SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dewey* [2019] QCA 161
PARTIES:	**R** **v** **DEWEY, Steven William** (appellant)
FILE NO/S:	CA No 205 of 2018 DC No 2855 of 2017 DC No 1661 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 25 July 2018 (Porter QC DCJ)
DELIVERED ON:	23 August 2019
DELIVERED AT:	Brisbane
HEARING DATE:	16 April 2019
JUDGES:	Gotterson and McMurdo JJA and Douglas J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – JOINT TRIAL OF SEVERAL COUNTS – where the appellant was convicted of three counts of armed robbery – where the offences related to armed robbery with a knife of a service station late at night on three separate occasions – where there was a strong circumstantial case against the appellant on the third offence – where the first and second offences were committed by the same person – where the first and third offences involved the use of a distinctive serrated blue knife, which was found in the possession of the appellant – whether there were any unusual features of the offences which gave the evidence of one offence sufficient probative value to warrant its admission in proof of another – whether the charges were wrongly joined *HML v The Queen* (2008) 235 CLR 334; [2008] HCA 16, cited *Pfennig v The Queen* (1995) 182 CLR 461; [1995] HCA 7, cited *Phillips v The Queen* (2006) 225 CLR 303; [2006] HCA 4, cited
COUNSEL:	S G Bain for the appellant M A Green for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** I agree with the order proposed by McMurdo JA and with the reasons given by his Honour.

[2] **McMURDO JA:** The appellant was charged with three offences of armed robbery, two of which occurred on the one night (counts 1 and 2 on the indictment), and the other eight days later (count 3). Each of the offences involved a robbery, with the use of a knife, by a man entering a service station, late at night, when there was no one else on the premises other than an attendant, and demanding the cash which was kept behind the counter. Undoubtedly there were offences of armed robbery on these occasions. The question for the jury, on each charge, was whether it was proved that the offender was the appellant.

[3] The jury convicted the appellant on all counts. He appeals against those convictions, upon the grounds that the charges were wrongly joined, the evidence on one count not being admissible on the others and with the consequent risk that the jury engaged in impermissible propensity reasoning. The appellant has abandoned his proposed challenge to his sentence of eight years' imprisonment.

[4] In a pre-trial hearing, the appellant applied to have each count tried separately and reasons were given for dismissing that application. However the question for this Court is whether, having regard to the evidence at the trial, there was a miscarriage of justice such that the convictions should be quashed and re-trials ordered. The critical issue is whether the evidence on one count was properly admitted on the other counts. If not, then there was a risk of prejudice from the jury concluding that, if the appellant was guilty on one charge, he had a propensity to commit all of these offences. That risk could not have been avoided by a direction from the trial judge that the jury should not engage in propensity reasoning, and, as it happens, such a direction was not given.

The evidence at the trial

[5] Count 1 involved a robbery at a service station at Beenleigh at about 10 pm on 27 February 2017. The complainant was working as the attendant at the service station, behind the counter in the shop. At that time of night, customers were able to enter the shop only if the attendant pushed a button to open the door. After he entered the shop, the offender went to the counter and pulled a knife from his pocket. He moved the knife menacingly towards the complainant, putting his arm holding the knife through some security bars which separated the two men. At that point the offender pulled up, over his face, a bandana which had been around his neck and said "I want money, give me the cash." The complainant opened the till and placed a drawer containing $765 on the counter. The offender picked up the drawer, with its contents, and left immediately. This occurrence was recorded by CCTV footage.

[6] Count 2 was an armed robbery at a service station at Mount Gravatt, at 11.37 pm on the same night. Again the complainant was the attendant who was working in the shop at the time. There was the same security feature, by which a customer could enter the store at that hour only if the attendant pushed a button to open the door.

The offender approached the front counter and said "give me money". At first the attendant said "no", understanding the offender to be asking her for her own money. The offender then said "no this is a robbery", as he pulled out a knife from his waist which he showed to the attendant before putting it away. The attendant opened the till and the offender said that he wanted the money placed in a bag. The attendant did so, placing about $250 in the bag, which the offender took from the counter before walking out of the shop. Again the occurrence was captured on CCTV footage.

[7] Count 3 involved an armed robbery at a service station at Coorparoo, at 12.40 am on 7 March 2017. This offence was committed in the same way as the others: the sole attendant at the service station was working in the shop and allowed the offender entry. The attendant had seen the offender walking past the service station about half an hour earlier. The offender approached the counter and lifted up his shirt, exposing a large knife that was tucked into his waist, which he removed as he said to the attendant "give me the money". The attendant opened the cash register and asked the offender whether he wanted the "whole till". The offender replied "give me the whole thing", and the complainant handed him the cash drawer, containing $521. Again, this occurrence was captured by CCTV footage. The offender left the store and was seen by the attendant walking across the road to a grey utility vehicle, which stopped briefly and then drove off.

