IN THE COURT OF APPEAL [1999] QCA 050

SUPREME COURT OF QUEENSLAND

C.A. No. 332 of 1998

Brisbane

[R v O'Keefe]

THE QUEEN

v.

GORDON DANIEL O'KEEFE

Appellant

Pincus JA
Davies JA
Thomas JA

Judgment delivered 5 March 1999.

Separate reasons for judgment of each member of the Court, each concurring as to the order made.

APPEAL AGAINST CONVICTION DISMISSED.

CATCHWORDS: **EVIDENCE - similar facts - questions to be addressed by trial judge for admission of propensity evidence - *Pfennig v R* (1995) 182 CLR 461 and subsequent decisions in state courts discussed.**

Counsel: Mr P Callaghan for the appellant.
Mr M J Byrne QC for the respondent.

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

Hearing Date: 8 February 1999.

REASONS FOR JUDGMENT - PINCUS J.A.

Judgment delivered 5 March 1999

1 I have read the reasons of Thomas J.A. and am in substantial agreement with them. In particular I agree with the suggestions made by Thomas J.A. as to the way in which problems posed by certain passages in Pfennig (1995) 182 C.L.R. 461, should be resolved. That is, I agree that when a question of admission of propensity evidence arises, the trial judge should consider whether the evidence 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" and whether if the evidence were admitted the "evidence as a whole" - i.e. the whole of the evidence in the case including the propensity evidence - would be "reasonably capable of excluding all innocent hypotheses" (emphasis added). As to the second proposition, I further agree that it is to be applied, when considering admissibility, on the assumption that the propensity evidence proffered is accurate and truthful.

2 A reason for rejecting the view that what was said in Pfennig was intended

to lay down a rule that because propensity evidence is circumstantial evidence it cannot be admitted unless "there is no reasonable view of the evidence consistent with the innocence of the accused" (Pfennig at 485), is that any such rule would have a dubious pedigree. Its inspiration appears to be a statement in Hoch (1988) 165 C.L.R. 292 at 296, as to the effect of what Dawson J. said in Sutton (1984) 152 C.L.R. 528 at 564. There Dawson J. said that "a trial judge may find assistance" in arriving at the correct test of admissibility of similar fact evidence "by applying the same standard as a jury must ultimately apply in dealing with circumstantial evidence"; if read literally that appears, with respect, to be novel. Dawson J. relied on Martin v. Osborne (1936) 55 C.L.R. 367, the most relevant set of reasons in which is that of Dixon J. who discussed the admissibility of certain similar fact evidence from pp. 375 to 377. Although Dixon J. used various expressions, his Honour's predominant view appears to have been that:

> ". . . the acts of a party are admissible against him whenever they form a component in a combination of circumstances which is unlikely to occur without the fact in issue also occurring". (376)

That a test of this kind, one which is irreconcilable with the rule set out at the

beginning of this paragraph, is what Dixon J. had in mind can be deduced from his discussion of authority; there one finds reference to evidence which "greatly increases the probability" of the accused having committed murder; of evidence making it "unlikely" that an abortion was not criminal; of evidence making it "probable" that an accounting irregularity was fraudulent; and evidence of acts which "increase the probability" of criminal uttering of a coin (376, 377). It is difficult to read the judgment as intended absolutely to exclude all circumstantial evidence which is capable of any rational explanation consistent with innocence. Such a rule would, for example, keep from the jury evidence that the accused, in a homicide case, happened to own a weapon of an unusual type, said by witnesses to look just like that with which the victim was seen to have been killed; the accused's ownership would be capable of an innocent explanation, namely that an unknown person, the real killer, also had such a weapon.

3 I should add that at first sight the length of the period of time which elapsed, between the events the subject of the disputed evidence and those which

constituted the offence alleged, would tend to make one think that the former could not be sufficiently probative to justify admission of the evidence. But in the circumstances explained by Thomas J.A., the tests of admissibility his Honour has set out, and with which I agree, are satisfied.

4 I agree that the appeal should be dismissed.

REASONS FOR JUDGMENT - DAVIES JA

Judgment delivered 5 March 1999

1 I have read the reasons for judgment of Pincus and Thomas JJA. I agree generally with the reasons of Thomas JA and, in particular, with his statement of the questions which must be addressed (par 21) and the application of those tests to the facts of this case. I wish to add only one comment with respect to the question

stated in par 21(b).

