SUPREME COURT OF QUEENSLAND

CITATION:	*R v BAR* [2005] QCA 80
PARTIES:	**R** **v** **BAR** **(appellant)**
FILE NO/S:	CA No 317 of 2004 DC No 141 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	29 March 2005
DELIVERED AT:	Brisbane
HEARING DATE:	4 February 2005
JUDGES:	McPherson JA, Mackenzie and Chesterman JJ Separate reasons for judgment of each member of the Court, McPherson JA and Chesterman J concurring as to the orders made, Mackenzie J dissenting
ORDER:	**1. Appeal allowed and convictions on counts 18 to 24 quashed** **2. Re-trial ordered on those counts** **3. Application for leave to appeal against sentence in respect of counts 1 to 17 refused**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – SIMILAR FACTS – ADMISSIBILITY – GENERALLY – where the appellant was convicted on 17 counts of sexual misconduct against a girl under the legal age of consent who is his stepdaughter – where the appellant was further convicted on 7 counts of indecently dealing with another girl under the legal age of consent who is also his stepdaughter – where the trial judge admitted evidence given by one girl in relation to counts relating to the other girl – whether the trial judge erred in allowing similar fact evidence on the basis that it was 'substantially similar' – whether the trial judge erred in not exercising a discretion to exclude the evidence CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENCE – whether

the sentence imposed was manifestly excessive

Criminal Code Act 1899 (Qld)
Criminal Offence Victims Act 1995 (Qld)
Evidence Act 1997 (Cth)

Carne v R [1997] QCA 176, cited
Director of Public Prosecutions v P [1991] 2 AC 447, discussed
Hoch v R (1988) 165 CLR 292, discussed
Hooper v R [1999] QCA 310, discussed
Makin v Attorney-General for New South Wales [1894] AC 57, discussed
Meissner v R (1995) 184 CLR 132, cited
Mitchell v R (1952) 36 CrAppR79, cited
Peacock v R (1911) 13 CLR 619, cited
Pfennig v R (1995) 182 CLR 461, discussed
R v Baskerville [1916] 2 KB 658, cited
R v Berrill [1982] Qd R 508, cited
R v Boardman [1975] AC 421, discussed
R v Delgado-Guerra ex parte Attorney-General [2001] QCA 266, cited
R v Makin & Wife (1893) 14 NSWLR 1 (L), discussed
R v Noyes [2003] QCA 564, cited
R v O'Keefe [2000] 1 Qd R 564, discussed
R v Riley [1997] QCA 277, cited
R v S [2001] QCA 501, discussed
R v Sims [1946] KB 531, cited

COUNSEL: P E Nolan, with N Martin for the appellant
M J Copley for the respondent

SOLICITORS: Jason Buckland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McPHERSON JA:** In August 2004 the appellant was arraigned in the District Court at Southport on an indictment charging him with a total of 24 counts of sexual offences under the Criminal Code against two female complainants K and B. Counts 1 to 17 related exclusively to the complainant K and, with respect to her, alleged the commission on various dates between July 1970 and April 1980 of two counts of indecent dealing with a girl under 17, each with an accompanying circumstance of aggravation that she was under 14 years of age; one count of occasioning bodily harm; eight counts of indecent dealing with a girl under 16, each with that circumstance of aggravation; and six counts of attempted rape. When arraigned on these counts, the appellant pleaded guilty to all of them.

[2] He was then arraigned on each of the remaining seven counts 18 to 24, which related exclusively to the second complainant B and were alleged to have been committed on various dates between 31 December 1982 and May 1988. Each of those counts

charged the appellant with having indecently dealt with B, a girl under 16, with the aggravating circumstance that she was then under 14 years of age. To each of these counts, the appellant pleaded not guilty. A trial on those counts then ensued, at the conclusion of which the jury returned verdicts of guilty on each count.

[3] The complainant B gave evidence about each of the incidents comprised in counts 18 to 25. Her evidence at the trial was followed by that of the complainant K, who testified about the incidents the subject of counts 1 to 17 as to which she was the victim, and to which the appellant had already pleaded guilty.

[4] The question on this appeal is whether his Honour was correct in ruling that K's evidence of those matters was properly admissible and admitted on the trial of counts 18 to 25 relating to complainant B, and whether his Honour had correctly directed the jury on the use that might be made of it in arriving at their verdicts of guilty on each count. On these matters, I have read the reasons of Chesterman J and I agree with them; but I propose to add some observations of my own. For that purpose, the facts need not be restated further than has already been done.

[5] There was, as I read the evidence of K and B on this point, little or no reason to suspect any possibility of collaboration between them about what they said or complained of. At the trial and on appeal, the prosecution sought to justify the adduction in support of counts 18 to 25 committed against B of the evidence of K in relation to counts 1 to 17 on the basis that her testimony disclosed the existence of similar facts. It is common human experience that a conjunction of facts or events of the same or a similar kind can give rise to inferences about matters such as a common cause; whether it was the result of human act or intervention; and, if so, with what motive or intention. The classic instance of this kind is, of course, *Makin v Attorney-General for New South Wales* [1894] AC 57. Frequent repetition of the well-known statement by Lord Herschell ([1894] AC 57, 65) of the two competing rules governing admissibility has perhaps tended to obscure the fact that the similar evidence there was held relevant and admissible in proof not simply of the death of the deceased baby, but that the accused and his wife had caused it with intent to kill. The facts are more completely recounted in the judgment of Windeyer J in *R v Makin & Wife* (1893) 14 NSWLR 1 (L), from which it appears that at the time of that decision a prevailing judicial concern was, in part, whether or not the admissibility rule extended beyond killings by poisoning to other cases involving similar fact evidence; and also whether, before similar facts were admitted, there first had to be "antecedent" satisfactory evidence of the administration of poison by the accused (14 LR (NSW) 1, 25).

[6] The present is not a case of that kind. However, whatever doubts may have prevailed in the past, the admissibility of similar fact evidence on charges of sexual offences has been settled in Australia by the decision of the High Court in *Hoch v The Queen* (1988) 165 CLR 292. In that instance, the accused had been charged with indecently dealing with three boys on different occasions while they were resident in the home or institution at which he was employed. In their joint reasons for judgment, Mason CJ, Wilson and Gaudron JJ said that similar fact evidence served two functions (165 CLR 292, 296). The first, they said, was as circumstantial evidence to corroborate or confirm the veracity of the evidence given by other

complainants. The second was as circumstantial evidence of the happening of the event or events in issue. Their Honours prefaced their remarks to that effect by saying "in cases like this", which I take to be a reference to cases in which children claim that sexual offences have been committed against them by a particular adult person who has control over or has been associated with them.

[7] Their Honours' views were repeated, and perhaps further refined, in *Pfennig v The Queen* (1995) 182 CLR 461, 480-484. Like *Makin v The Queen*, it was an example of the second of the two functions described by their Honours, being a case in which evidence of the accused's earlier conduct in abducting a boy was held to have been rightly admitted to prove a charge of murdering another boy on a later occasion after it was alleged he had been abducted in similar circumstances. The case before us now is not of that description, in which the objective circumstances are capable of speaking for themselves to raise particular inferences tending to prove guilt or it is sought to rely on them to do so. Here the function, if any, served by K's evidence on the trial of the charges concerning B was the first of the two mentioned in *Hoch*. Its purpose was, and could only have been, to corroborate or confirm the veracity of B's evidence concerning what the appellant had done to her. The testimony that K gave was not circumstantial but direct evidence of the appellant's conduct towards her on the occasions about which she spoke.

[8] The jury was, I consider, entitled to conclude that K's evidence at the trial about what the appellant had done to her was true. The appellant had pleaded guilty to all of the counts involving her that were charged against him. In that respect, I do not agree with the trial judge's direction that the appellant's pleas of guilty were not necessarily proof of the charges involving K. His pleas were formal admissions in open court of all the elements of those offences (see *Meissner v The Queen* (1995) 184 CLR 132, 157), which included the fact that he had committed the acts comprised in those charges. He did not attempt to withdraw them, and the court accepted the appellant's pleas by remanding him for sentence on those counts. No doubt K's evidence at the trial went further in some respects in filling in details and circumstances of his acts that were not explicitly averred in the counts in the indictment. But, as regards the elements of each offence, there was every justification for treating her evidence as true and reliable. Indeed, when regard is had to the fact that, naturally enough, no attempt was made to cross-examine her about the evidence she gave of those acts, it was more or less inevitable that, acting rationally, the jury would accept what she said. If corroboration of her evidence is sought, it was afforded by the appellant's own pleas of guilty to counts 1 to 17.

