered.

454 The line of authority through *Sutton* and *Hoch* to *Pfennig* places a great deal of emphasis on similar fact evidence as circumstantial evidence. However, a question not decided in any of those cases, which bears on the adequacy of the directions given in these three matters, is whether the test of admissibility applied in *Pfennig* to circumstantial evidence of propensity led to prove identity, also applies to circumstantial evidence of facts or matters tendered to explain or render intelligible the offences as charged, which evidence incidentally reveals propensity.

Pfennig

455 For the reasons which follow, I respectfully disagree with the conclusion that the test set out in *Pfennig* applies, or should be extended to apply, to the evidence of uncharged acts in these three matters. In each case the evidence was led for purposes other than to establish propensity as proving an element of, or fact essential to, the offences charged.

456 It can be accepted that the evidence of the uncharged acts in these three cases was evidence of "similar acts", despite a distinct awkwardness in grouping together two different kinds of similar fact cases: those concerning parties

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387 (1963) 110 CLR 234 at 242-243; [1963] HCA 44.

388 (1984) 153 CLR 521; [1984] HCA 7.

389 (1990) 170 CLR 573; [1990] HCA 56.

extraneous to the accused and the complainant, and those concerning prior continuous or recurrent conduct by the accused against the complainant. It can also be accepted that the evidence in each case discloses propensity, despite not being led for the purpose of establishing propensity as a fact from which guilt can be inferred.

457 Further, it may be correct that the evidence of uncharged acts in all of these matters (with the possible exception of the G-string evidence in *HML*) could meet the stringent test of admissibility set out in *Pfennig*, so that there is no practical difference in result whether or not the *Pfennig* test is applied. However, because any account of the charged acts may be incomplete or incoherent without the evidence of uncharged acts and because it might be considered an affront to common sense to exclude the evidence of uncharged acts, the test to establish the probative value of that evidence is important.

458 Consideration of the facts in *Pfennig*, and of the provenance of the test for admissibility there stated, shows that the rationale of the test is that it is intended to state a rule of law based on the criminal standard, which is designed to ensure there is no unfairness in a trial arising from inculpating an accused on the basis of a circumstantial fact of propensity.

459 That the type of evidence of uncharged acts in each of these cases is distinctly unlike the evidence of similar facts in *Pfennig* was recognised explicitly in the minority judgment of McHugh and Hayne JJ in the case of *Gipp v The Queen*[390], which concerned charges, the background of which was long-standing sexual abuse perpetrated by the accused upon his step-daughter. Their Honours said[391]:

> "[T]he evidence of the previous and continuing history in this case was far removed from the kinds of propensity evidence that have attracted the stringent requirements of admissibility and direction imposed by common law doctrine."

460 Further, all members of the majority appeared to recognise that the higher standard of probative value set in *Pfennig* could not be automatically transposed to evidence of a relationship put forward as the context in which the offences charged occurred. Gaudron J appears to have accepted that evidence of the context of the charges might be admissible depending on issues raised by an accused[392]. Kirby J did not seem to apply the *Pfennig* test to the facts. Callinan J

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390 (1998) 194 CLR 106.

391 (1998) 194 CLR 106 at 134 [81].

392 (1998) 194 CLR 106 at 113 [12].

accepted that certain evidence of context may be admissible, although he sounded a warning about background evidence which was too general or too vague to have significant probative value[393].

461 The differences between the similar fact evidence in *Pfennig*, and the evidence of uncharged acts like that in these cases, were also recognised in *KRM v The Queen*[394] ("*KRM*"). As well, respective appellate courts in *Vonarx* and *Nieterink*, which both concerned evidence of uncharged acts of sexual misconduct, distinguished the facts in each of those cases from the facts considered in *Pfennig*[395]. The importance of the differences is that the rationale for the *Pfennig* test has no application to evidence of a relationship put forward as the context which explains the offences or makes them intelligible.

462 Another critical consideration is that these three cases are not entirely circumstantial. Evidence tendered to explain or make intelligible the conduct covered by the charges is not led as sole proof by which elements of, or facts essential to, the offence are to be proved. None of the accused is at risk of being inculpated solely by an inference of guilt based on the evidence of uncharged acts. Each complainant gave direct evidence of the elements of the charges such that a jury could convict each accused without any reference to, or reliance upon, the evidence of uncharged acts. A conclusion of guilt was open to a jury in each case, even if the jury rejected the evidence of the uncharged acts, or otherwise set it aside.

463 A further consideration is that despite the existence of exclusionary rules, whether as framed in *Makin* or as expounded in *Boardman* and *DPP v P* or as further refined in *Pfennig*, evidence of a relationship between an accused and a complainant (or victim) has been admitted, notwithstanding possible revelation of propensity[396], when the relationship is capable of being treated as explaining the offences charged. As observed by McHugh J in *KRM*[397], numerous examples can be found where "relationship evidence" has been admitted which could not have satisfied the *Pfennig* test.

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393 (1998) 194 CLR 106 at 168 [182]. His Honour repeated that warning in *Tully v The Queen* (2006) 230 CLR 234 at 275-276 [136]; [2006] HCA 56.

394 (2001) 206 CLR 221 at 229-231 [23]-[25] per McHugh J, 264 [133]-[134] per Hayne J; [2001] HCA 11.

395 [1999] 3 VR 618 at 622 [13] per Winneke P, Callaway JA and Southwell AJA; (1999) 76 SASR 56 at 65 [41] and 66 [48] per Doyle CJ.

396 Forbes, *Similar Facts*, (1987) at 223-226.

397 (2001) 206 CLR 221 at 230 [24].

464 As already mentioned, evidence of a relationship of mutual antipathy between a husband and wife, respectively the accused and victim, was admitted in *Wilson* for the purposes of throwing light on the offence of murder with which the accused was charged and to negative a defence of accident.

