HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

BBH APPLICANT

AND

THE QUEEN RESPONDENT

BBH v The Queen [2012] HCA 9
28 March 2012
B76/2010

ORDER

1. *Application for an extension of time to apply for special leave granted.*

2. *Special leave to appeal granted.*

3. *Appeal dismissed.*

On appeal from the Supreme Court of Queensland

Representation

B W Walker SC with P J Callaghan SC and A Boe for the applicant (instructed by Boe Williams)

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

CATCHWORDS

BBH v The Queen

Criminal law — Evidence — Relevance — Propensity evidence — Applicant found guilty by jury of maintaining sexual relationship with child under 16, indecent treatment of child under 16 and sodomy of person under 18 — Complainant was applicant's daughter — Complainant's brother gave evidence of uncharged incident between applicant and complainant — Complainant's brother provided innocent explanation for incident — Whether brother's evidence admissible where complainant did not give evidence about incident — Whether evidence relevant to applicant's alleged sexual interest in complainant — Whether test for admissibility in *Pfennig v The Queen* (1995) 182 CLR 461 applicable — Whether test satisfied.

Words and phrases – "propensity", "rational view", "sexual interest".

Criminal Code (Q), ss 208, 210 and 229B.

FRENCH CJ.

Introduction

1 On 25 January 2006 an indictment was presented against the applicant in the District Court of Queensland alleging a number of sexual offences against the *Criminal Code* (Q) ("the Code") in relation to his daughter ("the complainant"). The complainant was born on 5 July 1983. The offences were alleged to have been committed at different times between 1987 and 1999. The indictment contained 12 counts. The first count charged that, between 3 July 1989 and 31 March 1999, the applicant had maintained an unlawful sexual relationship with the complainant contrary to s 229B of the Code. There were six counts of unlawful and indecent dealing when the complainant was under 14 and under 16 years of age. In four counts it was alleged that the applicant had sodomised the complainant. On another count it was alleged that he unlawfully procured the complainant to do an indecent act when the complainant was under 12 years of age.

2 After a trial by jury, the applicant was convicted on 17 May 2007 of the offence of maintaining an unlawful sexual relationship with the complainant, four offences of unlawful and indecent dealing with the complainant and four offences of sodomising the complainant. He was sentenced to 10 years imprisonment on each count, the sentences to be served concurrently.

3 The applicant's appeal to the Court of Appeal of the Supreme Court of Queensland was dismissed on 19 October 2007[1]. On 24 December 2010 he applied to this Court for special leave to appeal against the decision of the Court of Appeal. He sought an extension of time. On 13 May 2011 the application for special leave was referred to an enlarged Bench by order of Gummow, Crennan and Bell JJ.

4 The application was concerned with the reception at trial of evidence, given by the applicant's youngest son, concerning an uncharged incident involving the applicant and the complainant, which the son said he had observed in 1994 or 1995. The son, who was 10 or 11 years of age at the time of the incident, said that while on a farm holiday with the applicant, the complainant and his older brother, he had observed the applicant and the complainant together at the caravan in which they were all staying. The complainant was undressed from the waist down and bending over. The applicant had his hand on her waist and his face close to her bottom. After making a statement to the police in 2005, the son volunteered to the applicant's partner that what he saw was consistent with the applicant looking for an ant bite or a bee sting. He gave evidence to that

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1 *R v BBH* [2007] QCA 348.

effect and said he saw nothing untoward about the incident. The complainant did not recall the incident, which did not follow the pattern of conduct of which she gave evidence. The applicant denied it ever occurred.

5 The son's evidence was admitted, over objection, as propensity evidence tending to show "a guilty passion between the accused and the complainant." It should not have been admitted. It was equivocal. It could achieve relevance only by a process of reasoning conferring probative significance upon it by reference to direct evidence of the conduct it was adduced to prove. Its prejudicial effect was the invitation it offered to circular logic. Before considering how the evidence came to be admitted, it is necessary to refer to the counts of the indictment on which the applicant was convicted and the statutory provisions relevant to them.

Maintaining a sexual relationship

6 Course of conduct sexual offences against young persons, defined in terms of maintaining a sexual relationship, are created by statute in four of the States and Territories[2]. Analogous offences designated by the terms "persistent sexual exploitation" and "persistent sexual abuse" have been created in other States[3].

7 Section 229B of the Code, as enacted in 1989[4], relevantly provided that:

> "(1) Any adult who maintains an unlawful relationship of a sexual nature with a child under the age of sixteen years is guilty of a crime and is liable to imprisonment for seven years.

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2 *Criminal Code* (Q), s 229B commenced 3 July 1989; *Criminal Code* (Tas), s 125A commenced 25 November 1994; *Criminal Code* (NT), s 131A commenced 1 June 1994; *Crimes Act* 1900 (ACT), s 56 commenced 24 December 1991. In Victoria, s 47A of the *Crimes Act* 1958 (Vic) was originally enacted in similar terms to s 229B by the *Crimes (Sexual Offences) Act* 1991 (Vic), s 3 with effect from 5 August 1991, but was replaced with a "persistent sexual abuse" offence by the *Crimes (Amendment) Act* 1997 (Vic), s 5 with effect from 1 January 1998.

3 *Crimes Act* 1958 (Vic), s 47A commenced 1 January 1998; *Crimes Act* 1900 (NSW), s 66EA commenced 15 January 1999; *Criminal Code* (WA), s 321A commenced 27 April 2008; *Criminal Law Consolidation Act* 1935 (SA), s 50 commenced 23 November 2008. Previous versions of these offences were created by the *Criminal Code* (WA), s 321A which commenced 1 August 1992 and the *Criminal Law Consolidation Act* 1935 (SA), s 74 which commenced 28 July 1994.

4 *Criminal Code, Evidence Act and Other Acts Amendment Act* 1989 (Q), s 23.

(1A) A person shall not be convicted of the offence defined in the preceding paragraph unless it is shown that the offender, as an adult, has, during the period in which it is alleged that he maintained the relationship in issue with the child, done an act defined to constitute an offence of a sexual nature in relation to the child, other than an offence defined in paragraph (5) or (6) of section 210, on three or more occasions and evidence of the doing of any such act shall be admissible and probative of the maintenance of the relationship notwithstanding that the evidence does not disclose the dates or the exact circumstances of those occasions.

…

(2) A person may be charged in one indictment with an offence defined in subsection (1) and with any other offence of a sexual nature alleged to have been committed by him in the course of the relationship in issue in the first-mentioned offence and he may be convicted of and punished for any or all of the offences so charged:

Provided that where the offender is sentenced to a term of imprisonment for the first-mentioned offence and a term of imprisonment for the other offence an order shall not be made directing that one of those sentences take effect from the expiration of deprivation of liberty for the other.

(3) A prosecution for an offence defined in subsection (1) shall not be commenced without the consent of a Crown Law Officer."

Reference should be made briefly to sub-ss (1B) and (1C) because, in conjunction with other provisions of s 229B, they were amended and renumbered in 1997[5]. As enacted, sub-ss (1B) and (1C) in effect prescribed aggravating circumstances in relation to an offence against s 229B(1). The two sub-sections imposed higher maximum terms of imprisonment of 14 years and life respectively according to whether the offender, "in the course of the relationship of a sexual nature", had committed an offence of a sexual nature punishable by a maximum term greater than five years, but less than 14 years, or an offence punishable by a maximum term of 14 years or more. Sub-section (1D) is not material for present purposes[6].

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5 *Criminal Law Amendment Act* 1997 (Q), s 33.

6 Sub-section (1D) provided for a defence on the basis that the accused believed, on reasonable grounds, that the child (if above the age of 12 years) was of or above the age of 16 years at the commencement of the period of the alleged unlawful relationship.

Legislative history of s 229B

8 The enactment of s 229B gave qualified effect to a recommendation in a Report to the Queensland Government in 1985, titled *An Inquiry into Sexual Offences Involving Children and Related Matters* ("the Report"), by the Director of Prosecutions ("the Director")[7]. The Director proposed the creation of a new offence-creating provision broader in scope than s 229B as eventually enacted. It would have provided, inter alia, that "[a]ny adult who enters into and maintains a relationship with a child of such a nature he commits a series of offences of a sexual nature with that child is guilty of a crime"[8].

9 Section 229B was described in the Second Reading Speech as having been drafted "in recognition of the limited recall which many children, particularly those of tender years, have in respect of specific details such as time and dates of the offences and other surrounding circumstances."[9] Its drafting had been "tightened" beyond that recommended by the Director to require "that the prosecution establish the sexual relationship by proving no fewer than 3 specific acts which would constitute offences of a sexual nature."[10]

10 The enactment of s 229B predated the judgment of this Court in *S v The Queen*[11], delivered on 21 December 1989. The appellant in that case had been charged on indictment with separate counts of carnal knowledge of his daughter. Each count covered a different period[12]. The Court held that the Crown could not rely upon evidence of a number of offences within the period covered by a particular count, on the basis that any one of the alleged offences could fall within the description of the offence in that count. The enactment of provisions in other States and Territories analogous to s 229B was in part designed to

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7 Report at 71-72 [7.9].

8 Report at 71 [7.9].

9 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 24 November 1988 at 3256.

10 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 24 November 1988 at 3256.

11 (1989) 168 CLR 266; [1989] HCA 66.

12 The counts each charged an act of carnal knowledge on a date unknown within a different specified 12 month period.

overcome the requirements for particularity set out in *S v The Queen*[13]. Their intention, as described in *KRM v The Queen*[14], was:

> "to create an offence, the component parts of which by their very nature may have occurred over a long period, in the past, and in circumstances in which precise recall of detail will not only be difficult for a complainant, but also may provide fertile ground for cross-examination of him or her on behalf of an accused."

11 Section 229B was amended during the period of 10 years from 3 July 1989 to 31 March 1999, covered by the first count in the indictment against the applicant. The amendment took effect on 1 July 1997[15]. Section 229B(1) as amended read:

> "Any adult who maintains an unlawful relationship of a sexual nature with a child under the prescribed age is guilty of a crime and is liable to imprisonment for 14 years."

The amendment increased the maximum penalty for the offence from seven years to 14 years. The new term "prescribed age" was defined in s 229B(9) as 18 years to the extent that the relationship involved an act defined to constitute an offence in ss 208 or 209 of the Code and 16 years to the extent that the relationship involved any other act defined to constitute an offence of a sexual nature. Sub-sections (1A) and (1C) were renumbered as sub-ss (2) and (3). Sub-section (1B) was deleted[16].

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13 See Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 8 April 1993 at 1596; Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 2 March 1994 at 11393; New South Wales, Legislative Assembly, Crimes Legislation Amendment (Child Sexual Offences) Bill 1998, Explanatory Note at 2.

14 (2001) 206 CLR 221 at 245 [68] per Gummow and Callinan JJ referring to s 47A of the *Crimes Act* 1958 (Vic); [2001] HCA 11.

15 *Criminal Law Amendment Act* 1997 (Q).

16 Other amendments, not material for present purposes, included the replacement of the defence in sub-s (1D) by defences in new sub-ss (4) and (5). The former sub-s (2) became sub-s (6). The proviso to the former sub-s (2) was replicated as a separate sub-s (7).

12 Section 229B was further substantially amended in 2003[17] and again in 2008[18]. Those further amendments are not material for present purposes.

The construction and application of s 229B

13 The way in which the question of admissibility at the heart of this appeal was argued at trial directs attention to the nature of the relationship referred to in s 229B(1) and the function of s 229B(1A).

14 The logical structure of s 229B(1A) prior to 1 July 1997 indicated that proof of at least three offences of a sexual nature by the accused with the complainant was a necessary condition of conviction of an offence against s 229B(1)[19]. The question arises whether s 229B(1) deemed an unlawful relationship to have been maintained upon proof of the commission of at least three offences of a sexual nature with the same child[20]. In oral argument counsel for the applicant submitted to this Court that "[t]he relationship itself plays no role at all, any more than any circumstantial or similar evidence plays a role in the element of an offence." That submission should be accepted. Subject to possible qualifications relating to discrete acts constituting a single episode[21] and disconnected and isolated acts over a long period of time[22], it accords with the reasoning of this Court in *KBT v The Queen*[23]. That is not to say, as counsel accepted, that a pre-existing sexual relationship or sexual interest evidenced by

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17 *Sexual Offences (Protection of Children) Amendment Act* 2003 (Q), s 18.

18 *Criminal Code and Other Acts Amendment Act* 2008 (Q), s 43.

19 *R v Kemp (No 2)* [1998] 2 Qd R 510 at 512 per Pincus JA, 518-519 per Mackenzie J, Macrossan CJ agreeing at 510.

20 A proposition which was put and rejected in *R v Kemp (No 2)* [1998] 2 Qd R 510 at 521 per Mackenzie J, Macrossan CJ agreeing at 511, Pincus JA agreeing at 512. The Court in *Kemp* held that the "relationship" offence created by s 229B required an aspect of "habituality" in addition to the three offences of a sexual nature: at 518-519 per Mackenzie J, Macrossan CJ agreeing at 511, Pincus JA agreeing at 512.

21 See, eg, *Tognolini v The Queen* [2011] VSCA 113 at [23]; *Kelly v The Queen* (2010) 27 NTLR 181 at 186 [19]; *R v S* [1999] 2 Qd R 89 at 91-92.

22 *R v S* [1999] 2 Qd R 89 at 94.

23 (1997) 191 CLR 417; [1997] HCA 54.

uncharged conduct is not relevant to the proof of acts which give rise to an offence under s 229B[24].

15 The Court of Appeal of Queensland said in *Thompson*[25] that in a prosecution under s 229B(1), the jury was required to be unanimously satisfied beyond reasonable doubt that the accused had done the same three acts each constituting an offence of a sexual nature against the complainant[26]. That proposition was conceded by the Crown[27] and upheld by this Court in *KBT*[28]. Brennan CJ, Toohey, Gaudron and Gummow JJ held that the actus reus of the offence created by s 229B was not "maintaining an unlawful sexual relationship" but "the doing, as an adult, of an act which constitutes an offence of a sexual nature in relation to the child concerned on three or more occasions." [29] Their Honours also held that, although sub-s (1A) did not require proof of the dates or exact circumstances of the occasions on which the acts were committed, the prosecution must still prove beyond reasonable doubt "the actual commission of acts which constitute offences of a sexual nature."[30] Evidence of a general course or pattern of sexual misconduct or misbehaviour did not necessarily constitute evidence of the doing of "an act defined to constitute an offence of a sexual nature … on 3 or more occasions"[31].

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24 See generally *KRM v The Queen* (2001) 206 CLR 221 at 230 [24] per McHugh J; *HML v The Queen* (2008) 235 CLR 334 at 350 [2] per Gleeson CJ, 382 [103] per Hayne J; [2008] HCA 16.

25 (1996) 90 A Crim R 416.

26 (1996) 90 A Crim R 416 at 434.

27 (1997) 191 CLR 417 at 418-419, 422.

28 (1997) 191 CLR 417. The appeal to this Court was allowed as the Court of Appeal had wrongly held that in spite of an inadequate direction by the trial judge there had been no substantial miscarriage of justice.

29 (1997) 191 CLR 417 at 422.

30 (1997) 191 CLR 417 at 423 per Brennan CJ, Toohey, Gaudron and Gummow JJ.

31 (1997) 191 CLR 417 at 423 per Brennan CJ, Toohey, Gaudron and Gummow JJ. See also at 431-432 per Kirby J referring to the danger that generalised evidence tendered by the prosecution to establish a s 229B "relationship" would be used by the jury as propensity evidence.

16 In *KRM v The Queen*[32], the reasoning in *KBT* was applied to s 47A of the *Crimes Act* 1958 (Vic), as it stood before 1 January 1998, to reject the proposition that a trial judge must always warn a jury against "propensity" reasoning when the presentment contains a count of maintaining a sexual relationship contrary to s 47A or its equivalents in other jurisdictions. McHugh J said[33]:

> "It is true that the offence enacted by s 47A is described as 'maintain[ing] a sexual relationship with a child under the age of 16 …', but the substance of the offence is committing three or more offences of the kind specified".

Gummow and Callinan JJ read the negative reference to "dates" and "exact circumstances" in s 47A(3)[34] to mean that "proof of no more than the actual occurrence of the three acts is necessary."[35] It follows that it was not necessary for the Crown to prove an unlawful relationship in addition to proving the occurrence of three or more offences of the kind referred to in s 229B(1A) and its post-1997 version in s 229B(2)[36]. As indicated earlier, however, evidence of a relationship or sexual interest could be relevant to prove the commission of the acts necessary to establish the offence under s 229B.

17 It is necessary now to have regard to the period covered by the first count on the indictment. That period straddled the amendments to s 229B effected in 1997. The existence of those amendments appears to have played a role in the discussion between the trial judge and counsel at the trial which led to the trial judge fixing upon "guilty passion" as the basis of the admissibility of the evidence which is in issue in this appeal.

