SUPREME COURT OF QUEENSLAND

CITATION:	*R v MAQ and RX; ex parte A-G (Qld)* [2006] QCA 355
PARTIES:	**R** **v** **MAQ** **and** **RX** (respondents) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 131 of 2006 CA No 132 of 2006 DC 1415 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Reference under s 668A Criminal Code
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	15 September 2006
DELIVERED AT:	Brisbane
HEARING DATE:	30 August 2006
JUDGES:	McPherson and Holmes JJA and Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Questions answered as follows:** **1. Not necessary to answer.** **2. No.**
CATCHWORDS:	EVIDENCE – ADMISSIBILITY AND RELEVANCY – SIMILAR FACTS – TO PROVE FACT IN ISSUE – IN GENERAL - whether the learned primary judge was correct in applying to the contested evidence the rule of exclusion applicable to evidence of similar facts – where evidence of the accused MAQ's propensity, criminal or otherwise to ignore the welfare of her baby was excluded by operation of the rule in *Pfennig v The Queen* – evidence relevant to relationship – whether the correct test was applied for the admissibility of relationship evidence *Criminal Code* 1899 (Qld) s 7(1), s 320A, s 364(a), s 590AA, s 668A(1) *Evidence Act* 1977 (Qld), s 132B

Chevathan and Dorrick [2001] QCA 337; (2001) 122 A Crim R 441, considered
Conway v R (2000) 172 ALR 185, considered
Makin v Attorney-General for New South Wales [1894] AC 57, considered
Pfennig v The Queen (1995) 182 CLR 461, considered
R v Clark (2001) 123 A Crim R 506, cited
R v PAB [2006] QCA 212; CA No 343 of 2005, 16 June 2006, cited
R v Palaga (2001) 80 SASR 19, cited
R v Stewart; ex parte A-G (Qld) [1989] 1 Qd R 590, cited
Wilson v The Queen (1970) 123 CLR 334, considered

COUNSEL: M J Copley for the appellant
P Davis SC with him M Dight for the respondent MAQ
M Byrne for the respondent RX

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Legal Aid Queensland for the respondent MAQ
M A Kent Solicitors for the respondent RX

[1] **McPHERSON JA:** The respondents are MAQ and RX, who were jointly indicted in the District Court on counts: (1) that between 30 July 2003 and 19 August 2003 they tortured T; (2) that between those dates, they, having lawful care of T a child under 16 years, caused suffering to her by failing to provide her with medical treatment when it was available to them from their own resources. Count 1 is charged under s 320A(1) of the *Criminal Code*, which makes it a crime to torture a person. Section 320A(2) defines torture as meaning "the intentional infliction of severe pain or suffering on a person by an act or series of acts done on one or more occasions". Count 2 in the indictment is charged under s 364(a) of the Code, which constitutes it an offence for a person having care or charge of a child under 16 years to cause suffering to the child by failing to provide adequate medical treatment when it is available to that person from his or her own resources.

[2] After the indictment was presented but before trial, a judge of the District Court was asked under s 590AA(2)(e) of the Code to rule on the admissibility of evidence that the prosecution was seeking to adduce at the trial of the first accused. After hearing submissions from counsel for the prosecution and the defence, his Honour ruled that the evidence in question was inadmissible. The Attorney-General, acting under s 668A(1) of the Code, has now referred to this Court for its opinion a point of law arising in relation to his Honour's ruling under s 590AA.

[3] The point is said to arise in this way. T was at the dates mentioned in count 1 of the indictment the nine-month old daughter of the first accused MAQ. At that time she and the second accused RX were living together with the first accused's two young daughters K and T. RX was joined in the indictment on the basis that pursuant to one or more of the paragraphs of s 7(1) of the Code he was a party to the offences charged. It is accepted by the Crown on this reference that his criminal responsibly is not affected by this reference or by the ruling, which was concerned with the admissibility of evidence against MAQ alone.

[4] On 19 August 2003 the two accused presented at the Ipswich Hospital with T. According to medical evidence, which the Crown proposes to lead, T was found to have recently sustained the following injuries:

- a fracture of the right tibia
- a fracture of the right fibula
- a second fracture of that fibula
- a fracture of the left tibia
- fractures of the right humerus
- fractures of the right ulna and radius
- fractures of the left ulna and radius
- fractures of five ribs on the right side and perforation of the oesophagus
- a further fracture to the rib on the posterior right side
- fractures to three ribs on the left side.

Evidence from medical practitioners is capable of establishing that all of these injuries would have required for their infliction the application of direct blows to the body, or of twisting forces in the case of some of the limb injuries sustained by the child. It is most unlikely that the injuries were caused by accident. Evidence of healing of the injuries to the fractured bones also makes it unlikely that they were all caused at the same time. The "background", as explained in the written outline of submissions on behalf of the Attorney on this reference, is accepted as accurate by the respondent's legal advisers.