[8] About 45 minutes later, police intercepted a grey utility vehicle at Mount Gravatt. The appellant was the driver and there was a female passenger with him. Both of them were detained and arrested and police searched the vehicle, finding items of clothing, two knives, including a large blue knife, a scrunched up pair of white rubber gloves, a pair of black shoes, $280 in cash under the seat cover of the front passenger seat and another $81.40 in the centre console. The appellant was found with a single $100 note in the pocket of his jeans.

[9] Each of the complainants gave evidence. On count 1, the complainant described the offender as being about 40 to 45 years of age, about 170 centimetres in height and having white skin. He was described as wearing a t-shirt and a bandana which, the CCTV footage showed, was lifted up to cover his face at one point during the incident. The witness described the offender as pulling a knife from his pocket, which was a knife which was entirely blue in colour and had a serrated edge.

[10] The complainant on count 2 described the offender as a Caucasian man in his mid to late 50s, about 178 centimetres tall and with a slim build. She said that the man had light blue eyes with a slightly slanted jaw and grey stubble. The offender was wearing a black polo shirt and blue pants, she said, and a bandana tied around his neck. She described the knife being carried by the offender as having a yellow plastic handle, with a blade which was about 10 centimetres in length, wider at the handle and tapering to a point.

[11] The CCTV footage for counts 1 and 2 showed identical clothing being worn by the offender in the two incidents, and no obvious difference between the appearance of the offender from one film to the next. In each case, the offender was wearing black shoes, blue jeans, a dark polo shirt with white rims on the edges of the sleeves and around the collar, and a maroon cap.

[12] The complainant on count 3 described the offender as a Caucasian man, about 180 centimetres in height, of slim build, aged 50 to 55 years and with grey trimmed

facial hair. He described the man as wearing a yellow "Minions" cap, a dark coloured shirt, dark blue jeans and white disposable gloves, and carrying a blue coloured knife. His description accorded with what the CCTV footage depicted: a man with black shoes, blue jeans, a dark polo shirt, a "Minions" hat, and gloves, and carrying a blue knife. In the vehicle being driven by the appellant when it was stopped by police, police found a "Minions" cap and a navy blue polo shirt. As I have mentioned, they also found two knives, including a large blue knife, a scrunched up pair of white rubber gloves and a pair of black shoes as well as some cash.

[13] No evidence was given or called by the appellant.

The argument of the prosecution case at the trial

[14] The prosecutor disavowed any argument that the jury could identify the appellant from his appearance in the dock as the man depicted in any of the CCTV footage. This was fortified by a direction from the trial judge that the jury was not to reason in that way. However the prosecutor argued that the jury could compare the three pieces of footage with each other, to conclude that the offender had the same physical appearance in each case, which could be used, with other evidence, to conclude that it was the same man who committed these offences.

[15] The prosecutor argued to the jury that they should first consider whether the appellant had committed the offence charged by count 3. The case against the appellant was strong on this count, because he had been found driving a car, not long after the offence was committed and in a nearby suburb, in a car matching the description by the complainant of the getaway vehicle, and with a "Minions" cap, white gloves and a distinctive blue knife in the car.

[16] The prosecutor then argued that the jury would be satisfied that it was the same man who had committed the offences charged by counts 1 and 2, mainly because the offences were conducted within two hours of each other, by an offender wearing identical clothing, and in the same way.

[17] The prosecutor argued that if the jury was satisfied that the appellant committed the offence in count 3, they would find that it was the appellant who was the offender in count 1. That argument emphasised the distinctive appearance of a blue knife, as a common feature of the two events. The complainant on count 1 identified the knife seized by police after count 3 as "exactly the same one" as that used in the offence against him. Further, it was submitted, the appearance of the offender in count three was consistent with that of the offender in count 1 and the *modus operandi* was the same. If the jury was satisfied that it was the appellant who committed count 3, then they would conclude the appellant was guilty of count 1 and, therefore, also guilty of count 2.

[18] In this way the prosecution case was made dependent upon the jury first being satisfied of the appellant's guilt on count 3, and then using that conclusion as probative of his guilt on counts 1 and 2. The admission of the evidence on count 3 for the other counts was critical to the proof of the prosecution case on them. Indeed, without the evidence on count 3, the jury could have found the same man committed counts 1 and 2, but they could not have found that he was the appellant.

