SUPREME COURT OF QUEENSLAND

CITATION:	*R v Roach* [2009] QCA 360
PARTIES:	**R** **v** **ROACH, Kerry Raymond** (appellant/applicant)
FILE NO/S:	CA No 115 of 2009 DC No 1951 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	27 November 2009
DELIVERED AT:	Brisbane
HEARING DATE:	20 October 2009
JUDGES:	Keane and Holmes JJA and A Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction dismissed;** **2. Application for leave to appeal against sentence dismissed.**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – PROPENSITY, TENDENCY AND CO-INCIDENCE – ADMISSIBILITY AND RELEVANCY – PROPENSITY EVIDENCE – EVIDENCE OF UNCHARGED ACTS – where appellant convicted of one count of assault occasioning bodily harm – where evidence of prior assaults by appellant on complainant admitted – where evidence admitted as relationship or context evidence – where s 132B of the *Evidence Act* 1977 (Qld) allows admission of relevant evidence of the history of domestic relationship between defendant and complainant – whether *Pfennig* admissibility test applicable – whether evidence of prior assaults relevant as context evidence or on any other basis – whether evidence admissible – whether trial judge should have exercised discretion under s 130 of the *Evidence Act* to exclude the evidence – whether jury should have been directed that it could not use the evidence unless satisfied beyond reasonable doubt that the prior assaults happened CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where appellant

sentenced to 18 months imprisonment with parole release date fixed after eight months – where assault on frail female complainant, with whom appellant had been in a relationship and for whom he had acted as carer – where assault caused bruising to complainant's arms and one side of her face – where appellant 54 years old; had two prior convictions for assault; had good work record and favourable references – whether sentence manifestly excessive

Evidence Act 1977 (Qld), s 130, s 132B

FDP v R [2008] NSWCCA 317, cited
HML v The Queen (2008) 235 CLR 334; [2008] HCA 16, considered
O'Leary v The King (1946) 73 CLR 566; [1946] HCA 44, cited
Pfennig v The Queen (1995) 182 CLR 461; [1995] HCA 7, considered
R v Chevathen & Dorrick (2001) 122 A Crim R 441; [2001] QCA 337, cited
R v Garner [1964] NSWR 1131; (1964) 81 WN (Pt 1) (NSW) 120, cited
R v Johnson [2002] QCA 283, cited
R v King [2006] QCA 466, cited
R v Pierpoint (2001) 126 A Crim R 305; [2001] QCA 493, cited
R v Raye (2003) 138 A Crim R 355; [2003] QCA 98, cited
R v Sadler (2008) 20 VR 69; [2008] VSCA 198, cited
S v The Queen (1989) 168 CLR 266; [1989] HCA 66, cited
Shepherd v The Queen (1990) 170 CLR 573; [1990] HCA 56, cited

COUNSEL: C W Heaton for the appellant/applicant
P F Rutledge for the respondent

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

[1] **KEANE JA:** I have had the advantage of reading in draft the reasons of Holmes JA. I agree with those reasons and with the orders proposed by her Honour.

[2] **HOLMES JA:** The appellant appeals against his conviction on one count of assault occasioning bodily harm, and also seeks leave to appeal against the sentence imposed in respect of that offence, of 18 months imprisonment with a parole release date fixed after eight months. The appeal against the conviction has two grounds: the first, that irrelevant evidence of earlier acts of violence against the same complainant was admitted; the second, that the trial judge failed to exclude that evidence in the exercise of his discretion. The ground for the application for leave to appeal against sentence is that it is manifestly excessive.

The charged assault

[3] The Crown case relied on the evidence of the complainant, who said that she had a sexual relationship of an intermittent nature with the appellant between early 2004

and mid-April 2006. For some part of that time, the appellant received a carer's pension for looking after the complainant, who suffered from a variety of illnesses, including cirrhosis of the liver, drug dependence and depression. The two led an itinerant existence, staying separately or together in boarding houses and shelters, and were from time to time homeless. As at April 2006, however, the complainant was living alone in a small unit at New Farm.