465 More particularly, evidence of a relationship between an accused and a complainant has been admitted to prove sexual crimes against young people, including incest[398]. It was thought by at least one writer that when the *Makin* approach to exclusion was employed there was a "less exacting test" for the admissibility of "relationship evidence" than there was for similar fact evidence *strictu sensu*[399]. Whether or not that is correct, the differences between propensity evidence of the kind considered in *Pfennig* and the evidence of uncharged acts here are easily recognised[400].

466 Once a prosecutor demonstrates that the evidence of uncharged acts has a relevance beyond merely demonstrating propensity and disavows use of the evidence as propensity evidence, the test for admissibility is the basic criterion referred to in both *Hoch*[401] and *Pfennig*[402]. That basic criterion requires asking whether the probative value of the evidence outweighs its prejudicial effect, whether that is specifically grounded in *Boardman*, or more generally in *R v*

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398 See for example *R v Whitehead* (1897) 23 VLR 239; *R v Gellin* (1913) 13 SR (NSW) 271; *R v Young* [1923] SASR 35; *R v Allen* [1937] St R Qd 32; *R v Power* [1940] St R Qd 111; *R v Cooksley* [1982] Qd R 405 at 414; *R v Etherington* (1982) 32 SASR 230; *R v Chamilos* unreported, New South Wales Court of Criminal Appeal, 24 October 1985; *R v Wickham* unreported, New South Wales Court of Criminal Appeal, 17 December 1991.

399 Forbes, *Similar Facts*, (1987) at 223-224.

400 *Pfennig* (1995) 182 CLR 461 at 506 per Toohey J, 525-526 per McHugh J; *Gipp v The Queen* (1998) 194 CLR 106 at 112 [11] per Gaudron J, 132 [77] and 134-135 [81]-[85] per McHugh and Hayne JJ, 166-167 [177] and 168 [180]-[182] per Callinan J; *KRM* (2001) 206 CLR 221 at 229-231 [23]-[25] per McHugh J, 264 [133]-[134] per Hayne J; Smith and Holdenson, "Comparative Evidence: Admission of Evidence of Relationship in Sexual Offence Prosecutions – Part I", (1999) 73 *Australian Law Journal* 432.

401 (1988) 165 CLR 292 at 294-295 per Mason CJ, Wilson and Gaudron JJ, 300-301 per Brennan and Dawson JJ.

402 (1995) 182 CLR 461 at 481 per Mason CJ, Deane and Dawson JJ, 507 per Toohey J, 513-514 per McHugh J.

Christie[403], a possibility recognised in *Markby v The Queen*[404], which first adopted the *Boardman* test as part of the Australian common law.

467 The gloss on that basic criterion, imposing a higher standard of probative value, which arose out of the facts in *Hoch* and *Pfennig*, and the purposes for which the evidence was led in each of them, has no application to the purposes for which evidence of uncharged acts was led in these three matters.

Other matters

468 A number of other matters deserve brief mention. "Relationship" is a vague term. However, it is not the character of the evidence as "relationship evidence" which determines whether or not *Pfennig* applies. For example, if offences such as those at issue in these three cases were committed in circumstances which somehow precluded the complainant from giving direct evidence of the identity of the accused, then the relationship evidence might be led to prove propensity as probative of identity. However, if *Pfennig* applied in those circumstances there would be no need to warn against the use of propensity reasoning because the stringency of the test is based on permitting the fact of propensity to be relied on as probative of elements of, or facts essential to, the offence.

469 Secondly, the expressions "sexual attraction", "guilty passion" and cognate expressions were employed in the 80 years or so between *Makin* and *Boardman* to identify a category of cases recognised as an exception to, or limitation upon, the general exclusionary rule in respect of character evidence. There was no particular consensus about the theoretical underpinnings of the exception[405]. Since *Boardman*, such expressions have continued to be used, although not exclusively to denote a fact or a pattern of conduct or to indicate intention, motive or propensity. In the matters under consideration, expressions of that kind were used to refer to a fact about the nature of the relationship, which was the context in which the offences charged occurred. That was the basis on which the evidence was put before each jury.

470 Nevertheless, it cannot be denied that expressions such as "sexual interest" or "ongoing sexual attraction" applied to a sexualised family relationship

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403 [1914] AC 545.

404 (1978) 140 CLR 108; [1978] HCA 29.

405 Compare, for example, Phipson, *The Law of Evidence*, 6th ed (1921) at 160-161 with Wigmore, *Evidence in Trials at Common Law*, 3rd ed (1940), vol 2, §360 at 274 and §398 at 355 and Cross, *Evidence*, (1958) at 281-282.

between an adult accused and a child complainant inevitably point to propensity[406]. Nor can it be ignored that the specific propensity disclosed is in relation to a crime which might arouse disgust or other negative reactions, an important point particularly emphasised in submissions made in *HML*.

471 The answer to that point is that when it appears unjust to exclude evidence of prior sexual misconduct because its probative value outweighs its prejudicial effect, balance and fairness to the accused must be ensured by requiring a trial judge to do three things: give a clear explanation to the jury of the purposes for which the conduct has been admitted, give a clear direction or indication not to substitute the evidence of prior misconduct for the direct evidence of the offences charged, and also give a warning against propensity reasoning in coming to a conclusion of guilt.

472 Finally, the differences of principle said to exist between *Vonarx* and *Nieterink* seem more chimerical than real. To the extent that the description of purposes for which evidence of uncharged acts could be led differs in *Vonarx* and *Nieterink*, the differences reflect no more than specific ways in which the evidence of uncharged acts explains, or makes intelligible, the offences charged, a matter which will always turn on the facts of a case, and may do so irrespective of apprehended defences[407]. Use of expressions such as "context" or "true context" or "realistic contextual setting" or "background" or "essential background" to identify the relevance of evidence such as that under consideration here, does not and should not give rise to any particular difficulty so long as it is clear that such references, however expressed, are references to circumstances which are part of the integral history of an offence charged. If the evidence is so vague or so general as to not answer that description it may be rejected as irrelevant or because its probative value does not outweigh its prejudicial effect[408].