2 I do not think that there can be any doubt that the High Court in *Pfennig v The Queen* (1995) 182 CLR 461 intended that it must be the evidence as a whole which must be reasonably capable of excluding all innocent hypotheses rather than merely the propensity evidence. I do not wish to add to the reasons of Thomas JA for that conclusion. But if the evidence as a whole, whether or not it includes propensity evidence, is not, if accepted, capable of excluding all innocent hypotheses, the prosecution case must fail. So par (b) adds little, if anything, to par (a) except a measure of additional care because of the risk of prejudice which the admission of propensity evidence entails.

REASONS FOR JUDGMENT - THOMAS JA

Judgment delivered 5 March 1999

1 The appellant was convicted on two counts of arson committed on 9 February 1998. The first count related to a fire which had been set in a shed attached to a boarding house, and the second related to a fire which had been set

a short time later at an unoccupied nearby house.

2 The evidence revealed the following circumstances:

(a) The appellant had been a resident of flats situated at 6 Corry Street, Toowoomba. On approximately 31 December 1997 he was given notice to quit within 15 days.

(b) On 1 January 1998 the appellant "trashed" the garden at Corry Street by pulling out plants, breaking off others, taking rocks from the garden and putting the rocks and rubbish from wheelie bins onto the verandah of the premises.

(c) At about midnight on 9 February 1998 a fire was started at 6 Corry Street by placing paper through a broken window up against a wardrobe and igniting the paper. A person wearing white/cream pants and a red shirt was noticed in the vicinity by a number of witnesses.

(d) Whilst members of the fire brigade were attending to the fire, smoke was also noticed to be coming from other premises about 120 metres

away. That fire had been started by igniting waste materials (mainly newspapers and telephone books) that were against or beside the front door of the building.

(e) When the fire engine went to those other premises (at Taylor Street) a person wearing cream pants and a red shirt was seen to be leaving the boundary of the property.

(f) The appellant was located by police a short time later in Taylor Street, wearing cream pants and a red shirt. He smelt of smoke, liquor could be smelt on his breath, and he had a cigarette lighter on his person.

(g) Evidence was also led of records of interview given by the appellant in relation to two fires in Chinchilla with respect to which he had been charged in 1975. In those interviews the appellant admitted to setting fire at night-time to a car shed by means of first lighting paper. The shed was owned by a man against whom he held a grudge. He further admitted that on the same night he had also gone to other premises about 100 yards away and set light to paper which he had

heaped around rolls of linoleum lying on the floor of a room. He did not know the owner of the second premises but said that he wanted to set fire to them to make it hard for the owner of the other premises against whom he had a grudge. He had taken liquor before lighting the fires. This evidence will be referred to as "the 1975 evidence".

(h) Evidence was also presented to the jury by way of deposition (the witness being unavailable to give evidence at time of trial) that on 2 February 1998 the occupant of Unit 2 in the 6 Corry Street premises was approached by a young man (apparently not the appellant), described as a slim man in his mid 20's, about 180 cm tall. The man came into his apartment, said "wrong apartment" and walked outside. The deponent then heard banging noises from the vicinity of Unit 1, followed by the man walking back into Unit 2 asking "Did I leave a bag in here?" and "Do you want a cone?" Shortly after the man had gone the witness noticed smoke coming from Unit 1 and found that two or three little fires had been lit in the room. He and

some other persons then extinguished those fires. This evidence will be referred to as "the 2 February 1998 evidence". It is the principal foundation for the appellant's submission that the 1975 evidence ought not to have been admitted.

Grounds

3 The main ground argued was that the learned trial judge erred in admitting the 1975 evidence. It was also submitted that his Honour's directions on the use that could be made of such evidence were defective, and that his Honour ought to have given a direction to cure certain remarks of the learned Crown Prosecutor which were unhappily described as "inflammatory".

