HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

KERRY RAYMOND ROACH APPELLANT

AND

THE QUEEN RESPONDENT

Roach v The Queen [2011] HCA 12
4 May 2011
B41/2010

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Queensland

Representation

M J Byrne QC with H C Fong and C W Heaton for the appellant (instructed by Legal Aid Queensland)

A W Moynihan SC with A D Anderson for the respondent (instructed by Office of the Director of Public Prosecutions (Qld))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Roach v The Queen

Criminal law – Evidence – Propensity evidence – Admissibility and relevance – Where appellant charged with assault occasioning bodily harm – Where trial judge admitted evidence of other assaults by appellant upon complainant during their relationship pursuant to s 132B of *Evidence Act* 1977 (Q) ("Act") making admissible relevant evidence of history of domestic relationship – Where s 130 of Act preserved trial judge's discretion to exclude evidence where admission would be unfair to accused – Whether rule in *Pfennig v The Queen* (1995) 182 CLR 461 to be applied in determining admissibility under s 132B or exercising discretion under s 130 – If evidence admitted, whether jury ought to have been directed they could not rely upon evidence unless satisfied of its truth beyond reasonable doubt.

Words and phrases – "domestic violence", "prejudicial", "probative", "propensity", "relationship evidence", "unfairness".

Evidence Act 1977 (Q), ss 130, 132B.

1 FRENCH CJ, HAYNE, CRENNAN AND KIEFEL JJ. The appellant was convicted by a jury of one count of assault occasioning bodily harm[1], following a trial in the District Court of Queensland. The appellant and the complainant had been in a sexual relationship for some two and a half years prior to the alleged assault, although the relationship was intermittent. For part of that period the appellant was the complainant's carer. The complainant suffered from a number of conditions, including cirrhosis of the liver, drug dependence and depression.

2 The appellant and the complainant were also somewhat itinerant. At the time of the alleged offence, April 2006, the complainant lived alone in a unit in the suburb of New Farm in Brisbane. The appellant was visiting her when the alleged offence occurred.

3 The circumstances of the offence, as given in evidence by the complainant and summarised by Holmes JA in the Court of Appeal, were as follows[2]:

> "At 12.45 am on the morning of 13 April, the appellant telephoned the complainant and asked if he could visit her. She agreed, and he arrived very promptly. When she admitted him, he went straight to the refrigerator to get himself a drink. She remonstrated with him, saying that he ought not to help himself before he was invited to do so. The appellant, on the complainant's account, reacted angrily, punching her face and arms with a closed fist and then pulling on her left arm, which he had previously injured. He said, 'I know you're gonna ring the fuckin' coppers, so I may as well make a fuckin' good job of it', before punching her another eight times. The appellant was, the complainant said, intoxicated. He left the unit after assaulting her, and she did call the police. One of the officers attending observed bruises on the complainant's arms and swelling to her left eye, while a general practitioner who examined her some four days later recorded bruises on her arm and her face and a haematoma around the left eye."

4 At the commencement of the trial, the trial judge (Howell DCJ) admitted evidence of other assaults by the appellant upon the complainant in the course of their relationship. Such evidence may be admitted pursuant to s 132B of the *Evidence Act* 1977 (Q), if it is relevant. Section 130 of that Act confirms that a

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1 *Criminal Code* (Q), Ch 30, s 339.

2 *R v Roach* [2009] QCA 360 at [4].

trial judge has the power to exclude evidence, which is otherwise admissible, where it would be unfair to an accused to admit it.

5 In the Court of Appeal the appellant contended that, in determining whether the evidence would be unfair to him, it was necessary that the trial judge apply the rule in *Pfennig v The Queen*[3] and consider whether "viewed in the context of the prosecution case, there is a reasonable view of [the relationship evidence] which is consistent with innocence"[4]. Alternatively, if the evidence were admitted, the jury ought to have been directed that they could not rely upon the evidence unless satisfied of its truth beyond reasonable doubt. The Court of Appeal (Keane and Holmes JJA and A Lyons J) rejected both arguments and dismissed the appeal.

6 On appeal to this Court the appellant advanced the same arguments.

The *Evidence Act* 1977 provisions

7 Although the appellant's submissions in this Court focussed upon the decision in *Pfennig*, the correct starting point is the provisions of the *Evidence Act* 1977 which govern the admissibility of evidence of the kind here in question and provide for a discretion to exclude it. Section 132B of the *Evidence Act* 1977 is entitled "Evidence of domestic violence". It provides:

> "(1) This section applies to a criminal proceeding against a person for an offence defined in the Criminal Code, chapters 28 to 30.
>
> (2) Relevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed is admissible in evidence in the proceeding."

The offence of assault occasioning bodily harm appears in Ch 30 of the *Criminal Code* and s 132B of the *Evidence Act* 1977 therefore applies to a proceeding for that offence. The section has no application to sexual offences against children or to rape and other sexual assaults. These offences are dealt with in, respectively, Chs 22 and 32 of the *Criminal Code*.

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3 (1995) 182 CLR 461; [1995] HCA 7.

4 *Pfennig v The Queen* (1995) 182 CLR 461 at 485. See also *Phillips v The Queen* (2006) 225 CLR 303 at 308; [2006] HCA 4.