473 There are further general considerations which I have taken into account. In *R v H*[409], an English case concerning the capacity of similar acts involving one victim to corroborate an account given by another victim, Lord Griffiths welcomed developments in the law which involved reconsideration and restatement of exclusionary rules. He recognised that judges in past times did

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406 *S v The Queen* (1989) 168 CLR 266 at 275 per Dawson J.

407 *Harriman v The Queen* (1989) 167 CLR 590 at 601-602 per Dawson J; cf *Gipp v The Queen* (1998) 194 CLR 106 at 113 [12] per Gaudron J.

408 See *Gipp v The Queen* (1998) 194 CLR 106 at 168 [182] per Callinan J; *Tully v The Queen* (2006) 230 CLR 234 at 275-276 [136] per Callinan J.

409 [1995] 2 AC 596.

not trust less well-educated and often illiterate juries to evaluate all the relevant material. This, he said, explains the evolution of many exclusionary rules "deemed necessary to ensure that the accused had a fair trial in the climate of those times"[410].

474 In *R v Seaboyer*[411], a Canadian case concerned with whether "rape shield" provisions infringed the right to a fair trial guaranteed by the Canadian Charter of Rights and Freedoms, McLachlin J, delivering a judgment on behalf of a majority, observed that it is fundamental to the Canadian system of justice that the rules of evidence should permit the judge and jury to get at the truth and properly determine the issues in a case.

475 Faced with a similar issue in *R v A (No 2)*[412], Lord Hope of Craighead approved this statement and went on to observe:

> "A law which prevents the trier of fact from getting at the truth by excluding relevant evidence runs counter to our fundamental conceptions of justice and what constitutes a fair trial."

476 Such general considerations transcend the manifold factual distinctions which could be made between those cases and these three cases. They can be applied to the Australian legal system and are apt to be taken into account when considering whether the test for admitting evidence of uncharged acts of sexual misconduct, tendered for the purpose of showing the context of the offences, should be the stringent *Pfennig* test of probative value.

Standard of proof

477 It is the elements of a charge which must be proved beyond reasonable doubt. On occasions, a fact which is not one of the ultimate facts which constitute elements of the offence may nevertheless be so indispensable to a finding of guilt that the fact is metaphorically "a link in a chain"[413]; if so it will be necessary for a trial judge to direct a jury that that particular fact must be proved beyond reasonable doubt. However, as Dawson J observed in *Shepherd v The Queen*[414], such a warning should not be given where it would be unnecessary or

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410 [1995] 2 AC 596 at 613.

411 [1991] 2 SCR 577 at 609.

412 [2002] 1 AC 45 at 71 [55].

413 Wigmore, *Evidence in Trials at Common Law*, Chadbourn rev (1981), vol 9, §2497 at 412-414.

414 (1990) 170 CLR 573 at 579.

confusing to give it or where it is not appropriate to give it because the evidence is not indispensable to a finding of guilt.

HML

478 I agree, for the reasons stated by Hayne J, that the evidence HML sought to tender concerning the status of criminal proceedings against him in Victoria was correctly excluded by the trial judge as irrelevant.

479 As demonstrated by Heydon J in his reasons[415], there was no substance in the complaint that the trial judge misdirected the jury on the standard of proof.

480 For the reasons set out above, the evidence of uncharged acts was admissible for the purposes identified, all of which went to explain and render intelligible the conduct with which the accused was charged. The directions given by the trial judge included an explanation to the jury of the limited purposes for which the evidence was admitted, a direction not to substitute the evidence of uncharged acts for the evidence of the offences charged and a warning against propensity reasoning: that because the accused engaged in sexual misconduct other than that with which he was charged, he was the kind of person likely to have committed the offences. Such directions were adequate and did not give rise to any miscarriage of justice.

SB

481 I agree with Gleeson CJ, Kirby, Hayne and Heydon JJ that leave to amend the notice of appeal in this Court to raise the issue of the admissibility of evidence, to which no objection was taken at the trial, should be refused in accordance with settled principles[416].

482 The trial judge allowed the evidence of uncharged acts to go to the jury for the limited purpose that the evidence might put the offences in context and thus assist jurors in understanding the offences charged which might otherwise have seemed difficult to comprehend. The trial judge directed the jury that it could not substitute that evidence for the evidence of the offences charged. His Honour also gave a warning to the jury against propensity reasoning. Such directions were adequate and did not give rise to any miscarriage of justice.

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415 Reasons of Heydon J at [339].

416 *Crampton v The Queen* (2000) 206 CLR 161; [2000] HCA 60; reasons of Gleeson CJ at [36]; reasons of Kirby J at [50]; reasons of Hayne J at [207]; reasons of Heydon J at [360] n 310.

OAE

483 There was no substance in the complaint that the trial judge misdirected the jury on the standard of proof, as shown by Heydon J in his reasons[417].

484 The evidence of uncharged acts went to the jury for the limited purpose of showing a relationship between the accused and the complainant characterised by the "sexual attraction" of the accused to the complainant; the relationship was described to the jury as putting the offences in a proper context. As well as describing those limited purposes the trial judge directed the jury that the evidence could not be substituted for the direct evidence of the elements of the offences and he gave a warning against propensity reasoning. Those directions were adequate and did not give rise to any miscarriage of justice.

Orders

485 In each of *HML v The Queen* and *SB v The Queen* the appeal should be dismissed. Special leave to appeal should be granted in *OAE v The Queen*, the appeal treated as heard instanter but the appeal should be dismissed.

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417 Reasons of Heydon J at [395]-[396].