[9] This, in short, was an instance in which the evidence of the similar facts adduced by the prosecution to prove its case on counts 18 to 25 was not disputed either seriously or at all. It is, however, at this point that the legal problem arises. It cannot, from the mere fact that one witness at the trial tells the truth, be logically deduced that any other witness at the trial is also doing so. Indeed, evidence that is relevant only to a witness's credibility is generally not admitted or admissible. The rule to that effect is succinctly stated in s 102 of the *Evidence Act 1995* (Cth); but in origin it is a rule of the common law. For K's evidence on counts 1 to 17 to be admissible at the trial of the appellant on counts 18 to 25, it had to be relevant to something more than B's credibility. It might, as the High Court recognised in *Hoch v The Queen* (165 CLR

292, 296), be admissible because it corroborated or confirmed the veracity of complainant B. Traditionally, however, it is necessary for such evidence to confirm or support, or tend to confirm or support, the complainant's sworn account or "story" of what had happened to her, and to do so in some "material particular": *R v Baskerville* [1916] 2 KB 658, 667; *R v Berrill* [1982] Qd R 508, 522-524.

[10] It may be that the High Court was not speaking of corroboration or confirmation in this limited way, but in some wider and unspecified sense. K's evidence might conceivably have been capable of performing the function of confirming B's account if the events about which K testified comprised acts on the part of the appellant that were distinctive of or "strikingly similar" to those about which B gave evidence. It was urged that this was so here because each of the female complainants was only about four years old when the abuse started; they were both stepdaughters of the appellant, although by different mothers; and they were both indecently dealt with in the home environment at times when their mother was not in the house or perhaps close at hand. Although similar, however, none of these features is distinctive or capable of being described as "strikingly" similar. Indeed, in those respects, the acts alleged against the appellant are depressingly familiar concomitants of dozens of other cases of this kind of criminal behaviour that come before courts in this State and elsewhere in Australia. No doubt because of increasing numbers of marriage and family breakdowns, there are now many more stepfathers living in the same homes as girls who are not their natural daughters than there were before it became common for parents to separate while their children were still young. Correspondingly there are more opportunities for older males to commit sexual offences against young girls than ever before. But criminal and tragic though it unquestionably is, it seems to me to be difficult now to characterise many of the acts of indecent dealing with such girls that are commonly encountered in prosecutions for such offences as being, without something more, "strikingly similar" as distinct from similar to many other offences of that kind. Offences of the same kind are almost always likely to be similar, and even substantially so.

[11] Quite apart from that consideration, it is in my opinion not really possible to say that the appellant's treatment of B was similar, either strikingly or substantially, to his conduct towards K. The latter was subjected between 1970 and 1980 to acts which were much more serious, not to say violent, than those visited upon B between 1983 and 1988. When K was four years old, he began by one day taking her out to a work shed, laying her down on the floor and rubbing his penis on her pubic area. On other occasions he made her take her clothes off and touched her on the chest, licking her nipples while masturbating himself in front of her, or forcing her to masturbate him or to take his penis in her mouth. On at least one occasion he used a vibrator on her. There were, as his pleas demonstrate, no fewer than six instances of attempted rape. On occasions he would say he loved her. By comparison, in the case of B the appellant's conduct usually started with tickling her first, and then touching or fondling her vagina under her clothing. There seems to have been only a single instance of masturbation in front of her. It was not suggested that there was an "innocent" explanation for these incidents of tickling and touching. They were frequently repeated, but they were separated both in time, place and severity from the acts perpetrated on K. What is similar no doubt turns on the level of generality adopted in describing the acts and the circumstances in which they were carried out;

but in this case the similarity consists of little more than that the appellant indecently dealt with each of the complainants.

[12] What I have said is designed to show not that the acts committed against B were trivial (which they were not), but rather that they were not strikingly similar to those committed against K in any particular except that they were sexual acts committed by a stepfather on each of his two young stepdaughters. It is true that "striking similarity" or some such element is not an essential prerequisite of admissibility of similar fact evidence in every case of this kind: see *Pfennig v The Queen* (1995) 182 CLR 461, 483. Here the trial judge invited the jury to consider whether there were "substantial similarities" between the two sets of offences. What, according to Mason CJ, Deane and Dawson JJ in their joint judgment in that case (182 CLR 461, 484), is, however, essential before evidence of similar facts becomes admissible is that it must be such as to raise:

> "the objective improbability of some event having occurred other than that asserted by the prosecution; in other words, that there is no reasonable view of the evidence, consistent with the innocence of the accused … Accordingly, the admissibility of the evidence depends upon the improbability of its having some innocent explanation in the sense discussed."

This is, of course, the test applied to circumstantial evidence generally: *Peacock v The King* (1911) 13 CLR 619, 634, as indeed was recognised by their Honours themselves in *Pfennig v The Queen* (1995) 182 CLR 461, 483. When one comes to apply it to the evidence of the complainant in this case, there can be only one answer to the question posed. A rational or reasonable view of K's evidence that is consistent with innocence is available here. It is that, although the appellant committed the offences against K, he may not have performed the acts that B claimed were committed against her.

[13] Stating the matter in that way may suggest an impression that B was not telling the truth at the trial or that her testimony was in some respects not reliable. Nothing could be further from what it is intended to convey here. She may and probably was telling the truth in what she said in her evidence. The jury at any future trial of counts 18 to 25 may well conclude that she is a reliable and truthful witness in all relevant respects; but, in arriving at such a conclusion, they must be left to reach their verdict without the distraction afforded by the testimony of K. It referred to and proved other events and matters that have no logical or probative value in assessing the evidence of B as a witness concerning the acts alleged to have been committed by him on her on quite different occasions.

[14] Some degree of similarity must necessarily exist between the two sets of acts before evidence of one becomes probative of or admissible in support of the other. Otherwise it would be theoretically possible for the prosecution to tender evidence of successive acts of violent non-sexual assaults by the appellant against one stepdaughter in order to prove acts of non-violent sexual assault committed by him against another. That would be to infer no more than that, because one stepdaughter is telling the truth, the other must be doing so too. Yet that is not, as the law now stands, a legitimate process of reasoning to invite a jury to adopt. To describe K's testimony about the appellant's actions as affording "propensity" evidence against

him, or evidence of "disposition', seems to me to overstate its probative effect. It had no specific connection with the offences alleged to have been committed against B. The most that K's evidence established against the appellant was, as Dowsett J said of the accused in *R v Riley* [1997] QCA 277, that he had a propensity or disposition for taking advantage of opportunities for sexual misconduct as they presented themselves. In this, he resembles many other men who come before the court on charges like these. The fact that, in saying that the appellant indecently dealt with her, K was telling the truth did not prove that B was doing so when she said that he also indecently dealt with her. That remains so even though the appellant did not give evidence that contradicted B's evidence against him.

[15] In the result, I do not consider that the evidence of K concerning the matters covered by counts 1 to 17 was admissible at the trial in proof of the acts with respect to B averred against the appellant in counts 18 to 25.

[16] There is another matter on which I find the need to comment. In directing the jury, the trial judge provided them with typed copies of notes he had prepared for his own use in summing up and which he used in doing so. If the notes do not go beyond what is said orally in summing up, I see no objection to adopting such a course, except perhaps that even today not all jurors are literate, and those who are not may not wish to reveal it to others. However, if that course is followed, as it was here, the notes in question necessarily become part of the summing up and must be marked or identified in some way so as to ensure their inclusion in the appeal record.

[17] I would allow the appeal and make the orders proposed by Chesterman J in his reasons.

[18] **MACKENZIE J:** The appellant was convicted of a variety of counts of a sexual nature against his stepdaughter. He appeals on the grounds that the learned trial judge erred in law in allowing the evidence of another stepdaughter of a previous relationship to be admitted. Alternatively, if the evidence was strictly admissible the learned trial judge erred in law in not exercising a discretion to exclude it. There is also an application for leave to appeal against sentence, although counsel conceded that there was little that could be said in support of it.

[19] The appellant was arraigned on 17 August 2004 in the presence of the jury panel on an indictment alleging 24 counts. Counts 1 to 17 related to a woman ("the first complainant") who by the time of trial was 38. She was the appellant's stepdaughter at the time of the offences, from 1970 to 1980, by reason of her mother's marriage to him when the complainant was about three years of age. Counts 18 to 24 related to a woman, 26 at the time of trial ("the second complainant"), for offences allegedly committed from 1983 to 1988. She was the daughter of a woman who began to live with the appellant at Christmas 1982 and married him in May 1983.