The duration of the offence under s 229B

18 In the course of argument before the trial judge it emerged that, according to the brother's written statement to police in 2005, the incident of which he was

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32 (2001) 206 CLR 221.

33 (2001) 206 CLR 221 at 236 [41].

34 The equivalent of s 229B(1A) of the Code.

35 (2001) 206 CLR 221 at 245 [67].

36 As a protection against indiscriminate application, s 229B(3) required the consent of a Crown Law Officer before commencement of a prosecution: Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 24 November 1988 at 3256.

to be called to give evidence occurred in or about 1994[37]. Defence counsel pointed out that if the incident had occurred in or about 1994, it would be necessary "to be cognisant of what the appropriate legislation was". There followed a discussion about the effect of the successive amendments to s 229B. The trial judge suggested that the period covered by the first count should terminate on the coming into effect of the 1997 amendment. The prosecutor said that there were three acts, which he could rely upon, that had occurred before that amendment[38]. If a second charge under s 229B(1) was laid to cover the period from 1 July 1997 the brother's evidence could not be used as evidence of an offence of a sexual nature to support it. In response the trial judge raised the possibility that the evidence was admissible, in any event, as going to "guilty passion". The prosecutor submitted that it was admissible on that basis.

19 Following an adjournment, and before ruling on the brother's evidence, the trial judge asked the prosecutor what he was going to do about the first count on the indictment. The prosecutor submitted that from 1997 to 2003, sub-s 229B(2) was in almost identical terms to sub-s 229B(1A). The trial judge expressed the view that the only change was the prescribed age provision[39]. Neither her Honour, nor counsel, seem to have given consideration to the change in the penalty provisions in s 229B. That change should have been considered. Penalty is a "defining and … essential element of any crime."[40] The effect of the 1997 amendments, although incidental to the debate on the admissibility of the challenged evidence, was not agitated on this appeal. Nevertheless, the approach taken to the first count directs attention to what Gaudron and McHugh JJ said in *S v The Queen*[41]:

> "a court must know what charge it is entertaining in order to ensure that evidence is properly admitted, and in order to instruct the jury properly as to the law to be applied; in the event of conviction, a court must know the offence for which the defendant is to be punished; and the record must

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37 The brother was born in 1984. According to his police statement the incident occurred when he was about 10.

38 This appears to have been a reference to the offences charged in counts 2 and 3 and the conduct referred to in the brother's proposed evidence.

39 The trial judge evidently regarded the amendment as material because the complainant had been under 16 years of age at all times between 1989 and 1999.

40 *Momcilovic v The Queen* (2011) 85 ALJR 957 at 1035 [295] per Hayne J; 280 ALR 221 at 309; [2011] HCA 34.

41 (1989) 168 CLR 266 at 284. See also at 276 per Dawson J; *Walsh v Tattersall* (1996) 188 CLR 77 at 106-108 per Kirby J; [1996] HCA 26.

> show of what offence a person has been acquitted or convicted in order for that person to avail himself or herself, if the need should arise, of a plea of autrefois acquit or autrefois convict."

That proposition was true in its application to the offence created by the enactment of s 229B, which preceded *S v The Queen*. It remains true in its application to the offences created by like provisions in other Australian jurisdictions which post-dated *S v The Queen*.

20 Ultimately, the trial judge directed the jury on the basis that the applicant was charged, as appeared from count 1, with one offence under s 229B of maintaining an unlawful relationship of a sexual nature over a period of 10 years from 1989 to 1999. The applicant was found guilty of the offence charged in that count.

The counts and the convictions

21 Count 1 on the indictment on which the applicant was convicted alleged:

> "That between the third day of July, 1989 and the thirty-first day of March, 1999 at Redland Bay or elsewhere in the State of Queensland, [BBH] being an adult, maintained an unlawful relationship of a sexual nature with [the complainant], a child under 16 years
>
> And further, that during the course of that relationship [BBH] sodomised [the complainant], a child under the age of 16 years,
>
> And [the complainant], was to the knowledge of [BBH], his lineal descendant
>
> And further, that during the course of that relationship, [BBH] unlawfully and indecently dealt with [the complainant], a child under the age of 16 years,
>
> And [the complainant], was to the knowledge of [BBH], his lineal descendant
>
> And [BBH] had [the complainant] under his care
>
> And it is averred that the prosecution of Count 1 has been commenced with the consent of the Director of Public Prosecutions".

22 Count 2 alleged an unlawful and indecent dealing between 4 July 1987 and 6 July 1988. Count 3 alleged unlawful procuring of an indecent act between 4 July 1989 and 6 July 1991. Count 4 alleged an unlawful and indecent dealing between 4 July 1997 and 6 July 1998. On each of those three counts a verdict of not guilty was returned.

23 Each of the counts of unlawful and indecent dealing of which the applicant was convicted (counts 5, 7, 9 and 11 on the indictment) alleged an offence against s 210(1)(a) of the Code. That section makes it an offence to unlawfully and indecently deal with a child under the age of 16 years. Subject to variations in the periods covered, each of the counts was in the form set out in count 5:

> "That on a date unknown between the fourth day of July, 1997 and the sixth day of July, 1999 at Redland Bay in the State of Queensland, [BBH] unlawfully and indecently dealt with [the complainant], a child under 16 years
>
> And [the complainant] was to the knowledge of [BBH], his lineal descendant
>
> And [BBH] had [the complainant] under his care."

24 Each of the counts of sodomy of which the applicant was convicted alleged an offence against s 208(1)(a) of the Code. That section makes it an offence to sodomise a person under the age of 18 years. Again, subject to variations in the periods covered, each count was in the form set out in count 6:

> "That on a date unknown between the fourth day of July, 1997 and the sixth day of July, 1999 at Redland Bay in the State of Queensland, [BBH] sodomised [the complainant], a person under 18 years
>
> And [the complainant] was, to the knowledge of [BBH], his lineal descendant".

None of the counts in relation to the charges of unlawful and indecent dealing and sodomy, of which the applicant was convicted, covered periods commencing earlier than the commencement date of the *Criminal Law Amendment Act* 1997 (Q).

Evidence at the trial

25 The applicant married in 1981. He and his former wife had three children, two boys and a girl. The complainant, who was their second child and only daughter, was born in July 1983. Her younger brother, whose evidence at trial is in issue in this appeal, was born in September 1984.

26 The applicant and his wife separated in 1995 and were divorced in 1996. Immediately after the separation the children lived with their mother. After a Family Court hearing the children resided with the applicant.

27 The complainant gave evidence that she began to be sexually abused by the applicant when she was "younger than four". The first occasion alleged was the subject of count 2, of which the applicant was acquitted. The frequency of the abuse varied from every couple of days to every couple of weeks or months. The incidents of abuse were said to have involved digital penetration of the complainant's vagina and penile penetration of her anus. According to the complainant these incidents sometimes occurred when the family went on camping trips. The complainant's brother gave evidence of the farm holiday incident after the complainant's evidence and following the ruling by the trial judge that his evidence was admissible. Her Honour's ruling and the brother's evidence are outlined below.

28 The complainant's mother was called as a Crown witness. She testified about an incident when the complainant was a young child and the applicant picked her up, held her on his hip and stroked her upper thigh with his hand. The complainant's mother also gave evidence that on occasions, when she and the applicant were having intercourse in their bedroom in the morning, he would call the children in to the bedroom and ask them to give their mother a cuddle while intercourse was occurring.

29 A former boyfriend of the complainant gave evidence identifying a letter which she had written to him when she was in Year 12 at school. The letter referred indirectly to the applicant's conduct with the complainant over a period of some years.

30 A doctor who saw the complainant in 2000 and 2001 gave evidence, without objection, of the contents of an unsigned letter she had written to the doctor alleging that the applicant had taken advantage of her sexually, that she had been unable to stop him as she was too frightened, and that his conduct had continued until she was 15 years old. The letter was not put in evidence. Another doctor gave evidence as to the physical symptoms which would be exhibited by a person who had been sodomised over a 10 year period.

31 The applicant gave evidence. He denied the complainant's allegations. He said he had enjoyed a good relationship with his daughter which soured when he expressed his disapproval of her relationship with another boyfriend which began before she was 14 years of age.

32 The only other witness called for the defence was a woman with whom the applicant had entered into a relationship in 1996. The relationship had lasted between 12 and 18 months. She had met the children. She saw nothing in the complainant's conduct that indicated the complainant had a problem with the applicant. The witness also said that she and the applicant did not have any sexual contact in the presence of any of his children.

The contested evidence – the trial judge's ruling

33 The objection by defence counsel to the evidence to be led from the complainant's brother was taken prior to the commencement of the trial. The Crown prosecutor argued that the evidence was led as one of three indecent acts which could support a conviction on count 1. He also said it would be led as evidence of "guilty passion". The discussion between the trial judge and counsel about the effect of the 1997 amendments to s 229B on the use to which the evidence could be put and the outcome of that discussion have already been outlined.

34 The trial judge's ruling on the admissibility of the complainant's brother's evidence was made after the complainant had given her evidence. In her evidence-in-chief the complainant had testified that "the things that [her] father would do with [her] sexually" occurred "[u]sually in [her] parents' bedroom, [and] sometimes outside, or on camping trips." She said in cross-examination that there was "[a]t least one [incident]" which occurred on her uncle's farm. It was the same type of incident as had occurred in other places where she had been lying down and the applicant had played with her vagina. She was asked if there had ever been an incident in which the applicant had her standing up and bending over. She said "No". Asked again if anything like that ever happened on the farm, she said "No, not that I remember." Re-examined on the point, she maintained that she did not remember such an incident.

35 The brother's evidence had been foreshadowed in a signed statement which he had given to police in 2005. The trial judge had not seen that statement before making her ruling, but relied upon what appeared in a written outline of submissions. She said:

> "he has provided a statement in which he says he observed an incident when he was much younger at a time when the family was camping on the uncle's property, and he says that he on an occasion observed through the caravan door the complainant with only a T-shirt on and naked to her waist with underpants around her ankles, and that he observed the accused sitting behind her with his hand on her waist and that his face was six inches from her backside."

36 Her Honour said that the basis of the defence's objection was the complainant's failure to mention any such incident. The prosecutor's justification for admissibility was characterised thus:

> "The prosecution say that the evidence is admissible on the basis, one, that it could come in as an uncharged act, and, two, that it is relevant to count 1 to show a guilty passion existing towards the complainant by the accused."

In ruling that the evidence could be admitted, the trial judge relied only upon the "guilty passion" ground. She said:

> "I don't think the fact that the complainant hasn't mentioned an incident similar in detail is decisive one way or the other. The jury, of course, are told that they may accept all of what a witness says, part of it. They may come to the view if they accept the brother that the event happened but she has forgotten it. She has already given evidence that she remembers some specific incidents, but that events of a sexual nature happened on very many occasions from the time she was a very young child. The probative value of the evidence is that if the jury accept it it goes to show a guilty passion between the accused and the complainant. Such evidence is regularly allowed in matters of this nature. I rule that the evidence is admissible."

Her Honour made no reference to the potentially prejudicial effect of the evidence. As is apparent from her ruling the trial judge did not admit the evidence as evidence of an uncharged act. That is to say her Honour did not characterise the evidence as evidence of an unlawful and indecent dealing, or some other offence of a sexual nature committed by the applicant at the time to which that evidence related.

The contested evidence – the brother's testimony

37 The complainant's brother gave evidence immediately after the trial judge's ruling. He said that the applicant had taken him and the complainant and his older brother to their great-uncle's farm during school holidays. Another uncle, and that uncle's children, were also camping on the farm. The witness was about 11 years old at the time. Cross-examined on his written statement given to police on 11 February 2005, in which he said he was about 10 at the time of the incident, he responded:

> "It was several years ago and I was only a child at the time."

38 The complainant's brother said that he and his sister and their brother and the applicant camped in a caravan in one of the paddocks at their great-uncle's farm. One day their great-uncle arranged a tractor ride for the children. The complainant's brother left the group which was going off for the tractor ride to retrieve a pocket knife which he had left back at the campsite. When he returned to the campsite he saw the complainant standing behind the caravan bending over and the applicant sitting on the back grate of the van looking at her. The complainant only had a shirt on. She had on nothing from the waist down. The applicant's hand was on her waist. The complainant was bending almost as if she was touching her toes. She was about six inches away from the applicant. The witness said that he did not retrieve his pocket knife. He went back to rejoin the other children, but they had already left for the tractor ride.

39 After making his statement to the police in 2005, which included reference to the incident, but before he signed the statement, the complainant's brother rang the applicant's current partner. He told her that he was concerned because what he had seen was quite consistent with an innocent act on his father's part, such as looking for a bee sting or an ant bite. He accepted the proposition in cross-examination that he had not mentioned anything about the incident to a social worker who visited the family when Family Court proceedings were pending between his parents. That was because he had seen nothing untoward about the incident. He also said in cross-examination that nobody had suggested the insect bite hypothesis to him.

The trial judge's direction to the jury

40 The question raised upon the application for special leave, as argued before this Court, is whether the testimony of the complainant's brother was admissible. The application as argued did not specifically raise the sufficiency of the trial judge's direction. Nevertheless, the direction was relied upon in argument as casting some retrospective light on the question of admissibility.

41 In summing up to the jury the trial judge referred to the complainant's evidence of uncharged incidents of sexual activity involving the applicant. Her Honour told the jury that if they accepted such evidence, it showed "the true nature of the relationship between the [applicant] and the complainant, and therefore [put the] charges on the indictment in their proper context." Her Honour warned the jury against using such evidence to conclude that the applicant was someone with a tendency to commit the type of offences with which he was charged. However, as counsel for the applicant submitted in reply, the trial judge's warning related only to the complainant's evidence of uncharged acts.

42 The trial judge referred to the evidence of the complainant's mother concerning the thigh stroking incident and the evidence of the complainant's brother relating to the incident at the great-uncle's farm. The trial judge told the jury that the evidence had been adduced by the prosecution as evidence of the relationship between the applicant and the complainant and part of the background against which the evidence of their conduct was to be evaluated. Her Honour also characterised the prosecution's use of the evidence in another way:

> "they say it's evidence capable of establishing the guilty passion or the sexual interest by the accused in the complainant, or by proving an unnatural or unexpected relationship of sexual intimacy between the father and the daughter."

Her Honour said:

> "Then you must be satisfied that what it was that they saw does show a sexual interest, you know, an unnatural or unexpected natural interest by father and daughter and that it doesn't have an innocent explanation. If you were satisfied of those things, then the *prosecution say* the existence of the relationship demonstrated by those incidents helps you evaluate and decide that the complainant's evidence is true. They are not charges in themselves, that's the way in which the evidence is sought to be used." (emphasis added)

Those directions[42] conveyed the proposition that the brother's evidence was relevant to the proof of the acts necessary to establish the offence under s 229B and the offences set out in the other counts in the indictment.

43 In relation to the charge under s 229B of the Code, the trial judge directed the jury, in accordance with the decision of this Court in *KBT*, that before the jury could be satisfied that the applicant did an act defined as an offence of a sexual nature on at least three occasions, they must all agree on the three acts which he did. Her Honour expressly left open the possibility that the prosecution could prove, for the purposes of the charge, that the accused did an uncharged act of a sexual nature. She said:

> "The prosecution can prove that the accused did an act of a sexual nature even if it's not charged on the indictment, even if it is an uncharged act, but you've got nine of them on the indictment to consider."

Her Honour did not limit, by reference to specific evidence, the acts in respect of which such a finding would be open. Her Honour thereby left open the possibility that the brother's evidence might be treated as evidence of an uncharged offence of a sexual nature for the purpose of s 229B(1). That was not a possibility which should have been left open. The brother's evidence was not capable, taken by itself, of supporting a finding that on the day and at the time to which it related, an offence of a sexual nature was committed by the applicant. The evidence was not capable of meeting the standard for proof of such an act, namely proof beyond reasonable doubt, as explained by this Court in *KBT*. The brother's description of what he saw was limited. There was no additional material to complete the picture and support the inference of an uncharged offence occurring. The complainant's evidence was that she had no recollection

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42 To some degree the trial judge elided the prosecution's contentions and her own directions. No point was made about that elision but judicial direction should be clearly separated from the contentions of the parties.

of the incident and that incidents of a sexual nature which had occurred at the farm between her and the applicant were of a different character.

The Court of Appeal decision

44 The applicant sought leave to appeal against his convictions to the Court of Appeal on a number of grounds which included the complaint that the trial judge erred in admitting the evidence of the complainant's brother. The applicant also contended before the Court of Appeal that the trial judge's direction to the jury in relation to the brother's evidence was inadequate to avoid undue prejudice to the applicant.