8 Section 132B was inserted by s 122 of the *Criminal Law Amendment Act* 1997 (Q) on the motion of the Shadow Attorney-General, who spoke of concerns that the criminal justice system had unfairly discriminated against women[5]. The example he gave was of a case involving a woman killing her husband and the rejection of her plea of provocation at trial[6], despite a lengthy history of violence on the part of her husband towards her. In the debate which followed, the Attorney-General questioned the need for the provision, on the basis that the courts had already accepted that evidence of the kind to which it was directed was admissible if relevant[7]. It is of some interest to observe that the Attorney-General referred[8], in this regard, to the decision in *Wilson v The Queen*[9], to which reference will be made later in these reasons.

9 Section 132A was inserted at the same time as s 132B. It deals expressly with similar fact evidence, requiring that when such evidence has particular probative value it must not be ruled inadmissible on the ground that it may be the result of collusion. The section was no doubt introduced as a response to *Hoch v The Queen*[10]. It does not assume particular relevance on this appeal.

10 Although the words of s 132B suggest that it alone governs the admissibility of evidence of the kind with which this appeal is concerned, s 130 contains reference to the power of a trial judge to exclude evidence in criminal proceedings. That section provides:

> "Nothing in this Act derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit that evidence."

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5 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 25 March 1997 at 824.

6 Corrected on appeal: *The Queen v R* (1981) 28 SASR 321.

7 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 26 March 1997 at 868-869.

8 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 26 March 1997 at 868-869.

9 (1970) 123 CLR 334; [1970] HCA 17.

10 (1988) 165 CLR 292; [1988] HCA 50.

Relevance, admissibility and exclusionary rules

11 Section 132B, it will be observed, contains reference to the concepts of relevance and admissibility of evidence, which have been developed by the common law. The common law has also developed rules or discretions which require or permit evidence that is otherwise admissible to be excluded by a trial judge in a criminal trial. The rule in *Pfennig* operates as an exclusionary rule with respect to similar fact evidence tendered for a particular purpose. Separate and distinct from that rule is the common law discretion[11] to exclude relevant evidence in criminal proceedings. It permits a judge to exclude evidence where its prejudicial effect exceeds its probative value. It is commonly applied to similar fact evidence. Section 130 confirms the operation of what is sometimes referred to as a "residual discretion" at common law, which is directed to prevent unfairness to an accused.

12 The first requirement which must be fulfilled, for evidence to be admissible, is that it be relevant. The question as to relevance is whether the evidence, if accepted, could rationally affect the assessment by the jury of the probability of the existence of a fact in issue[12]. It may do so indirectly. As Gleeson CJ observed in *HML v The Queen*[13], evidence may be relevant if it assists in the evaluation of other evidence.

13 In *Smith v The Queen*[14] it was said that evidence is relevant or it is not; no question of discretion arises. If it is not relevant, no further question arises about its admissibility, for irrelevant evidence may not be received. It was then said that[15]:

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11 Although, as *Cross on Evidence*, 8th Aust ed (2010) at 397 [11125] observes, the term "discretion" may not be entirely apt.

12 *Smith v The Queen* (2001) 206 CLR 650 at 654 [7]; [2001] HCA 50.

13 (2008) 235 CLR 334 at 352 [6]; [2008] HCA 16.

14 (2001) 206 CLR 650 at 653 [6].

15 *Smith v The Queen* (2001) 206 CLR 650 at 653-654 [6] per Gleeson CJ, Gaudron, Gummow and Hayne JJ (footnote omitted).

"These propositions are fundamental to the law of evidence and well settled. They reflect two axioms propounded by Thayer and adopted by Wigmore:

> 'None but facts having rational probative value are admissible,'

and

> 'All facts having rational probative value are admissible, unless some specific rule forbids.'"

14 The common law rules of exclusion arise for consideration only with respect to evidence which is relevant[16]. Included in the exclusionary rules by which evidence that is otherwise admissible may be rejected in criminal proceedings, is that which concerns similar fact evidence. By that rule, the prosecution may not adduce evidence of other misconduct on the part of the accused, if that evidence shows that the accused had a propensity to commit crime or the offence in question, unless the evidence is sufficiently highly probative of a fact in issue to outweigh the prejudice it may cause[17].

15 This rule of evidence is based upon the concern of the law about the prejudicial effect of such evidence and "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."[18] The decision in *Pfennig* added further requirements concerning proof, which make the rule more stringent.

16 The prosecution case in *Pfennig*, that the appellant had abducted and murdered a young boy, was based upon circumstantial evidence which included the evidence of another boy (H), that the appellant abducted and raped him a year after the alleged murder. The appellant had pleaded guilty to the abduction and rape. A majority of the Court held that because the prejudicial capacity of evidence of propensity is so high, a trial judge is required to apply the same test as a jury, in determining the admissibility of the evidence, and "ask whether there

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16 *Papakosmas v The Queen* (1999) 196 CLR 297 at 306 [21] per Gleeson CJ and Hayne J; [1999] HCA 37.

17 *Cross on Evidence*, 8th Aust ed (2010) at 709 [21010].

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

is a rational view of the evidence that is consistent with the innocence of the accused"[19]. Their Honours explained[20]:

> "Only if there is no such view can one safely conclude that the probative force of the evidence outweighs its prejudicial effect. And, unless the tension between probative force and prejudicial effect is governed by such a principle, striking the balance will continue to resemble the exercise of a discretion rather than the application of a principle."

17 It will be seen that their Honours distinguished the principle, or rule, to be applied from the exercise of the common law discretion. This assumes some importance on this appeal.