[5] The prosecution evidence against MAQ is entirely circumstantial. The Crown proposed to adduce evidence from five witnesses of their observations of conduct or behaviour of the accused MAQ towards T on occasions before or during the period 30 July to 19 August 2003 specified in the indictment. This evidence is directed only to the prosecution case against MAQ. The accused RX was represented by counsel both at the hearing under s 590AA(2) before his Honour and on this reference; but he made no submissions in the proceedings in this Court. As to the accused MAQ, the point of law referred to this Court under s 668A(1) of the Code is whether the learned judge, in ruling as he did on 23 May 2006 that the evidence was inadmissible, "applied the correct test for the admissibility of relationship evidence". This is the second of the two points of law referred by the Attorney, the first of which was not the subject of submissions and has not been pursued before this Court.

[6] At the hearing before the primary judge, counsel for the prosecution submitted that the evidence of the five witnesses was relevant and admissible against MAQ for three reasons, which were summarised before us as follows: (a) it placed in proper context the relationship between the accused MAQ and the infant T; (b) it assisted in drawing inferences as to whether the accused inflicted any or all of the injuries and did so with the intention requisite for torture under s 320A(2), being the intention to inflict severe pain or suffering on the infant; and (c) it was capable of rebutting any suggestion that the injuries were caused accidentally or by the infant herself.

[7] Having read the statements of the five witnesses, I am bound to say that much of the content of each of them is directed to MAQ's mistreatment of her somewhat older first daughter K. There are not many references to her treatment of or conduct towards the complainant T. While conceding this to be so, Mr Copley of counsel

for the Attorney said that he did not suggest that the evidence was relevant in so far as it related to K, and he relied only on those parts of the statements that concerned MAQ's attitude to and relations with T. Nor did he question that, after ruling the evidence inadmissible, his Honour went on to add that, even if he was wrong in so ruling, he was satisfied that the prejudicial effect of the evidence significantly outweighed any probative value it might have; and he therefore, as a matter of discretion, excluded it on that ground also. His decision to that effect was not questioned before us, and it therefore stands until challenged, if at all, on some future occasion.

[8] On behalf of the Attorney, Mr Copley, as I have said, summarised in his written outline the evidence in the prosecution witness statements. I do not think it does injustice to that summary or those statements to say that, in condensed form, they speak of MAQ's complete indifference to the little girl's condition. T was often seen to be unwashed and unchanged, so that she developed a nappy rash. She was also seen by one or more of the intended witnesses to be hungry, under weight and dehydrated. She was fed nothing but milk with no solid food. In July 2003, T was in a congested condition and suffering a discharge from the nose. On 15 July 2003 she was vomiting such that MAQ was advised by another or other women to take her to hospital. This she declined to do, even after the child had developed a fever. Her response to her daughter's crying and the attempts by others to intervene on the child's behalf was one of anger or irritation coupled with the comment that T was attention-seeking. There is also material in the statements that she used to pick up the baby by pulling her up by the arms. When told that this might dislocate the infant's shoulders, MAQ said it would not hurt her, and she continued to pick her up in that way.

[9] The evidence ruled inadmissible is, I have said, entirely circumstantial, in the sense that no one claims to have seen MAQ hit T or otherwise act to cause the injuries from which she was found to be suffering on 19 August 2003. Of course, a jury might take the view that the circumstantial evidence did not assist in proving beyond reasonable doubt that (count 1) it was MAQ who caused those injuries, or that she did so with the intention required by s 320A(2) of inflicting severe pain or suffering on this little girl. They might also not be satisfied that (count 2) the accused had caused suffering to her by not providing her with medical treatment that was available. Nevertheless, the cogency of circumstances and the inferences to be drawn from them are matters ultimately for a jury to determine. There is authority that it is not for the trial judge to determine as a matter of law that inferences ought not be drawn: see *R v Stewart, ex p Attorney-General* [1989] 1 Qd R 590 and the decisions referred to there.

[10] The substantial issue on this reference is, however, whether the learned judge was correct in applying to the contested evidence in this instance the rule of exclusion applicable to evidence of similar facts. The well-known statement by Lord Herschell in *Makin v Attorney-General for New South Wales* [1894] AC 57, 65, precludes the prosecution from adducing evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment "for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried". On the other hand, as his Lordship went on to add:

> "… the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury …".