45 The reasons for decision of the Court of Appeal were given by Keane JA, with whom Holmes JA and Lyons J agreed. In relation to the admissibility of the brother's evidence, their Honours held:

- the evidence of the complainant's mother and brother, and the complainant's evidence of uncharged acts of sexual abuse, was relevant because "it was apt to render more intelligible and credible allegations which otherwise might be seen to be unintelligible and incredible in terms of the usual relationship between father and daughter."[43] Their Honours referred to the judgment of Dixon J in *O'Leary v The King*[44] in support of this justification for admissibility. That case, however, concerned the admissibility of evidence without which other evidence "could not be truly understood and, isolated from it, could only be presented as an unreal and not very intelligible event."[45] That was not this case. The complainant's evidence of a history of abuse from childhood to her teenage years was intelligible. On any view, the evidence of her brother did not render it more so. Its effect on the credibility of that evidence depended upon the inferences that could be drawn from it;

- the brother's evidence was also relevant because "it tended to establish the maintaining offence, in that it revealed a sexual relationship between the [applicant] and the complainant."[46] It can be said immediately that if the premise of this aspect of their Honours' reasoning was that s 229B required proof of the prohibited statutory relationship over and above proof of at least three acts constituting offences of a sexual nature, it was

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43 *R v BBH* [2007] QCA 348 at [40].

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

45 (1946) 73 CLR 566 at 577.

46 [2007] QCA 348 at [41].

inconsistent with *KBT*. On the other hand, evidence of a sexual relationship could legitimately be used to support inferences about the commission of the three or more offences of a sexual nature required by s 229B(1A) to establish the statutory relationship;

- the absence of evidence from the complainant concerning the incident to which her brother testified did not render her brother's evidence inadmissible[47];

- the jury were given a clear direction to consider whether there was an innocent explanation for what the brother saw[48]. That, of course, was not a matter going to the admissibility of the evidence.

The Court of Appeal also held, in relation to the sufficiency of the trial judge's directions to the jury, that:

- it was not necessary for the trial judge to direct the jury that they could not act on the brother's evidence unless they were satisfied beyond reasonable doubt that the brother's evidence, considered in isolation from the other evidence in the case, established "a sexual act" between the applicant and the complainant[49]. This aspect of the reasoning suggests that their Honours were of the view that the brother's evidence could establish that an act of a sexual nature had been committed by the applicant on the camping weekend in 1994;

- the trial judge's direction was sufficient to ensure that the jury understood that they could not act on the brother's evidence unless satisfied that the incident did occur and that it did not have an innocent explanation. That direction was sufficient to ensure that the jury did not misuse the brother's evidence[50].

The application for special leave

46 The applicant sought special leave to appeal from the judgment of the Court of Appeal on the grounds that the Court erred in holding that:

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47 [2007] QCA 348 at [42].

48 [2007] QCA 348 at [41].

49 [2007] QCA 348 at [44].

50 [2007] QCA 348 at [44].

1. evidence of an event, the source of which was a witness who proffered an innocent explanation for that event, could be used in proof of an unnatural relationship between the applicant and the complainant, who gave no evidence about any such event;

2. it was not necessary for the jury to be directed as to the need to be satisfied beyond reasonable doubt that such an event had a sexual character, before it could be used in proof of the existence of a sexual relationship between the applicant and the complainant.

While the application for special leave was referred to an enlarged Bench for argument as on an appeal on both grounds, the application was argued before this Court only on the ground relating to the admissibility of the brother's evidence.

Whether the impugned evidence was evidence of an uncharged offence of a sexual nature

47 Counsel for the respondent contended for a short answer to the question of admissibility of the impugned evidence on the basis that it was evidence of the commission of an offence of a sexual nature in relation to the complainant. For that reason the evidence was, he submitted, directly relevant to the relationship charge under s 229B. The conduct of the applicant could be relied upon as one of at least three offences of a sexual nature which had to be established pursuant to s 229B(1A). This submission reflected one of the bases upon which the prosecutor at trial had sought to justify the admission of the brother's evidence. As noted earlier, the evidence was not admitted on that basis.

48 In so submitting to this Court, counsel for the respondent contended that counsel for the applicant had conceded that "the act observed by [the complainant's brother] could constitute an offence of a sexual nature." However, despite some ambiguity in responses made by counsel for the applicant to questions from the Court, there was no such concession. In the event, the evidence was not capable of establishing that what the complainant's brother saw was the commission of an offence of a sexual nature.

49 Absent further particularisation of the count under s 229B(1), and putting to one side concerns about the 1997 amendments, it was open to the Crown at trial, in order to support a conviction on that count, to rely upon evidence of the separately charged offences and evidence of uncharged offences of a sexual nature in relation to the complainant falling within the period of the alleged unlawful relationship. The brother's evidence did not fall into either category. The trial judge admitted the brother's testimony as evidencing "guilty passion". It is on that basis that its relevance and admissibility must be judged.

The question of relevance

50 The evidence of the complainant's brother was admitted on the basis that it was propensity evidence. That term includes, but is not limited to, what has been called "similar fact evidence", "relationship evidence" and "identity evidence"[51]. In the context of sexual offences it extends to evidence said to demonstrate "guilty passion" or sexual interest or feeling towards another. In so saying, I agree with the cautionary remarks of Hayne J[52] that the adoption of classificatory labels can obscure the proper identification of applicable principle. In this case the key principle is relevance. All evidence must pass the threshold test of relevance which is the necessary condition of admissibility. As was said in *Smith v The Queen*[53]:

> "Evidence is relevant or it is not. If the evidence is not relevant, no further question arises about its admissibility. Irrelevant evidence may not be received."

Relevance is determined by reference to the content of the proposed evidence and the issues at trial, including the elements of the offences with which the accused is charged, issues about the facts constituting those elements and issues about facts relevant to facts in issue[54]. There being no applicable statutory test of relevance under the *Evidence Act* 1977 (Q), the Court is in the realm of the common law.

51 Thayer wrote that "[t]he law furnishes no test of relevancy. For this, it tacitly refers to logic and general experience"[55]. According to Stephen's Digest, in a definition adopted in the eighth Australian edition of *Cross on Evidence*, "relevant" means that[56]:

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51 *Pfennig v The Queen* (1995) 182 CLR 461 at 464-465 per Mason CJ, Deane and Dawson JJ; [1995] HCA 7; *Phillips v The Queen* (2006) 225 CLR 303 at 307 fn 24; [2006] HCA 4.

52 Reasons of Hayne J at [63].

53 (2001) 206 CLR 650 at 653 [6] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; [2001] HCA 50.

54 (2001) 206 CLR 650 at 654 [7] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

55 Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898) at 265.

56 Stephen, *A Digest of the Law of Evidence*, 12th ed (1936) at 4 [Art 1], cited in *Cross on Evidence*, 8th Aust ed (2010) at 106-107 [1490].

> "[A]ny 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."

Logical relevance is a precondition of admissibility. It is not itself a rule of law. It does not incorporate questions of sufficiency. As Tillers stated in his revision of Wigmore[57]:

> "There is a basic distinction between the relevancy of evidence and its sufficiency. In the immortal words of Professor McCormick, 'A brick is not a wall.'" (citations omitted)

52 In the context of sexual offences, the logical relevance of propensity evidence said to demonstrate "guilty passion" was simply explained in the 1979 Chadbourn revision of Wigmore's *Evidence in Trials at Common Law*[58]:

> "The evidence as offered … consists in conduct, and from this the first inference is to the then emotion, from this next to the emotion at the time charged, and from this to the act charged."

In this case the acts in question were those alleged in the substantive counts of sodomy and unlawful and indecent dealing and the acts, charged or uncharged, which might be relied upon to constitute the offence, alleged in count 1, of maintaining an unlawful relationship of a sexual nature contrary to s 229B(1).

53 Typically the cases about the admissibility of propensity evidence in relation to sexual offences have been decided on the premise that logical relevance has been established. The species of propensity evidence designated "similar fact evidence" has been admitted or excluded by reference to whether or not the probative force of the evidence outweighs its merely prejudicial effect. Evidence excluded by this criterion is excluded because of[59]:

> "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

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57 Wigmore, *Evidence in Trials at Common Law*, Tillers rev (1983), vol 1A at 1032.

58 Wigmore, *Evidence in Trials at Common Law*, Chadbourn rev (1979), vol 2 at 458.

59 *Roach v The Queen* (2011) 242 CLR 610 at 617 [15]; [2011] HCA 12. See also *Pfennig v The Queen* (1995) 182 CLR 461 at 482-483 per Mason CJ, Deane and Dawson JJ; *Harriman v The Queen* (1989) 167 CLR 590 at 597 per Dawson J; [1989] HCA 50.

> conclusion that it clearly points to the guilt of the accused'." (citation omitted)

54 In *Director of Public Prosecutions v Boardman*, which is said to have marked a shift from admissibility conditioned upon accepted categories of uses of propensity evidence to admissibility conditioned upon cogency[60], Lord Wilberforce said[61]:

> "The basic principle must be that the admission of similar fact evidence … is exceptional and requires a strong degree of probative force. This probative force is derived, if at all, from the circumstance that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by experience and common sense, either all be true, or have arisen from a cause common to the witnesses or from pure coincidence."

That passage was quoted with approval by Mason CJ, Wilson and Gaudron JJ in *Hoch v The Queen*[62]. Their Honours' reasons left open the possibility that a question of admissibility might collapse into a question of logical relevance if the tendered evidence lacked any probative force. Their Honours posited the case in which the existence of a rational view of similar fact evidence inconsistent with the guilt of the accused "destroys the probative value of the evidence which is a condition precedent to its admissibility."[63] In that limiting case, the evidence would be capable of proving nothing about any fact in issue. In *Phillips v The Queen* the Court observed that[64]:

> "On one view, the problems presented by the tender of similar fact evidence are merely problems of relevance. On another view, evidence tendered as similar fact evidence must first be assessed for relevance, and, if that hurdle is overcome, must satisfy some additional test based on probative force." (citations omitted)

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60 Imwinkelried, "The Evolution of the Use of the Doctrine of Chances as Theory of Admissibility for Similar Fact Evidence", (1993) 22 *Anglo-American Law Review* 73 at 80.

61 [1975] AC 421 at 444.

62 (1988) 165 CLR 292 at 295; [1988] HCA 50.

63 (1988) 165 CLR 292 at 296.

64 (2006) 225 CLR 303 at 308 [10].

55 Although there was reference to the exclusionary rule for propensity evidence enunciated in *Pfennig v The Queen*, the problem presented by the complainant's brother's evidence in this case was one of relevance. It was a limiting case of the kind adverted to in *Hoch*. To subject it to the *Pfennig* calculus is to do no more in this case than to take a path that leads, in any event, to a conclusion of logical irrelevance.

56 The evidence was irrelevant because it was equivocal. As counsel for the applicant said, all the complainant's brother was able to give was a snapshot of an incident. The brother offered, in retrospect, an innocuous explanation for what had occurred. Whatever arguments might be constructed to support the proposition that, for reasons to do with the potential consequences of his testimony for his father, he was stating a theory in which he did not believe, the explanation he gave was rationally open. His evidence was not admitted as evidence of an uncharged act although, as noted earlier, the trial judge's directions may have left the jury with the belief that they could treat it as such. Despite being admitted as evidence of "guilty passion" it was not probative of a sexual act. In the circumstances, if it was not probative of a sexual act, it was not probative of guilty passion.

57 In oral argument, counsel for the applicant accepted as a summary of his argument the proposition that:

> "It was not admissible unless, if accepted and placed in the context of the prosecution case, there was no explanation consistent with innocence and, by its very nature, the evidence was equivocal".

The equivocal character of the evidence marked this as a case of logical irrelevancy.

58 The jury were effectively invited to engage in circular reasoning. The evidence itself could only be characterised as evidence of guilty passion if some additional element of conduct at the farm, not observed by the brother, was to be inferred. Alternatively, the jury were invited to characterise the incident as indicative of sexual interest. Neither of those inferences was open without reference to evidence which the brother's testimony was adduced to support. The only way in which the brother's evidence gained probative force was by a process of circular inference. It invited reasoning from conclusion to conclusion. That it indicated guilty passion could only be inferred by referring to the very evidence which it was adduced to support. The testimony should not have been admitted. It carried with it its own rational explanation consistent with the absence of any guilty passion.

59 Even if the evidence could be said to have some probative force sufficient to meet the requirements of logical relevance, the existence of a rational explanation consistent with innocence remained open. On the test established by

this Court in *Pfennig*, the evidence could not have been admitted. On any view, it was not sufficient for the trial judge to leave it to the jury to determine whether there was a rational explanation consistent with innocence in relation to that evidence.

Conclusion

60 For the above reasons there should be an extension of time, and a grant of special leave. The appeal should be allowed, the order of the Court of Appeal set aside and in lieu thereof it be ordered that the applicant's convictions be quashed, his sentence set aside and a new trial be had.

61 GUMMOW J. For the reasons given by Hayne J, there should be an extension of time, a grant of special leave and orders providing for the allowing of the appeal, the quashing of the convictions and for a new trial.

62 HAYNE J. Disputes about the admissibility of evidence in a criminal trial must almost always be decided quickly. Judges and counsel seek to make those decisions easier and more predictable by imposing systems of classification that divide evidence into various kinds. Usually the classes are identified by reference to categories of information rather than by reference to modes of reasoning[65]. Hence in decisions relating to the trial of sexual offences against children frequent reference will be found to classes of evidence identified as "relationship evidence" or evidence "of guilty passion" or the like.

63 The adoption of such classifications can, and in this case does, obscure the principles that are to be applied. The use of terms like "relationship evidence" invites reasoning which takes as its premise the name given to the supposed category of evidence and seeks to deduce the answer to a question of admissibility according to how apt the name of the class is to describe the evidence in question. And even if false reasoning of that kind is avoided, the adoption of some system of classifying evidence according to its subject matter may lead, as it has in this case, to asking whether there is a class of evidence called "relationship evidence" which does not have to meet the requirements of a separate rule identified either as the rule against similar fact evidence or the rule in *Pfennig v The Queen*[66]. To frame the relevant question in that way obscures the proper identification of applicable principle. It does that by diverting attention from what the evidence is said to demonstrate in the case at hand. That is, it diverts attention from *why* the evidence is relevant.

64 A person charged with crime stands trial for the offence charged, not for any other act or omission. Evidence that the accused has, or may have, done other discreditable – even criminal – acts is generally not admissible. In some cases proof that the accused had committed some other discreditable act or some other criminal offence would not bear rationally on whether the prosecution proved the accused's commission of the charged offence. In such a case it is readily evident that evidence of other discreditable conduct would be irrelevant at trial. And as Best wrote[67] in 1854:

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65 *D F Lyons Pty Ltd v Commonwealth Bank of Australia* (1991) 28 FCR 597 at 603 per Gummow J, referring to *Harriman v The Queen* (1989) 167 CLR 590 at 599 per Dawson J; [1989] HCA 50; Ligertwood, *Australian Evidence*, (1988) at 59.

66 (1995) 182 CLR 461; [1995] HCA 7.

67 Best, *A Treatise on the Principles of Evidence*, 2nd ed (1854) at 319 §245, quoted by Willes J in *Hollingham v Head* (1858) 4 CB (NS) 388 at 391-392 [140 ER 1135 at 1136].

> "Of all rules of evidence, the most universal and the most obvious is this – that the evidence adduced should be alike directed and confined to the matters which are in dispute, or form the subject of investigation. … *[A]nything which is neither directly nor indirectly relevant to those matters, ought at once to be put aside,* as beyond the jurisdiction of the tribunal, *as tending to distract its attention and to waste its time.*" (emphasis added)

65 But sometimes showing that the accused committed some discreditable act on an occasion other than that charged could bear rationally on whether the prosecution proved the accused's commission of the offence charged. The evidence could bear rationally on proof of guilt because it is evidence of a fact or circumstance which, if proved, points towards guilt. That is, it is circumstantial evidence[68] of guilt. The common law has long recognised, however, that the prejudicial effect of evidence of that kind can outweigh its probative value and has sought to fashion a rule of admissibility which meets that concern.

66 Writing in 1933, Julius Stone observed[69] of "evidence of facts similar to the main fact in issue" that:

> "First, the admission of such evidence presents the possibility of undue prejudice in an extreme form. Second, and somewhat paradoxically, the extreme likelihood of prejudice, which is a reason for its exclusion, is concomitant with a strong likelihood that the evidence tendered has real probative value and should be admitted."

Since the decision of the Privy Council in *Makin v Attorney-General for New South Wales*[70], the courts of Australia and England have often considered how the competition between these two ideas is to be resolved.

67 From time to time the decisions have been understood as providing a sufficient basis for stating a rule[71] by reference to a mode of reasoning (propensity reasoning) from which is carved out a series of exceptions classified by reference to subject matter, such as evidence that could be said to "rebut a defence or explanation fairly attributable to the accused" or to "show a system"

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

69 Stone, "The Rule of Exclusion of Similar Fact Evidence: England", (1933) 46 *Harvard Law Review* 954 at 954.

70 [1894] AC 57.