486 KIEFEL J. The facts relevant to each of these matters are set out in the reasons of Hayne J and Heydon J. In each matter the offences charged were the sexual assaults of and sexual intercourse with a child, by a parent in the cases of *HML v The Queen*[418] and *SB v The Queen*[419] and by the brother of the child's foster mother in *OAE v The Queen*[420]. In each matter the prosecution case relied upon the complainant's account. On each of those accounts the offences charged were not isolated incidents, but part of a course of conduct engaged in by the accused. In circumstances such as these it is generally regarded as impracticable to charge the accused with every alleged act. Particular occasions are selected as the subject of charges. In some jurisdictions an offence is defined, by statute, by reference to the maintenance of a sexual relationship with a child. It is proved by establishing a sexual act upon the child on a number of separate occasions in a specified period. The statutory provision in South Australia[421] requires three separate occasions and came into force in 1994. It was not utilised in *HML* and *OAE*, there being only two charges in each, and could not apply in *SB*. Difficulties may arise in the prosecution of isolated acts if the evidence to be placed before the jury is restricted to the circumstances of the offences charged. Nevertheless, evidence concerning other offences or misconduct on the part of the accused must not only be relevant to a fact in issue with respect to the offences charged, but also qualify for admission in accordance with the rule of evidence concerning similar facts.

Condition for admissibility

487 It is a rule of evidence that evidence which tends to show the commission, by the accused, of criminal acts other than those covered by the indictment, tendered for the purpose of enabling a conclusion that the accused is a person likely, by reason of that conduct or the accused's character, to have committed the offences charged, be excluded[422]. The rationale for its exclusion, as a matter of legal policy, has its basis in the concern of the law as to the way in which the information might be used by a jury. The concern is not so much with the nature of the information, about the other offences or misconduct, as with the process of

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418 *R v H, ML* [2006] SASC 240.

419 *R v S, B* [2006] SASC 319.

420 *R v O, AE* (2007) 172 A Crim R 100.

421 *Criminal Law Consolidation Act* 1935 (SA), s 74.

422 See *Makin v Attorney-General for New South Wales* [1894] AC 57 at 65.

reasoning which the jury might apply to it[423]. The "forbidden reasoning"[424], which might be employed by a jury, is to infer guilt where neither logic nor experience necessitates such a conclusion[425]. That is to say the jury may reason from what the other offences or misconduct convey about the accused as a person, directly to guilt. This may be more likely to occur where the other conduct is particularly reprehensible.

488 Lord Goddard CJ in *R v Sims*[426] suggested that it was preferable not to start with the assumption of the exclusion of all such evidence, but with the general proposition that all evidence that is logically probative is admissible unless it is excluded. This statement prefaced comments concerning the second limb of the rule as stated in *Makin v Attorney-General for New South Wales*[427], which was once controversial[428] but no longer assumes importance. The statement is undoubtedly correct. It focuses attention, in the first instance, upon the relevance of the evidence of the other misconduct, from which the importance attaching to the evidence may be gauged. The law does not deny that evidence of similar misconduct may have probative value with respect to a fact in issue. The exclusion is therefore qualified. The basic condition for admissibility, applied since *Director of Public Prosecutions v Boardman*[429], is that evidence of this kind have such a strong probative force that it transcends the possible prejudice to the fair trial of the accused[430]. The prejudice referred to is the misuse by the jury of the evidence as earlier mentioned and does not arise from the strength of the evidence itself. It may be assumed that where there is a legally relevant basis for its use a jury, properly directed, will not employ forbidden reasoning.

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423 *Cross on Evidence*, 7th Aust ed (2004) at [21030].

424 *Director of Public Prosecutions v Boardman* [1975] AC 421 at 453 per Lord Hailsham of St Marylebone.

425 *Pfennig v The Queen* (1995) 182 CLR 461 at 482 per Mason CJ, Deane and Dawson JJ; [1995] HCA 7.

426 [1946] KB 531 at 539.

427 [1894] AC 57.

428 *Pfennig v The Queen* (1995) 182 CLR 461 at 476-477 per Mason CJ, Deane and Dawson JJ.

429 [1975] AC 421.

430 *Hoch v The Queen* (1988) 165 CLR 292 at 300-301 per Brennan and Dawson JJ; [1988] HCA 50.

489 The courts have recognised that some evidence may be such that it would be an "affront to common sense" to exclude it[431]. In *Director of Public Prosecutions v P*[432] it was accepted that it may be just to admit evidence having a sufficiently great probative force, despite the fact that it may be prejudicial to the accused, in tending to show the accused was guilty of another crime[433]. The courts have permitted use of the propensity or tendency disclosed by the other conduct as circumstantial evidence in proof of the offences charged. *Pfennig v The Queen*[434] was such a case. In admitting evidence of the accused's conviction, for the abduction and sexual assault of a boy, Mason CJ, Deane and Dawson JJ applied a test for admissibility which had regard to the character of the evidence as propensity evidence with "a prejudicial capacity of a high order"[435]. The test was that to be applied by a jury in determining guilt by reference to circumstantial evidence. It required the trial judge to be satisfied that there was no rational view of the evidence consistent with the innocence of the accused[436]. Their Honours said of the requirement[437]:

> "In stating the question in that way, we point out … that the purpose of the propensity evidence is to establish a step in the proof of the prosecution case, namely, that it is to be inferred, according to the criminal standard of proof, that the accused is guilty of the offence charged. Accordingly, the admissibility of the evidence depends upon the improbability of its having some innocent explanation in the sense discussed."

490 It may be observed from their Honours' explanation that the reasoning employed is not propensity reasoning, in the sense of the forbidden reasoning earlier mentioned. It involves the use of propensity or tendency evidence but maintains conventional probability reasoning.

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431 *Director of Public Prosecutions v Boardman* [1975] AC 421 at 456 per Lord Cross of Chelsea.

432 [1991] 2 AC 447 at 460 per Lord Mackay of Clashfern LC.

433 And see *Director of Public Prosecutions v Boardman* [1975] AC 421 at 439 per Lord Morris of Borth-y-Gest; *Pfennig v The Queen* (1995) 182 CLR 461 at 528 per McHugh J.

434 (1995) 182 CLR 461.

435 (1995) 182 CLR 461 at 482-483.

436 (1995) 182 CLR 461 at 482-483.

437 (1995) 182 CLR 461 at 484.