[20] The appellant pleaded guilty to counts 1 to 17 but not guilty to counts 18 to 24. Prior to arraignment, there had been legal argument, following which the learned trial judge ruled that the evidence of the appellant's admitted conduct in relation to the first complainant was admissible against him on the trial of counts 18 to 24. As

a result of this ruling he faced a trial where the first complainant's evidence was left to the jury, instead of facing a trial in which the acceptability of the second complainant's evidence, without the assistance of the first complainant's evidence, was the major issue.

[21] The pre-trial argument was conducted on written submissions supplemented by limited oral argument. If this procedure is followed, the written submissions should be included in the record in case the ruling on the point becomes a ground of appeal. Upon obtaining copies of them it is apparent that the prosecution argument focused on whether there was sufficient similarity between acts performed by the appellant on the first complainant and those performed on the second complainant to make the evidence of the first complainant admissible on the trial of the counts concerning the second complainant. A list of what was relied on as points of similarity was included. There was a concession that acts against the first complainant were more serious than those against the second complainant. However, it was submitted that the majority of acts involved some conduct identical in both cases.

[22] In *Pfennig v The Queen* (1995) 182 CLR 461, 464 Mason CJ, Deane and Dawson JJ said, with reference to the judgment of Mason CJ, Wilson and Gaudron JJ in *Hoch v The Queen* (1988) 165 CLR 292, 295:

> "An important distinction is to be drawn between cases such as the present case in which the 'similar facts' are not in dispute and cases in which such facts are in dispute. Thus, their Honours said:
>
> > 'Where the happening of the matters said to constitute similar facts is not in dispute and there is evidence to connect the accused person with one or more of the happenings, evidence of those similar facts may render it objectively improbable that a person other than the accused committed the act in question, that the relevant act was unintended, or that it occurred innocently or fortuitously. The similar fact evidence is then admissible as evidence relevant to that issue.'
>
> Where the propensity or similar fact evidence is in dispute, it is still relevant to prove the commission of the acts charged. The probative value of the evidence lies in the improbability of witnesses giving accounts of happenings having the degree of similarity unless the events occurred. Obviously the probative value of disputed similar facts is less than the probative value those facts would have if they were not disputed".

[23] In reasons given before arraignment for admitting the evidence, the learned trial judge identified a number of features which led him to the conclusion that the evidence was admissible. There is no specific indication in the transcript that he considered the issue of exercising the discretion; I will return to this later. The features he relied on were:

(a) Each complainant was the child of a woman with whom the appellant had had a relationship;
(b) The children were members of his household;

(c) He had assumed a paternal role in respect of them;
(d) Both were young, being 4 to 5 years of age when the alleged offending began;
(e) The appellant was persistent notwithstanding objections by each complainant to what he was doing;
(f) Threats about disruption of the family if the complaints were made.

He also identified as an important point that the relationships were similar, even though the exact mechanism of offending may have been different. He identified that the jury may place significance on the improbability of similar lies, referring to *R v Noyes* [2003] QCA 564.

[24] He applied the following tests, derived from the judgment of Thomas JA in *R v O'Keefe* [2000] 1 Qd R 564, 573-574:

> "(1) Is the propensity evidence of such calibre that there is no reasonable view of it other than to support an inference that the accused is guilty of the offence charged? …
>
> (2) If the propensity evidence is admitted, is the evidence as a whole reasonably capable of excluding all innocent hypotheses? This would have to be answered on the assumption of the accuracy and truth of the evidence to be led. If the judge thought that the evidence as a whole was not reasonably capable of excluding the possibility that the accused is innocent, then the accused should not be exposed to the possible risk of mistrial by a jury that might give undue prejudicial weight to propensity evidence. The exercise is to be undertaken with special care because of the potential danger of misuse of such evidence by a jury. "

[25] The importance of identifying the purpose for which evidence commonly described as propensity or similar fact evidence is to be led as an aid to analysing its admissibility is alluded to at the commencement of the joint judgment of Mason CJ, Deane and Dawson JJ in *Pfennig* at 464-465 where they said:

> "There is no one term which satisfactorily describes evidence which is received notwithstanding that it discloses the commission of offences other than those with which the accused is charged. It is always propensity evidence but it may be propensity evidence which falls within the category of similar fact evidence, relationship evidence or identity evidence. Those categories are not exhaustive and are not necessarily mutually exclusive. The term 'similar fact' evidence is often used in a general but inaccurate sense."

[26] The present case is one where the purpose of the evidence is to assist in proving that acts which the second complainant alleges were done to her by the appellant were in fact done by him as alleged. As Mason CJ, Wilson and Gaudron JJ said in *Hoch* at 294:

> "The basis for the admission of similar fact evidence lies in it possessing a particular probative value or cogency by reason that it

> reveals a pattern of activity such that, if accepted, it bears no reasonable explanation other than the inculpation of the accused person in the offence charged: see Dixon J's discussion (at 375) in *Martin v Osborne* (1936) 55 CLR 367. In that same case Evatt J pointed out that it bears that probative value or cogency not as a matter of deductive logic but by reason that it allows for 'admeasuring the probability or improbability of the fact or event in issue, if we are given the fact or facts sought to be adduced in evidence' (at 385)."

[27] The question to be answered is whether the learned trial judge was correct in ruling that the evidence of the first complainant should be admitted on the trial of the counts with respect to the second complainant. The appellant's argument is twofold. Firstly, it is submitted that the evidence was not admissible as a matter of law. Secondly, it should have been excluded in the exercise of the learned trial judge's discretion because of its prejudicial nature. The learned trial judge, it was submitted, had not applied his mind to this question. On the question of admissibility, it was submitted that the learned trial judge placed too much emphasis on whether the first complainant's evidence would give more credibility to the uncorroborated evidence of the second complainant. The similar relationship each complainant had with the appellant as a child in his household was not sufficiently decisive to make the evidence admissible. With regard to the discretionary exclusion, it was submitted that the prejudicial weight of the plea of guilty to the offences concerning the first complainant and the facts of those offences "outweighed the utility of admitting that evidence" in relation to the counts concerning the second complainant.

[28] The starting point in considering the appellant's arguments is the following passage from the joint judgment in *Pfennig* at 483-484*:*

> "There has been a tendency to treat evidence of similar facts, past criminal conduct and propensity as if they each raise the same considerations in terms of admission into evidence. The difficulty is that their probative value varies not only as between themselves but also in relation to the circumstances of particular cases. Thus, evidence of mere propensity, like evidence of a general criminal disposition having no identifiable hallmark, lacks cogency yet is prejudicial. On the other hand, evidence of a particular distinctive propensity demonstrated by acts constituting particular manifestations or exemplifications of it will have greater cogency, so long as it has some specific connection with or relation to the issues for decision in the subject case. That evidence, as has been said, will be admissible only it its probative value exceeds its prejudicial effect. But that statement, it seems to us, is of little assistance unless it is understood that the evidence sought to be admitted is circumstantial and as such raises the objective improbability of some event having occurred other than that asserted by the prosecution; in other words, that there is no reasonable view of the evidence consistent with the innocence of the accused. In stating the question in that way, we point out, as Lord Cross of Chelsea suggested in *Boardman*, that the purpose of the propensity is to establish a step in

> the proof of the prosecution case, namely, that it is to be inferred, according to the criminal standard of proof, that the accused is guilty of the offence charged. Accordingly, the admissibility of the evidence depends upon the improbability of its having some innocent explanation in the sense discussed.
>
> Acceptance of the statement of principles state above means that striking similarity, underlying unity and other like descriptions of similar facts are not essential to the admission of such evidence, though usually the evidence will lack the requisite probative force if the evidence does not possess such characteristics."

[29] Reference should also be made to *R v S* [2001] QCA 501, a case where joinder of counts in respect of two complainants was in issue, where the evidence of one girl had been held not to be admissible in the case involving another girl. Thomas JA referred to "a strong leaning in favour of severance of sexual offences involving multiple complainants unless the principal evidence of each complainant is admissible in the cases involving the other complainants." He said that there was, however, no absolute rule. More importantly for present purposes he went on to raise an issue that might be considered afresh in regard to the admissibility of the disputed evidence in any retrial in that case.