18 So far as concerns the application of the "residual discretion" to which s 130 refers, it has been observed that it is difficult to see how unfairness could be tested otherwise than by reference to the more general discretion[21]. That is to say, consideration must be given to whether the prejudicial effect of the evidence exceeds its probative value. In the latter regard, consideration may be given to directions which may be given to the jury which may reduce the prejudicial effect of the evidence.

The evidence

19 The prosecution disavowed any reliance upon the evidence of the previous assaults as evidence of the appellant's propensity to injure the complainant. The evidence of other assaults upon the complainant by the appellant in the course of their relationship was ruled admissible by the trial judge on the basis that, without it, the jury would be faced with a seemingly inexplicable or fanciful incident. The evidence of the incident charged would otherwise appear to be given in a vacuum, his Honour held.

20 The evidence which was led consequent upon the ruling was as follows. Shortly after the commencement of the relationship between the complainant and the appellant, in early 2004, the appellant became angry with the complainant. He reached into his pocket and threw a handful of "silver" at her, hitting her on the forehead and causing her to bleed. In the months following that incident, the

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19 *Pfennig v The Queen* (1995) 182 CLR 461 at 483.

20 *Pfennig v The Queen* (1995) 182 CLR 461 at 483.

21 *Cross on Evidence*, 8th Aust ed (2010) at 397-398 [11125].

appellant would frequently punch the complainant causing bruises or marks. As those injuries were nearly healed, the appellant would repeat his assaults. At a point about nine months into the relationship the appellant caused the first injury to the complainant's arm. The appellant and the complainant were then living together. The complainant had returned to their home after undertaking an errand for the appellant to obtain some money from an acquaintance. The appellant was intoxicated. On this occasion the appellant punched the complainant in the face many times and then hit her in the back and she fell to the floor, injuring her left arm. She required surgery, including reconstruction of her shoulder, as a consequence of these injuries. The complainant said that in 2005 the appellant assaulted her many times, by punching her in the face and in the arms. She said that "if [the appellant] had more than that one too many Chardonnays, I always copped a flogging."

The decision of the Court of Appeal

21 In the Court of Appeal it was not disputed by the appellant that the evidence in question qualified as part of the history of the relationship between the complainant and the appellant. The Court did not accept the appellant's submission that the rule in *Pfennig* applied to the admissibility of the evidence. Holmes JA, with whom Keane JA and A Lyons J agreed, held that the sole test for the admissibility of such evidence under s 132B is relevance and the *Pfennig* test has no application[22]. It followed, in her Honour's view, that the trial judge had not been required to apply that test, nor to have regard to the judgments in *HML v The Queen*[23] dealing with the application of the test.

22 Although rejecting the test for the admissibility of propensity evidence propounded in *Pfennig* as unnecessary to evidence falling within s 132B, Holmes JA characterised the evidence in question as propensity evidence and held it to be relevant on that basis. Her Honour rejected the characterisation of the evidence as "relationship" evidence. It was, in her Honour's view, in reality propensity evidence, but admissible as such under s 132B[24]. Her Honour said[25]:

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22 *R v Roach* [2009] QCA 360 at [14].

23 *R v Roach* [2009] QCA 360 at [14].

24 *R v Roach* [2009] QCA 360 at [19]-[23].

25 *R v Roach* [2009] QCA 360 at [19].

> "In seeking to have the evidence admitted, the Crown spoke in terms of needing it to provide context for the incident and to ensure that the jury was not considering the complainant's account in a vacuum. Although it disclaimed any reliance on propensity, in reality, the way in which it sought to give that context and to fill that vacuum was by adducing evidence of the appellant's disposition to aggression against the complainant. The bland references to 'context' or 'relationship' evidence were not incorrect, but they offered nothing to explain how the evidence was probative; they failed to acknowledge the propensity reasoning underlying the proposed use of the evidence."

23 Her Honour referred in this regard to statements made by Mason CJ, Deane and Dawson JJ in *Pfennig* that propensity evidence and relationship evidence "are not necessarily mutually exclusive."[26]

24 In *Pfennig* it had been observed that evidence of a general propensity lacks cogency, yet it is prejudicial. Particular, distinctive propensity demonstrated by acts constituting manifestations or exemplifications of it will have greater cogency[27]. Holmes JA considered it to be important that, in this case, the evidence had not been directed to show "a propensity at large on the appellant's part to behave aggressively."[28] Rather, it showed a proclivity on his part, when intoxicated, to assault the complainant in the same way as he was alleged to have done in the incident charged. It showed an animosity on his part towards her. That anger manifested itself in violence towards her. Her Honour then concluded[29]:

> "By providing that particular context for the charged assault, which otherwise might indeed have been 'out of the blue', the evidence made the appellant's conduct on that occasion intelligible, and it made it more probable that he assaulted the complainant as she said. It was thus relevant to whether the charged act took place."

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26 (1995) 182 CLR 461 at 465 and to observations made by Dawson J in *S v The Queen* (1989) 168 CLR 266 at 275; [1989] HCA 66, referred to in *R v Roach* [2009] QCA 360 at [19].

27 *Pfennig v The Queen* (1995) 182 CLR 461 at 483.

28 *R v Roach* [2009] QCA 360 at [21].

29 *R v Roach* [2009] QCA 360 at [21].

25 Turning to s 130, Holmes JA held that the evidence had strong probative value, which must be weighed against any difficulty the evidence created for the appellant. That probative value lay in it "establishing the nature of the appellant's regular response to the complainant"[30]. Whilst the trial judge had not correctly characterised the evidence as "tendency" or "propensity" evidence, a recognition of the true function of the evidence would have resulted in its admission, in the exercise of the discretion given by s 130[31].