Relevance

491 It is not possible to discuss the probative force of evidence without identifying the way in which it may be used and the issue to which it relates. Cases dealing with offences of the kind here in question have identified more than one purpose for adducing evidence of the other sexual misconduct under the general heading of "relationship evidence". This has added to the confusion as to the appropriate standard to be applied for its admissibility.

492 The term "relationship evidence" refers to all the conduct of a sexual kind that has taken place between the accused and the complainant. It encompasses sexual conduct which is an offence, often referred to as "uncharged acts", and misconduct which may not be an offence. It may not be desirable for a trial judge to describe the acts as "uncharged" to a jury, since it may convey a view, on the part of the judge, that they were proper subjects for charges. The characterisation of the evidence of the other sexual misconduct as "relationship evidence" may also be inapposite to describe the respective positions of the parties and the unilateral actions of the accused. Nevertheless it is a term which has been used for some time to describe the other evidence of sexual misconduct and I will maintain its use in these reasons, for consistency.

493 Clearly, relationship evidence is relevant as showing the sexual interest of the accused in, or the "guilty passion" for, the complainant. Its relevance in this regard has been acknowledged by judges of this Court[438] and by judges of State courts[439]. There can be little doubt about its probative force. It may reveal a tendency in the accused, sometimes described as a motive. Where the relationship evidence shows that the accused has carried out sexual acts upon the complainant, or undertaken acts preparatory to them, the tendency or propensity on the part of the accused may be taken as confirmed. It may be concluded that the accused is prepared to act upon the tendency to an extent that it may be inferred that the accused will continue to do so. The evidence may then render more probable the commission of the offences charged.

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438 *B v The Queen* (1992) 175 CLR 599 at 601-602 per Mason CJ, 605 per Brennan J, 610 per Deane J, 618 per Dawson and Gaudron JJ; [1992] HCA 68; *Gipp v The Queen* (1998) 194 CLR 106 at 132 [76] per McHugh and Hayne JJ; [1998] HCA 21.

439 *R v AH* (1997) 42 NSWLR 702 at 708 per Ireland J; *R v Wackerow* [1998] 1 Qd R 197 at 204 per Pincus JA; *R v Nieterink* (1999) 76 SASR 56 at 66 [48]-[49]; *R v Vonarx* [1999] 3 VR 618 at 622 [13]; *Cook v The Queen* (2000) 22 WAR 67 at 83 [65]-[66] per Anderson J.

494 More difficulty attends the question as to the relevance of relationship evidence where it is used in a more general way, to provide a setting or context for the offences charged[440]. The perceived need for the evidence is that the charged acts may otherwise seem unreal and not very intelligible[441]. Professor Birch distinguishes "background evidence" from that tendered as similar facts. She emphasises the assistance it gives to the jury by putting them in the general picture. If it involves references to prior offences, it does so because an account would otherwise be incomplete or incoherent. It is not so much that it would be an affront to common sense to exclude the evidence, rather that it is helpful to have it and difficult for the jury to do their job if events are viewed in total isolation from their history, in her view[442].

495 A description of the work relationship evidence might do does not, however, complete the identification of its legal relevance. I do not understand the cases dealing with relationship evidence of the kind here in question to suggest that such evidence could be admitted as part of the res gestae. It could not be said to be relevant on account of being contemporaneous with the offences charged[443]. The inclusionary aspect of the res gestae doctrine, extending to bad disposition[444], suggests that no wide view should be taken of evidence properly falling within it. As McHugh J reminded in *Harriman v The Queen*[445], if evidence is characterised as part of the transaction charged, it is not subject to any further condition of admissibility.

496 Some cases have admitted evidence of events extending beyond those proximate to the act charged on the basis that they make the act understandable and because the events are regarded as being bound up with the offence. On closer examination it may be thought that the evidence in question qualified as part of the res gestae.

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440 See *B v The Queen* (1992) 175 CLR 599 at 610 per Deane J.

441 *Gipp v The Queen* (1998) 194 CLR 106 at 130 [72] per McHugh and Hayne JJ; *KRM v The Queen* (2001) 206 CLR 221 at 264 [134] per Hayne J; [2001] HCA 11; *Tully v The Queen* (2006) 230 CLR 234 at 278 [145] per Callinan J; [2006] HCA 56; *R v Etherington* (1982) 32 SASR 230 at 235 per Walters J; *R v Wickham* unreported, New South Wales Court of Criminal Appeal, 17 December 1991 per Gleeson CJ; *R v Nieterink* (1999) 76 SASR 56 at 65 [43] per Doyle CJ.

442 Commentary to case note on *R v Stevens* [1995] Crim LR 649 at 651.

443 *Cross on Evidence*, 7th Aust ed (2004) at [37001].

444 *Cross on Evidence*, 7th Aust ed (2004) at [37001].

445 (1989) 167 CLR 590 at 633; [1989] HCA 50.

497 In *O'Leary v The King*[446] evidence was admitted of the accused's drunken and violent conduct towards fellow employees on the day leading up to the murder of one such employee. Dixon J said that if the events of the day were not presented in evidence the murder would seem "an unreal and not very intelligible event". But his Honour also described them as a series of connected events which could be considered as one transaction[447]. Latham CJ said that the evidence made it possible to obtain a real appreciation of the events of the day and night, but also said that the events formed "constituent parts or ingredients of the transaction itself"[448]. McHugh J in *Harriman*[449] appears to have viewed *O'Leary* as concerned with res gestae evidence. *R v Bond*[450] is another case where the evidence was described generally as "necessarily admissible" and unable to be excluded "without the evidence being thereby rendered unintelligible"[451]. However, it was also described as involving acts "so closely and inextricably mixed up with the history of the guilty act itself as to form part of one chain of relevant circumstances"[452], which may suggest that it was in truth viewed as part of the res gestae.

498 It has been said that evidence may be admissible, in a general way, to show the true relationship between the parties[453]. More particularly, in cases of the kind in question, it may show that a sexual relationship exists[454]. *Wilson v The Queen*[455] was a case where evidence was relevant to explain a relationship between husband and wife, on the trial of the husband for the murder of his wife.