Admission of the 1975 evidence

4 The learned trial judge concluded that the 1975 evidence was strikingly similar to that with which the appellant was charged, referring to the similarity of motive and method and the accompanying detail of a second fire in an unoccupied building close by. His Honour considered that the 1975 evidence had "compelling

probative effect when measured in the light of the evidence that is to be led in the prosecution case involving these offences". I do not understand counsel for the appellant to have seriously submitted that the 1975 evidence failed to reveal sufficient striking similarity. The submission was that there is another dimension to the *Pfennig* test[1] which was overlooked by his Honour, namely that the 1975 evidence was not of sufficient cogency to warrant its admission. It was initially submitted that the period of 22 years that separated the two events made the former occasion too remote, and that nothing which happened more than 10 years previously could ever have a sufficient connection to be properly receivable as propensity evidence. This submission was in the end not seriously pressed, counsel for the appellant very properly drawing attention to the case of *Perry*[2] in which evidence of a poisoning in 1961 was admitted on a charge of attempted murder by poisoning in 1978. Moreover, as a matter of human experience it would seem that peculiar traits, methods, quirks and personalities may endure a lifetime. The

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[1] *Pfennig v R* (1995) 182 CLR 461.

[2] *Perry v R* (1982) 150 CLR 580.

existence of such an approach as was initially suggested would be an unwarranted boon for serial offenders.

5 The submission proceeded to rely upon what was described as the second aspect of the *Pfennig* test. His Honour is said to have erred in failing to determine whether there was, viewed in the context of the prosecution case, a reasonable view of the evidence which was consistent with the appellant's innocence. It was submitted that the 2 February 1998 evidence demanded that such a view be taken as it made it reasonably possible that the acts for which the appellant was convicted were carried out by an unknown third party.

The *Pfennig* test

6 In *Pfennig* the High Court provided a detailed summary of the development of the law concerning propensity evidence, including the sub-category of similar facts evidence, and it is not necessary here to repeat the excursus. However it is necessary to repeat certain passages from *Pfennig* relevant to the argument upon which the appellant relies. Phrases to which special reference will be made are italicised.

(a) Having referred to *Hoch v R*[3] their Honours continued:

> "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[4]."

(b) "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. Here "rational" must be taken to mean "reasonable" and the trial judge must ask himself or herself the question in the context of the prosecution case; that is to say, he or she must regard *the evidence* as a *step* in the proof of that case. Only if there is no such view can one safely conclude that the probative force of *the evidence* outweighs its prejudicial effect.[5]"

(c) "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

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3 (1988) 165 CLR 292, 294.

4 *Pfennig v R* (1995) 182 CLR 461 at 481-482.

5 Ibid pp482-483.

Cross of Chelsea suggested in *Boardman*[6], that the purpose of the propensity evidence is to establish a step in the proof of the prosecution case, namely, that it is to be inferred, according to the criminal standard of proof, that the accused is guilty of the offence charged. Accordingly, the admissibility of *the evidence* depends upon the *improbability* of its having some innocent explanation in the sense discussed[7]."

(d) With reference to the task of the trial judge in balancing the probative value of such evidence against its prejudicial effect the court continued:

"But the trial judge, in making that judgment, must recognize that propensity evidence is circumstantial evidence and that, as such, *it should not be used to draw an inference adverse to the accused unless it is the only reasonable inference in the circumstances.* More than that, the evidence ought not to be admitted if the trial judge concludes that, *viewed in the context of the prosecution case,* there is a reasonable view of *it* which is consistent with innocence[8]."

7 The above statements are contained in the majority judgment delivered by Mason CJ, Deane J and Dawson J. Different, less stringent and, with respect,

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6 *Boardman v DPP* [1975] AC 421 at p457.

7 *Pfennig v R* (above) pp483-484.

8 Ibid p485.

more workable views were expressed by Toohey J and McHugh J. However unless and until further clarified by authority, it is to the majority judgment that attention must be turned.

8 State courts, in attempting to apply these principles, have quoted and relied upon various passages of the majority judgment in *Pfennig* which, taken in isolation, have led to the expression and application of different tests which will be mentioned in paragraphs 9 to 12 below.

9 For example, in the South Australian Court of Criminal Appeal in *R v Tamboureas, R v Batas*[9], Cox J (with whom the other members of the court agreed) referred to passage (b) above from *Pfennig*, and stated that it is not sufficient if the similar fact evidence simply provides another strand of circumstantial evidence against the accused that a reasonable jury might or might not accept as evidence of his or her guilt[10]. His Honour however rejected the submission that similar fact evidence can only be admitted if there is already a case for the

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9 (1996) 186 LSJS 286; BC9602281, delivered 28 May 1996.