71 See, for example, Cross, *Evidence*, 3rd ed (1967) at 304-305, 308-321.

or to "go to identity". But as L H Hoffmann, later Lord Hoffmann, pointed out more than 35 years ago[72]:

> "The use of the categories was extremely confusing. In the first place, whatever Viscount Simon may have said[73], judges were understandably reluctant to admit similar fact evidence, however compelling it might be, which did not seem to be covered by precedent. Then the categories produced hideously metaphysical problems of definition. How many acts made a 'system'? When could the accused be said to have raised a defence of 'innocent association'? Must the accused have pleaded an alibi before there can be an 'issue of identity'? Much time and ingenuity were spent in debating these questions. Finally, the category approach suggested that once the case had been given the appropriate label, admissibility followed as of course."

68 This Court's decision in *Pfennig*, especially in the light of its earlier decisions in *Markby v The Queen*[74], *Sutton v The Queen*[75], *Hoch v The Queen*[76] and *Harriman v The Queen*[77] and the decision of the House of Lords in *R v Boardman*[78], *must* be read as recognising that the supposed categories of exception are derived from a more fundamental principle: that the evidence of other discreditable conduct of an accused is admissible only if the evidence has particular probative value (or "cogency" or "particular relevance" or "strength"). And *Pfennig* requires that this more fundamental principle be applied to determine whether evidence of an accused's other conduct may be admitted. That is, *Pfennig* decided[79] that other discreditable conduct by the accused is admissible – has sufficient probative value – *only* where the evidence, if accepted, bears no reasonable explanation other than the inculpation of the accused in the offence charged. This, not whether the evidence falls into some supposed category of subject matter, is the question for decision.

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72 Hoffmann, "Similar Facts after *Boardman*", (1975) 91 *Law Quarterly Review* 193 at 200.

73 In *Harris v Director of Public Prosecutions* [1952] AC 694 at 705.

74 (1978) 140 CLR 108; [1978] HCA 29.

75 (1984) 152 CLR 528 at 556-557, 564; [1984] HCA 5.

76 (1988) 165 CLR 292 at 294-295, 301-302; [1988] HCA 50.

77 (1989) 167 CLR 590.

78 [1975] AC 421 at 452-453, 458-459.

79 (1995) 182 CLR 461 at 481-482, 485, 506-507.

69 What was said in *Pfennig* depended upon the basic considerations that have been identified. Because that is so, neither the circumstances in which *Pfennig* is to be applied nor the proper application of the principles established in *Pfennig* can be understood without reference to these fundamental considerations.

70 Evidence that shows that the accused is a bad person, has committed other crimes, or has a "disposition" or "propensity" to commit crimes of the kind charged is generally not admissible. It is not admissible because it is not *sufficiently* relevant to – that is, of sufficient probative value in establishing – any issue being tried. The logical connection between demonstration that the accused is a bad person, has committed other crimes, or has a propensity or disposition to commit crimes of the type charged and the conclusion that the accused did commit the offence that is charged is judged to be too weak either to meet the test of relevance or to have sufficient probative value to justify its admission. And because the connection is weak the evidence may be misused. It may be misused by giving it undue weight; that is, its prejudicial value is greater than its probative value.

71 The common law recognised, long ago, the force of the proverb "give a dog an ill name, and hang him". Hence the basic rule relating to similar fact evidence that evidence of other discreditable conduct is not admissible if it shows *only* that the accused has a propensity or a disposition to commit crime or a crime of the kind charged[80]. But, as has been said, evidence of other discreditable conduct by an accused may have particular probative value or cogency. And *Pfennig* identifies that latter class of evidence as evidence which, if accepted, bears no reasonable explanation other than the inculpation of the accused in the offence charged.

72 How then are these principles to be applied at the trial of charges of sexual offences allegedly committed against a person with whom the accused was associated at relevant times because the accused and the complainant were related by blood, marriage or other family tie or because the accused was in a position of power or authority over the complainant?

73 In cases of this kind the accused will often be charged with offences that do not encompass all of the offending that the complainant would say has taken place. That is, there are other "uncharged" acts.

74 That a complainant can give evidence of other uncharged acts may present several different issues. First, the evidence of other uncharged acts, if accepted,

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80 *Pfennig* (1995) 182 CLR 461 at 480-481, 483.

could be understood to show that the accused had a sexual interest in the complainant to which the accused gave effect by action. Second, the evidence which the complainant would give about the acts which are the basis of the charges being tried may not easily be disentangled from evidence that the complainant would give of uncharged acts or other discreditable behaviour by the accused that are or is not the subject of a charge being tried. And even if evidence of charged and uncharged acts can be disentangled and separated, to have a complainant give evidence without reference to uncharged acts may make the account that is given of the acts that are charged artificial and implausible.

75 Two different questions are presented by such evidence. First, is the evidence admissible? Second, if it is admissible, how may the jury use the evidence? Neither question is answered satisfactorily by determining whether the evidence can be described as "relationship" evidence.

76 In *HML v The Queen*[81], this Court divided in opinion about the basis or bases upon which evidence of uncharged acts was admissible and how such evidence could be used by a jury. The Court also divided in opinion about whether the jury should be told not to act on evidence of other discreditable conduct by the accused unless satisfied beyond reasonable doubt that the accused had engaged in that conduct.

77 When a complainant gives evidence that the accused committed sexual offences against the complainant other than those which are the subject of the charges being tried, that evidence may aptly be described as evidence of the relationship that existed between the accused and the complainant; it may aptly be described as evidence that puts the complainant's evidence about the charged acts in its "proper context". But if the evidence is admitted it is admitted because, if accepted by the tribunal of fact, it bears no reasonable explanation other than the inculpation of the accused in the offence or offences charged. The evidence of uncharged acts bears no reasonable explanation other than inculpation because, if accepted, it shows that the accused had a sexual interest in the complainant *upon which the accused acted*.

78 To tell the jury that the evidence of uncharged acts shows the "relationship" between the accused and the complainant or "puts the complainant's evidence in context" or shows that the offending conduct "did not come out of the blue", or the like, may or may not constitute some permissible comment by the trial judge upon the evidence. But what is critical is that the judge tell the jury (a) that the jury may not act upon the evidence unless satisfied of it beyond reasonable doubt and (b) that, if accepted, the evidence shows that

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81 (2008) 235 CLR 334; [2008] HCA 16.

the accused had a sexual interest in the complainant on which, on other occasions, the accused had acted.

79 The evidence at issue in the present appeal was evidence which the prosecution said at trial could be understood by the jury as evidence of other discreditable conduct by the applicant. But the conduct described was discreditable to the applicant only if what the complainant's brother observed was not an innocent act but a sexual act. If the applicant was proved to have had a sexual interest in his daughter, on which he was willing to act, what the brother saw may have been a sexual act. But the brother's evidence, if accepted, was reasonably open to other – innocent – explanations. Indeed, the brother, in his evidence, proffered one such innocent explanation.

80 Because the evidence could reasonably bear an innocent explanation, it was not admissible. The applicant was not on trial for whether, on the occasion observed by the brother, he performed some act of indecency on or in respect of the complainant. The conclusion that the applicant had performed an act of indecency on that occasion could be reached only by concluding that he had committed one or other of the offences charged. Doubt about whether the charged offences were proved was not, and could not be, resolved by the brother's evidence. The brother's evidence could be taken to describe sexual conduct *only* if it was proved that the applicant had a sexual interest in his daughter on which he had acted. Yet the jury were told that they could use the brother's evidence not only to show the "relationship" between the applicant and the complainant but also to "evaluate and decide that the complainant's evidence is true".

81 Acceptance of the evidence given by the brother did not necessarily inculpate the applicant in the offences charged. The evidence was equivocal. And, for the reasons given by French CJ, the respondent's submission, advanced for the first time in this Court, that the brother's evidence was of an act that could constitute one of the three sexual acts founding the charge of maintaining a sexual relationship with the complainant, and was admissible on that basis, should not be accepted. The brother's evidence was not admissible.

82 I agree with the orders proposed by French CJ.

83 HEYDON J. The background facts and circumstances are set out in Bell J's reasons for judgment.

84 The applicant contends that one item of evidence was wrongly admitted. On that point the way the applicant's case was argued in this Court appears to have differed from the way it was argued in the Court of Appeal. In this Court, the applicant wavered between relying on irrelevance as a rule of exclusion and relying on the principle in *Pfennig v The Queen*[82] as a rule of exclusion. In these circumstances it is desirable to deal with both points, and with issues of discretionary exclusion as well. Thus there are three issues. The first is: was the evidence relevant? The second is: did *Pfennig v The Queen* have to be complied with, and was it complied with? The third is: did the prejudicial effect of the evidence require its exclusion?

Relevance

85 The evidence which the applicant says is inadmissible was given by the complainant's younger brother W. It concerned an incident which supposedly took place at a time when the complainant was 11 or 12 and he was approximately 10 or 11 while they were staying on their great uncle's farm with other children and adults. W's evidence is summarised in Bell J's reasons for judgment[83]. It is also analysed below[84].

86 *The applicant's primary relevance submission.* The following submission can be assembled from various elements of the argument advanced for the applicant. W's evidence was irrelevant because when taken by itself it was not capable of supporting a finding beyond reasonable doubt that the applicant committed an offence of a sexual nature. The bases of the submission were as follows. The evidence, being equivocal, was not by itself probative of the sexual act. The complainant did not recall any such incident. The sexual incidents of which the complainant testified were of a different character. W had offered to the police, and then offered in cross-examination an innocuous explanation for what had occurred which was rationally open on the facts. It rested on circularity in that it could only amount to evidence of guilty passion if the complainant's evidence regarding the events forming the subject of the charges was taken into account. Below this submission will be called "the applicant's primary relevance submission". Although the applicant objected to the tender of W's evidence, very

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82 (1995) 182 CLR 461; [1995] HCA 7.

83 At [186]-[189].

84 At [102]-[105].

little of the applicant's primary relevance submission was put to the trial judge before she ruled that W's evidence in chief was admissible.

87 If completely correct, some parts of the applicant's primary relevance submission would have profound implications for the law of evidence in its received understanding. There was no attempt to support it by reference to authority. The correctness of some parts of this submission need not be decided. Other parts of it are incorrect in principle.

88 *The applicant's primary relevance submission: parts whose correctness need not be decided.* Underlying the applicant's primary relevance submission there appeared to be various assumptions about items of testimony tendered by the prosecution in a criminal case. One was that an item of testimony tendered as similar fact evidence is irrelevant unless it is capable *by itself* of proving beyond reasonable doubt the fact to which the witness is to testify. Another was that any item of testimony is irrelevant unless it is capable *by itself* of proving beyond reasonable doubt the fact to which the witness is to testify. This case does not provide an appropriate occasion on which to examine these assumptions thoroughly, because the applicant must fail even if these assumptions are correct. But it should be said that both of the applicant's assumptions are questionable. For example, James Fitzjames Stephen appeared to contradict them in his much-approved definition of "relevant". He said[85]:

> "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." (emphasis added)

Speaking about the jury's role at the end of the trial, Wigmore remarked that the "measure of reasonable doubt need not be applied to the specific detailed facts, but only to the *whole issue*" (emphasis in original)[86]. In similar vein, speaking of the earlier stage when admissibility is ruled on, he also said[87]:

> "Admissibility signifies that the particular fact is relevant, and something more – that it has also satisfied all the auxiliary tests and extrinsic policies. Yet it does not signify that the particular fact has demonstrated or proved

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85 *A Digest of the Law of Evidence*, 4th ed (1893) at 2.

86 *Evidence in Trials at Common Law*, Chadbourn rev (1981), vol 9, ¶2497 at 412-413.

87 *Evidence in Trials at Common Law*, Tillers rev (1983), vol 1, ¶12 at 689 and 692-693 (one footnote omitted).

> the proposition to be proved, but merely that it is received by the tribunal for the purpose of being weighed with other evidence. …
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> Admissibility falls short of proof or demonstration. This is due partly to the circumstance that, in our system, the tribunal has traditionally been a divided one, so that the rule of law, uttered by the judge, merely declares what is sufficient to go to the jury and the jury ultimately decides upon the total effect that we call proof. But chiefly the distinction is due to the circumstance that each evidential fact is offered separately and the quality of complete demonstration could therefore never be expected of it. Since the production of evidence takes time, and since one piece of evidence must precede another, the rules of admissibility, if there are to be any at all, can have nothing to do with the inquiry of whether certain evidence effects complete proof."

And in *United States v Madera* the Fifth Circuit Court of Appeals said[88]: "Evidence need not be conclusive of a material issue in order to be admitted." There is also authority against the applicant's assumptions in this Court[89], and elsewhere in Australia[90].

89 It would be inconsistent with these approaches to require as a test for relevance a condition that there be a capacity to prove the fact asserted beyond reasonable doubt at the stage when the admissibility of an item of evidence is under consideration.

90 Further, a test of that kind appears inconsistent with the principle that an individual item of circumstantial evidence need not be established beyond reasonable doubt unless it is an indispensable intermediate step in the reasoning process towards an inference of guilt[91]. Why should a favourable decision on the relevance of evidence depend on its capacity to prove a fact asserted beyond reasonable doubt when a favourable decision as to its weight does not have to satisfy that standard?

91 In addition, where a submission of no case to answer is made, whether in civil or criminal proceedings, the court must ask whether the prosecution evidence or the plaintiff's evidence could be accepted by the jury as proof to the relevant standard assuming that the prosecution or plaintiff's evidence is believed

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88 574 F 2d 1320 at 1322 (5th Cir 1978) per Judges Goldberg, Ainsworth and Hill.

89 *Evans v The Queen* (2007) 235 CLR 521 at 568 [177]; [2007] HCA 59.

90 See also *Jones v Harris* [1946] SASR 98 at 104.

91 *Shepherd v The Queen* (1990) 170 CLR 573; [1990] HCA 56.

and left uncontradicted and unexplained[92]. When that question is asked, the interpretation of or inference from the evidence which is most favourable to the prosecution or the plaintiff is adopted[93]. To hold that an item of evidence tendered by the prosecution can only be relevant if the trial judge considers that it is capable of proving the facts it is tendered to prove beyond reasonable doubt, while perhaps not strictly inconsistent with these principles, would be in tension with them.

92 But it is not necessary to consider whether these two assumptions underlying the applicant's primary relevance submission are sound. This is because W's testimony, taken by itself, was capable of proving beyond reasonable doubt that the incident he narrated took place. Before turning to that proposition, it is necessary to deal with some parts of the applicant's primary relevance submission which are incorrect in principle.

93 *Is it material that the complainant did not remember the incident narrated by W and that W gave an innocent explanation of it in cross-examination?* The applicant's primary relevance submission was flawed so far as it relied on the fact that the complainant did not remember the incident to which W testified. It is also flawed so far as it relied on the fact that W gave an innocent explanation of the applicant's conduct to the police, which he repeated in cross-examination. These elements cannot affect the relevance of W's evidence in chief. It was actually not the applicant's preferred position that the farm incident was to be explained as innocent conduct. His case as put by his counsel in cross-examination of the complainant and as put in his own evidence was that the incident never happened. Indeed, he said that he would not have behaved in the way that W described if his daughter had been suffering from the effects of an ant bite or bee sting or thorns. But the question of an innocent explanation is immaterial for more fundamental reasons.

94 The admissibility of W's evidence in chief was the subject of a pre-trial ruling. If that had not taken place, admissibility would have been determined by a process in which counsel calling W asked a question, counsel for the applicant objected, and the trial judge made a ruling. A question can be permissible even though it may elicit inadmissible evidence, so long as it is capable of eliciting admissible evidence[94]. If the actual answer is or becomes irrelevant, it is usually

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92 *Jayasena v The Queen* [1970] AC 618 at 624.

93 *Bressington v Commissioner for Railways (NSW)* (1947) 75 CLR 339 at 353; [1947] HCA 47. See generally Glass, "The Insufficiency of Evidence to Raise a Case to Answer", (1981) 55 *Australian Law Journal* 842 at 845-846.

94 *Evans v The Queen* (2007) 235 CLR 521 at 562-563 [157].

ignored, though if necessary various formal techniques for dealing with irrelevant evidence which may be prejudicial can be employed. One of those techniques is striking out the evidence[95]. Another is telling the jury to ignore it[96]. A third is telling the jury to treat the case as if the evidence had not been given[97]. A fourth is discharging the jury[98].

95 In conducting the examination in chief of W, counsel for the prosecution did not elicit the innocent explanation which W gave to the police and to the applicant's partner, and which he was to give in cross-examination. In the circumstances of this case, there was no duty on counsel for the prosecution to do so. It was understandable that W gave that explanation to the police when he was 20 out of concern to protect his father, and understandable that he might repeat it in the witness box in cross-examination. But it was possible that he would not advance it in cross-examination. It was possible that he would not be asked the necessary questions in cross-examination. And it was possible that even if he were asked he would choose not to give the explanation he gave to the police.