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446 (1946) 73 CLR 566; [1946] HCA 44.

447 (1946) 73 CLR 566 at 577.

448 (1946) 73 CLR 566 at 575.

449 (1989) 167 CLR 590 at 628-629; and see also *R v Etherington* (1982) 32 SASR 230 at 235 per Walters J.

450 [1906] 2 KB 389.

451 [1906] 2 KB 389 at 400 per Kennedy J.

452 [1906] 2 KB 389 at 400 per Kennedy J.

453 *KRM v The Queen* (2001) 206 CLR 221 at 230 [24] per McHugh J.

454 *R v Vonarx* [1999] 3 VR 618 at 623 [15], 625 [21]-[22]; *Gipp v The Queen* (1998) 194 CLR 106 at 156 [141] per Kirby J.

455 (1970) 123 CLR 334; [1970] HCA 17.

The evidence admitted showed the acrimony in their relationship, disclosed in particular by statements made by the wife as to her belief that her husband wished to kill her. Menzies J said that the evidence was admitted because the jury would want to know what the relationship was between the husband and wife, for otherwise they would be deciding the matter "in a vacuum"[456]. But the evidence was not relevant in some general way. It permitted an inference to be drawn, as to the husband's state of mind, such as might negative the prospect of an accidental shooting, which he had raised by way of defence. In cases of the kind presently under consideration evidence tendered to show the relationship between the parties would provide more than context. It would focus attention upon its sexual nature and the accused's role in its creation and continuance. It would invite inferences to be drawn about the accused's state of mind towards the complainant and therefore his tendency. This does not provide support for a more general role for the evidence.

499 It may be accepted that relationship evidence has long been admitted for the explanation it provides to the jury[457]. In *KRM v The Queen* McHugh J said that it might explain why, on the occasions charged, the complainant did not rebuff the accused or showed no distress or resentment[458]. Cases involving sexual offences against children have identified other questions which are likely to occur to a jury and require explanation. They include: whether the offences are isolated incidents; why the accused felt confident enough to demand the acts in question; why the child was compliant; and why he or she did not make a complaint to another person[459]. The present case of *HML* provides another example. The jury would naturally be concerned to know whether any conduct of a sexual nature had preceded the alleged demands by the accused for fellatio and anal intercourse. They would wonder at, if not be concerned by, the complainant's apparent detachment in the way she described the circumstances of the offences. The evidence she gave, as to a statement made by the accused, makes the point. He encountered some difficulty with penetration when having anal intercourse with the complainant and commented that it had not happened

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456 (1970) 123 CLR 334 at 344 per Menzies J, McTiernan and Walsh JJ agreeing.

457 *KRM v The Queen* (2001) 206 CLR 221 at 230 [24] per McHugh J.

458 (2001) 206 CLR 221 at 230 [24].

459 *Harriman* (1989) 167 CLR 590 at 631 per McHugh J; *Gipp v The Queen* (1998) 194 CLR 106 at 113 [12] per Gaudron J, 131 [73] per McHugh and Hayne JJ; *R v Etherington* (1982) 32 SASR 230 at 235 per Walters J; *R v Wickham* unreported, New South Wales Court of Criminal Appeal, 17 December 1991 per Gleeson CJ; *R v Josifoski* [1997] 2 VR 68 at 77 per Southwell AJA; *R v Wackerow* [1998] 1 Qd R 197 at 209 per Byrne J; *R v Nieterink* (1999) 76 SASR 56 at 72 [76] per Doyle CJ.

before. The complainant was able to explain that he had had intercourse of this kind with her on previous occasions.

500 In my view relationship evidence is relevant, but not in a general way and not by way of background or contextual evidence. It is relevant to answer questions which, in cases of the kind under consideration, may fairly be expected to arise in the minds of the jury were they limited to a consideration of evidence of the offences charged. So understood the basis for its admission is not to bolster the complainant's credit. It is relevant to answer questions and thereby rebut or negative an inference which might otherwise be drawn by the jury. In *Gipp v The Queen*, McHugh and Hayne JJ accepted that general relationship evidence might be admitted for a limited purpose, one which did not rely upon the accused having a sexual interest in the complainant[460].

501 Relationship evidence tendered for this limited purpose does not depend, for relevance, upon a question being raised by the defence. Gaudron J in *Gipp*[461] accepted that issues may arise as to the complainant's lack of surprise or failure to complain, but considered that they could only be raised by the defence. I must respectfully disagree. Gibbs ACJ in *Markby v The Queen*[462] did not consider that the admissibility of evidence, relevant otherwise than as to tendency or propensity, depended upon the line taken by the defence at trial, that is, whether the accused had raised or disclaimed a particular defence[463]. The position of the defence may not be clearly exposed on cross-examination of the complainant. It may not be until addresses that reliance is placed upon gaps in the complainant's account. Even if the defence eschewed reliance upon what might be drawn from the absence of particular evidence from the complainant, it would not always be sufficient to settle a concern held by the jury. In any event, if it be accepted that the evidence is relevant to meet questions which may be fairly anticipated to occur to a jury, it cannot be seen as dependent upon the course taken by the defence.

Propensity evidence and admissibility

502 Relationship evidence tendered for the purpose of providing answers to the jury, in the way explained, discloses the other misconduct. It does not, however, involve the use of any tendency of the accused, in the reasoning of the

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460 (1998) 194 CLR 106 at 131-132 [75]-[76].

461 (1998) 194 CLR 106 at 113 [12].

462 (1978) 140 CLR 108; [1978] HCA 29.

463 (1978) 140 CLR 108 at 116-117, referring to *Harris v Director of Public Prosecutions* [1952] AC 694 at 710.

jury, so long as the jury are properly instructed. It will be necessary, where it is relied upon for this limited purpose, for the trial judge to carefully direct the jury as to the use they can make of the evidence[464]. In *BRS v The Queen* McHugh J acknowledged that a direction may be effective to overcome the potential for prejudice[465]. To achieve that it will be necessary that the jury be told that they must use the evidence only to answer the questions, identified at an early point by the prosecution and accepted as relevant by the trial judge, which are considered likely to occur to them; but that they are not to use it to reason that the accused is likely to have committed the offences. In some cases a trial judge might fairly observe that the reference to other acts, which are likely to be of the same kind as those charged, does not logically prove the prosecution case or enhance the complainant's credit.