10 Ibid at p4.

appellant to answer independently of it. Similarly, in *R v Correia*[11], Steytler J in the Western Australian Supreme Court, having referred inter alia to passages (a), (b) and (d), and to passages from the judgments of McHugh and Toohey JJ, posed the question: "whether the evidence of the assault upon one complainant has, in each case, a particular probative value or cogency such that, if accepted, it bears no reasonable explanation other than the inculpation of the accused as regards the offence of assault on the other, when looked at in the context of the prosecution case"[12].

10 In the recent case of *Thompson v R*[13], Steytler J, with whom Kennedy and Wallwork JJ agreed, having referred to passages (b) and (c), seemingly adopted a more flexible approach: "Each case will, of course, raise different considerations and

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11 (1996) 15 WAR 95.

12 Ibid at p101.

13 BC 9805532 (CCA No 42 of 1998, delivered 19 October 1998).

the probative value of propensity evidence will vary markedly in different cases. Consequently, while it is critical for the trial Judge to keep the relevant principles firmly in mind, their application will differ from case to case. Much will depend upon the purpose for which the propensity evidence is sought to be led and upon the cogency of that evidence, taken together with other admissible evidence, in achieving that purpose ... However there is nothing in the propensity cases, as I read them, which suggests that the cogency of the propensity evidence should be assessed otherwise than in the context of the admissible evidence as a whole, having regard for (sic) the purpose for which the propensity evidence has been led"[14].

11 A fundamental difficulty first exposed by Pincus JA in *W*[15] has not been authoritatively or satisfactorily answered. In *W* Pincus JA drew attention to the requirement in passage (a) above that there be "no reasonable view of it other than as supporting an inference that the accused is guilty", observing that support for an

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[14] Ibid at p13.

[15] *W v R* (1996) 90 A Crim R 297; [1998] 1 Qd R 197 at pp204-205.

inference may be weak or strong but that other passages in the majority judgment made it clear that only strong support would do. His Honour concluded that the evidence in *W* was such that it "must have made a guilty verdict on the offences charged one which a rational jury would much more readily reach". This and later decisions in *Ingram*[16] and *W*[17] arguably pose a less stringent test than that in passage (c) above.

12 Other Queensland judges have adopted a similar approach. For example, Dowsett J in *R v Rushton*[18] stated that *Pfennig* requires that "evidence indicating uncharged criminal misconduct, when led to prove the offence charged, must be objectively examined to ensure that there is a logical, intellectual process by which the jury might reasonably give probative weight to it"[19]. This appears to be less

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16 *R v Ingram*, BC9604015 (CA No 151 of 1996, delivered 27 August 1996).

17 *R v W* [1998] 2 Qd R 531.

18 BC9702582 (CA No 98 of 1997, delivered 17 June 1997).

19 Ibid at p1. Also see the judgment of Dowsett J in *R v Riley* BC9704237 (CA No 109 of 1997, delivered 9 September 1997), where his Honour stated that the following consideration emerged from *Pfennig:* propensity "evidence will only be admissible if, when taken with the other evidence in

stringent than the test elucidated by the majority of the High Court in *Pfennig.* Davies JA in *R v Smith*[20] relied on *Pfennig* at pp483-4 (which encompasses passage (b)) to support the proposition that in that case, the jury "were entitled to infer from this evidence, the probative value of which is high, that it was the appellant who had inflicted these injuries and, at least the first two of these and the injuries constituting the grievous bodily harm being injuries which were deliberately inflicted, that this evidence raises the *objective improbability* that it was someone other than the appellant who inflicted the injuries constituting grievous bodily harm" (emphasis added)[21]. In *R v Carne*[22], de Jersey J relied on passages (a), (b) and (c), and stated that, following *Pfennig*, the issue is whether evidence of the appellant's involvement in an earlier crime could, when added to other evidence of the appellant's involvement in the crime for which he or she is charged, "found the

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the case, there is no reasonable view of the evidence which is consistent with the innocence of the accused" (at p7).

[20] BC9705231 (CA No 29 of 1997, delivered 10 October 1997).

[21] Ibid at pp4-5.