[4] At 12.45 am on the morning of 13 April, the appellant telephoned the complainant and asked if he could visit her. She agreed, and he arrived very promptly. When she admitted him, he went straight to the refrigerator to get himself a drink. She remonstrated with him, saying that he ought not to help himself before he was invited to do so. The appellant, on the complainant's account, reacted angrily, punching her face and arms with a closed fist and then pulling on her left arm, which he had previously injured. He said, "I know you're gonna ring the fuckin' coppers, so I may as well make a fuckin' good job of it", before punching her another eight times. The appellant was, the complainant said, intoxicated. He left the unit after assaulting her, and she did call the police. One of the officers attending observed bruises on the complainant's arms and swelling to her left eye, while a general practitioner who examined her some four days later recorded bruises on her arm and her face and a haematoma around the left eye.

The admission of evidence of prior violence

[5] At the commencement of the trial, the learned judge ruled that evidence of prior assaults by the appellant on the complainant was admissible. The evidence admitted in consequence of that ruling was as follows: the complainant said that some four weeks into her relationship with the appellant, in early 2004, he had thrown a handful of silver at her, hitting her forehead and making her face bleed. After that, he had often assaulted her by punching her. On an occasion about eight months after the first, he had, while intoxicated, punched the complainant in the face a number of times before knocking her to the ground. The fall caused injuries to her left arm, as a result of which she required some form of shoulder reconstruction. Over 2005, the appellant assaulted her on many occasions by punching her, with closed fists, in the face and arms. The complainant summarised: "[I]f [the appellant] had more than that one too many Chardonnays, I always copped a flogging".

[6] In seeking the admission of the evidence, the Crown prosecutor disavowed any intention to rely on it as propensity evidence, arguing that its function was as relationship evidence, giving a context to what otherwise would be an inexplicable incident. The evidence was said to explain the appellant's comment in relation to the police, as well as his treatment of what he knew to be the complainant's previously injured left arm. Defence counsel objected to its admission on the basis that it was not probative of the assault in question and that it ought, in any event, to be excluded in the exercise of the common law discretion preserved by s 130 of the *Evidence Act* 1977 (Qld), because any probative value was very limited and it was highly prejudicial.

[7] The learned judge, in essence, accepted the submissions for the Crown:

> "The complainant's evidence is that there was other discreditable conduct on a number of occasions of the aforesaid other violence of real concern by the accused on her.

> Crown counsel submits that not only motive but to give it any context and meaning – the evidence of the previous domestic violence in their relationship is admissible.
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> During the assault the complainant's evidence that the accused said, 'I know you're going to call the police so I may as well give you a good beating', without a proper understanding of the relationship, in his submission, such would seem fanciful without it, and in effect submits it shows a motive for continuing the assault with a certain violence, further in the said incident the accused punched the complainant on an arm which hurt to a greater degree because it was already injured.
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> It was already injured, on the complainant's evidence, because the accused had injured it on a prior occasion and that the accused would know he had injured it on a prior occasion, and that gives an extra context or a more meaningful context to the punching on the known sore arm, that such would mean an otherwise vacuum or inexplicable or arguably fanciful incident without the evidence of previous violence, the domestic context, would be given a meaningful context with the evidence of the domestic violence.
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> At the end of the day, applying the appropriate test, my ruling is that Crown counsel may lead the evidence. The evidence should be admitted in relation to the said motive connotation that has just been referred to. Without it the jury would have an inexplicable or fanciful incident. It would have far from the appropriate meaningful context. It would not have the proper context which would be in a vacuum."

Counsel's submissions on the appeal

[8] Counsel for the appellant here argued that the evidence of the earlier acts of violence was not admissible because it was not relevant to any fact in issue. In general, he submitted, evidence of uncharged acts was not admissible purely as relationship or context evidence. If evidence of such conduct were to be admitted, it had first to satisfy the test in *Pfennig v The Queen*,[1] and the jury must be directed it could not rely on it unless satisfied that the acts were proved beyond reasonable doubt.

[9] Counsel based his submissions on an analysis of the judgments in *HML v The Queen*,[2] the three appeals in which concerned earlier sexual acts directed at the complainant in each case. Hayne, Gummow and Kirby JJ took the view that evidence of uncharged acts could not be admitted unless it met the *Pfennig* test. It was unnecessary and unrealistic to categorise such evidence as "propensity" evidence, on the one hand, or "context" evidence on the other; and, because such evidence was admitted in order to establish a step in the proof of the prosecution case, it was necessary that the jury be directed that it could use the evidence in that way only if it were satisfied beyond reasonable doubt of the acts in question.