[30] Thomas JA observed that there may well be "a current overestimation of the rigours of admissibility of similar facts evidence." He referred to the proposition that existence of dissimilarities in the conduct under consideration is not inevitably fatal to its admissibility, relying on *Pfennig, Carne v R* [1997] QCA 176, *Hooper v R* [1999] QCA 310 and *R v Delgado-Guerra ex parte Attorney-General* [2001] QCA 266. He repeated what de Jersey CJ said in *Hooper*, that while "striking similarity", "unusual features", "underlying unity", "system" or "pattern" will often be the criteria that permit such evidence to be received, none of them was an essential prerequisite for admissibility. He then continued:

> "In my view the commission of sexual acts upon various members of the one household, especially upon members of the same sex at comparable ages is, to say the least, a promising commencing point for an application for reception of similar fact evidence. Where it is alleged that someone has committed sexual offences against different members of the same household, where the degree of control is similar (perhaps virtually identical) the types of molestation similar, the increasingly venturesome pattern of molestation similar, it would be unsurprising that there should be a ruling that the evidence of each satisfies the necessary tests for reception of similar fact evidence."

[31] Later, having proceeded to consider the question of severance on the assumption that the ruling that the evidence in the case of one complainant was not admissible in that of the other was correct, he said:

> "The true key to a combined trial in cases like the present is a ruling that the evidence in each is admissible as similar fact evidence. In 'same family' cases the key might not be as difficult to turn as has sometimes been thought."

[32] I take that to mean that Thomas JA was of the view that strict similarity of a kind that is relevant to "signature" cases because the purpose is to prove identity by reason of the improbability of two offences being identically carried out by separate offenders, is not as critical as in "same family" cases where the issue is often whether the acts attributed to an identified person occurred at all. That would not be a surprising conclusion since the very nature of sexual activity, the ways in which opportunities to engage in it may arise in a family setting and the impact of individual personalities of victims on the way in which an intending offender's objective may be achieved are likely to make precise similarity less likely. Yet the aggregation of circumstances may make a cogent case that the acts committed in respect of one complainant are highly probative of a case that offences have been committed in respect of a second complainant even allowing for the points of difference in the evidence. In *Hooper* it was accepted that making this kind of determination is very much a matter of impression. It is also made plain that frequently what is done will be similar to what predators may generally do. The question is whether the aggregation of features which, individually, would not be enough to establish guilt, in combination suggests a particularly distinctive approach characteristic of the person alleged to be the offender.

[33] The present case was not one where possible collusion between complainants was an issue. Section 132A of the *Evidence Act* 1977 (Qld), introduced to avoid the strictures of *Hoch* provides that the possibility that similar fact evidence may be the result of collusion or suggestion is not to be treated as a basis for ruling the evidence inadmissible. The effect of such collusion on the weight of the evidence is declared to be a jury question. However, the qualification that the prohibition only applies to similar fact evidence the probative value of which outweighs its prejudicial effect, means that a judgment as to the balance between probative value and prejudicial effect must still be made.

[34] In this case the possibility of collusion was excluded by the evidence. The second complainant gave evidence that she had not spoken to the first complainant until some months after the second complainant had made her complaint and statement to the police. There had been no contact between them since the second complainant was about four years old. There was evidence that, on the occasion she made her complaint to the police, the second complainant nominated the first complainant, and the first complainant's sister, who had been a member of the second complainant's household until the second complainant was, perhaps, nearly seven years of age as people who may be potential complainants. The first complainant's sister, nominated as a possible complainant, did not give evidence. There is nothing in the evidence suggesting that she was a conduit for information between the first and second complainants.

[35] It is implicit in the cross-examination of the first complainant about a pretext telephone call she made to the appellant, and in certain other remarks made during the pre-trial legal argument and elsewhere in the record, that the appellant's experienced counsel was suggesting a contrast between the appellant's ready admission of what he had done to her and his breaking down in tears during the phone call, and his denial of any wrongdoing in relation to the second complainant. The fact that he was nevertheless convicted is another example of the not uncommon

experience in criminal courts that a defence resting on the premise that, because an accused pleads guilty to some offences, he is not guilty of those to which he pleads not guilty is not guaranteed to be successful. However, that line of defence is a side issue, since it would not have been necessary to rely on it at all had the evidence of the first complainant not been admitted.

[36] One further matter, which in one respect is not capable of satisfactory resolution on the material presently available, requires comment. It concerns one passage of the evidence of the second complainant that, in my view, might have some significance on the question of admissibility of evidence or at least parts of the evidence of the first complainant in the event of a new trial. It is as follows:

> "… when he first started doing it I asked him what he was doing and he asked me if I liked it, which I replied 'no' and he said, 'well, you'll learn to like it,' and, 'this is what fathers and daughters do together.'"

It would underestimate the nature of such a statement to treat it simply as something that any person minded to abuse a young child might well say.

[37] Awareness of the frequency of cases involving abuse of children in family situations suggests that such an attitude may not be as uncommon in the community as one might hope. Nevertheless, in my view evidence that such a statement was made by an alleged offender should not be undervalued in the process of considering whether the evidence of the first complainant was admissible. The fact that such a statement was made goes to the probability that the offences alleged by the second complainant were committed. In my view, the evidence of the first complainant would, to use the old terminology, be capable of corroborating the evidence of the complainant in a material particular, even though corroboration is not necessary as a matter of law. In my view, the editing of the actual terms of what was said does not falsify this, for reasons referred to below. The conclusion is, of course, premised on the acceptance of the second complainant's evidence that the words quoted above were said, which can only be assumed at the time of ruling on admissibility.

[38] It can be seen from the appeal record that the issue of whether and what of this evidence should be admitted was discussed to an extent in the pre-arraignment hearing but as a separate issue from the "similar fact" issue. What appears to have happened was that in her statement to the police, the full text of the conversation was:

> "She said, 'what are you doing?' I remember he said, 'do you like it?' She said, 'no'. He said I'd learn to like it, that (the first complainant's sister) liked it and this is what fathers and daughters did together."

[39] The police statement itself was not marked and placed on the record; the quote immediately above was read into the transcript during argument as to what, if any, of that passage should be admitted. However, as far as can be deduced from the record, the objection by defence counsel and the deletion of the reference to the first complainant's sister seems to have been made because it was expected that the second complainant would say that the conversation happened while the applicant

was doing a particular act to her, of a kind of which the first complainant's sister had not complained although she had complained of "other things". In the result the reference to the first complainant's sister was not led and she was not called as a witness at all.

[40] Logically, if a complainant gave evidence that the offender had made an admission regarding his conduct with another girl, evidence from that other girl that offences had been committed against her would tend to support the complainant's evidence. An example of such a case is *Mitchell v R* (1952) 36 Cr App R 79. The complication in the present case is that the admission does not relate directly to the first complainant. Any basis for her to give corroborative evidence must rely on a statement in the most general way that the appellant had said that the conduct was of a kind that fathers and daughters engaged in.

[41] The actual specific admission in its unedited form relates to a girl who was not called to give evidence. There was no admission in that statement concerning the first complainant but the plea of guilty was one. One obvious reason for the reference to the first complainant's sister, but not to the first complainant, is that the former was a contemporaneous resident in the family group with the second complainant for a period of time. The first complainant was not. In that setting, although not approached in that way at trial, her evidence might have been used for the purpose of supporting the second complainant's evidence of contact of a sexual nature with the appellant. It cannot be satisfactorily resolved on the material in the record whether the evidence the first complainant's sister might give provides a sufficient foundation for her evidence to be led, in the event that there is to be a new trial, as I apprehend there is likely to be.

[42] The kinds of acts described by the first complainant comprised the following acts on the part of the accused:

(a) rubbing his penis against her pubic area on an occasion when he had taken her to a shed near their home;
(b) taking her on his lap when they were swimming and then fondling her genitals;
(c) rubbing a vibrator over her vaginal area on two occasions;
(d) attempts to penetrate her vagina after committing acts of indecency and after lubricating his penis with oil;
(e) numerous undifferentiated occasions of touching and fondling her genitals;
(f) licking and touching her chest and nipples;
(g) clasping her hand over his penis and masturbating;
(h) acts of cunnilingus and;
(i) one attempt to make her fellate him.

[43] With respect to the second complainant the kinds of acts described comprised:

(a) tickling her ribs while she was sitting on his lap; while she was laughing uncontrollably, fondling her genitals;
(b) other occasions where he fondled her genitals with his hand either inside or outside her clothing;
(c) wrestling playfully with her, tickling her until she laughed uncontrollably and then fondling her genitals and kissing her;

(d) asking her to scratch his back and then kissing her and fondling her genitals;
(e) two occasions when, in association with other indecent acts, he clasped her hand on his penis and masturbated;
(f) on one such occasion, interrupted by the arrival of a relative, when her pants were taken down and he was lying on top of her, asking her to "make love to him". When she kissed him on the cheek, having not understood the implications of what he had said, he said that she should not be worried because he would not make her pregnant.
(g) fondling her genitals while she lay asleep on the couch with her legs over his lap.