[11] The exclusionary rule was considered in detail in *Pfennig v The Queen* (1995) 182 CLR 461 and other decisions in which the High Court has discussed the application of the rule and the exceptions to or qualifications upon it. It was that rule that led his Honour in the present case (or so the Attorney contends) to exclude the contested evidence, and to do so, as it is submitted, erroneously. What is contended by the Attorney is that the evidence should have been ruled admissible at the trial on the basis that it constituted "relationship evidence".

[12] The first point to be noticed is that in *Makin's* case Lord Herschell spoke in terms of the inadmissibility of evidence of "criminal acts" or of "other crimes" for the purpose of leading to the impermissible purpose. If it is only criminal acts or conduct that enliven the exclusionary rule, it is difficult to identify in the contested evidence in the present case anything that answers that description. So far as can be gathered from the prosecution witness statements, or the summary of them set out earlier, none of the acts or omissions ascribed by those witnesses to MAQ in respect of T in itself amounts to a criminal act or offence. Considered individually or even in conjunction, they show the accused to be an unusually uncaring mother, who would be regarded by many as abnormally lacking in maternal feelings towards her own infant child.

[13] It was not, however, submitted by the Attorney that the exclusionary principle applies only to acts that are criminal. In *Pfennig v The Queen* (1995) 182 CLR 461, 464-465, their Honours preferred to describe the evidence that for this reason is excluded not as similar fact but as "propensity evidence", while explaining that:

> "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."

By this, I do not, with respect, understand their Honours to be saying that any or all forms of propensity evidence are capable of attracting the exclusionary rule. The reference in the passage quoted from *Pfennig* is to the reception of evidence notwithstanding that it discloses the commission of offences other than those charged. Decisions and texts commonly discuss the exclusionary rule in the context of "other criminal acts"; but its ambit may not be as limited as that. It may be that it owes its origin not (or not only) to a desire to avoid prejudice to an accused from evidence about his criminal conduct on other occasions; but rather to a determination to limit and confine evidence to the immediate issue in the proceedings, which is whether the accused committed the precise act or offence charged. Whatever the true scope or limits of the exclusionary rule, the subject reference should I consider be regarded as raising the question whether evidence of MAQ's propensity, criminal or otherwise, to ignore the welfare of their baby girl is excluded by the rule in *Pfennig v The Queen* (1995) 182 CLR 461.

[14] The ground on which the Attorney submits that the ruling in this case is wrong is that evidence sought to be adduced is "relationship evidence" and ought not to have been ruled inadmissible. Section 132B(2) of the *Evidence Act* 1977 now provides:

> "(2) Relevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed is admissible in evidence in the proceeding".

The ambit of "proceeding" is specified in s 132B(1) as a criminal proceeding against a person for an offence defined in the Criminal Code, Chapters 28 to 32. The offence in count 1 (s 320A) therefore falls within its scope; but not the offence in s 364(a) of the Code. In the reasons for his ruling here, his Honour did not refer to s 132B, although it was relied on by counsel for the Crown in his written submissions at the hearing.

[15] It is open to question whether s 132B adds anything much to the law as it was before the enactment of that section. Relevant evidence has always been admissible unless positively excluded by some particular rule of law. It may be that s 132B(2) was intended to ensure that evidence of "the history of the domestic relationship" between the accused and the complainant is admissible in evidence in the proceeding notwithstanding its exclusion by some other rule, such as that relating to propensity evidence. If so, s 132B would not assist the prosecution in relation to count 2 as distinct from count 1 in this case. In the end Mr Copley sought to support the claim to admissibility on each count primarily on the basis that the evidence here was admissible as "relationship evidence" at common law.

[16] For present purposes the genesis of "relationship evidence" as a special category of admissibility may be found in *Wilson v The Queen* (1970) 123 CLR 334, where the accused was charged with murdering his wife by a gunshot, which he had claimed discharged accidentally. At the trial the prosecution was permitted to adduce evidence of earlier quarrels between the wife and the accused in which she had said she knew he wanted to kill her for her money; and also that he wanted to kill her and that he should "get it over with". The High Court held that evidence of these statements was properly admitted. Barwick CJ said (123 CLR 334, 338), that evidence of the conduct of the accused was not necessarily limited to the act charged, in this case the act of shooting or discharging the gun, but extended to evidence of "any act of the accused the proof of which is itself relevant to the question whether the accused in fact did the act charged". As such, the "conduct of the accused" included evidence that might be explanatory of the relationship of the parties, which might provide evidence not only of motive "but material on which the fact of the killing may be inferred" (123 CLR 334, 339). In his Honour's opinion, "evidence of the relations which had developed between the [accused] and his wife was admissible" (ibid). To similar effect were statements in the judgment of Menzies J, with whom McTiernan and Walsh JJ agreed. Those statements were circumstantial evidence that the shooting was the act of the accused, as well no doubt of the intention and motive accompanying it.