503 It must be accepted that relationship evidence may have dual purposes. Where it is tendered for both, the more stringent test for admissibility must necessarily be applied. If it is not tendered for the purpose of showing the accused's tendency it does not follow that it is inadmissible for the more limited purpose of informing the jury, according to general principles of the law of evidence. In *Bull v The Queen*, McHugh, Gummow and Hayne JJ said that the fact that evidence which is relevant and legally admissible on one issue, may be logically but not legally relevant to another issue, does not make the evidence inadmissible on the first issue[466]. When an exclusionary rule of evidence otherwise applies, the trial judge will need to warn that the evidence can be used for the admissible purpose and no other[467].

504 This rule of admissibility does not overcome the rule of exclusion, where it is shown that the risk of prejudice to the accused is far greater than the probative value of the relationship evidence. A risk of prejudice is most likely to arise, in cases of this kind, where specific, detailed incidents of other sexual misconduct are recounted by the complainant. The possibility must be accepted that there may be cases where the trial judge may consider that the risk cannot be negatived or limited to an acceptable degree by a direction. It is not possible to envisage the circumstances of every case. But it may be expected that in most cases the evidence necessary to answer the particular questions, identified as likely to occur to the jury, will be of a general nature. Evidence beyond that

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464 *BRS v The Queen* (1997) 191 CLR 275 at 305-306 per McHugh J; [1997] HCA 47; *Gipp* (1998) 194 CLR 106 at 156 [141] per Kirby J.

465 (1997) 191 CLR 275 at 310.

466 (2000) 201 CLR 443 at 463 [68]; [2000] HCA 24.

467 *Bull v The Queen* (2000) 201 CLR 443 at 463 [69], referring to *B v The Queen* (1992) 175 CLR 599 at 619.

necessary to answer the question would exceed the bounds of relevance. However, in some cases the evidence may be so general as to be objectionable on that account[468].

505 In *Gipp*, McHugh and Hayne JJ expressed the view that relationship evidence tendered for the limited purpose did not offend the policy of the law upon which the rule of exclusion is based[469]. I respectfully agree. The direction to the jury prohibits its use as evidence of tendency and it is therefore to be distinguished from other similar fact evidence[470]. In *Pfennig* it was said in the joint judgment that relationship evidence is a type of propensity evidence[471]. I take their Honours to mean that this is so when it is used as propensity evidence. In that situation it belongs to a special class of circumstantial evidence which may attract the test there propounded[472]. The test applied in *Pfennig* can have no application to the limited purpose here discussed. It has been assumed that the test did not apply[473]. In *Conway v The Queen* relationship evidence was considered to fall outside the special rules in *Pfennig*, because *Pfennig* dealt with the more difficult and dangerous category of similar fact evidence[474].

506 The admission of relationship evidence to show the accused's sexual interest in the complainant clearly involves use of the accused's tendency to engage in acts with the complainant such as those charged. Where the accused has already offended that propensity or tendency may be taken as showing a preparedness on the part of the accused to act upon it and to continue to act upon it. It is to be recalled that in cases such as this there is usually no independent evidence to prove the acts relied upon as relationship evidence. It is for the jury to determine whether all, or some, of the evidence is acceptable for the purpose suggested by the prosecution, assuming for present purposes that they do not accept the direct evidence of the offences given by the complainant as itself sufficient. A finding of propensity on circumstantial evidence is one as to an

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468 *Gipp* (1998) 194 CLR 106 at 132 [75] per McHugh and Hayne JJ.

469 (1998) 194 CLR 106 at 134 [84] per McHugh and Hayne JJ.

470 *Gipp* (1998) 194 CLR 106 at 112-113 [11] per Gaudron J.

471 (1995) 182 CLR 461 at 464-465 per Mason CJ, Deane and Dawson JJ.

472 (1995) 182 CLR 461 at 482-483.

473 *KRM v The Queen* (2001) 206 CLR 221 at 233 [31] per McHugh J; *R v Nieterink* (1999) 76 SASR 56 at 66 [49] per Doyle CJ; *R v Vonarx* [1999] 3 VR 618 at 622 [13].

474 (2000) 98 FCR 204 at 233 [95].

intermediate fact. In the ordinary course a jury would be instructed by the trial judge that they must only find that the accused has a sexual interest in the complainant if it is proved beyond reasonable doubt[475]. From that point they may consider that it is more probable that the accused committed the offences.

507 The more difficult question, when relationship evidence is tendered for this purpose, is whether the test for admissibility in *Pfennig* must be applied to it before it is put before the jury. As the passage from the joint judgment in *Pfennig* earlier referred to[476] shows, the rationale for the test is that propensity is applied directly to a step in proof of the prosecution case. There it was to be used to remove any question about the identification of the accused as the person who committed the murder and thereby to conclude guilt. In cases such as the present matters its use, and the process of reasoning in which the jury are involved, is different. The identifiable step is proof of propensity itself which, by reason of the nature of the cases, may leave little to add to the evidence of the commission of the offences themselves to conclude the question of guilt.

508 The use of the accused's tendency or propensity in *Pfennig* was relatively straightforward, although uncommon. The evidence in question showed that the accused had abducted a boy on another occasion, for sexual purposes. The tendency may have been in operation at the time of the murder of the boy in question. Absent this evidence the prosecution could prove only that the boy had been abducted and that he had met and talked with the accused near the scene of his disappearance. The fact of the boy's murder was to be inferred. The critical issue before the jury was the identity of the murderer, as the joint judgment acknowledged[477]. The abnormal propensity of the accused was, clearly enough, regarded as admissible as an indicium of identity. This is similar to the use made of the accused's propensity in *Thompson v The King*[478]. The accused's propensity in *Pfennig* excluded the possibility of another person being the murderer, although this result is perhaps not clearly stated. It may be inferred that that was the only innocent explanation thought necessary to be excluded. That left no rational view of the evidence as a whole consistent with the accused's innocence. The evidence was therefore admissible.