26 The question which remained for the Court of Appeal was the standard of proof to be applied by the jury to the evidence following its reception. Holmes JA noted that in some judgments in *HML v The Queen* views had been expressed that proof to the criminal standard was required where it constituted a step, or indispensable step, in reasoning towards guilt[32]. However, in her Honour's view, whilst the evidence of the previous assaults in this case might make it more likely that the charged act occurred, it fell far short of being essential to the jury's reasoning to a conclusion of guilt. As her Honour observed, the jury could have convicted on the basis simply of the complainant's account of the charged assault. Applying *Shepherd v The Queen*[33], her Honour concluded that the evidence did not constitute an "indispensable link" in the chain of proof so as to require a direction that it be proved beyond reasonable doubt[34].

The appeal

27 It will be observed that the Court of Appeal took a view different from that of the trial judge as to the relevance of the evidence of the alleged prior assaults. On this appeal the appellant did not challenge Holmes JA's characterisation of the evidence as relevant to establish a propensity on the part of the appellant. Little attention was therefore directed in written argument to the

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30 *R v Roach* [2009] QCA 360 at [25].

31 *R v Roach* [2009] QCA 360 at [25].

32 *HML v The Queen* (2008) 235 CLR 334 at 361 [32] per Gleeson CJ, 371 [61] per Kirby J, 406 [196] per Hayne J, Gummow J agreeing, 502 [512] per Kiefel J, referred to in *R v Roach* [2009] QCA 360 at [27]-[28].

33 (1990) 170 CLR 573; [1990] HCA 56.

34 *R v Roach* [2009] QCA 360 at [30].

question of relevance, but it is a topic to which it will be necessary to return later in these reasons.

28 The starting point in the appellant's argument was that, were it not for ss 130 and 132B, the rule in *Pfennig* would apply. So much may be accepted, if the evidence was to be used in proof of the appellant's propensity. What it was necessary for the appellant to explain was how that rule could be applied, given the terms of ss 130 and 132B. This directs attention to the purpose and intended operation of those sections.

29 Although the appellant submitted that it was necessary to consider and apply the decision in *Pfennig* in connection with both sections, the principal focus of submissions on his behalf was s 130. It was submitted that in determining unfairness under s 130, it was necessary to apply the rule in *Pfennig*. That exclusionary rule applied because the theoretical foundation for it was the unfairness of admitting evidence of other, uncharged, acts unless the evidence has the probative force required by the test. Thus, it was necessary for the trial judge to consider whether "viewed in the context of the prosecution case, there is no reasonable view of the … evidence consistent with the innocence of the accused"[35], the appellant submitted.

30 It should first be observed that the text of s 130 and s 132B does not contain any suggestion that the test in *Pfennig* is to be applied. Evidence of the kind contemplated by s 132B – of other acts of domestic violence in the history of a relationship – may clearly enough qualify as similar fact evidence which might, in a particular case, be tendered as proof of an accused's propensity. It may also be relevant as evidence of a person's state of mind, or as part of the *res gestae*, which is to say, part of the circumstances of the crime. Its further possible relevance, to show the kind of relationship the complainant and the accused had and its use to assist in the evaluation of the complainant's evidence, will be discussed later in these reasons. And, in cases where the recipient of domestic violence is accused of an offence against the perpetrator of the violence, the evidence may be relevant and admissible to a plea of provocation or self-defence.

31 The section therefore has a potentially wide operation. It is not restricted in its application to similar fact evidence tendered to prove propensity on the part of the accused, which is the focus of this appeal. Its purpose is to ensure that in

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35 *Phillips v The Queen* (2006) 225 CLR 303 at 308 [9], applying *Pfennig v The Queen* (1995) 182 CLR 461.

criminal trials evidence of the history of domestic violence is put before a jury, or other arbiter of fact, so long as it is relevant to an issue in those proceedings. Relevance is the only requirement stated for admissibility. It may be assumed that that legislative choice was made with knowledge of the decision in *Pfennig*, which had been made some two years earlier and which effected an important change. It was not necessary for the rule in that case to be expressly excluded, as the appellant submitted. The sole basis to be applied for admissibility, relevance, is clearly stated.

32 Section 132B must, however, be read with s 130, which, as earlier observed, preserves the common law discretion to exclude evidence on the ground of unfairness. Evidence relevant and therefore admissible under s 132B may nevertheless be rejected, if a trial judge considers that the evidence will be productive of unfairness in the trial of the accused.

33 The question which then arises from the appellant's argument is whether the rule in *Pfennig* may be imported into s 130. It would be necessary for that rule to operate within s 130 for it to have an effect upon the question of admissibility, which is otherwise governed by s 132B. The discretion referred to in s 130 is the only possible basis for the exclusion of evidence of a domestic relationship which satisfies the test of relevance of s 132B.

34 There seems no reason to doubt that the question of unfairness, to which s 130 refers, would ordinarily be resolved by reference to the common law principle, expressed as the exercise of a discretion, that the probative value of the evidence in question must exceed the potential prejudice to the accused if the evidence is not to be excluded. It may be accepted that the concern in *Pfennig* was as to the highly prejudicial effect that similar fact evidence of propensity may have for an accused; although such an effect alone cannot be said to be unfair if the evidence has high probative value. More to the point, the possibility that a jury might reason to guilt, when such a conclusion is not compelled, might be productive of unfairness. It may be said that the rule in *Pfennig* addresses that problem. But it does so in a way quite different from the exercise of a discretion.