[44] The second complainant said that often when offences were committed her mother was at work, out for other reasons or in the shower, which made a distinctive sound while running, enabling someone to know when she had finished showering. There was no evidence of where the first complainant's mother was during the events committed in her case.

[45] It is apparent from the lists of complaints that there was a wider variety of sexual misconduct in the case of the first complainant; cunnilingus and attempted fellatio were not features alleged by the second complainant. Nor were there actual attempts to effect penetration in the case of the second complainant, although there was one event where, inferentially, it was in contemplation but for the arrival of the relatives. Much of the conduct in respect of each complainant was of a similar kind, although not particularly distinguishable from what frequently happens in cases of this kind.

[46] In the case of each complainant, there was engagement, on some occasions, in seemingly innocent play which was a prelude to the commission of indecent acts. The incident while swimming is an example in the case of the first complainant. The tickling, wrestling and back scratching incidents are examples in the case of the second complainant.

[47] The explanations given to the respective complainants as to why he engaged in the conduct were different. The first complainant gave evidence that, when she protested, the appellant said he was only doing it because he loved her. She said that she had never threatened to tell anyone about what he was doing to her but he had said he would go to gaol if she did.

[48] The second complainant said that when she said she did not like what he was doing, he said she would learn to like it and that it was 'what fathers and daughters do together'. She said there were occasions when she drew her mother's attention to what the appellant was doing but nothing came of it. On one occasion, she was intimidated by the appellant's body language and did not repeat what she had said. (Her mother gave evidence that she discounted one complaint because the appellant 'had a habit of pulling pants down on kids' and she thought that was what had happened). The second complainant said that on several occasions when she made remarks to the effect that she was going to tell her mother if he did not stop doing it, he would say she would be taken away from her mother and her mother would get into trouble with her grandparents. She said that he also told her on one occasion

that he would buy her a new dog to replace one that had died if she did not resist what he was doing.

[49] The explanations for his conduct and what he said about the consequences of complaining are different in each case. However, as things stood, by the time he was allegedly engaging in the conduct with the second complainant, the explanation he gave to her was historic fact. Further, while the transcript is not always a certain guide, it suggests that the second complainant was always more overtly resistant to his conduct, although, plainly, neither wanted him to continue to engage in it.

[50] While it may be arguable that the reasons given by the learned trial judge for admitting the evidence are general and generic, I am satisfied that on the basis of the evidence as it stands, the evidence of the second complainant was admissible. The analysis of the acts admittedly committed on the first complainant and alleged by the second complainant shows that they both had common features and differences. It is accepted that it is a matter of impression as to the weight that should be given to the fact that acts common to both complainants are unremarkable; they are the kinds of acts commonly found in such cases. The weight to be given to the fact that the conduct in respect of the first complainant began and ended some years before the acts in respect of the second complainant included some that were different and more serious than were alleged by the second complainant is also a matter for judgment. The relative degrees of defiance or resistance to what was being done is in my view not irrelevant in this connection. Both cases include instances where seemingly innocent play led to indecent assaults being committed.

[51] In my view, the propensity evidence, looked at in context, is of such a calibre that there is no reasonable view of it other than to support an inference that the accused is guilty of the offences charged against the second complainant. Without the appellant's statement that what he was doing to her was what fathers and daughters did together, the result may have been otherwise. I am satisfied that if the evidence is admitted, the evidence as a whole is reasonably capable of excluding all innocent hypotheses. With regard to discretionary exclusion, I am satisfied there is no reason to exercise the discretion in favour of the appellant on the facts as they stand.

[52] In the course of the summing up the evidence complained of was left to the jury with notes prepared by the learned trial judge relevantly in the following form:

> "(9) …
>
> (b) The pleas of guilty to the charges involving (the first complainant) are not necessarily proof of these charges, counts 18 to 24.
>
> (c) Be careful not to assume that (the appellant) would have committed offences against (the second complainant) because of a tendency to do that.
>
> (d) Are there substantial similarities between (the first complainant's) and (the second complainant's) accounts of his conduct? If so, his previous conduct can be taken into account in assessing (the second complainant's) evidence. If not, put his previous conduct to one side."

[53] These were supplemented by the oral directions in the following passages:

> "What the law does allow you to do is to look at his earlier conduct with regard to (as first complainant) and say to yourselves, are there substantial similarities between what happened with (the first complainant) and what (the second complainant) says happened. And if you think there are substantial similarities, that is you can use that to see whether or not you accept what (the second complainant) says about it. Do you understand that?
>
> As I have put it in my note D on 2, if there are substantial similarities, his previous conduct in that respect can be taken into account in assessing (the second complainant's) evidence. In other words, if you believe her or not. Now, if you don't think they are substantial the way the Prosecutor said they were, you should put his previous conduct to one side. Because you must not convict a man because of some perceived tendency to do certain things.
>
> Now, so you can see there is a close link between the right way to look at (the second complainant's) evidence that he did lots of similar things over years, which aren't charged, and what you know happened to (the first complainant) at his hands. In short, you have to be pretty careful about it."

[54] While it is not a ground of appeal, I should comment on one thing. In some circumstances, a direction of this kind of brevity might raise questions whether it sufficiently analysed the issues concerning the similar fact evidence for the assistance of the jury. However, I am not persuaded that that criticism is applicable in this case. The trial was short; the evidence was all but completed in one day. The Crown Prosecutor's address, by inference from what the learned trial judge said in the middle paragraph quoted in paragraph [53], had included analysis of the similarities relied on. The address would have been fresh in their minds, having been heard by them only about two hours before. In the circumstances, I am not persuaded that the summing up was inadequate.

[55] I would dismiss the appeal against conviction and refuse the application for leave to appeal against sentence.

[56] **CHESTERMAN J:** On 17 August 2004 the appellant was arraigned on an indictment charging him with 24 offences of a sexual nature. He pleaded guilty to the first 17 counts which were of sexual misconduct against K, between 1970 and 1980, when K was a girl under the age of 14. The counts comprised ten of indecently dealing with a girl under the age of 14, one of assault occasioning bodily harm and six of attempted rape. The appellant pleaded not guilty to the remaining seven counts, each of indecently dealing with B, also a girl under the age of 14, between 31 December 1982 and 24 May 1988. After a two day trial the appellant was convicted on the seven counts.

[57] At the conclusion of the trial the appellant was sentenced on all counts. With respect to the 17 counts against K he was sentenced to two years' imprisonment for

each of the offences of indecent dealing and six months' imprisonment for the assault. He was sentenced to five years' imprisonment for three of the offences of attempted rape and six years' imprisonment for each of the other three. All these sentences were to be served concurrently. On each of counts 18 to 24 he was sentenced to a term of two years' imprisonment, to be served concurrently, but cumulatively on the sentences imposed in respect of counts 1 to 17.

[58] K was called as a witness to testify to the appellant's acts which constituted the first 17 offences described in the indictment. These acts were said to be similar to those alleged against the appellant by B. The appellant had objected to the admissibility of her evidence and sought a ruling, pursuant to s 590AA of the *Criminal Code* 1899 (Qld), prior to the commencement of the trial, whether it was admissible. The trial judge, who heard the application on the day before the trial started, ruled that the evidence was admissible. The trial judge then knew that the appellant intended to plead guilty to counts 1 to 17, and that the appellant would not challenge the veracity of the evidence, if it was admitted. The ruling and the subsequent reception of the evidence are the subject of an appeal against conviction. To understand the argument, and the ruling, it is necessary to rehearse the evidence.

The Evidence

[59] K was born on 6 April 1966. She became the appellant's stepdaughter when her mother married the appellant in about 1969. She was about four years of age when the appellant first indecently dealt with her. She was 13 or 14 at the time of the last offence upon her, an attempted rape. K's evidence was that the appellant began to fondle her when she was about four years old and thereafter he did so very frequently, several times a week. The specific occasions that K could remember were the subject of the various counts.

[60] On the first occasion he took her into a shed near where they lived. He took down her pants and laid her on the floor. He took his penis from his shorts and rubbed it against her pubic area. The next occasion was when she was about a year older. Her mother and stepfather had visited friends who lived on the bank of a canal at the Gold Coast. K and some other children swam in the canal. The appellant joined them. He pulled K onto his lap which was below the surface of the water. He put his hands inside her bathing costume and fondled her about the vulva.