[22] (1997) 94 A Crim R 249.

inference - as the only reasonable inference open - that the appellant committed" the crime.[23]

13 It is necessary then to return to the language of the majority in *Pfennig*. The passage in (a) above merely requires the propensity evidence to be capable of reasonably supporting an inference of guilt. However the passage in (b) seems to require more. It confirms the view that propensity evidence is circumstantial evidence, but the majority did not apply the usual test of admissibility for items of circumstantial evidence. The usual test recognises that it is the ultimate combination of evidence that must exclude an innocent hypothesis rather than individual items which if viewed alone might not support an inference of guilt[24]. Instead, the majority appears to have applied the test applicable to an intermediate fact which is an indispensable step upon the way to an inference of guilt, namely that there is no rational view of that particular evidence that is inconsistent with the

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[23] Ibid at p271.

[24] *Shepherd v R (No 5)* (1990) 170 CLR 573, 581.

guilt of the accused[25]. There is an artificiality in treating a special propensity manifested by conduct at another time as an essential intermediate step, or as a link in a chain, or as the majority described it in passage (b) above as a "step in the proof of that case". Such evidence would more appropriately be seen as a strand that assists in identifying the accused as the perpetrator of a particular act rather than as a separate link which itself proves the identity of the offender. Indeed propensity evidence can never of itself prove the facts in issue. It is always ancillary to other proof. An example would be where there is an arguable case based on a by no means overwhelming combination of circumstances tending to identify the accused as the perpetrator. When the Crown has further propensity evidence of peculiar conduct which satisfies all the necessary tests of probative force compared with prejudicial effect, and of striking similarity or modus operandi, or as the case may be, such evidence is likely to be the clinching factor, and it

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[25] *Shepherd* (above); the adopted test is taken from words used with respect to circumstantial evidence in *Sutton v The Queen* (1984) 152 CLR 528, 564, adopted in *Hoch v R* (1988) 165 CLR 292, 296 and in turn adopted in *Pfennig* at p483 in passage (b) above.

would be very difficult to understand let alone explain why such evidence should be kept away from the jury.

14 It is to be observed that the passage in *Hoch*[26] adopted by the majority in passage (b) was written in the period between *Chamberlain*[27] and *Shepherd*[28] and prior to the important clarification in the latter case dispelling the widely held view that *Chamberlain* required the individual items of evidence in a circumstantial case to be proved beyond reasonable doubt.

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[26] Above at p296.

[27] *Chamberlain & Another v R (No 2)* (1983-1984) 153 CLR 521, 536.

[28] *Shepherd v R (No 5)* (1990) 170 CLR 573.

15 The question arises whether "the evidence" referred to in passages (b) and (c), and "it" referred to in (d) are all references to the propensity evidence as such, or references to the evidence as a whole. A literal reading strongly suggests the former, but for reasons given hereunder it seems probable that some of those terms were intended to refer to the evidence as a whole[29].

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[29] Discussed further in para 20 below.

16 What then is a trial judge bound to do and what tests must be applied in a ruling on the admission of propensity evidence? Unlike a ruling of "no case" by the trial judge at the close of the Crown case, as to which a trial judge's powers are now relatively circumscribed[30], it should be appreciated that the ruling will almost certainly be given at the beginning of the trial and before the Crown opening. Although some of the evidence may be heard on voir dire, the ruling is required before the evidence emerges in its final form before the jury. Obviously the propensity evidence needs to be viewed in the context of the prosecution case (see passage (d) above). It is difficult to think that it could be otherwise viewed. In the whole history of reception of similar facts or, as it is now called, propensity evidence, it has never been suggested that such evidence needs to prove the whole case before it can be received. It has always been received as ancillary evidence aimed at strengthening other evidence presented against the accused.

17 The proper interpretation of the above passages is I think considerably aided

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30 *R v Sutton* [1986] 2 Qd R 72, (1985) 20 A Crim R 280; *Doney v R* (1990) 171 CLR 207.

by considering their application in *Pfennig* itself, where the entire court (including the majority) concluded that the propensity evidence in that case satisfied the necessary tests and was properly admitted.