96 A great deal of testimony in chief is later qualified, contradicted or even withdrawn under cross-examination. The possibility that these things may happen does not mean that it is wrong to admit that testimony in chief as relevant. For it is ultimately for the trier of fact to decide what to make of it. The trier of fact may accept the testimony in chief and reject the later qualifications, contradictions and withdrawals.

97 Several things could have happened to W's evidence in chief. The jury could have disbelieved it. Or the jury, with or without the aid of what W said in cross-examination, could have characterised the conduct he narrated innocently. Or the jury could have accepted the evidence in chief and not the evidence given in cross-examination. The possibility that evidence will be disbelieved cannot render it irrelevant, for all items of testimony are open to disbelief, and the process of deciding to disbelieve it often depends on taking into account all the evidence. A great deal of similar fact evidence tendered by the prosecution is denied by the accused, but the possibility that eventually it will be disbelieved does not prevent its reception as relevant. As W A N Wells said[99]:

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95 *Horne v Milne* (1881) 7 VLR (L) 296 at 300.

96 *Hannes v DPP (Cth) (No 2)* (2006) 165 A Crim R 151 at 217-218 [245]-[247].

97 *Peacock v The King* (1911) 13 CLR 619 at 643-644; [1911] HCA 66.

98 *Maric v The Queen* (1978) 52 ALJR 631 at 635; 20 ALR 513 at 521-522.

99 Stone, *Evidence: Its History and Policies*, Wells rev (1991) at 130.

> "[an] item of evidence whose relevance is in dispute may validly be held to be relevant notwithstanding that, upon an appraisal of the entire body of evidence in the case, it is found to carry no weight at all, and is discarded."

If so, provided that evidence is reasonably capable of being characterised as the tendering party desires, the possibility that evidence will in fact be innocently characterised by the jury cannot render it irrelevant either: for much evidence is capable of characterisation in several ways.

98 When testimony to establish similar fact evidence is tendered, it is common for argument to take place about admissibility on the assumption that the testimony is correct, even though it is plain that once the evidence is admitted the accused will either deny it or call evidence to establish an innocent explanation for it. Apart from the special area at common law to which *Hoch v The Queen*[100] relates, where there is a possibility of concoction, counsel who object to similar fact evidence do not do so on the ground that it is untrue.

99 In assessing questions of relevance in relation to admissibility, it is not for judges to speculate about possible constructions of the evidence which are adverse to the interests of the tendering party. It is necessary to assess relevance by taking the proposed evidence at the highest level it can reasonably be put at from the tendering party's point of view. It is not correct for judges in jury trials to assess the probative value of the evidence for themselves and reject it as irrelevant if they identify aspects of it which may make it unconvincing or not probative in the fashion which the tendering party alleges. The possibility or likelihood, even, that evidence is fabricated does not make it irrelevant. When it is said that judges in jury trials in determining the admissibility of evidence have regard to the weight of the evidence, what is meant is not that they determine for themselves whether it is to be or may be believed, but that they determine what weight it would have in the case as a whole if it were believed.

100 Hence factors which might affect the weight of evidence given in chief, perhaps preventing it from in the end proving beyond reasonable doubt the fact which it is tendered to prove, are not relevant to admissibility. It follows that the aspects of the applicant's primary relevance submission which concerned challenges to the truthfulness of the testimony – the complainant's non-recollection of the incident and the innocent explanation offered in cross-examination – do not affect its relevance. Those two matters were not

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100 (1988) 165 CLR 292 at 296, 300-301 and 305; [1988] HCA 50. This does not apply in Queensland: *Evidence Act* 1977 (Q), s 132A.

material to the relevance inquiry conducted by the trial judge, but only to the weight inquiry conducted by the jury.

101 *The applicant's primary relevance submission considered.* If one omits the two aspects of the applicant's primary relevance submission just discussed which are incorrect and assumes the correctness of the controversial parts of it referred to earlier[101], the applicant's position is as follows. Even if one took W's evidence at its highest, it was incapable of supporting a conclusion beyond reasonable doubt that the incident he narrated was sexual in nature. That submission must be rejected.

102 Counsel for the applicant submitted that evidence that a father was in the presence of his partially unclothed daughter was not by itself capable of demonstrating sexual interest beyond reasonable doubt. Perhaps not. But there was much more to W's testimony in chief than that. Counsel for the applicant called what W saw a "snapshot" of a "physical configuration of two people seen at a distance". Even if it was only a snapshot of that kind, it was a picture with background. The picture took significance from its background. This background was that it was originally anticipated that at the time when W saw the applicant and the complainant together, W would be with other members of the family while the complainant's great uncle gave them a tractor ride around his farm. W left the early stages of that excursion in order to retrieve his treasured pocket knife, which he wanted to take everywhere, from the campsite. It was open to the jury to conclude beyond reasonable doubt that what happened was that the applicant had assumed he would be alone with the complainant and believed he would not be interrupted. W saw his 11 or 12 year old sister, wearing nothing below the waist, bending over as if touching her toes six inches from her father's face while he had his hand on her waist.

103 What W saw, in those circumstances, was capable of giving rise to a jury conclusion, beyond reasonable doubt, that his father was participating in a sexual incident with the complainant, his daughter. The father was engaging in conduct with a child at or approaching puberty for which it is difficult to think of any other explanation. In assessing the admissibility of W's evidence in chief it was not proper to take into account the "bee sting" or "ant bite" explanations actually advanced in W's cross-examination, or the "bunch of prickles" or "thorn" explanations which the applicant canvassed in his cross-examination. Even if it was proper to take these explanations into account as theoretical possibilities in assessing the admissibility of the evidence in chief, they are very unconvincing. When bees and ants bite human flesh or thorns penetrate it, the victim experiences a sensation of localised pain. This would have required no examination of the whole of the complainant's naked anatomy below the waist.

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101 See above at [88]-[92].

Hence the "explanations" do not explain why the whole of the complainant's clothing below the waist was removed. Nor do they explain why she was bending over as if touching her toes. Nor do they explain why the applicant was touching the waist of his half-naked daughter. The applicant's primary relevance submission contended that what W saw was different in character from the alleged acts forming the subject of the charges. However, it was open to the trial judge to conclude that a jury could reasonably infer that what W saw was conduct preliminary to the type of conduct charged in counts 6, 8, 10 and 12. And even if there were differences between the incident W witnessed and the alleged incidents underlying the charges against the applicant, the conduct suggested that the applicant was revealing a sexual passion for the complainant.

104 In all the circumstances, W's evidence in chief was not incomplete or equivocal. If the jury believed that evidence, it had the capacity, taken by itself, of supporting a finding beyond reasonable doubt that the applicant had either committed an offence of a sexual nature, or carried out other conduct, revealing his sexual passion for the complainant. In particular, that capacity existed without it being necessary to have recourse to the alleged incidents underlying the charges against the applicant or any other similar fact evidence.

105 Thus the evidence was relevant, as tending to establish a motive to commit the crimes charged, namely sexual passion.

The application of *Pfennig v The Queen*

106 The test in *Pfennig v The Queen*[102] for the reception of similar fact evidence was not considered in the courts below. Counsel for the applicant directed considerable energy to contending that W's evidence could not be admitted unless it passed that test. That contention is correct. But W's evidence did pass that test.

107 *Pfennig v The Queen* held that 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, the similar fact evidence will be inadmissible unless there is no view of it, viewed in the context of the prosecution case, consistent with the innocence of the accused[103].

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102 (1995) 182 CLR 461.

103 *Pfennig v The Queen* (1995) 182 CLR 461 at 485; *Phillips v The Queen* (2006) 225 CLR 303 at 323-324 [63]; [2006] HCA 4; *HML v The Queen* (2008) 235 CLR 334 at 428-430 [283]-[285]; [2008] HCA 16; *Roach v The Queen* (2011) 242 CLR 610 at 627 [53]; [2011] HCA 12.

108 The evidence against the applicant was largely given by the complainant. She gave evidence to support the 12 charges. The complainant's evidence was capable of proving the charges beyond reasonable doubt. It is necessary to assume, however, that it did not do so. On the assumption that W's evidence was accepted as true, that evidence, on no reasonable view, in the context of the prosecution case, was consistent with the applicant's innocence on the charges. Hence it was admissible.

109 The applicant submitted that the *Pfennig* test required the trial judge "to proceed on the basis that W's evidence – and that must mean all of it, including under cross examination – would be accepted as true". This submission is incorrect. The question is whether the evidence the prosecution tendered is admissible. That was W's evidence in chief. It was that evidence which the *Pfennig* test required to be accepted as true. Once it was admitted, it remained before the jury whatever W said in cross-examination, unless some application was made to remove it from the jury by one of the techniques referred to above[104]. As noted earlier, there was no application. It would have had no prospects of success. There was no contention to this Court that the trial judge erred in not removing W's evidence from the jury either.

110 The applicant also submitted of W's evidence:

> "if the evidence is accepted, it left in the very words of the witness whose testimony supplies the evidence, an innocent explanation. Thus it could not be, so to speak, the clincher. It could not, combined with the rest of the prosecution case on the assumptions that this court has sought to explicate in *Phillips* and *HML*, leave the position as being no possibility other than guilt of the charged offences."

This submission, too, is incorrect. The *Pfennig* test determines the admissibility of what the prosecution tendered, and that is unaffected by qualifications in cross-examination.

Discretion

111 It would appear to follow from the brief treatment of the admissibility issue in the Court of Appeal that the applicant relied on discretionary exclusion. In this Court s 130 of the *Evidence Act* 1977 (Q), which provides that nothing in the 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, was not relied on. Should W's evidence, however, have been excluded on the ground that its prejudicial effect exceeded its probative

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104 See above at [94].

value? It is highly questionable whether there is any room for the operation of this exclusionary discretion where the *Pfennig* requirement has been satisfied by the prosecution. The strictness of that requirement leaves little room for a tender which satisfies it to fail the test for discretionary exclusion. In *Pfennig v The Queen* itself, the majority said that only if the *Pfennig* test was satisfied could "one safely conclude that the probative force of the evidence outweighs its prejudicial effect."[105] Thus the functional role of the discretionary exclusion test is subsumed into the *Pfennig* test.

112 In any event, for the reasons already given, the probative value of W's evidence in chief was high. It had no prejudicial effect beyond that probative value. As Hunt CJ at CL has explained[106]:

> "The power of the trial judge to exclude evidence in accordance with the … discretion does not permit the judge, in assessing what its probative value is, to determine whether the jury should or should not accept the evidence of the witness upon which the Crown case depends. The trial judge can only exclude the evidence of such a witness where, taken at its highest, its probative value is outweighed by its prejudicial effect".

On observing the applicant and the complainant together, W turned around and sought to rejoin the group being given a tractor ride by his great uncle, without completing his mission of retrieving his pocket knife. This does not suggest that at the time he thought the conduct was innocent. As Bell J has pointed out, it is to be inferred from W's conduct that he instinctively understood that he was witnessing something that was not intended for his eyes[107]. Further, if the complainant had actually been stung by an insect or injured by a plant in a manner requiring intimate assistance by her father, it is doubtful that either would have forgotten so unusual an event. In any event, W's subsequent watering down of his testimony in cross-examination by offering an innocent explanation of the applicant's conduct was immaterial to the reception of his testimony in chief. It might have been material to an application at the trial after the cross-examination for the evidence in chief to be removed from the jury's consideration. But as already noted there was no application of that kind. And there was no contention in this Court that the trial judge erred in not removing it from the consideration of the jury.

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105 (1995) 182 CLR 461 at 483 per Mason CJ, Deane and Dawson JJ.

106 *R v Carusi* (1997) 92 A Crim R 52 at 66 (Newman and Ireland JJ concurring).

107 See below at [198].

Order

113 The application for special leave was brought over three years out of time. It is not necessary to consider the merits of the applicant's arguments in support of an extension of time within which to file his special leave application in view of what has been said about its substantive merits. The application for special leave to appeal should be granted but the appeal should be dismissed.

114 CRENNAN AND KIEFEL JJ. BBH applies for special leave to appeal from the order of the Court of Appeal of the Supreme Court of Queensland dismissing his appeal from conviction on 19 October 2007[108]. The applicant's delay in filing his application for special leave is explained by him and other witnesses in affidavits filed in support of an extension of time for his application for special leave to appeal. The question sought to be raised on appeal concerns whether certain evidence was wrongly admitted in proof of the applicant's propensity to commit the offences charged.

The trial and the evidence

115 In the District Court of Queensland on 17 May 2007, the applicant was convicted by a jury of one count of maintaining an unlawful sexual relationship with a child under 16 years of age ("the maintaining offence")[109] who was his daughter ("the complainant") and in his care; four counts of indecent dealing with a child under the age of 16[110] who was his daughter and in his care; and four counts of sodomy of a person under 18 years of age[111], who was his daughter. He was sentenced to 10 years' imprisonment on each count, to be served concurrently. He was found not guilty of two counts of indecent dealing and one count of procuring a child under 16 years of age to commit an indecent act.

116 The complainant was born in July 1983. She gave evidence of offences of a sexual nature which she alleged were perpetrated upon her by the applicant from a time before she was four years of age and which continued until she was 15. The charge of maintaining an unlawful relationship of a sexual nature with a child relates to the period from July 1989 to March 1999. Her parents separated in 1995 and divorced in 1996. The complainant lived with her mother for approximately 18 months following the divorce, but then returned with her two brothers to live with the applicant. She left the applicant's residence in 1999

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108 *R v BBH* [2007] QCA 348.

109 *Criminal Code* (Q), s 229B(1). The provision was amended by the *Criminal Law Amendment Act* 1997 (Q), s 33, during the period to which the charge relates. It has been amended subsequent to the period to which the charge relates. However, those amendments are not presently material. References to s 229B in these reasons are to that provision as in force prior to the amendments.

110 *Criminal Code*, ss 210(1)(a) and 210(4) (as the provision stood at the time of the offences).

111 *Criminal Code*, ss 208(1)(a) and 208(2) (as the provision stood at the time of the offences).

and returned to her mother's for a short period, before moving on to live elsewhere.

117 The complainant gave evidence that the first occasion of sexual abuse occurred between July 1987 and July 1988, when the applicant digitally penetrated her vagina. She said that, from that time, the applicant abused her "[s]ometimes every couple of days, sometimes every couple of weeks or months." The initial method of abuse, by digital penetration of her vagina, was said to have continued throughout the period in which the abuse is alleged to have occurred. The complainant also alleged that, at a later point in time, the applicant began sodomising her. The applicant denied the charges.

118 After three incidents in early 1999 which involved both methods of abuse, the complainant left the applicant's home and returned to her mother. She said that after the third such incident she said to the applicant, "That's it. No more", and that he kept asking "why he couldn't be my boyfriend and why we couldn't continue".

119 The complainant conveyed allegations of sexual abuse to others. She wrote to her former boyfriend in 2000, when she was in grade 12 at high school, in terms suggesting experiences of sexual abuse from a young age. She wrote that: "he [the applicant] had done it from such a young age. … I didn't know how to stop it" and said repeatedly that she was not "strong enough" to stop "it". The "it" she refers to would seem from the context to refer to the sexual abuse. She told staff at a hospital, when she was about to undergo surgery on her cervix, that her father had sexually abused her. The complainant's general practitioner, who had diagnosed the complainant as suffering from depression, gave evidence that she received a letter from the complainant containing allegations of sexual abuse by the applicant in which the complainant said, relevantly, that the sexual abuse continued until she was 15, that she had been scared of the applicant and that she could not stop the abuse. The letter was sent some time between March 2000 and October 2001. In 2004 the complainant's mother also received a letter from the complainant containing similar allegations.

120 The complainant's mother gave evidence at trial that she had observed the applicant stroking the complainant's upper thigh when the complainant was a young child. She also said that, on some mornings, the applicant would call the children into the bedroom at a time when she and the applicant were having sexual intercourse and he would encourage them to cuddle their mother. She said the applicant told her that on occasions when he cuddled the complainant and she was lying on top of him, he would have an erection. No objection was taken to this or any other aspect of the mother's evidence.

121 The mother also gave evidence that in 1992 she became concerned about the behaviour of the complainant and the complainant's brother, W. At her

request, officers of the Family Services Department visited their residence and interviewed the children. The mother said that the applicant was very angry about this and threatened to kill whoever had "dobbed him in". The complainant also gave evidence in which she recalled being interviewed and said that the applicant told her not to say anything about what had happened between them and that accordingly she did not.

122 The evidence presently in question is that which was given by the complainant's brother, W. He testified to an incident which he observed some time after his parents had separated. The complainant would have therefore been about 12 and W would have been about 11 years of age. W said that the applicant and the children were holidaying in a caravan on a rural property owned by the complainant's great uncle. The applicant and the complainant had been left alone at the campsite by the others. W returned to retrieve his pocket knife and found his sister at the back of the caravan. She was bent over as if touching her toes and was about six inches away from the applicant. The applicant was sitting down. The complainant was clothed only in a shirt and was undressed from the waist down. The applicant was fully clothed. The applicant's hand was on the complainant's waist and his face was close to her bottom.