[61] She described many occasions when the appellant touched and fondled her between the legs. He would touch her chest, lick her nipples, expose his penis and masturbate, putting K's hand under his for the purpose. He also attempted intercourse 'on many occasions'. On numerous other occasions he performed acts of cunnilingus. She complained about his behaviour and told him she did not want him to persist. Sometimes she cried and begged him to stop. He refused, explaining that 'I'm only doing it because I love you.'

[62] On two occasions when the appellant and his family lived at Hervey Bay and K was at home alone with the appellant, he took off her clothes and had her lie on a lounge. He had an electric vibrating massager which he inserted into K's vagina. She found

the episodes distressing and implored him to stop. He refused, telling her to relax and assured her that she would 'enjoy it'.

[63] K recalled events which occurred when the family moved to Brisbane and her mother was working, which she did at night. Once the appellant took K out of her bed and into his bedroom. He undressed her and himself. He lubricated his penis with oil, lay on top of K and attempted penetration. K could recall two similar incidents at the same address. These attempted rapes were preceded by touching, fondling and kissing, which can only be described as gross indecency given K's age. She described the acts with some specificity though, as far as one can tell from the transcript, unemotionally.

[64] After about four and a half years of marriage the appellant and K's mother separated. The appellant continued to see K and his own natural daughter, K's half sister. The appellant lived in a duplex where the girls visited him on weekends. On two occasions the appellant took K to his bedroom, undressed her, attempted intercourse and performed acts of oral sex. On another occasion the appellant committed an act of cunnilingus on K and had her commit an act of fellatio on him.

[65] When K asked why he did these things to her the appellant said, 'Because I love you and you can't tell anyone or I'll go to gaol.'

[66] The count of assault occasioning bodily harm had its origin in the appellant's manner of chastising K. He inflicted corporal punishment by means which were clearly meant to excite the appellant rather than to correct the child.

[67] The appellant subsequently remarried. His second union brought him another stepdaughter, B, who was the complainant in each of the offences which comprise counts 18 to 24 in the indictment. In 1986 the appellant adopted her as his own daughter. The offences were alleged to have been committed between 31 December 1982 and 24 May 1988. The complainant was four years of age at the time of the first alleged offence and ten at the time of the last. They were all of indecent dealing.

[68] The complainant's evidence about the first offence was that when she was about four she was sitting on the appellant's lap in the lounge of their house at the Gold Coast. The appellant commenced tickling the child's ribs, causing her to laugh uncontrollably. As she did he slipped his right hand beneath her underclothing and inserted fingers into her vagina. She told him to stop because she found his activities unpleasant. She asked him, then or a little later, why he dealt with her in that way. He asked if she 'liked it' and the complainant said no. The appellant replied:

> 'Well, you'll learn to like it…. This is what fathers and daughters do together.'

[69] The complainant's evidence was that the appellant touched her in the same manner very frequently. She thought that until she was about eight, a period of about four

years, the appellant would fondle her genital area, sometimes over her pants, sometimes underneath, 'every day or every second day.' The occasions were so many that she could recall distinctly only a few 'because of something different that … happened….' The complainant gave evidence that she would often remark to the appellant that she would tell her mother about his misconduct if he did not stop it. His response was to tell the complainant that she would be 'taken away' from her mother and that her mother would 'get in trouble' with her parents if the complainant revealed what he was doing.

[70] The complainant gave evidence of a second occasion which she remembered. It occurred at her grandparents' house. She was lying on a double bed watching wrestling on television. The appellant came into the room, lay beside her and started wrestling with her. That itself was not remarkable because it was a form of play between them, but on this occasion the appellant tickled her, making her laugh uncontrollably. He then placed his hand between the complainant's legs and began kissing her. He lay on top of the complainant, then beside her. At this stage he put the child's hand on his penis and had her masturbate him.

[71] A third occasion involved similar conduct to the first. B was sitting on the edge of her bed wearing only pyjama pants when the appellant entered the room and began tickling her with the usual sequel. She called out to her mother '…he's doing it again'. B's mother came into the room but the complainant, in fear of the appellant, said that nothing had happened and her mother went back to the kitchen.

[72] The next event, which the complainant described specifically, occurred when she was eight or nine. She was asleep on a couch and woke to find her legs over the appellant's lap and felt him touching her 'around … (the) vagina area….' She pretended to remain asleep until the appellant removed his hand.

[73] The last episode which the complainant described occurred when she was nine or ten. One day when she returned from school the appellant called her to his bedroom. He asked her to scratch his back and when she did so he turned and kissed her lasciviously before putting his hand onto her vulva. Later in the embrace the appellant grasped the complainant's hand which he placed on his penis and commenced to rub with it, though through his clothing. She pulled away and left the room.

[74] About two years after the appellant had stopped his offending behaviour, when the complainant was about 12, she told him that she '…would see him in Court one day'. His response was that if she complained about his conduct she would incur her mother's wrath and her mother would in turn be subjected to her parents' anger so the complainant 'better not tell anyone.'

The Use of the Evidence

[75] The trial judge ruled that K's evidence was admissible as similar fact evidence in the prosecution against the appellant on the counts of indecently dealing with B. His Honour said:

> 'It is apparent … that it will be put to [B] that these events did not happen. … The question is whether or not similar fact evidence is admissible in those circumstances. It is true that there is not a high degree of coincidence … about the exact details of the sexual misconduct in each case. On the other hand … there are many points of similarity. … The important point … is that the relationships were similar even though the exact machinery of the offending may have been … different …. Here … (by) the evidence of [K] … if there's a plea of guilty … the allegations … will be admitted. The question is can that only reasonably be viewed as supporting an inference of guilt with respect to the allegations made by [B]. In my opinion it does.'

[76] His Honour referred to a number of relevant authorities and quoted from the judgment of Thomas JA in *R v O'Keefe* [2000] 1 Qd R 564 at 573. His Honour pointed out, correctly, that a striking similarity between the evidence sought to be admitted and the evidence of the complainant was not essential to admissibility.

[77] Following the ruling K gave evidence, which I have already summarised. There was no challenge to any part of her depiction of the appellant's conduct towards her. It is important to note the trial judge's charge to the jury on the use they could make of the evidence. His Honour gave a written synopsis of his summing up. Relevantly that read:

> '(9) (a) …
>
> (b) The pleas of guilty to the charges involving [K] are not necessarily proof of these charges, counts 18 to 24.
>
> (c) Be careful not to assume that [the appellant] would have committed offences against [B], because of a tendency to do that.
>
> (d) Are there substantial similarities between [K] and [B]'s accounts of his conduct? If so, his previous conduct can be taken into account in assessing [B]'s evidence. If not, put his previous conduct to one side.'

[78] In his address to the jury the trial judge said:

> 'Now, that's why my note (9)(b) says, "The pleas of guilty to the charges involving [K] are not necessarily proof of these charges." … [T]he law has always set it's (sic) face against making assumptions… [t]hat because a man does the wrong thing on one

> occasion, we can readily assume he's done the wrong thing on a second occasion, because that's felt to be a very dangerous course which can lead to injustice. … [B]e careful not to assume that [the appellant] would have committed offences against [B] just because his convictions with respect of [K] might show a tendency to do that. You must not use that sort of reasoning at all. The Law does not allow it. It may well be wrong and it would certainly be unjust to do it.
>
> What the law does allow you to do is to look at his earlier conduct with regard to [K] and say to yourselves, are there substantial similarities between what happened with [K] and what [B] says happened. (sic) And if you think there are substantial similarities, that is you can use that to see whether or not you accept what [B] says about it. … [I]f there are substantial similarities, his previous conduct in that respect can be taken into account in assessing [B]'s evidence. In other words, if you believe her or not. Now, if you don't think they are substantial … you should put his previous conduct to one side. Because you must not convict … because of some perceived tendency to do certain things.'

[79] This direction amounted to an instruction that the jury should not use K's evidence to conclude that the appellant had a propensity, or tendency, to molest his stepdaughters, but if they thought that there were substantial similarities between K's unchallenged evidence and B's evidence they could more readily believe B's account. This, in essence, was a direction that the jury could regard K's evidence as corroborating the complainant's, if the jury thought there were substantial similarities between the two witnesses' accounts of the appellant's molestation.

[80] It is to be noted that the trial judge did not essay any analysis of the similarities or dissimilarities between the conduct described by each woman. Nor did his Honour draw attention to what he had thought was significant in terms of similarity when determining the evidence to be admissible.

[81] The similarities which counsel for the respondent identified on the appeal were that:

(a) Both complainants were female.

(b) Both complainants were about four years of age when the appellant's molestation began.