18 It was accepted by both Crown and defence in *Pfennig* that there were only two logical possibilities concerning the boy's disappearance – either he had drowned at the reserve where his bike was found, or he had been abducted. Thus the Crown had to exclude the hypothesis of drowning before any case could be accepted that the accused man had abducted and killed the boy. Against that background one can understand the repeated references in the majority judgment in *Pfennig* to the necessity of excluding any reasonable hypothesis consistent with innocence. In sequence the trial judge, then the jury and finally the High Court considered that the evidence was strong enough to exclude that as a reasonable possibility[31]. The respective functions of trial judge, jury and appellate court in reaching such a view are of course different. The relevant ruling of a trial judge

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31 *Pfennig* at p486.

must surely be on the basis of what the evidence is reasonably capable of showing, or in the present context, of what it is reasonably capable of excluding. This differs from the jury function of deciding what the evidence actually proves.

19 In *Pfennig*, to exclude accidental death, attention had to be turned to the evidence of those in the vicinity when the boy disappeared, of the movements of the accused and his van at material times, of the prior contact between the accused and the boy, and of the accused's attempt to induce two other children to enter his van on the day before. The combination of that evidence was obviously insufficient of itself to convict the accused. The propensity evidence in *Pfennig* concerned the abduction of a boy by the accused almost 12 months after the disappearance of the boy with whose murder he was charged. On the later occasion the accused was shown to have inveigled the boy into entering the van, closed the sliding door, taken the boy's bicycle into the van and later left it elsewhere having wiped it with a cloth, and to have proceeded to bind, gag, blindfold and eventually rape the boy. On the following day the boy managed to escape. The propensity evidence that was admitted in *Pfennig* was dissimilar to the charged acts in a number of respects

including the absence of killing. The evidence was however sufficiently probative as it tended to prove that the accused, as a person in the vicinity at the relevant time, must have been the abductor. Of course no-one could possibly say that the propensity evidence of itself proved anything about the events 12 months earlier. It can only have been received as ancillary evidence that in combination with the contemporaneous evidence could be taken to identify the accused as the perpetrator.

20 How then does the actual decision on the facts in *Pfennig* cast light upon the essential passages in the majority judgment which have been quoted above? Plainly the main hypothesis consistent with innocence that needed to be excluded in *Pfennig* was the possibility that the boy had drowned at the reserve. Innocence would remain undisplaced if the propensity evidence considered together with the rest of the evidence was not strong enough to prove that the accused had abducted the boy. Both sets of evidence were necessary in order to justify the conviction. There is therefore reason for thinking that references to "the evidence" in the above passages have a shifting meaning. For example in passage (b) there are three

references to "the evidence". The last two references are plainly references to the propensity evidence, but it would be absurd to treat the first reference as confined to the propensity evidence. If one asked "whether there is a rational view of the evidence that is consistent with the innocence of the accused" as stated in that passage, with reference to merely the propensity evidence, the answer would always be "yes", because the propensity evidence of itself proves none of the facts in issue. Such a question can only be answered properly from an examination of the whole of the evidence including the propensity evidence. With this in mind the phrase in passage (d) "viewed in the context of the prosecution case" must require consideration of the whole of the evidence, as distinct from consideration limited to the propensity evidence "in context". Unless it is viewed *along with* the other evidence in the prosecution case, the exercise would be meaningless. This equates with the process actually followed by their Honours in determining that the evidence was properly admitted, and guides the proper interpretation of the four rather perplexing passages in the majority judgment.

21 In consequence it seems to me that 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?[32] The observations of Pincus JA in *W* are helpful in addressing this particular question;[33] and

(b) 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 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

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[32] *Pfennig* at pp.481-2.

[33] *R v W* [1998] 1 Qd R 197, 204, discussed above in para 11.

evidence by the jury.

22 The result of all this is to confer a complex task upon the trial judge in ruling upon the admissibility of propensity evidence. The judge must look at the evidence as a whole. In practice much of this will have to be done on the papers and review of the initial ruling might be necessary if the evidence emerges differently. It must be said that this involves a very broad exercise despite the anxiety of the majority to require application of a principle rather than a discretion[34].