35 The rule in *Pfennig* accepts the probative force of evidence of propensity. Indeed in *Pfennig* the evidence in question was a necessary step in the prosecution case towards a conclusion of guilt[36]. This does not mean that the rule is concerned with the sufficiency of evidence otherwise admissible in proof of guilt. Its focus is upon the propensity evidence itself. The rule requires a trial

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36 *Pfennig v The Queen* (1995) 182 CLR 461 at 483.

judge, when determining whether the evidence of propensity is to be admitted before the jury, apply the standard which the jury must eventually apply. The judge must ask whether there is a rational view of the propensity evidence, seen in the setting of the prosecution case, which is consistent with the accused's innocence. If the judge so concludes, the evidence ought not to be admitted[37].

36 The rule in *Pfennig* was said to be applied in order to resolve "the tension between probative force and prejudicial effect"[38]. It therefore addressed the same factors as are relevant to the common law discretion. However, the rule resolves that tension without more. The majority in *Pfennig* were at pains to point out that no exercise of discretion was involved, but rather the application of a rule of law[39]. No conclusion as to whether the evidence may operate unfairly is thereby reached as it is in the exercise of the discretion, by balancing the evidence's probative force and its prejudicial effect.

37 So understood, the rule in *Pfennig* cannot be imported into the exercise of the power confirmed by s 130, which is in the nature of a discretion. If the rule applied, it would not be possible for a trial judge to test for unfairness in a manner consistent with that discretion. The rule operates in such a way that there would be no room for the exercise of any discretion.

38 The foregoing permits two conclusions to be reached. The application of the rule in *Pfennig* would not be consistent with the common law discretion which is preserved by s 130. It follows that if the exclusionary rule in *Pfennig* was to apply to evidence of the kind in question, it would be necessary to express it as a qualification of s 132B. Absent such a qualification, and subject to the exercise of the s 130 discretion, evidence of domestic violence in the history of a relationship is admissible so long as it is relevant.

39 The rule in *Pfennig* had no application in this case, even if the evidence was to be used as evidence of the appellant's propensity, as the Court of Appeal held. The fact that the Court differed from the trial judge as to the relevance of the evidence is therefore not critical to the outcome of this appeal. Nevertheless, the assumption upon which the Court proceeded, that relationship evidence may

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37 *Pfennig v The Queen* (1995) 182 CLR 461 at 485.

38 *Pfennig v The Queen* (1995) 182 CLR 461 at 483.

39 *Pfennig v The Queen* (1995) 182 CLR 461 at 483.

not be relevant other than as propensity evidence, is not unimportant and requires further consideration.

40 In submissions for the appellant it was put that in cases involving domestic violence, "relationship" evidence can only, in truth, be admissible as evidence of propensity. The Court of Appeal appears to have been of a similar view. Holmes JA appears to have doubted that the evidence could have probative value other than as to propensity. Such a view may confuse evidence that may show propensity with evidence used in proof of the offence charged.

41 In *HML v The Queen*, Gleeson CJ observed that it is necessary to consider *Pfennig* in its context. It was a case about the fact of propensity as circumstantial evidence in proof of the offence charged. It was not a case involving evidence that happened to show propensity[40]. In such a case, if the evidence has other, sufficient, probative value, it may be necessary to give directions to the jury as to its specific use. If evidence is admissible on one issue, the fact that it may be logically, but not legally, relevant to another issue does not render it irrelevant and therefore inadmissible on the first issue[41].

42 The purpose of the evidence in *Pfennig* may be contrasted with that for which the evidence in question was tendered in the present case. Here the complainant gave direct evidence both of the alleged offence and of the "relationship" evidence. The latter evidence, which included evidence of other assaults, was tendered to explain the circumstance of the offence charged. It was tendered so that she could give a full account and so that her statement of the appellant's conduct on the day of the offence would not appear "out of the blue" to the jury and inexplicable on that account, which may readily occur where there is only one charge. It allowed the prosecution, and the complainant, to meet a question which would naturally arise in the minds of the jury[42].

43 It is difficult to resist the conclusion that it was intended, by the insertion of s 132B, that persons suffering from domestic violence not be disadvantaged in the giving of their evidence and that they be able to tell their story comprehensively. It may be taken to express a perception that it is in the public

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40 *HML v The Queen* (2008) 235 CLR 334 at 357 [22].

41 *Bull v The Queen* (2000) 201 CLR 443 at 463 [68]; [2000] HCA 24; *HML v The Queen* (2008) 235 CLR 334 at 499 [503] per Kiefel J.

42 *HML v The Queen* (2008) 235 CLR 334 at 502 [513] per Kiefel J.

interest that they be able to do so and that the prosecution of offences which involve a history of domestic violence be thereby enabled. The reception of the evidence operates more fairly to a complainant. Unfairness to the accused, by its reception, is to be considered by reference to s 130.