(c) Both complainants were the appellant's stepdaughters.

(d) The appellant threatened both complainants 'with a spectre of adverse consequences to the family if his conduct was disclosed'.

(e) In each case the offending was regular and protracted.

(f) The conduct was similar in that both were fondled in the genital area; both were kissed by the appellant who inserted his tongue into their mouths and both were encouraged to masturbate the appellant.

(g) The appellant rationalised his conduct to each complainant on the basis that he was acting in their best interests.

[82] This categorisation of the evidence glosses over some substantial divergences in it. The appellant gave as his motivation for his conduct towards K the fact that he entertained a genuine passion for her. His express motivation for molesting the complainant was callously impersonal. The differences cannot be assimilated by describing both explanations as a 'rationalisation that the appellant was acting in the girls' best interests'. The nature of the threats given to discourage the complaint were also dissimilar in content and effect.

[83] Nor is it realistic to describe the course of offending and the nature of the conduct as substantially similar. If one must scrutinise the acts with particularity it is evident that the appellant's assault on K, and his attempts at rape, have no parallel in his dealings with B. Of course there are similarities in some of the acts of indecency. These are inevitable in the commission of offences of that type. Given the distribution of erogenous zones in the human body, and the organs available for arousal and satisfaction, there is necessarily invariability in the behaviour of offenders who seek gratification from children. Indeed one is compelled to agree with the author of Ecclesiastes, not only that all is vain, but also that nothing is new. This observation necessarily depreciates the significance of similarities in acts said to constitute indecent dealing. Even so, there are differences in kind and degree between the appellant's dealings with K and those concerning B. The former were more aggressive and intrusive. It is not necessary to dwell on the particulars. The differences are apparent from the summary of the evidence.

[84] The points of 'substantial' or 'striking' similarity come down to the facts that:

- both complainants were young girls
- who were the appellant's stepdaughters.

The Cases

[85] A convenient starting point for a consideration of the law relating to the admissibility of similar fact evidence is *Hoch v The Queen* (1988) 165 CLR 292 in which Mason CJ, Wilson and Gaudron JJ said (at 294):

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

[86] At 296 their Honours said:

> 'In *Sutton* ((1984) 152 CLR 528 at 564) Dawson J expressed the view, with which we agree, that to determine the admissibility of similar fact evidence the trial judge must apply the same test as a jury must apply in dealing with circumstantial evidence and ask

> whether there is a rational view of the evidence that is inconsistent with the guilt of the accused.'

[87] Brennan and Dawson JJ said (at 301):

> 'The rule which excludes similar fact evidence rests upon the view taken by the law that the mere proof of the commission of offences other than the offence with which an accused is charged does nothing more than establish criminal propensity …. Evidence of criminal propensity – a disposition to commit crime – is prejudicial … for it may be wrongly used as sufficient by itself to show that the offence charged was actually committed. But if the evidence, although of propensity, points in some other way to the commission of the offence charged, it may be admitted provided that the additional probative value is sufficient to outweigh … the … prejudice.'

[88] Two cases in the House of Lords appear to have had some influence in the High Court's analysis of the basis of, and test for, admitting similar fact evidence. In *R v Boardman* [1975] AC 421 Lord Hailsham said (at 452):

> 'The truth is that a mere succession of facts is not normally enough … whether the cases are many or limited to two … There must be something more than mere repetition. What there must be is variously described as "underlying unity" …, "system" …, "nexus", "unity of intent, project, campaign or adventure" …, "part of the same criminal conduct", "striking resemblance" …. These are all highly analogical not to say metaphorical expressions and should not be applied pedantically. It is true that the doctrine "must be applied with great caution" …. The test is … whether there is "… such an underlying unity between the offences as to make coincidence an affront to common sense" ….'

[89] Lord Salmon said (at 462):

> 'The test must be: is the evidence capable of tending to persuade a reasonable jury of the accused's guilt on some ground other than his bad character and disposition to commit the sort of crime with which he is charged?'

[90] The second case is *Director of Public Prosecutions v P* [1991] 2 AC 447 in which Lord Mackay, having discussed the speeches in *Boardman*, said (at 460):

> 'From all that was said … I would deduce the essential feature of evidence which is to be admitted is that its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime. Such probative force may be derived from striking similarities in the evidence about the manner in which the crime was committed …. But restricting the circumstances in which there is sufficient probative force to overcome prejudice … to cases in which there is some striking similarity … is to restrict the operation of the principle … which

> gives too much effect to a particular manner of stating it, and is not justified in principle.'

[91] In formulating the principle for determining the admissibility of similar fact evidence Lord Mackay said (at 462):

> '… [T]he judge must first decide whether there is material upon which the jury would be entitled to conclude that the evidence of one victim, about what occurred to that victim, is so related to the evidence given by another victim, about what happened to that other victim, that the evidence of the first victim provides strong enough support for the evidence of the second victim to make it just to admit it notwithstanding the prejudicial effect …. This relationship, from which support is derived, may take many forms and while these forms may include "striking similarity" in the manner in which the crime is committed, consisting of unusual characteristics in its execution the necessary relationship is by no means confined to such circumstances. Relationships in time and circumstances other than these may well be important relationships in this connection.'

[92] The High Court again considered the applicable principles in *Pfennig v The Queen* (1995) 182 CLR 461. Mason CJ, Deane and Dawson JJ said (at 481; 482-483; 484; 485):

> '… [I]n *Hoch* … their Honours stated that the basis for the admission of similar fact evidence lies in its possessing a particular probative value or cogency such that, if accepted, it bears no reasonable explanation other than the inculpation of the accused in the offence charged. In other words, for propensity or similar fact evidence to be admissible, the objective improbability of its having some innocent explanation is such that there is no reasonable view of it other than as supporting an inference that the accused is guilty of the offence charged.
>
> …
>
> Because propensity evidence is a special class of circumstantial evidence, its probative force is to be gauged in the light of its character as such. But because it has a prejudicial capacity of a high order, the trial judge must apply the same test as a jury must apply in dealing with circumstantial evidence and ask whether there is a rational view of the evidence that is consistent with the innocence of the accused.
>
> …
>
> Thus, evidence of mere propensity, like evidence of a general criminal disposition having no identifiable hallmark, lacks cogency yet is prejudicial. On the other hand, evidence of a particular distinctive propensity demonstrated by acts constituting particular manifestations or exemplifications of it will have greater cogency, so long as it has some specific connection with or relation to the issues

> for decision in the subject case. That evidence, as has been said, will be admissible only if its probative value exceeds its prejudicial effect. But that statement … is of little assistance unless it is understood that the evidence sought to be admitted is circumstantial and as such raises the objective improbability of some event having occurred other than that asserted by the prosecution; in other words, that there is no reasonable view of the evidence consistent with the innocence of the accused.
>
> … Striking similarity, underlying unity and other like descriptions of similar facts are not essential to the admission of such evidence, though usually the evidence will lack the requisite probative force if the evidence does not possess such characteristics.
>
> … [T]he evidence of bad disposition should also have some "specific connection" with the commission of the offence alleged. That is because, as a matter of policy, the courts have taken the view that propensity evidence, if it does no more, is likely to have a very prejudicial effect and should not be received unless its probative force exceeds that prejudicial effect. So the evidence of propensity needs to have a specific connection with the commission of the offence charged….'

[93] Some of the expressions of principle in *Pfennig* were thought by this court to sit unhappily with each other. In *O'Keefe* Thomas JA (at 573) attempted a synthesis and concluded in a passage which has since been regarded as authoritative:

> '… the only sensible resolution of these passages requires the trial judge to address two questions:
>
> (a) Is the propensity evidence of such calibre that there is no reasonable view of it other than as supporting an inference that the accused is guilty of the offence charged? …
>
> (b) If the propensity evidence is admitted, is the evidence as a whole reasonably capable of excluding all innocent hypotheses? … If the judge thought that the evidence as a whole was not reasonably capable of excluding the possibility that the accused is innocent, then the accused should not be exposed to the possible risk of mis-trial by a jury that might give undue prejudicial weight to propensity evidence. The exercise is to be undertaken with special care because of the potential danger of misuse of such evidence by the jury.'

[94] A consideration of these passages suggests that the following points are relevant to the admissibility of similar fact evidence:

- It must show more than a disposition in the accused to commit offences of the type with which he is relevantly charged.
- The persuasiveness of the proof offered by the similar fact evidence must exceed the prejudice an accused would suffer by having the jury told of his propensity to commit crimes of the type in question.