509 The joint judgment in *Pfennig* spoke, at various points and in a general way, of the application of the test to cases involving similar facts. Cases

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475 *Shepherd v The Queen* (1990) 170 CLR 573; [1990] HCA 56; and see *Gipp* (1998) 194 CLR 106 at 132 [76] per McHugh and Hayne JJ.

476 See above at [489].

477 (1995) 182 CLR 461 at 475 per Mason CJ, Deane and Dawson JJ.

478 [1918] AC 221.

involving the use of relationship evidence as disclosing propensity were not, however, the subject of discussion in the reasons. The submissions for each of the accused in the present matters did not suggest that the *Pfennig* test should not be applied because that decision was wrongly decided. They assumed that the test had no application to cases of this kind. How that was so was not fully investigated. Nevertheless it seems plain enough that the circumstances of these cases are very different from those pertaining in *Pfennig*, as is the use to which the evidence is to be put and the reasoning in which the jury would be engaged. These considerations raise the question whether the test is necessary and whether it could have any real practical operation.

510 The starting point in the application of the *Pfennig* test, in cases involving relationship evidence, is the assumption, on the part of the trial judge, that there is a reasonable doubt arising from the prosecution case absent the relationship evidence. The enquiry undertaken by the trial judge, for admissibility, is whether there remains any explanation consistent with innocence when the evidence of the accused's propensity is applied. The second assumption necessary to be made, in cases such as these, is that the jury will accept the relationship evidence in full, which of course they may or may not do, depending on the view taken of the complainant's credit and the plausibility of her account. At this point the relationship evidence may be applied in order to determine whether there is an explanation which might be consistent with the accused's innocence, that is to say whether the reasonable doubt remains. When applied to cases involving relationship evidence which shows the accused's propensity in relation to the complainant there will rarely be a case where an innocent explanation is left. This result will be brought about because evidence of the offences themselves will largely be indistinguishable from the acts the subject of the relationship evidence. The reason that the relationship evidence is highly probative is because it is of the same type and it is specifically directed towards the complainant. It is used to establish the accused's propensity and then to reason as to the likelihood of the commission of the offences. It may be contrasted with the situation in *Pfennig*, where the evidence was of a general propensity, towards boys, and it was used to identify the accused as the murderer.

511 If the rule were to be applied, I respectfully agree with the view, stated by each of Gleeson CJ[479], Hayne J[480] and Heydon J[481], that the evidence in each of the three matters would pass the test. In my view, however, that largely follows because the test is somewhat artificial, and therefore not very useful, in its application to cases of this kind.

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479 Reasons of Gleeson CJ at [27].

480 Reasons of Hayne J at [171], [216] and [234].

481 Reasons of Heydon J at [287], [364] and [387].

Summary as to admissibility

512 In my view relationship evidence is admissible for two purposes. It is admissible to show the sexual interest the accused had in the complainant at the time of the commission of the offences. That tendency, if proved, will in most cases make it likely that the accused committed the offences. The jury will require the usual directions with respect to the use of circumstantial evidence and clear directions as to proof of the sexual interest as an intermediate fact. The need for and practical effect of the test for admissibility referred to in *Pfennig* does not suggest its application in cases such as these as obvious. If applied, the evidence in these cases would qualify for admissibility in accordance with that test.

513 Relationship evidence is also admissible for the more limited purpose of providing answers to questions which might naturally arise in the minds of the jury, such as questions about the complainant's reaction, or lack of it, to the offences charged, or questions about whether the offences charged were isolated events. These examples are not exhaustive. It follows that no more evidence than is necessary to answer the enquiry could be considered relevant. Admissibility for this purpose is conditioned by the requirement of a direction to the jury as to the limits on the use to which the evidence can be put. Where the direction is not considered sufficient to overcome the potential for misuse of the evidence, perhaps because of the nature of the evidence, it should not be admitted on this ground.

Determination of the cases

514 Details of the summings up in each of the three cases are provided in the reasons of Hayne J, Heydon J and Crennan J.

HML v The Queen

515 The directions provided by the trial judge were consistent with the use of the relationship evidence for the limited purpose discussed. His Honour the trial judge identified it as providing background and an explanation as to why the accused was confident enough to demand oral sex and have intercourse with the complainant, and why she acquiesced. Insofar as the existence of a relationship was said to be disclosed by the evidence, its relevance was attached to the question about what it might explain about the circumstances of the offences. The fact of the accused having a sexual interest in the complainant was, in any event, governed by his Honour's direction requiring proof to the criminal standard. His Honour gave warnings about the use of propensity reasoning. The fact that no charges had been laid in Victoria, with respect to some of the acts forming part of the relationship evidence, was irrelevant and nothing more was

required to be said by his Honour about that. Leave to amend the notice of appeal should be granted and the appeal dismissed.

SB v The Queen

516 Leave to amend the notice of appeal should be refused because it raises matters with respect to evidence which was not the subject of objection at trial. The trial judge explained to the jury that the evidence was relevant only to assist them in understanding how a particular incident came about and gave a strong warning against the use of it as evidence of the accused's propensity. The directions were appropriate and sufficient. This appeal should be dismissed.

OAE v The Queen

517 This matter requires special leave to appeal. That leave should be granted. The trial judge directed the jury that the evidence showed the nature of the relationship between the accused and the complainant. More specifically, his Honour explained that its purpose was to show that the event the subject of the second and third offences charged, which took place some four years after the first, would have otherwise appeared to have "happened out of the blue, so to speak". No reliance was placed upon the evidence as disclosing the accused's sexual interest. His Honour in any event directed the jury, in clear terms, not to use the evidence to reason to the guilt of the accused by reference to what it disclosed about the accused. The directions were sufficient. The appeal should be dismissed.