44 Moreover, a view that evidence of the history of a relationship, including the conduct of one party to it towards the other, is not relevant other than as to the other person's propensity does not accord with what was said by Menzies J (with whom McTiernan and Walsh JJ agreed) in *Wilson v The Queen*[43] to which, it will be recalled, reference was made by the Attorney-General for Queensland in the debate on the Bill containing s 132B. Menzies J said:

> "It seems to me that here, as so often happens, an attempt has been made to reduce the law of evidence—which rests fundamentally upon the requirement of relevancy, ie having a bearing upon the matter in issue—to a set of artificial rules remote from reality and unsupported by reason. Any jury called upon to decide whether they were convinced beyond reasonable doubt that the applicant killed his wife would require to know what was the relationship between the deceased and the accused. Were they an ordinary married couple with a good relationship despite differences and disagreements, or was their relationship one of enmity and distrust? It seems to me that nothing spoke more eloquently of the bitter relationship between them than that the wife, in the course of a quarrel, should charge her husband with the desire to kill her. The evidence is admissible not because the wife's statements were causally connected with her death but to assist the jury in deciding whether the wife was murdered in cold blood or was the victim of mischance. To shut the jury off from any event throwing light upon the relationship between this husband and wife would be to require them to decide the issue as if it happened in a vacuum rather than in the setting of a tense and bitter relationship between a man and a woman who were husband and wife. Accordingly, in my opinion the evidence in question was properly admitted because it was pertinent to the issues which the jury had to decide."

45 In the present case the evidence, if accepted, was capable of showing that the relationship between the appellant and the complainant was a violent one, punctuated as it was with acts of violence on the part of the appellant when affected by alcohol. Without this inference being drawn, the jury would most likely have misunderstood the complainant's account of the alleged offence and

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43 (1970) 123 CLR 334 at 344.

what was said by the appellant and the complainant in the course of it. To an extent Holmes JA acknowledged this in the conclusions to her reasons. Whilst her Honour identified the relevance of the evidence as showing the particular propensity of the appellant, she also concluded that it made the appellant's conduct in relation to the alleged offence intelligible and not out of the blue[44].

46 No issue was taken by the appellant concerning the exercise of the discretion to exclude the evidence under s 130, absent the application of the rule in *Pfennig*. The trial judge appears to have accepted that the evidence had high probative value, for the reason that otherwise the complainant's evidence would seem "inexplicable or arguably fanciful". There seems no reason to doubt that it was concluded, properly, to outweigh its prejudicial effect and that the latter could be addressed by directions to the jury.

47 The importance of directions in cases where evidence may show propensity should not be underestimated. It is necessary in such a case that a trial judge give a clear and comprehensible warning about the misuse of the evidence for that purpose and explain the purpose for which it is tendered. A trial judge should identify the inferences which may be open from it or the questions which may have occurred to the jury without the evidence. Those inferences and those questions should be identified by the prosecution at an early point in the trial. And it should be explained to the jury that the evidence is to allow the complainant to tell her, or his, story but that they will need to consider whether it is true.

48 The directions in this case were sufficient. At the conclusion of the evidence the trial judge directed the jury of the need to exercise care and that it would be dangerous to convict on the complainant's evidence alone unless they were convinced of its accuracy. His Honour told the jury that the history of the relationship between the complainant and the appellant had been led "for a very specific purpose" and that they must be "very, very careful in relation to the limited use that [they] may make of such evidence." He explained how evidence could be used as evidence of propensity and directed them that they were not to use the evidence in that way. His Honour informed the jury that the evidence was led so that the incident charged was not considered in isolation or in a vacuum but "to give [them] a true and proper context to properly understand what the complainant said happened on the 13th of April 2006." More specifically, his Honour said that otherwise they would consider the relationship of "boyfriend/girlfriend" had been on and off for about two and a half years, and

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44 *R v Roach* [2009] QCA 360 [21].

then "on the Sunday evening out of the blue he suddenly attacked her with quite a degree of violence". He said that their reaction to that might be to say "[w]ell, that's highly unlikely. That just doesn't make sense."

49 Having regard both to the footing on which the evidence of the appellant's earlier conduct was admissible and admitted, and to the directions given to the jury about the use to which that evidence might be put, it was neither necessary nor appropriate for the trial judge to give the jury any direction about the standard of proof to be applied to that evidence. The appellant's alternative ground of appeal (that the jury should have been told not to act on that evidence unless persuaded of its accuracy beyond reasonable doubt) should be rejected.

50 The appeal should be dismissed.

51 HEYDON J. Section 132B of the *Evidence Act* 1977 (Q) ("the Act") may be said to deal with the admissibility of a species of "relationship evidence"[45]. Section 130 of the Act preserves the power of a court to exclude otherwise admissible evidence on grounds of unfairness to the accused[46].

52 The grounds of appeal raise three questions. One is a question about the interaction between the common law of similar fact evidence and s 132B. The second is a question about the interaction between the common law of similar fact evidence and s 130. The third is whether there is a duty to direct the jury as to the need to be satisfied beyond reasonable doubt about evidence received under s 132B.

Pfennig v The Queen and s 132B

53 At common law, similar fact evidence is only admissible if it is relevant and satisfies the test stated in the majority judgment in *Pfennig v The Queen*. That test is to be applied on the assumptions that the similar fact evidence will be accepted as true but that without it the other evidence will be insufficient to exclude a reasonable doubt. On that test and those assumptions, similar fact evidence is inadmissible unless there is no reasonable view of the similar fact evidence, viewed in the context of the prosecution case, consistent with the innocence of the accused[47]. There is a qualification stated in *Hoch v The Queen*[48]

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45 Section 132B provides:

> "(1) This section applies to a criminal proceeding against a person for an offence defined in the Criminal Code, chapters 28 to 30.
>
> (2) Relevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed is admissible in evidence in the proceeding."