Application to present case

23 Consistently with the above principles, should the 1975 evidence have been admitted in the present case? The main argument on behalf of the appellant is that the incident of 2 February 1998 raises the question whether the crimes for which he was convicted may have been committed by the intruder who was observed on that earlier occasion. The possibility that someone else was responsible for an offence

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[34] "[U]nless the tension between probative force and prejudicial effect is governed by such a principle, striking the balance will continue to resemble the exercise of a discretion rather than the application of a principle" *Pfennig* above at p483.

is of course always theoretically open, and not infrequently evidence is adduced in the course of a trial designed to suggest that someone else is responsible, or that such a possibility is more than fanciful. Examples include *Daylight*,[35] *Zullo*[36] and *Condren.*[37] Such issues involve a question of degree in every case, as the above cases exemplify. In *Condren* the fact that someone else had confessed to the same murder in circumstances where it would have been very difficult for him to have known of certain details mentioned by him unless he had actually been present at the time, was regarded as an important factor in the court's conclusion that the conviction could not stand. On the other hand in *Daylight*, the fact that the dying victim describing his attacker as being of a colour different to that of the accused was received into evidence but did not avoid a guilty verdict. In the present case there is no evidence that a person resembling the 2 February visitor was ever seen

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35 *R v Daylight* (1989) 41 A Crim R 354.

36 *R v Zullo* [1993] 2 Qd R 572.

37 *R v Condren; ex parte Attorney-General* [1991] 1 Qd R 574 at 581, 588-9; (1990) 49 A Crim R 79.

in the vicinity again and the evidence of that occasion tends to suggest an irrational act by a person strongly affected by drugs. It would in my view be open to a reasonable jury taking that evidence into account along with all the other evidence to convict.

24 The 2 February 1998 evidence, although potentially of assistance to the defence, was not in my view such as necessarily to raise a doubt in the otherwise strong proof that the appellant was the offender. Both the propensity evidence and the evidence as a whole were such as to justify affirmative answers by the trial judge to each of the two questions posed in paragraph 21 above. The 1975 evidence was therefore correctly admitted.

25 The correctness of the learned trial judge's ruling can further be seen from a comparison of the evidence in *Pfennig* and the evidence in the present case. On the essential points of comparison the evidence in the present case is stronger, including both the evidence at the scene and the propensity evidence itself. In each case, the theory of innocence was convincingly displaced by evidence that the accused must be the guilty party.

The Summing-up

26 Counsel for the appellant further submitted that the summing-up, although otherwise impeccable, erred by referring to the question of likelihood and discussing the way in which the propensity evidence could be used. It is true that the learned trial judge, in leaving to the jury the question whether they were satisfied that the similarities between the 1975 evidence and the present offences were sufficiently striking, used phrases such as the need for the similarities to be "so striking as to make coincidence a very unlikely explanation". This was in the context of a clear and in my view helpful summing-up of the basis upon which such evidence could be used, including reference to the question whether the similarities are so striking as to indicate that the accused had put his stamp upon the acts and to make it easily recognisable that he must have committed both sets of offences. His Honour continued "[i]f you thought that any similarity is explained by coincidence or any other reason other than that the accused committed both sets of facts, then you could not use the evidence against him". There was also a full discussion of the defence submissions of dissimilarity or lack of sufficient similarity and repeated

directions of the need to be satisfied beyond a reasonable doubt and of the need to acquit if there was any reasonable possibility of innocence and the need to exclude other hypotheses.

27 There was no request made for correction or redirection.

28 The phrase "very unlikely explanation" should not have been used, but looking at the directions as a whole it would seem that the error was neutralised by other appropriate directions. It is impossible to think that any miscarriage of justice resulted from this imperfection, and overall I would not regard the summing-up as erroneous.

Remarks of Crown Prosecutor

29 Finally objection was taken to some remarks made by the Crown Prosecutor in address suggesting to the jury that "from their general knowledge they would know that people who light fires very often like to hang around to see their handiwork". This was said in the context of discussing the question whether the appellant was a mere coincidental spectator. I do not consider that the Crown

Prosecutor's remarks went beyond the limits of legitimate advocacy. Counsel are entitled to some degree of generalisation about the conduct of human beings, and defence counsel would be equally entitled to suggest that a guilty party would not hang around to be seen. It would be for the jury to say which generalisation, if any, they preferred. In the circumstances his Honour was not obliged to advert to the question or to go further than telling the jury that they could give such weight to the submissions in respect of counsel as they thought they deserved.

Conclusion

30 Overall this was a strong Crown case made stronger by rather striking similar fact evidence.

31 The appeal should be dismissed.