[17] It is not necessary to go into detail through the many decisions in which the admission of evidence of this kind has been upheld in the past. One case on which particular reliance was placed by Mr Copley is the decision of the Federal Court (Miles, von Doussa and Weinberg JJ) in *Conway v R* (2000) 172 ALR 185, on appeal from the Capital Territory. The accused and his lover were convicted of murdering his wife by procuring two other persons to administer a fatal injection of heroin. The prosecution was permitted to adduce evidence of a previous occasion on which he had admitted to his wife that he had put something in her coffee ("the

coffee incident"), which it was suggested was heroin. The Court expressly rejected (§ 95; 172 ALR 185, 212) a submission that the admissibility of "relationship evidence" fell within the exclusionary rule discussed in *Pfennig v The Queen* (1995) 182 CLR 461 and other decisions of the High Court. Their Honours said:

> "The admissibility of 'relationship evidence' turns upon its relevance to the issues in the trial. Such evidence must satisfy the test that its prejudicial nature is outweighed by its probative value. It is not required to satisfy the special test formulated ultimately in *Pfennig* designed to deal with the admissibility of what has been traditionally described as 'similar fact evidence' … *Pfennig* dealt with the special dangers inherent in propensity reasoning."

See also their Honours' statement at §102; 172 ALR 185, 213, that the rule governing the admissibility of similar fact evidence had no application to the admissibility of the evidence concerning the coffee incident.

[18] In my opinion, the same conclusion applies to the evidence proposed to be tendered from the witness statements that the prosecution relies on. In this respect Mr Davis SC for the respondent MAQ accepted that, if the evidence is relevant to relationship, it was admissible notwithstanding that it failed to comply with the *Pfennig* test. That concession accords not only with *Conway v R*, but with *Chevathen and Dorrick* (2001) 122 A Crim R 441, 449, where the Queensland Court of Appeal said that the reception of "relationship" evidence was not prohibited by any rule derived from *Pfennig*. In that instance the evidence in question was, like this here, of the nature of the relationship between the mother and stepfather and a four year old child whom they were convicted of murdering. McMurdo P, Thomas JA and Cullinane J held that evidence of the accused's acts of prior violence towards the girl was admissible under s 132B(2) of the *Evidence Act* 1977 as being "relevant" within the meaning of that section. See also *R v PAB* [2006] QCA 212, at paras 21-28 in the reasons for judgment of Keane JA in that case. There the evidence received related to physical assaults on a child whom the accused was charged with sexually abusing. And see *R v Palaga* (2001) 80 SASR 19, and *Clark* (2001) 123 A Crim R 506.

[19] Mr Davis submitted that the case before us was not appropriate for determination on a reference under s 668A(1) of the Code because it concerned a matter of fact, or of mixed law and fact, whereas what is predicated by that provision is a "point of law" simpliciter. Further, or perhaps alternatively, it was submitted that the substance of his Honour's ruling was not that the contentious evidence infringed the exclusionary rule against similar facts, but that it was simply not "relevant" within the meaning of s 132B(2) or at common law.

[20] I am unable to accept either of these submissions. In the first place, the statutory provision in s 590AA (2)(e) of the Code, under which his Honour's decision was given, expressly provides for a ruling in relation to:

> "(e) deciding questions of law including the admissibility of evidence…"

If the admissibility of the evidence in this case had not been a question of law, the ruling could not properly have been sought or given under that provision. In the second place, it is clear to me, from the reasons given by his Honour for excluding the evidence in this instance, that he was applying the exclusionary principle considered in *Pfennig*. He referred to authorities in which "similar fact" evidence

> was discussed and the reason or reasons why it is excluded, as well as to the need for it to have "a high level of cogency". This or these are criteria used in applying the *Pfennig* test of admissibility to exclude propensity evidence; they are not criteria that prevail where the test of admissibility is simply one of relevance. In fact, his Honour was far from impressed by the strength of the evidence, which is no doubt why he also excluded it in the exercise of his general discretion. One may certainly sympathise with that view; but, before deciding to exclude the evidence as a matter of discretion the learned judge had already ruled against its admissibility as a matter of law, and I consider that the Attorney is therefore entitled to refer it for consideration as a point of law under s 668A(1) of the Code.

[21] In my respectful opinion for the reasons given here his Honour's ruling was mistaken. I would therefore answer "No" to the second question in the reference, which is whether the judge applied the correct test for the admissibility of this relationship evidence.

[22] **HOLMES JA:** I have read the reasons of McPherson JA, with which I agree and concur that the second question in the reference should be answered "No".

[23] **WILSON J:** I agree with McPherson JA that the second question in the reference should be answered "No," and with his Honour's reasons.