In the *Criminal Code* (Q), Ch 28 deals with homicide, suicide and concealment of birth. Chapter 29 deals with offences endangering life or health and Ch 30 deals with assaults.

46 Section 130 provides:

> "Nothing in this Act derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit that evidence."

47 *Pfennig v The Queen* (1995) 182 CLR 461 at 485; [1995] HCA 7; *Phillips v The Queen* (2006) 225 CLR 303 at 323-324 [63]; [2006] HCA 4.

48 (1988) 165 CLR 292; [1988] HCA 50.

excluding evidence in relation to which there is a possibility of concoction by collaboration between complainants.

54 The first question raised by the appellant is whether evidence cannot be admitted under s 132B(2) unless it complies with *Pfennig v The Queen*. The question is not unlike the debate among evidence scholars about whether at common law it is necessary for "relationship evidence" tendered as background to satisfy the rule stated in *Pfennig v The Queen* in relation to similar fact evidence[49]. Since this case does not exclusively concern the common law, it is not necessary now to resolve that debate. But the existence of the debate is not irrelevant to the first question raised by the appellant.

55 No part of the express language of s 132B(2) suggests that the provision incorporates or assumes the prior application of the rule in *Pfennig v The Queen*. Nor do any implications from it. There is no reason to conclude that s 132B(2) is to be read as adopting *Pfennig v The Queen* in the field which it describes, particularly since there is a debate about whether *Pfennig v The Queen* applies to the common law rules in relation to "relationship evidence", of which s 132B(2) is one species.

56 Nor can the appellant's submission that the rule in *Pfennig v The Queen* will survive unless abolished by clear words be upheld. The question of how similar fact evidence and relationship evidence (whether relationship evidence of the type tendered at common law or that tendered under s 132B(2)) are to be treated is a fundamentally important question. But the rule of the Australian common law for the reception of similar fact evidence stated in *Pfennig v The Queen* is not one of those fundamental common law rules which cannot be abolished without clear words. The formulations of it and its predecessors have evolved over time. Both those formulations and their application have led to an extraordinary amount of academic controversy and an unusually large number of appellate decisions. There is much to be said for *Pfennig v The Queen*, but it has proved to be unpopular with legislatures. All Australian legislatures have abolished the *Hoch* qualification except South Australia and the Northern Territory[50]. All Australian legislatures have abolished *Pfennig v The Queen* apart from that qualification except Queensland, South Australia and the Northern Territory. Those legislatures which have abolished *Pfennig v The Queen* have introduced their own somewhat different regimes for dealing with the fundamentally important question to which similar fact rules are directed. But even if clear words were needed in s 132B(2) to abolish the common law rule, they have been used.

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49 *HML v The Queen* (2008) 235 CLR 334 at 445-451 [320]-[335]; [2008] HCA 16.

50 For the position apart from Queensland, see *HML v The Queen* (2008) 235 CLR 334 at 431 [288] n 309.

57 In short, the proposition that the *Pfennig* principle should be incorporated into s 132B is incompatible with the express language of s 132B(2). So is the proposition that, if the *Pfennig* principle exists at common law in the area to which s 132B applies, it has survived.

58 It follows that the reasoning of the Court of Appeal is to be preferred to that of the trial judge. The trial judge held that the evidence was "relationship evidence", that it was not "propensity evidence", and that therefore the *Pfennig* test did not apply. The Court of Appeal held that the evidence was admissible simply because it fell within s 132B(2), and that the *Pfennig* test did not apply for that reason. The evidence fell within s 132B(2) because it was "relevant" – a proposition which the appellant contested, but not convincingly. It is not necessary for the purposes of this appeal to determine whether it was relevant as establishing propensity (as the Court of Appeal thought) or in another way (as the trial judge thought); nor to discuss what the significance of the difference might be. The appellant submitted that evidence could only be admitted under s 132B if it were propensity evidence, but that is too extreme a submission.

The common law and s 130

59 The appellant submitted that a court applying s 130 was under a duty to apply the *Pfennig* test.

60 Section 130 does not create an exclusionary rule in its own right. It merely preserves an existing power – doubtless a common law power – to exclude evidence on grounds of unfairness. There are common law principles relevant to similar fact evidence (a) by which evidence may be excluded where its prejudicial effect exceeds its probative value[51], and (b) by which evidence may be rejected if the strict rules of admissibility would operate unfairly against the accused[52]. In terms s 130 appears to refer, at least primarily, to the second of these powers, but it may also preserve the first, and perhaps others[53]. The powers

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51 *Sutton v The Queen* (1984) 152 CLR 528 at 534 and 565; [1984] HCA 5. At 565 Dawson J said the possibility of exclusion was not to be denied but was "ordinarily no more than a theoretical possibility" because "the whole purpose of restricting the admissibility of similar fact evidence is to ensure that it cannot be used unless its probative force is sufficiently strong to outweigh or transcend its prejudicial effect".

52 *Stephens v The Queen* (1985) 156 CLR 664 at 669; [1985] HCA 30.

53 For example, in relation to confessions: *Tofilau v The Queen* (2007) 231 CLR 396 at 469-470 [247]; [2007] HCA 39.

which s 130 preserves only operate once a strict rule of admissibility has been satisfied, for if it has not been satisfied, the question of exercising the exclusionary powers preserved by s 130 does not arise.