123 The complainant did not give evidence of the incident recounted by W. She did give evidence of abuse, in the nature of acts of sodomy or digital penetration of her vagina, occurring whilst the family were camping at her great uncle's farm. She did not recall an incident of abuse which occurred whilst she was standing or bending over. The applicant denied that it occurred.

124 In cross-examination, W agreed that he saw "nothing untoward" in the incident and, for that reason, had not mentioned it to a social worker who interviewed him in connection with the Family Court proceedings between his parents. He said he filled out the statement to the police about the incident, but before signing it he telephoned his father. It does not appear that he spoke to his father but he did speak to his father's partner. During that conversation he suggested that his father might have been looking for a bee sting or an ant bite. W also confirmed, in answer to a question from the trial judge during cross-examination, that the event occurred as he had described it in his evidence.

125 The evidence of W was ruled admissible by the trial judge (Dick DCJ) over the objection of counsel for the applicant. The objection was as to relevance – that the evidence of W did not relate to an offence charged. The prosecution identified the purpose of the evidence as twofold: first, as showing an indecent act; and, second, as evidence of "guilty passion", which is also sometimes

referred to as evidence of "sexual interest"[112]. The ruling was made after the complainant had given her evidence.

126 In the course of her ruling, her Honour said that she did not consider the fact that the complainant had not given evidence of the incident to be decisive. She considered that the jury might accept the brother's evidence and that the complainant had forgotten the incident. The complainant had said that events of a sexual nature happened on very many occasions since she was a very young child. Her Honour ruled the evidence to be admissible on the basis that its probative value was that it "goes to show" a guilty passion (or sexual interest) by the applicant towards the complainant. Her Honour noted that such evidence is regularly admitted in cases of this kind.

127 In her summing up, her Honour explained to the jury that the complainant's evidence of other, uncharged, acts was relevant to the true nature of the relationship between the applicant and the complainant, thereby putting the charges in their proper context. Her Honour explained that the evidence of the uncharged acts had that limited purpose.

128 Her Honour then directed the jury in relation to the evidence of W and the mother and the place of this evidence in the prosecution case. Her Honour said that the evidence of W and the mother had been called by the prosecution as evidence of the relationship between the complainant and the applicant and as part of the background against which evidence of the applicant's conduct fell to be evaluated. Her Honour went on:

> "Put another way, they say it's evidence capable of establishing the guilty passion or the sexual interest by the accused in the complainant, or by proving an unnatural or unexpected relationship of sexual intimacy between the father and the daughter."

Her Honour told the jury that before the evidence of W or the mother could be used they must be satisfied that it is honest and reliable evidence; that it shows a sexual interest, an unnatural interest, by the applicant in the complainant; and that it does not have an innocent explanation. Her Honour advised the jury that the incidents described were not themselves charges, but that the prosecution

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112 See, for example, *HML v The Queen* (2008) 235 CLR 334 at 353 [8], 358 [26] per Gleeson CJ, 376 [76] per Kirby J, 382 [103], 383 [109], 384 [111], 390 [132], 395 [155]-[158], 399-400 [171]-[175], 416 [244] per Hayne J, 453 [340] per Heydon J, 473 [405], 478 [426], 480 [436], 488-489 [470] per Crennan J, 494 [493], 500 [506], 502 [512], 503 [515] per Kiefel J; [2008] HCA 16.

claimed that the relationship demonstrated by the incidents may assist the jury in their evaluation of whether the complainant's evidence was true.

The appeal

129 In the Court of Appeal, Keane JA, with whom Holmes JA and Lyons J agreed, held that W's evidence was relevant, as was the mother's evidence of the way in which the applicant treated the complainant and her evidence of uncharged acts of sexual abuse, because it was apt to render more intelligible and credible allegations which otherwise might be seen to be unintelligible and incredible in terms of the usual relationship between father and daughter[113]. His Honour said that W's evidence was also relevant "because it tended to establish the maintaining offence, in that it revealed a sexual relationship between the [applicant] and the complainant."[114] His Honour observed that the jury were given a clear direction to consider whether there was an innocent explanation for what W saw. His Honour added that "[t]he suggestion that the [applicant] was looking for an ant bite or bee sting might well have been thought to strain credulity too far."[115]

The test in *Pfennig*

130 The argument for the applicant on his application for special leave focuses upon the probative quality of the evidence of W, standing alone. The argument draws upon what was said in *Pfennig v The Queen*[116] and in *Phillips v The Queen*[117] and *HML v The Queen*[118], as to the particular probative quality that evidence of propensity must have for it to be admissible.

131 The test in *Pfennig* operates to exclude otherwise relevant evidence. It applies to evidence of the accused's propensity. In *Roach v The Queen*[119], the test

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113 *R v BBH* [2007] QCA 348 at [40].

114 *R v BBH* [2007] QCA 348 at [41].

115 *R v BBH* [2007] QCA 348 at [41].

116 (1995) 182 CLR 461; [1995] HCA 7.

117 (2006) 225 CLR 303; [2006] HCA 4.

118 (2008) 235 CLR 334.

119 (2011) 242 CLR 610 at 622 [35]; see also at 627 [53] per Heydon J; [2011] HCA 12.

in *Pfennig* was said to proceed upon the basis that the propensity evidence in question was a necessary step in reasoning to guilt, and to require a trial judge:

> "when determining whether the evidence of propensity is to be admitted before the jury, to 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[120]."

To this statement it is necessary to add that the test in *Pfennig* is applied by a trial judge upon certain assumptions, namely, that the propensity or similar fact evidence is true and that the prosecution case, as revealed in evidence already given at trial or depositions of witnesses later to be called, may be accepted by the jury[121].

132 The rationale for the test in *Pfennig* is the concern that evidence which demonstrates an accused's propensity might be used by a jury to reason to guilt in circumstances where the evidence is of little real probative force. Because such evidence, of its nature, is highly prejudicial, *Pfennig* requires that the evidence have sufficiently strong probative force to make it just to admit the evidence despite its prejudicial effect.

133 The test in *Pfennig* was intended as a rule of general application to avoid the danger of causing unfair prejudice to an accused in the case of similar fact or propensity evidence. Its application is perhaps more readily apparent from the prosecution case in *Pfennig*, which was entirely circumstantial, and the evidence in question, the evidence of "H", which was crucial to a conclusion of guilt[122]. H's evidence showed the appellant's propensity to abduct and sexually interfere with young boys, and was used to identify the appellant, who was in the area where the boy who was presumed to be murdered had disappeared[123]. The test in *Pfennig* may be thought not to apply so readily to many other cases, particularly cases involving a long history of alleged sexual abuse where the prosecution case is principally, if not solely, founded upon the evidence of the complainant.

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

121 *Phillips v The Queen* (2006) 225 CLR 303 at 323 [63].

122 *Pfennig v The Queen* (1995) 182 CLR 461 at 465, 488.

123 *Pfennig v The Queen* (1995) 182 CLR 461 at 487, 489.

134 The *Pfennig* test has not been universally accepted. It has been the subject of statutory abolition in every State and Territory of Australia except Queensland, South Australia and the Northern Territory[124]. For those States and that Territory, at least, the test continues to apply in its proper sphere of operation. No challenge is made to the correctness of *Pfennig* in this case. None was made in *Phillips* nor in *HML*. In *Phillips*, the Court stated that "[n]othing said in these reasons should be understood as indicating any view about whether it is necessary, or would be desirable, to revisit what is said by this Court in *Pfennig v The Queen*."[125]

135 No submission was made at trial or in argument in the Court of Appeal that the test propounded in *Pfennig* should be applied to the evidence of W (or to the evidence of the mother). Nevertheless, the applicant now submits that it was incumbent upon the courts below to apply it to the evidence of W.

The applicant's argument and the questions arising

136 The applicant's argument proceeds upon the basis that evidence of sexual interest may be used as propensity evidence and attracts the test in *Pfennig*. There is support for this latter proposition in what was said in *HML*. In *HML*, Gleeson CJ considered that, when evidence of sexual interest is to be used as evidence of motive for conduct of the kind alleged in the charge and therefore propensity for such conduct, *Pfennig* will be engaged[126]. Hayne J considered the *Pfennig* test would apply to evidence which is alleged to demonstrate an accused's sexual interest[127].

137 In *HML*, the complainant gave evidence of sexual acts by the accused which were not the subject of charges. She also gave evidence of other conduct, such as the accused filming her and purchasing particular items of underwear for her. The latter evidence, of acts which were not sexual acts, might be thought to be relevant to show the accused's sexual interest in the complainant. However, it was bound up with the complainant's evidence of the uncharged sexual acts. For the most part, attention was not directed in the reasons to the complainant's

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124 As observed in *Roach v The Queen* (2011) 242 CLR 610 at 627-628 [56] per Heydon J.

125 *Phillips v The Queen* (2006) 225 CLR 303 at 323 [61].

126 *HML v The Queen* (2008) 235 CLR 334 at 358 [26].

127 *HML v The Queen* (2008) 235 CLR 334 at 384 [111]-[112], 399-400 [171]-[176] per Hayne J. See also at 362 [41] and 370 [59], where Gummow and Kirby JJ, respectively, agreed with Hayne J in this respect.

evidence of the filming and purchase of underwear to determine whether that conduct, viewed individually or together, was sufficient to demonstrate sexual interest and, if so, whether the test in *Pfennig* applied[128].

138 The principal question in *HML* concerned the relevance of the complainant's evidence of the uncharged acts and the other conduct, and the purpose for which that evidence could be tendered. The application of the test in *Pfennig* was a subsidiary question. Argument in *HML* was directed to whether the complainant's evidence was relevant as what is called, in a shorthand way, "relationship evidence", or as evidence of the accused's sexual interest in the complainant.

139 On the question as to its relevance as "relationship evidence", no majority view emerged in *HML*. Since *HML*, questions concerning the purposes for which such evidence might be tendered and whether the test in *Pfennig* applies to evidence tendered for those purposes were considered in *Roach*. In that case the evidence was of uncharged acts of violence. Further reference will be made to *Roach* later in these reasons in connection with the respondent's argument which relies upon the evidence of W as evidence of the kind there mentioned.

140 In *HML*, a majority of the Court did not hold that the only basis for the admission of the evidence in question was to show sexual interest. The assumption upon which the applicant's argument is founded, that evidence of sexual interest is evidence of propensity and attracts the test in *Pfennig*, therefore raises questions which *HML* did not resolve.

141 The applicant's case also raises a further question about the application of the test in *Pfennig*. The question is whether the test applies to each piece of evidence in a circumstantial case, evidence which is said to be some evidence of sexual interest, but which is not itself sufficient to demonstrate that fact. There can be no doubt that the test in *Pfennig* applies to a piece of evidence which itself has the quality of propensity evidence. The applicant's argument, however, denies that the evidence of W is sufficient to demonstrate propensity and therefore denies that it has that quality. Yet the test in *Pfennig* is said to apply. The applicant's argument may therefore be thought to involve a contradiction.

142 If the test in *Pfennig* applies to each piece of evidence regardless of its probative value as to the fact of propensity (as distinct from its probative value as propensity evidence), the result would appear to be that the approach to

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128 But see *HML v The Queen* (2008) 235 CLR 334 at 399-400 [172]-[176] per Hayne J.

circumstantial evidence referred to in *Shepherd v The Queen*[129] would not be available. The application of the *Pfennig* test would render inadmissible evidence of any act which did not itself demonstrate propensity. It would not be possible to add a piece of evidence to another and draw an inference as to the fact of the existence of an accused's sexual interest in a complainant. The applicant's argument would appear to identify the evidence of W as evidence of this kind.

The respondent's argument as to relevance

143 The respondent submits that the evidence of W was not evidence of a kind to which the *Pfennig* test applied. It is submitted that the evidence of W was relevant and admissible: to prove the maintaining offence under s 229B(1) of the *Criminal Code* (Q); to explain the nature of the relationship between the applicant and the complainant, so that the jury could evaluate the complainant's evidence; and because it was capable of supporting part of the complainant's evidence.

144 The maintaining offence is stated in s 229B(1) as that of maintaining an unlawful relationship of a sexual nature with a child under the age of 16 years. Sub-section (1A) of that section[130] contains certain requirements for a person to be convicted of that offence. The principal requirement is that the person charged has done an act, during the period in which it is alleged that the offender maintained the relationship with the child, which is defined as constituting an offence of a sexual nature, on three or more occasions. Evidence of the doing of such an act is admissible and probative of the nature of the relationship, notwithstanding that the evidence does not disclose the dates or the exact circumstances of the occasions.

145 The maintaining offence under s 229B(1) is not one of a general course of sexual misconduct. It was explained by this Court in *KBT v The Queen*[131] that the actus reus of the offence is as specified in sub-s (1A). The evidence of W might have been relied upon as evidence of an indecent assault[132], but it was not.

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129 (1990) 170 CLR 573; [1990] HCA 56.

130 During the period to which the charge relates, this sub-section was renumbered to sub-s (2): see *Criminal Law Amendment Act* 1997, s 33(12).

131 (1997) 191 CLR 417 at 422; [1997] HCA 54.

132 See *Criminal Code*, s 337(1)(a), as in force at the time of the maintaining offence, read with the definition of assault in s 245 of the *Criminal Code*. By s 58(1) of the *Criminal Law Amendment Act* 1997 this offence was re-named "sexual assault"

(Footnote continues on next page)

The prosecution case was not conducted on the basis that the evidence of W was relevant to proof of one of the three offences required to be shown in respect of the offence charged under s 229B. Her Honour the trial judge did not rule the evidence to be admissible upon that basis and it was not put to the jury as relevant in that way. It was admitted as relevant to, and as going some way towards, showing a sexual interest on the part of the applicant towards the complainant.

146 The respondent's reliance upon the evidence of W as relevant to the relationship between the applicant and the complainant, and as assisting in the evaluation of her evidence, directs attention to what was said in *Roach* concerning evidence of that kind.

147 In *Roach*, reference was made in the joint reasons to the nature of the evidence in question in *Pfennig*, propensity evidence, and to its use as such. It was observed that in *Pfennig* such evidence was regarded as a step necessary in the prosecution case to a conclusion of guilt[133]. The joint reasons accepted the distinction which had been drawn by Gleeson CJ in *HML* concerning *Pfennig*[134], between the use of evidence which incidentally shows propensity and evidence of propensity which is used in proof of guilt[135]. In *Roach*, the appellant had been convicted of an act of violence towards the complainant. On appeal, this Court rejected an argument that evidence of the relationship between the appellant and the complainant, which had been punctuated by acts of violence by the appellant, was necessarily evidence of propensity[136].

148 The test in *Pfennig* was held in *Roach* not to apply to evidence of the relationship between the appellant and the complainant which included uncharged acts. That evidence was considered to be relevant for another purpose, of rendering explicable the complainant's evidence[137]. The relationship evidence, the Court observed, was tendered so that the complainant could give a full account and so that her evidence of the appellant's conduct on the day of the

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though the substantive terms of the offence remain. The offence is now contained in s 352(1)(a). See *R v Jones* [2011] QCA 19 at [20].

133 *Roach v The Queen* (2011) 242 CLR 610 at 622 [35].

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

135 *Roach v The Queen* (2011) 242 CLR 610 at 623-624 [41].

136 *Roach v The Queen* (2011) 242 CLR 610 at 624-625 [42]-[45].

137 *Roach v The Queen* (2011) 242 CLR 610 at 624 [42], 625 [45].

offence would not appear "out of the blue" and inexplicable on that account[138]. It allowed the prosecution, and the complainant, to meet a question which would naturally arise in the minds of the jury[139].

149 It could not be said in this case that the evidence of W, or that of the mother, was necessary to better explain the complainant's account of what occurred for the reasons referred to in *Roach*. The evidence of W may be contrasted with the complainant's own evidence of uncharged acts, which was directed to better explaining the complainant's evidence and was capable of meeting questions which may have arisen in the minds of the jury about the incident charged had she not been permitted to recount the history of the relationship and events occurring within it.

150 The respondent suggested that the evidence could be said to anticipate a question, in the minds of the jury, as to whether members of the family had observed any untoward conduct in the period in question. This submission placed undue reliance upon this basis for admissibility. This basis applies only to evidence relevant to meet questions which might be taken naturally to arise in the minds of the jury[140] and which, if left unanswered, may be expected to reflect adversely, and unfairly, upon a complainant.

151 It could not reasonably be said that the jury's approach to the complainant's evidence might be affected by the omission of evidence from family members. The members of the jury are not likely to have assumed that some such observations would have been made by family members, given the secret nature of such offences. If a member of the jury did momentarily wonder whether a family member might have observed something, over the period in question, the answer would be provided when no such evidence was called. That person is not likely to have drawn an inference adverse to the complainant on that basis.