The arguments in this Court

[19] It is common ground that the critical issue of cross admissibility is to be determined according to the judgments of the High Court in *Pfennig v The Queen*[1] and *Phillips v The Queen*.[2] If the commission of one offence does no more than show a disposition or tendency to engage in crime or other discreditable conduct from which it is more likely that the defendant committed the other offence, the evidence of that first offence must be excluded.[3] The evidence is excluded because of its prejudicial effect, and, in this context, prejudice means the danger that the evidence will be improperly used, by "the risk that evidence of propensity will be taken by a jury to prove too much".[4] The exception to this rule of exclusion is a narrow one. What is commonly called similar fact evidence is inadmissible unless "viewed in the context of the prosecution case, there is no reasonable view of the similar fact evidence consistent with the innocence of the accused."[5] This test of admissibility requires an assumption by the trial judge "that the similar fact evidence would be accepted as true and that the prosecution case (as revealed in evidence already given at trial or in the depositions of witnesses later to be called) may be accepted by the jury."[6] In *Phillips*, it was said that:[7]

> "The "admission of similar fact evidence … is exceptional and requires a strong degree of probative force". It must have "a really material bearing on the issues to be decided". "It is only admissible where its probative force "clearly transcends its merely prejudicial effect". "[I]ts probative value must be sufficiently high; it is not enough that the evidence merely has some probative value of the requisite kind". The criterion of admissibility for similar fact evidence is "the strength of its probative force". It is necessary to find "a sufficient nexus" between the primary evidence on a particular charge and the similar fact evidence. The probative force must be "sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused.""

[20] For the appellant it is argued that there was no unusual feature of these offences which gave the evidence of one offence sufficient probative value to warrant its admission in proof of another, having regard to its highly prejudicial effect. Counsel for the appellant accepted that a blue knife, as was used in the first and third cases, was distinctive, but submitted that apart from that feature, there was nothing which linked those two offences, and the other features which were relied upon by the prosecution at the trial were not unusual.

[21] The respondent's argument emphasised the significance of the evidence of the blue knife. Without objection, the complainant on count 1 had been shown the knife seized from the appellant's car and identified it as that used in his case. There was no specific challenge to that evidence. The jury could find, at least, that the knife

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1 [1995] HCA 7; (1995) 182 CLR 461.
2 [2006] HCA 4; (2006) 225 CLR 303.
3 *Makin v Attorney-General (NSW)* [1894] AC 57 at 65.
4 *HML v The Queen* [2008] HCA 16 at [12]; (2008) 235 CLR 334 at [12] 354 (Gleeson CJ). See also Hayne J at 384 [113].
5 *Phillips v The Queen* [2006] HCA 4 at [9]; (2006) 225 CLR 303 at [9] 308 (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).
6 Ibid at [63] 323.
7 Ibid at [54] 320-321. Footnotes omitted.

used for count 1 was identical in appearance to that which was found in the appellant's car.

Consideration

[22] Clearly it was open to the jury to convict the appellant on count 3, for which there was a strong circumstantial case. If the appellant was the offender on that occasion, then, on the first complainant's evidence, there was no reasonable view of the evidence on count 3 which was consistent with the appellant's innocence on count 1. Put another way, the similarities between the facts and circumstances of counts 1 and 3, most importantly the use of an identical and uncommon knife, excluded the possibility that, coincidentally, the offences were committed by different men.

[23] There were other things which linked counts 1 and 2. Most importantly, the offender was wearing identical clothing and the offences took place on the same night. The possibility of coincidence between them was excluded.

[24] Consequently, in my conclusion, the evidence of count 3 was admissible in the proof of count 1, and the evidence on count 1 was admissible on count 2 (and vice versa). Therefore, there could have been no proper objection to the joinder of the three counts.

[25] What I have said is sufficient to dispose of the grounds of appeal. However, although there was no ground which complained of the summing up, something should be said about it. The trial judge did not direct the jury in the terms of direction 52 of the Benchbook.[8] The jury was not instructed that, if they were satisfied of the appellant's guilt on count 3, they could use that in considering another count only if the similarities between the two were so striking that they could be satisfied beyond reasonable doubt that the same person was responsible on each occasion. They were not instructed that it was insufficient for them to consider that the appellant was the sort of person who might, or even would, commit the offence on counts 1 and 2. After the summing up had finished and the jury had retired, the prosecutor raised the absence of such a direction with respect to similar fact evidence. The trial judge said that he had considered giving the direction, until he heard the prosecutor's argument to the jury, which, he said, had not "put a similar fact case". The prosecutor respectfully pointed out to the judge that it was for his Honour to direct the jury on the proper use of similar fact evidence. The trial judge then asked defence counsel what he should do, and was told that his directions had been sufficient, and further that it could be disadvantageous for the jury to be directed as was now being suggested by the prosecutor. The judge decided not to give the further direction. In my respectful opinion, his Honour may have misunderstood the effect of the prosecutor's argument. But a forensic choice was made by defence counsel, and there is no complaint, by a ground of appeal, that there was a miscarriage of justice which was caused by this omission.

Conclusion

[26] I would order that the appeal be dismissed.

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8 On similar fact evidence.

[27] **DOUGLAS J:** I agree with McMurdo JA.