61 In *Harriman v The Queen*[54], in 1989, Brennan J said:

> "As the argument against admissibility in this case relied on the judicial discretion to reject evidence otherwise admissible when it is necessary to do so to secure a fair trial, it is necessary to say something about the scope of the discretion. Is there a residual judicial discretion to reject evidence revealing the commission of another offence or a predisposition to commit an offence on the ground that its prejudicial effect is disproportionate to its probative effect when the evidence is found to be admissible because its probative force clearly transcends its merely prejudicial effect? Obviously, the occasions for the exercise of such a discretion are hard to envisage, for evidence which satisfies the criterion of admissibility is unlikely to attract the exercise of the discretion. Nevertheless, one cannot exclude the possibility of a case where, despite the substantial probative force of the evidence, fairness dictates its exclusion. As against the prospect of such an exceptional case arising, the continued existence of the residual discretion should be admitted."

62 In this passage Brennan J appears to assimilate principle (a) and principle (b), though they are analytically distinct. Brennan J does make it clear, however, that what he calls the "discretion" to reject evidence on the ground that its prejudicial effect excludes its probative value is quite distinct from the common law similar fact rule of admissibility itself – what is now known as the rule in *Pfennig v The Queen*. Brennan J also assumed that the "discretion" to reject admissible evidence in order to secure a fair trial is distinct from the common law similar fact rule of admissibility. The rule in *Pfennig v The Queen* now states what Brennan J called "the criterion of admissibility" at common law. That criterion of admissibility can be traced back to at least 1936[55], but it had evolved into full existence by 1989. It had found support from Murphy J from

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54 (1989) 167 CLR 590 at 594-595; [1989] HCA 50.

55 *Martin v Osborne* (1936) 55 CLR 367; [1936] HCA 23.

1982 on[56], from Dawson J from 1984 on[57], and from Mason CJ, Wilson and Gaudron JJ in 1988 – a majority of the Court sitting on the relevant case[58].

63 The common law power or powers preserved by s 130 assume that evidence has been held admissible, pursuant to what Brennan J called "the criterion of admissibility", subject to the possible exercise of powers which are sometimes called "discretions". It follows that the rule in *Pfennig v The Queen*, which is "the criterion of admissibility" at common law, and is not in any sense a "discretionary" power but a rule of strict admissibility, cannot be incorporated into s 130 to regulate its operation as a "discretion".

64 It may be accepted that one form of "unfairness" arises where evidence is tendered having the characteristic that its prejudicial effect exceeds its probative value. It may also be accepted that underlying the *Pfennig* test is a desire to avoid receiving evidence having that characteristic. But it does not follow that in considering s 130 the court incorporates the *Pfennig* test. The *Pfennig* test is very favourable to the interests of the accused and very restrictive of the prosecution's capacity to use similar fact evidence. In principle, many may think those to be attractive consequences of the test, but, as already noted, many legislatures, including the Queensland legislature, have not thought so. A construction of s 130 which would incorporate the *Pfennig* test when the court considers exercising its powers preserved by s 130 would be bringing in at the second stage of an admissibility inquiry a strict rule which the legislature had been concerned to exclude at the first stage by force of s 132B.

65 The relevant criteria of strict admissibility operate before s 130 cuts in. In Queensland those criteria of strict admissibility are to be found in the common law *Pfennig* rule as modified by s 132A, and, in the field in which it operates, in s 132B(2). Section 132B(2) does not incorporate or leave operative the *Pfennig* test, and that test is not a criterion of admissibility. There is therefore no occasion for incorporating the test under s 130, which operates only after the relevant criterion of admissibility has been applied. Whatever s 130 refers to, it does not incorporate the *Pfennig* test.

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56 *Perry v The Queen* (1982) 150 CLR 580 at 594-595; [1982] HCA 75; *Sutton v The Queen* (1984) 152 CLR 528 at 539.

57 *Sutton v The Queen* (1984) 152 CLR 528 at 564.

58 *Hoch v The Queen* (1988) 165 CLR 292 at 294 and 296.

Standard of proof in relation to the evidence of the uncharged acts of domestic violence

66 The appellant submitted that four judges in *HML v The Queen* held that where evidence of uncharged acts was admitted, it was necessary to direct the jury of the need to be satisfied of its truth beyond reasonable doubt. It is true that three judges[59] so held and that one judge[60] uttered dicta to that effect. Assuming (but not deciding) that that is the standard of proof and that the jury must be so directed, the terms of the judge's summing up conformed with that duty. At several stages he spoke of the need to be satisfied beyond reasonable doubt of "every element of the offence" or "every necessary element of the offence". That would not suffice, because there is a distinction between the elements of the offences and a particular category of evidence, like relationship evidence (which is only a means of proving the elements of the offences). But the judge also said to the jury: "If … you do have a reasonable doubt … about facts that would prove him guilty of the offence, then it is your duty to give the benefit of that reasonable doubt to the accused." That was a direction concerning the need for the relationship evidence to be established beyond reasonable doubt, for the relationship evidence was capable of establishing facts which might prove the accused guilty of the offence charged. It was reinforced by a direction to approach the complainant's evidence – which concerned both the crime alleged and the relationship evidence – "with special care"; a direction about the need to be "convinced of its accuracy"; a direction about the danger of convicting "on her evidence which has no independent support"; and a direction to be "very, very careful" about the relationship evidence.

Order

67 The appeal should be dismissed.

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59 *HML v The Queen* (2008) 235 CLR 334 at 362 [42] per Gummow J, 371-372 [61] per Kirby J and 406 [196] per Hayne J.

60 *HML v The Queen* (2008) 235 CLR 334 at 500 [506] per Kiefel J.