152 The evidence of W was relevant, not to put the evidence of the complainant in perspective or to assist in explaining aspects of it, but to add to the prosecution case and support the complainant's evidence in a particular way. Its relevance was as evidence of the applicant's sexual interest in the complainant

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138 *Roach v The Queen* (2011) 242 CLR 610 at 624 [42], 625 [45].

139 *Roach v The Queen* (2011) 242 CLR 610 at 624 [42].

140 *Roach v The Queen* (2011) 242 CLR 610 at 624 [42]; *HML v The Queen* (2008) 235 CLR 334 at 497 [499]-[500], 502 [513] per Kiefel J.

or as evidence of the engagement of the applicant in an act similar to the offences charged. In either event, it was relevant to show the applicant's propensity.

The application of *Pfennig*

153 It should be accepted, in cases of this kind, that a finding of a sexual interest held by an accused father towards his daughter is evidence of the accused's motive or propensity to engage in sexual acts with the daughter, and that it might be employed by a jury in propensity reasoning towards guilt. In a case such as this little, if any, distinction may be drawn between motive and propensity. Where sexual interest is demonstrated, the test in *Pfennig* is therefore attracted.

154 The question, then, is how the test stated in *Pfennig*, and referred to in *Roach*, is to be applied. How is the enquiry as to "whether there is a rational view of the [circumstantial] evidence that is consistent with the innocence of the accused"[141] to be addressed?

155 It is important to bear in mind that evidence demonstrating a sexual interest on the part of an accused in a complainant is not to be viewed in isolation. It was said in *Pfennig*[142], and confirmed in *Roach*[143], that propensity evidence must be viewed in the context of the prosecution case. In that process the prosecution case and the propensity evidence must be taken as accepted by the jury[144]. Hodgson JA in *WRC*[145] pointed out that an approach which viewed propensity evidence in isolation would be quite inconsistent with the correct approach to a consideration of circumstantial evidence, as explained in *Shepherd*.

156 In *WRC*, Hodgson JA also said that the test in *Pfennig* does not mean that a judge looks at all the prosecution evidence, including the propensity evidence, and admits the latter only if there is no reasonable view of it consistent with innocence. Such an approach would not take account of the need for the

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141 *Pfennig v The Queen* (1995) 182 CLR 461 at 483. Footnote omitted from quote.

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

143 *Roach v The Queen* (2011) 242 CLR 610 at 622 [35] per French CJ, Hayne, Crennan and Kiefel JJ, 627 [53] per Heydon J.

144 *Phillips v The Queen* (2006) 225 CLR 303 at 323-324 [63].

145 (2002) 130 A Crim R 89 at 101-102 [27]. Kirby J agreed with Hodgson JA with respect to the propensity evidence issue but differed on another issue not here relevant (at 133 [124]).

propensity evidence to have special probative force[146]. It would also deny that the evidence is to be used as a step in reasoning towards guilt. So much is plain from what was said in *Pfennig* and in *Roach*. In cases of the kind presently under consideration, such an approach might also be thought to involve a risk of circularity of reasoning.

157 The approach to the *Pfennig* test suggested by Hodgson JA in *WRC*[147] was referred to with approval by Gleeson CJ and Heydon J in *HML*[148]. It requires the assumption that all the other evidence in the prosecution case, although accepted by the jury, leaves the jury with a reasonable doubt about the guilt of the accused. The propensity evidence must be such that, when considered with the other prosecution evidence, there will then be no reasonable view of it consistent with the innocence of the accused. As Hodgson JA further explained[149]:

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

158 In the present case the complainant gave evidence of a history of sexual abuse by the applicant in the nature of digital penetration of her vagina and acts of sodomy. If the jury believed her, that would seem to suffice for conviction. It is difficult to imagine that, in that circumstance, a doubt could be entertained. But assuming, for present purposes, that some such doubt was present in the minds of the jury about what had occurred, the evidence of W must surely resolve it.

159 The probative force of W's evidence arises in part because of the similarity between the event observed by him and the acts of which the complainant complained. It was the coincidence of both the complainant and W independently giving evidence of such events which gave the evidence its special probative force. There could be no suggestion of collusion between the

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146 *WRC* (2002) 130 A Crim R 89 at 102 [28].

147 (2002) 130 A Crim R 89 at 102 [29]; albeit in the context of the application of ss 97, 98 and 101 of the *Evidence Act* 1995 (NSW), about which no opinion is here expressed.

148 See *HML v The Queen* (2008) 235 CLR 334 at 359 [27] per Gleeson CJ, 429-430 [285] per Heydon J.

149 *WRC* (2002) 130 A Crim R 89 at 102 [29].

complainant and W concerning the evidence – either in fact or at law[150]. Here the evidence was truly independent. The complainant did not recall the incident recounted by W, and W sought to find an innocent explanation for what he had seen. The observations of Hodgson JA in *WRC*, although addressed to the probative force of coincidence evidence for the purposes of the *Evidence Act* 1995 (NSW)[151], are apposite[152]:

> "the probative value of the coincidence evidence arises not merely from the related events, but also, and especially, from the circumstance that two or more persons independently give evidence of the related events, where it is improbable that they would have given accounts with such similarity unless both or all accounts had foundation in fact."

His Honour added that, in cases of this kind, the related events do not need to have such striking similarity as is required when it is the events themselves that are said to have probative value[153].

160 The applicant relied upon what W had himself offered in his evidence by way of possible innocent explanations, although it was accepted that they were useful only as suggestions. It is understandable that W sought to explain what he saw to others and perhaps to himself. His loyalties were divided. But he was certain about what he had seen. The event made a strong impression upon his young mind, such that he was able to recall and reflect upon it much later. The observations of the Court of Appeal concerning W's suggested innocent explanation are to the point. It strains credulity too far. No credible innocent explanation for the conduct observed by W comes to mind.

161 The applicant did not deal with the evidence of the complainant's mother in submissions on the application, consistently with the approach which was taken at trial. It will be recalled that the mother's evidence was given without objection. However, a consideration of the applicant's statement to the mother, which was in the nature of an admission, also qualified as propensity evidence and it too satisfied the test in *Pfennig*.

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150 Section 132A of the *Evidence Act* 1977 (Q) denies that aspect of the decision in *Hoch v The Queen* (1988) 165 CLR 292; [1998] HCA 50.

151 *Evidence Act* 1995, s 98.

152 *WRC* (2002) 130 A Crim R 89 at 102 [32].

153 *WRC* (2002) 130 A Crim R 89 at 102 [32].

162 That part of the mother's evidence which dealt with the applicant's habit of encouraging the children to enter the parents' bedroom whilst the parents were engaged in sexual intercourse cannot be said to be evidence of conduct of the applicant directed specifically to the complainant. It may be more correct to view it as indicative of the applicant's lack of inhibition and his lack of understanding about what constitutes inappropriate behaviour concerning children. However, the evidence of what the applicant told his wife concerning his reaction to physical contact with the complainant stands in a different category. It is evidence of his sexual interest in his daughter and therefore his propensity. In the context of the prosecution case this evidence, if accepted, would also be sufficient to negative any doubt in the minds of the jury concerning the applicant's guilt.

163 It cannot be said that the evidence of W lacks the strong probative force necessary to satisfy the test in *Pfennig*. That conclusion is sufficient for the disposition of the applicant's application for special leave to appeal and appeal. Nevertheless, something should be said about the remaining question raised by the applicant's argument identified earlier in these reasons[154].

Pfennig and *Shepherd*

164 The applicant's argument elided two questions: whether evidence is probative of the fact of sexual interest; and whether the test in *Pfennig* applies to exclude it. *Pfennig* applies to evidence of propensity. The strong probative force spoken of in *Pfennig* in connection with propensity evidence is its force as propensity evidence and in propensity reasoning. *Pfennig* is not directed to the question whether evidence *is* probative of propensity. Logically, that question is anterior to the application of the test in *Pfennig*.

165 *Shepherd* recognises that there may be findings on intermediate facts which constitute links in a chain of reasoning towards an inference of guilt[155] or facts which prove the facts which are the basis of that inference[156]. In such cases it will be necessary to consider the weight, or probative force, of individual

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154 At [141]-[142].

155 *Shepherd v The Queen* (1990) 170 CLR 573 at 579, 581 per Dawson J, with whom Toohey and Gaudron JJ agreed.

156 *Shepherd v The Queen* (1990) 170 CLR 573 at 579 per Dawson J, 589 per McHugh J.

circumstances when put together in proof of the intermediate fact[157]. A proven circumstance is not to be considered in isolation.

166 Nothing said in *Pfennig* about the application of the rule it propounded suggests that it was intended to deny the approach to circumstantial evidence to which *Shepherd* refers. In *Pfennig*, it was recognised that evidence of "a particular distinctive propensity" may be "demonstrated by acts constituting particular manifestations or exemplifications of it"[158].

167 When a finding of fact is made that an accused has a sexual interest in a complainant who is his daughter, propensity is thereby demonstrated. However, the fact of propensity inheres in the finding of sexual interest, not each piece of evidence which supports it. The test in *Pfennig* may therefore not apply to the evidence. In any event, the nature of the finding and the standard to which the fact of sexual interest of a father in his daughter must be proved are such that the finding will almost inevitably satisfy the test.

168 An intermediate fact may be an indispensable step in reasoning towards an inference of guilt. Where it is, *Shepherd* requires that it be proved beyond a reasonable doubt[159]. In the present case, her Honour the trial judge gave such a direction. The prosecution case clearly envisaged the potential for the use of W's evidence in conjunction with that of the mother. The conclusion reached earlier in these reasons, that each of the evidence of W and the mother was relevant and admissible independently of the other as propensity evidence, may be put to one side. For present purposes, it may be hypothesised that, taken together, that evidence was sufficient to demonstrate the applicant's sexual interest in the complainant.

169 It was observed in *HML* that evidence of uncharged sexual conduct of the accused against the complainant, relied upon as propensity evidence, will ordinarily satisfy the test in *Pfennig* because, in the context of the prosecution case, there will usually be no reasonable view of the evidence which would be consistent with innocence[160]. There would usually be no reasonable view of such

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157 *Re Belhaven and Stenton Peerage* (1875) 1 App Cas 278 at 279; *Shepherd v The Queen* (1990) 170 CLR 573 at 581.

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

159 *Shepherd v The Queen* (1990) 170 CLR 573 at 581 per Dawson J.

160 *HML v The Queen* (2008) 235 CLR 334 at 359 [27] per Gleeson CJ, 383 [107], 399 [171], 410 [216], 414 [234] per Hayne J, 430-431 [287], 460-461 [364], 467 [387] per Heydon J, 501 [510] per Kiefel J.

evidence other than as supporting an inference that the accused is guilty of the offence charged[161]. In this case, the same result would follow if the *Pfennig* test was applied to a finding of the applicant's sexual interest in the complainant. Assuming that the complainant's evidence left a reasonable doubt in the minds of the jury, a conclusion reached, to the criminal standard, that the applicant had a sexual interest in her would eliminate that doubt.

Conclusion and order

170 The applications for an extension of time and for special leave to appeal should be granted, but the appeal should be dismissed.

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161 *HML v The Queen* (2008) 235 CLR 334 at 383 [107] per Hayne J.

171 BELL J. This application for special leave to appeal from the orders of the Court of Appeal of the Supreme Court of Queensland (Keane and Holmes JJA and Lyons J) was referred into an enlarged Full Court. The application was said to raise an unresolved issue concerning the admissibility of evidence tendered in the prosecution of child sexual assault offences. That issue is the admissibility of evidence of acts which do not constitute sexual offences but which are alleged to disclose the accused's sexual interest in the complainant. It is the issue that was presented in *HML v The Queen* by the admission of the evidence of the purchase of the g-string underwear for the complainant[162].

172 The evidence in question in this application is that of the complainant's brother, W, regarding an incident that he witnessed on a camping trip ("the camping incident"). Unlike the evidence of the purchase of the underwear in *HML*, the camping incident was tendered as evidence of an indecent dealing with the complainant on an occasion that was not charged in the indictment[163]. It was evidence adduced to prove that the applicant possessed a particular propensity, namely, an unnatural sexual interest in the complainant and a tendency to act upon that interest. Evidence adduced to prove a propensity to engage in criminal conduct is inadmissible unless it satisfies the test enunciated in the plurality reasons in *Pfennig v The Queen*[164]. That test requires that the propensity evidence, when viewed in the context of the prosecution case, bear no rational explanation that is consistent with the accused's innocence[165]. The question raised by the application is not whether the *Pfennig* test applied to the admission of W's evidence, but whether the application of that test required that evidence of the camping incident be excluded. The applicant submits that it did because W had himself volunteered an innocent explanation for what he had seen: his father may have been examining his sister's naked bottom to detect a bee sting or an ant bite.

173 Neither at the trial nor in the Court of Appeal was the admissibility of W's evidence addressed by reference to the *Pfennig* test. In the Court of Appeal, the

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162 (2008) 235 CLR 334 at 399 [172] per Hayne J; [2008] HCA 16.

163 Section 210(1)(a) of the *Criminal Code* (Q) provides that it is an offence to unlawfully and indecently deal with a child under the age of 16 years. All references to the provisions of the *Criminal Code* (Q) in these reasons are to the provisions as in force at the time of the offences.

164 *Pfennig v The Queen* (1995) 182 CLR 461 at 482-483 per Mason CJ, Deane and Dawson JJ; [1995] HCA 7; *HML v The Queen* (2008) 235 CLR 334 at 359 [27] per Gleeson CJ, 362 [41] per Gummow J, 363 [46] per Kirby J, 383 [106] per Hayne J.

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

attack was on the trial judge's failure to exclude W's evidence in the exercise of the general discretion to exclude evidence the prejudicial effect of which outweighs its probative value. In the context of the argument put in that way, the Court of Appeal characterised W's suggested explanation for the camping incident as "strain[ing] credulity too far"[166]. Another way of expressing that conclusion is to say that the bee sting or ant bite explanation is not a rational explanation for what it was that W saw. In my opinion, that is the correct conclusion. When the camping incident is viewed in the context of the prosecution case, I do not consider that there is any rational view of it other than that it was an indecent dealing with the complainant. For the reasons that follow, I would grant special leave to appeal but I would dismiss the appeal.

174 The admissibility of W's evidence was raised before the jury was empanelled. Defence counsel objected to the evidence on the ground of relevance, submitting that it was "not even [evidence of] uncharged acts because the complainant doesn't testify to them happening". The Crown Prosecutor contended for the admission of the evidence on two bases. First, that it was evidence of an indecent assault and available as one of the three acts constituting a sexual offence required for proof of the offence of maintaining a sexual relationship with a child under 16 years ("the maintaining offence")[167]. Secondly, that it was evidence of the applicant's sexual interest in the complainant.

175 The trial judge deferred ruling on the admissibility of W's evidence until the conclusion of the complainant's evidence.

176 The complainant was born in July 1983. She was 23 years old at the date of the trial. The events charged in the indictment were alleged to have occurred in the period between July 1987 and early 1999, from when the complainant was a four year-old child until she was 15 years of age. The first count charged the maintaining offence, which was particularised as taking place between July 1989 and 31 March 1999. The second count charged the unlawful and indecent dealing with a girl under 16 years[168]. This count related to the first episode of sexual abuse recounted by the complainant. She said that she had climbed onto the waterbed in her parent's bedroom. The applicant had removed her pants and put his finger in her vagina saying that when she could fit two of her fingers "up there" she was to come back and tell him.

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166 *R v BBH* [2007] QCA 348 at [41].

167 *Criminal Code* (Q), s 229B(1).

168 *Criminal Code* (Q), s 216.

177 The third count charged the applicant with procuring the complainant to commit an indecent act[169]. The complainant said that she was aged six or seven years at the date of this offence. She said that the applicant had procured her to permit the family dog to lick her vagina.

178 The fourth count charged an indecent and unlawful dealing with a child under 16 years[170] that was said to have occurred when the complainant was aged 14 or 15 years. The complainant said that she had fallen asleep on the bed occupied by the applicant and his former partner, Marg. She woke up to find the applicant touching her vagina and at the same time touching Marg.

179 The fifth and sixth counts charged an unlawful and indecent dealing and sodomy[171], and related to an incident which the complainant said had also occurred when she was aged 14 or 15 years. She said that she and the applicant were watching a pornographic movie in his bedroom. He had rubbed her thighs and touched her vagina. He had removed her pants, sodomised her and inserted his fingers into her vagina.

180 The last six counts in the indictment charged events that were said to have occurred on three successive nights. One count of indecent dealing with a child under 16 years[172] and one count of sodomy of a person aged under 18 years[173] was charged relating to each occasion. The complainant was aged 15 years at the time. The incidents were all said to have followed the same pattern: the applicant sodomised the complainant, inserted his fingers into her vagina and licked her vagina. The offences charged in the eleventh and twelfth counts were the last occasions on which any form of sexual abuse took place.