- The evidence must be cogent in the sense that the similar fact evidence is so related to other evidence tendered against the accused whether by time, circumstance or mode of commission, that it would be an affront to common sense to regard the occurrence as coincidental.
- Some striking similarity, or underlying unity, between the similar fact evidence and the evidence otherwise admissible against the accused will ordinarily be present, but such features are not necessary for its admission. However its absence will usually deprive the similar facts of cogency of proof of the offences charged.
- The circumstantial evidence constituted by the similar facts must have no reasonable explanation other than as supporting an inference that the accused is guilty. If there is a rational view of the evidence which is consistent with innocence, the evidence may not be admitted.

Analysis

[95] The test applied by the trial judge for determining that K's evidence was admissible does not accord with any of the expressions of principle I have extracted from the authorities. His Honour thought that if there were 'substantial' similarities between the evidence of the two women, then K's account of the appellant's conduct towards her could be used by the jury to bolster their confidence in the veracity of B's testimony. This is wrong on two counts:

(1) The cases provide no warranty for the substitution of 'substantial' for 'striking' when determining whether the character of the similar fact evidence is such as to make it admissible. The cases of *P* and *Pfennig* removed the requirement that there be striking similarity, or pattern, or unity of conduct before such evidence can be admitted, but the cases do not substitute some lesser description, such as substantial similarity, as the test of admissibility. The test is whether the evidence has some cogent relationship with the other evidence so as to necessarily support an inference that the accused committed the offence. The evidence must be inconsistent with innocence.

(2) Nowhere do the cases suggest that the function of similar fact evidence is to enhance the credibility of a complainant. Logically it could not do so except by showing a propensity for indecently dealing with young girls. This use of similar fact evidence is forbidden. The jury was therefore invited to misuse the evidence.

[96] It is apparent that the trial judge applied the wrong test. If the right test be applied, was K's evidence admissible against the appellant on the charges that he indecently dealt with B? It should be observed that *Pfennig* was a case based entirely on circumstantial evidence, as was *O'Keefe*. In each the similar facts were one of the circumstances led against the accused to establish his guilt. There is, however, no doubt that similar fact evidence is admissible in cases where there is direct evidence of an accused's guilt. *Hoch*, *Boardman* and *P* were all such cases, as was *R v Sims* [1946] KB 531, a case approved in *Pfennig*. The formulation of the test for admission may owe something to the context from which it came: a circumstantial case. It may be easier to apply in such a case. It is apparent, however, that in all cases the test for admissibility will be whether the circumstance, constituted by the

similar facts, is reasonably consistent only with the accused's guilt. If it is not, applying *Pfennig*, the evidence will lack the necessary probative force, or cogency, or special relationship, to make it admissible.

[97] The evidence in question here does not pass this test. The circumstance that the appellant indecently dealt with, and sexually assaulted, K over nine years does not make it objectively improbable that he did not indecently deal with B in a later time span of five years. The similar fact evidence is reasonably consistent with the appellant's innocence on counts 18 to 24. It is not objectively improbable that he molested one girl but not the other. K's evidence is not such that there is no reasonable view of it other than as supporting an inference that the appellant molested B. It might be otherwise if there were in K's evidence striking similarities in the manner in which the offences were said to have been committed, or if there was some system or underlying unity such as to exclude coincidence. The evidence here is not of that kind. I have explained why the individual circumstances of the offences themselves have no distinguishing features. All that is left is that each complainant was the appellant's stepdaughter and formed part of his household. This is, in my opinion, insufficient to establish the requisite cogency or special relationship.

[98] Although the majority judgment in *Pfennig* appears to have approved of the judgments in *Boardman* and *P*, the expression of the principle for determining admissibility by the High Court differs from that favoured by the House of Lords. If one applies the test as expressed in *Pfennig* to the facts of *Boardman* and *P*, one would doubt that the evidence there in question would be admitted. In both cases, however, the House of Lords held it was admissible.

[99] Boardman was a boarding school headmaster who was convicted of procuring two of his students to bugger him in the seniors' sitting room. He approached both boys very early in the morning in their dormitory. The episodes concerning each boy were separated by some months. The judges thought the case 'just' satisfied the 'striking similarity' test. I would think that it is only on that basis that the evidence of one boy could be admitted on the trial of Boardman for the offence against the other. Only if the similar fact had that characteristic could it be said to be reasonably consistent only with Boardman's guilt. If there were no distinctive pattern to the offending, as the House of Lords thought there was, his behaviour with one boy would not tend to prove he misbehaved with another.

[100] The facts in *P* have some similarity to those in this appeal. P was convicted of committing incest on each of his two daughters, and of raping one. All charges were heard together and the evidence relating to each offence was held admissible on the others. The evidence was summarised by Lord Mackay (at 461):

> '… [T]he evidence of both girls describes a prolonged course of conduct …. In relation to each of them force was used. There was a general domination of the girls with threats against them unless they observed silence and a domination of the wife which inhibited her intervention. The defendant seemed to have an obsession for keeping the girls to himself, for himself. The younger took on the role of the elder daughter when the elder daughter left home. There

> was also evidence that the defendant was involved in regard to payment for the abortions in respect of both girls. In my view these circumstances taken together gave strong probative force to the evidence of each of the girls ….'

[101] It appears it was the degree of similarity between P's treatment of both his daughters, who lived with him at the same time, that gave the evidence of that treatment cogent, probative force. Although the 'striking similarity', or 'pattern', test was discarded, it would seem that it was only that characteristic which gave the evidence its probative force. If one applied the *Pfennig* test: hypothesis inconsistent with innocence, it might well be concluded that the evidence was inadmissible, if it were not for a distinctive pattern of conduct with each daughter.

[102] These observations may suggest that although 'striking similarity' has been deposed as the determinant of admissibility it will not disappear. As a matter of practicality it may well be that without features of underlying pattern or unity of conduct the evidence will not be inconsistent with innocence, and that the application of the *Pfennig* test in practice will still require an examination of similar fact evidence for the presence of such features.

[103] I have already indicated that K's evidence should not have been admitted because it lacked the necessary cogency and was not inconsistent with the appellant's innocence. There is, of course, the second aspect of the test for admissibility which has not so far been considered. It is that the similar fact evidence must be of such probative force as to outweigh its prejudice. I have explained why I conclude that the evidence in question had no particular probative value. Indeed it seems to me to prove only a propensity in the appellant to molest young girls in his household. On this basis alone it should have been rejected. The evidence was, however, extremely prejudicial. The jury heard a harrowing tale of sustained advances by the appellant against K over a nine year period. He was violent and importunate. The jury can only have been revolted by what they heard.

[104] The appellant did not testify but there was evidence which might have led the jury to doubt the veracity of the complainant:

(1) Her mother gave evidence of a long-standing animosity between the daughter and the appellant. The complainant said in evidence that she wished to see the appellant in jail.

(2) She first complained about his misconduct when she was about 15. The complaint followed close on a fierce argument. B had gone to a night club, despite her age, and come home late, and drunk. The appellant was extremely angry and expressed his feelings publicly. B resented the criticism of her behaviour. In an apparent attempt to deflect the impact of the lateness and circumstances of this complaint the complainant said that she had told her mother, during the course of the abuse, what the appellant was doing. B's mother did not support that testimony. The fact that she took no action at the time suggests there was no earlier complaint.

(3) The complainant obtained a substantial amount of money from the appellant, years after he had separated from her mother and when the

complainant was independent. She tried to obtain money from him on a second occasion but he could not, or would not, pay. The rejection of her request annoyed the complainant.

(4) The complainant admitted that she intended to pursue a claim for compensation pursuant to the *Criminal Offence Victims Act* (Qld) 1995 should the appellant be convicted.

[105] These four factors may well have caused the jury to doubt the complainant's honesty and, therefore, the appellant's guilt. Any doubt they may have entertained would have been dispelled by K's unchallenged evidence of the history of the appellant's depraved treatment of her, and the trial judge's direction that if they thought it substantially similar to B's complaints they could more readily believe B. The effect of K's evidence must have been to overwhelm points which might have cast doubt on that testimony. Accordingly the evidence should have been rejected on this ground also.

[106] The appellant's convictions on each of counts 18 to 24 should be set aside. Although there was an application for leave to appeal against sentence, it was not suggested that the sentences imposed on counts 1 to 17 should be varied in the event that the appeal against conviction on counts 18 to 24 succeeded, as it has.

[107] The orders that I propose are:

1. Allow the appeal and quash the convictions on counts 18 to 24.

2. Order a re-trial on those counts.

3. Refuse the application for leave to appeal against sentence in respect of counts 1 to 17.