181 The complainant gave evidence, without objection, that the applicant had sexually abused her on many occasions. Her account of uncharged incidents of abuse was given in general terms. The nature of the abuse had come to include sodomy from before she was seven years old. The abuse occurred "[s]ometimes every couple of days, sometimes every couple of weeks or months". It took place "[u]sually in [her] parents' bedroom, sometimes outside, or on camping trips". The complainant had no recall of particular incidents of abuse, apart from

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169 *Criminal Code* (Q), ss 210(1)(b), 210(3) and 210(4).

170 *Criminal Code* (Q), ss 210(1)(a) and 210(4).

171 *Criminal Code* (Q), ss 210(1)(a) and 210(4) (unlawful and indecent dealing) and ss 208(1)(a) and 208(2) (sodomy).

172 *Criminal Code* (Q), ss 210(1)(a) and 210(4).

173 *Criminal Code* (Q), ss 208(1)(a) and 208(2).

those charged in counts two and three, until she was aged about 13 years. Up to that time, the episodes of abuse "just seemed to all blur together".

182 The sexual abuse came to an end around February 1999, when the complainant "stood [her] ground" and told the applicant, "That's it. No more." The complainant had a boyfriend by this time and she felt that she was "cheating on him".

183 Cross-examination of the complainant was directed to demonstrating that she was a fantasist. Among the allegations that were put to her were that she had made up an account of having been chased around her home by some person and that she had claimed to be possessed by different personalities. It was put to her that none of the acts of which she complained had occurred. She was taxed with her failure to complain to her mother of her father's sexual abuse. It was suggested that her mother had become bitter and quite hateful towards the applicant following their separation. The evident purpose of this line of inquiry was to explore a possible motive for the fabrication of an account of paternal sexual abuse.

184 The camping incident was raised obliquely in the course of cross-examination. The complainant was asked if the applicant had engaged in sexual misconduct with her at her great uncle's farm. She said that there had been incidents of abuse at the farm of which she was able to recall one. Understandably, the cross-examiner did not seek to obtain an account of the incident. He did obtain the complainant's agreement that the abuse had involved "the same type of thing that happened elsewhere". The cross-examination continued:

> "Q: It wasn't the case that he had you standing up, bending over? A: No.
>
> Q: Nothing like that ever happened on the farm? A: No, not that I remember."

185 At the conclusion of the complainant's evidence it was apparent that, not only was the reliability of her account of the incidents the subject of the charges in issue, but it was the defence case that she had fabricated the allegations in their entirety. It was also apparent that the defence case was not that the camping incident was susceptible of an anodyne explanation, but that nothing of the sort had ever happened at the farm.

186 The ruling on the objection to the admission of W's evidence was made by reference to an outline of the contents of a statement that he had given to the police two years before the trial. In the statement, W put the camping incident as having occurred when he was aged 10 years. In evidence at the trial, W put the camping incident as having occurred when he was aged 11 years. In other respects, it does not appear that W's evidence departed from the account given in

the statement. The complainant is 14 months older than W. It follows that the camping incident relates to events that took place when the complainant was aged 11 or 12 years. The application book did not include the outline of W's proposed evidence on which the ruling was made. The following account of the camping incident is taken from the ruling and the evidence that W gave at the trial.

187 The applicant, his three children, his brother and the brother's two children all spent a holiday camping at a farm owned by the complainant's great uncle. The great uncle had arranged to take the party on a tractor ride around the farm. It appears that all the members of the group except the applicant and the complainant left the campsite to go on the ride. Before the ride commenced, W realised that he had left his pocket knife at the campsite. He had been given the pocket knife as a present and, "kids being kids", W had liked to take the pocket knife with him wherever he went. He returned to the campsite to collect it. On his arrival, he saw the applicant seated on a steel grate that was attached to the back of the caravan with the complainant bent over in front of him. Her underpants were around her ankles and she was naked from the waist down. The applicant's hand was on her waist and his face was about six inches from her exposed bottom. W turned around and left the campsite.

188 In cross-examination, W agreed that what he had seen was consistent with the applicant "perhaps looking for some sort of a bee sting or an ant bite or something of that sort". He agreed that he had suggested an innocent explanation along these lines in a telephone conversation with the applicant's partner, Lisa. The telephone conversation took place after the applicant had given the statement to the police, but before he had signed it. W agreed with the following account of the telephone discussion that was put to him by defence counsel:

> "You also, I would suggest, said to her – or she put to you that, 'Why are you doing this to your father', and you said, 'Look, he's' – these are my words not yours, but 'big enough to look after himself, but I will support my sister'."

189 As had been foreshadowed in the cross-examination of the complainant, the occurrence of the camping incident was squarely in issue. It was put to W that "[t]here was never a time when your father would have had your sister bent over in the way you've described … ".

190 The trial judge's reasons for admitting W's evidence over counsel's objection were delivered ex tempore in the course of a jury trial. They addressed the issues which counsel had raised. Relevantly, her Honour said:

> "The prosecution say that the evidence is admissible on the basis, one, that it could come in as an uncharged act, and, two, that it is relevant to

> count 1 to show a guilty passion existing towards the complainant by the accused.
>
> I don't think the fact that the complainant hasn't mentioned an incident similar in detail is decisive one way or the other. … She has already given evidence that she remembers some specific incidents, but that events of a sexual nature happened on very many occasions from the time she was a very young child. The probative value of the evidence is that if the jury accept it it goes to show a guilty passion between the accused and the complainant. Such evidence is regularly allowed in matters of this nature."

191 Understood in the context of the submissions earlier made, W's evidence was admitted as evidence of the applicant's unnatural sexual interest in his daughter. Implicit in the ruling was the rejection of the tender of W's evidence as direct evidence of an act that might be relied upon in proof of the relationship offence. Consistently with the ruling, the directions respecting proof of the relationship offence confined the acts constituting the actus reus of the offence to those charged in the indictment and to "the evidence of [the complainant] of other uncharged acts of a sexual nature". The respondent's submission in this Court, that W's evidence was rightly admitted because it was open to the jury to rely on the camping incident as one of the three acts required for proof of the relationship offence, must be rejected in the light of the conduct of the trial.

192 The evidence of the complainant's mother is detailed in the joint reasons of Crennan and Kiefel JJ[174]. The directions respecting the use to be made of the mother's evidence and W's evidence were that this evidence had been adduced by the prosecution to prove "the guilty passion or the sexual interest by the [applicant] in the complainant". Her Honour directed that, before the evidence could be used in this way, it was necessary that the jury be satisfied of the honesty and reliability of the evidence. She went on to direct the jury in these terms:

> "Then you must be satisfied that what it was that they [the mother and W] saw does show a sexual interest, you know, an unnatural or unexpected natural [sic] interest by father and daughter and that it doesn't have an innocent explanation. If you were satisfied of those things, then the prosecution say the existence of the relationship demonstrated by those incidents helps you evaluate and decide that the complainant's evidence is true. They are not charges in themselves, that's the way in which the evidence is sought to be used."

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174 See above at [120]-[121].

193 W's evidence was admitted and left to the jury as evidence that was capable of demonstrating that the applicant possessed an unnatural sexual interest in the complainant. The Court of Appeal said that W's evidence was relevant for reasons including that it was apt to render the complainant's account "more intelligible"[175]. I agree with Crennan and Kiefel JJ that W's evidence was not evidence which served to explain or render intelligible the allegations made by the complainant[176]. I also agree with their Honours' statements respecting the distinction between the use of evidence that incidentally reveals propensity and evidence of propensity adduced in proof of guilt[177].

194 Before considering whether the evidence of the camping incident possessed the strong probative weight that *Pfennig* requires, it is necessary to address the anterior question of its relevance. 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 proceedings[178]. Proof of circumstances bearing on the assessment of the probability in this respect is relevant. In *HML*, Heydon J classified facts in issue as "main facts in issue" and "subordinate or collateral facts in issue"[179]. In a criminal trial, his Honour said, the former comprise the facts necessary to prove the elements of the offence (or some affirmative defence) and the latter include those affecting the credibility of a witness or the admissibility of particular items of evidence[180]. At the conclusion of the complainant's evidence, it was clear that it was the defence case that she had made up a florid account of sexual abuse in the context of the emotional turmoil engendered by her parents' separation. Proof that the applicant had demonstrated an unnatural sexual attraction towards the complainant was capable of rationally bearing on the probability that the complainant was truthful in her account of the sexual misconduct the subject of the charges[181]. Proof of those matters also evidenced the applicant's motive to commit the offences charged against him. Proof that an accused possessed a motive to commit an offence is relevant to the

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175 *R v BBH* [2007] QCA 348 at [40].

176 See above at [149].

177 See above at [147]-[148].

178 *HML v The Queen* (2008) 235 CLR 334 at 351 [5] per Gleeson CJ; *Washer v Western Australia* (2007) 234 CLR 492 at 498 [5]; [2007] HCA 48; *Goldsmith v Sandilands* (2002) 76 ALJR 1024 at 1025 [2]; 190 ALR 370 at 371; cf *Evidence Act* 1995 (Cth), s 55.

179 *HML v The Queen* (2008) 235 CLR 334 at 425 [274].

180 *HML v The Queen* (2008) 235 CLR 334 at 425 [274].

181 *HML v The Queen* (2008) 235 CLR 334 at 353 [8] per Gleeson CJ.

assessment of whether the prosecution has established guilt, notwithstanding that motive is not an element of the offence[182]. Proof of the applicant's unnatural sexual interest in the complainant and his tendency to act upon that interest was relevant in the sense that it was material to the issues in the trial.

195 The applicant did not contend that proof that he had indecently dealt with the complainant in the course of the camping holiday was not relevant to issues in the trial. His challenge was to the capacity of W's evidence to prove that fact. The submission was that W's evidence was no more than evidence of "the physical configuration of two people seen at a distance". The camping incident was said to be equivocal and to take its colour as an indecent dealing only from knowledge of the allegations that the complainant made. To conclude from an acceptance of W's evidence that the applicant was sexually interested in the complainant, it was submitted, risked "undesirable circularity" in reasoning. For this reason, W's evidence was not rationally probative of the fact sought to be proved.

196 The suggested character of the camping incident as equivocal is pertinent to the determination of admissibility under the *Pfennig* test, but it does not deprive the evidence of its relevance. It is the distinction drawn by Hayne J with respect to the evidence of the purchase of the underwear in *HML*[183]. All evidence having *any* probative value is admissible, subject to any rule of exclusion[184]. W's evidence was tendered as an item of circumstantial evidence to prove the applicant's sexual interest in the complainant. Its capacity to prove that fact is not to be assessed without regard to the other evidence in the trial[185]. Proof of what W saw was capable of supporting an inference that the applicant was, on that occasion, indecently dealing with the complainant.

197 W's evidence was relevant. However, because it was tendered as evidence of sexual misconduct for the purpose of proving propensity, the trial judge was required to exclude it unless she was satisfied that it was not susceptible of a rational explanation consistent with the applicant's innocence. *Pfennig* was a wholly circumstantial case in which the propensity evidence was not disputed. The application of the "no rational view" test, formulated in the *Pfennig* context, to the admission of disputed propensity evidence to prove motive or sexual

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182 *HML v The Queen* (2008) 235 CLR 334 at 351 [5] per Gleeson CJ.

183 *HML v The Queen* (2008) 235 CLR 334 at 400 [175].

184 *Festa v The Queen* (2001) 208 CLR 593 at 599 [14] per Gleeson CJ; [2001] HCA 72.

185 *Martin v Osborne* (1936) 55 CLR 367 at 375 per Dixon J, 380-381 per Evatt J; [1936] HCA 23; *Shepherd v The Queen* (1990) 170 CLR 573; [1990] HCA 56.

interest in the prosecution of sexual offences, is explained in *Phillips v The Queen*[186] and *HML*. The propensity evidence must be viewed in the context of the prosecution case, upon the assumptions that the propensity evidence would be accepted as true and that the prosecution case (as revealed in the evidence or in the statements or depositions of witnesses to be called) may be accepted by the jury[187]. The trial judge is not required to conclude that the propensity evidence standing alone would establish guilt of the offence or offences with which the accused is charged[188]. If, viewed in this way and upon these assumptions, there exists a reasonable view of the propensity evidence that is consistent with the accused's innocence, the evidence must be excluded[189].

198 The only innocent explanation for a father making a close visual examination of the naked bottom of his pubescent or pre-pubescent daughter that was suggested on the hearing of the application was the explanation offered by W. To the possibilities of looking for a bee sting or an ant bite may be added other "quasi-medical" investigations, such as inspecting a rash or the like. It is convenient to refer compendiously to these as "the sting or bite explanation". The applicant placed considerable emphasis on the circumstance that W had himself volunteered the sting or bite explanation for what he had seen. The circumstance that W offered an innocent explanation on an occasion when he was challenged to explain why he was "doing this to [his] father" does not make the suggestion a rational explanation for what it was that he saw. W's account of the incident does not suggest that, at the time of the incident, it occurred to him that he had chanced upon his father examining his sister to detect a sting or a bite. W turned around and left the campsite without making his presence known. In the result, he did not collect the pocket knife that had been his object in returning to the campsite. W did not ask the complainant later that day or in the days thereafter about what misadventure had led to their father inspecting her bottom. The inference from W's conduct is that his reticence reflected his instinctive understanding that he was witnessing something that was not intended for his eyes.

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

187 *Phillips v The Queen* (2006) 225 CLR 303 at 323 [63] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ; *HML v The Queen* (2008) 235 CLR 334 at 357 [20]-[21] per Gleeson CJ.

188 *Phillips v The Queen* (2006) 225 CLR 303 at 323-324 [63] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ.

189 *Phillips v The Queen* (2006) 225 CLR 303 at 324 [63] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ.

199 The reasonableness of the inferences to be drawn from the camping incident involves the assessment of probabilities. It is an assessment that must take into account the other evidence in the prosecution case. In the light of the whole of the evidence, a possible explanation may cease to be a rational one. The circumstance that the complainant alleges that the applicant sexually molested her and that incidents of abuse occurred on camping trips is relevant to the assessment of whether the sting or bite explanation is a rational one for what W saw. This is not to engage in unacceptable circular reasoning[190]. It may involve, as Crennan and Kiefel JJ explain, a legitimate consideration of the improbability of events occurring by coincidence[191].

200 In the ordinary course of events, the occasions calling for a father to examine his 11 or 12 year-old daughter's naked bottom are likely to be few. When they occur, they are likely to be memorable to the father and the daughter. In considering whether the sting or bite explanation is a reasonable view of the camping incident, it is appropriate to have regard to the circumstance that neither the complainant nor the applicant have any recall of such an event. A reasonable explanation for the complainant's lack of recall of an occasion on the camping trip when the applicant inspected her naked bottom is that she was accustomed to being indecently dealt with by him and, until she was 13 years old, individual incidents of abuse were a blur. On the other hand, it is improbable, had there been an occasion when the complainant sought her father's assistance following a sting or a bite to her bottom, that the fact of being stung or bitten would not have impressed itself on her memory. A further improbability is that the occasion calling for the inspection of the complainant's bottom should occur at a time when all of the other members of the party were believed to be absent.

201 The admissibility of W's evidence fell to be determined after the complainant's evidence was completed. The question of whether there was a rational view of the camping incident consistent with the applicant's innocence did not depend upon the applicant advancing an innocent explanation for the incident. However, it was apparent from the cross-examination that the occurrence of the incident was in issue. In determining whether the sting or bite explanation was a rational one, it was appropriate to consider the improbability of that explanation being true, in circumstances in which it appeared the applicant had no recall of such an event.

202 In the context of the prosecution case as revealed by the complainant's evidence (and foreshadowed in the statements of witnesses to be called), the sting or bite explanation was not a rational view of what W had witnessed.

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190 *HML v The Queen* (2008) 235 CLR 334 at 430-431 [286]-[287] per Heydon J.

191 See above at [159].

203 The complainant gave direct evidence of the acts that were the subject of the charges. The jury might have assessed her evidence as credible but considered as a reasonable possibility that, in the emotional atmosphere of her parents' separation, the complainant had sided with her mother and made up her account of abuse. In such an event, proof of the camping incident was capable of resolving that doubt in favour of a conclusion of the applicant's guilt[192]. W's evidence was rightly admitted. Proof of the applicant's unnatural sexual interest in the complainant did not support acceptance of the *reliability* of the complainant's account of the acts particularised in each count. Appropriate directions respecting the need to consider each count separately were given. The discrimination of the verdicts shows that those directions were understood[193].

204 I agree with the orders proposed by Crennan and Kiefel JJ.

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192 *B v The Queen* (1992) 175 CLR 599 at 610 per Deane J; [1992] HCA 68.

193 The applicant was acquitted of the offences charged in counts two and three, which charged events that were alleged to have occurred when the complainant was a very young child. The applicant was also acquitted of the offence charged in count four, in which the applicant's former partner, Marg, gave evidence in the defence case which did not support acceptance of the complainant's evidence of the incident particularised.