[10] Gleeson CJ and Crennan J, on the other hand, regarded relationship evidence tendered to make a complainant's account intelligible (whether by explaining his or

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1 (1995) 182 CLR 461.

2 (2008) 235 CLR 334.

her responses or the accused's behaviour) as admissible and not requiring either application of the *Pfennig* test, or a direction that the jury had to be satisfied beyond reasonable doubt in relation to the relationship evidence. Kiefel J said that relationship evidence was admissible either to show sexual interest (in which case the direction had to be given in relation to proof of that sexual interest as intermediate fact), or,

> "for the more limited purpose of providing answers to questions which might naturally arise in the minds of the jury, such as questions about the complainant's reaction, or lack of it, to the offences charged, or questions about whether the offences charged were isolated events."[3]

Heydon J did not express a concluded view.

[11] Counsel's submission was that the trial judge in the present case should have acted in accordance with the view of Hayne, Kirby and Gummow JJ. Instead, the evidence of prior violence in the present case had been admitted without reference to the proper basis for admissibility and without applying the *Pfennig* test; and the jury had not been properly directed as to its use. In any event, the evidence had slight probative value but an obvious prejudicial effect, which should have led to its exclusion in the exercise of the discretion preserved by s 130.

[12] Counsel for the respondent Crown submitted that there was a line of authority supporting admission of evidence of the kind without any requirement that it satisfy the *Pfennig* test. He referred to *R v Raye*,[4] *R v Chevathen & Dorrick*[5] and the judgments of Gleeson CJ and Crennan and Kiefel JJ in *HML v The Queen*. Without the evidence, the jury would have been left with a scenario in which the appellant inexplicably set upon the complainant. Counsel also relied on the other argument advanced below, that the evidence provided a motive for the appellant's attack: because of the previous history of assaults he knew the complainant would call the police; and he also knew he could cause her significant pain by applying force to her previously injured arm. (It was not suggested, though, that he had made any regular practice of harming her left arm.)

Pfennig test inapplicable

[13] The Crown relied on the previous acts of violence which the complainant described as part of the history of her relationship with the appellant, and the defence did not suggest, here or at trial, that that was not an appropriate characterisation of them. Thus the admissibility of the evidence is governed by s 132B of the *Evidence Act* which provides:

> "(1) This section applies to a criminal proceeding against a person for an offence defined in the Criminal Code, chapters 28 to 30.
>
> (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."

Section 132B applies here because the offence of assault occasioning bodily harm is created by s 339 of the *Criminal Code*, which appears in Ch 30 of the *Code*. (It has

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3 At 502.
4 [2003] QCA 98.
5 [2001] QCA 337.

no application to sexual offences against children, which are dealt with in Ch 22, or to rape and other sexual assaults, which are dealt with in Ch 32.)

[14] Under s 132B(2), as may be seen, relevance is the sole test for admissibility of evidence of the history of a domestic relationship. Consequently, it is unnecessary to consider those parts of the judgments in *HML v The Queen* dealing with the application of the *Pfennig* test in determining admissibility. The learned trial judge committed no error in not applying that test.

Relevance

[15] The enquiry, then, must be whether the evidence of previous assaults in this case was relevant. In *HML v The Queen*, Gleeson CJ said this:

> "It is the tendency of evidence that determines its relevance. The trial judge decides whether evidence could rationally affect the jury's assessment of the probability of the existence of a fact in issue. The ultimate effect of the evidence is a question of fact to be decided by the jury.
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> The kind of similar fact evidence in question, that is, a complainant's evidence of uncharged acts, even when received and used as evidence of motive, is unlikely to compel, as a matter of logic, a conclusion that the charged offence or offences occurred. To prove that a person did something many times does not compel a conclusion that he did it again. However, it might make it more likely that sworn testimony that he did it again is true. People do not act in accordance with all their inclinations at every opportunity, but proof of a person's inclinations may provide strong support for direct testimony as to that person's conduct. Decisions as to the relevance of evidence are made by asking how, if accepted, it bears on the assessment of the probability of a fact in issue. Assessments of probability are rarely the subject of syllogistic reasoning."[6]

[16] Arguing at trial for admission of the evidence, the Crown disavowed any intention to rely on propensity, asserting that it was led purely to give context and to explain the appellant's comment about the police and his assault on the complainant's arm. But the more specific bases proffered for admission do not bear close examination. There was no evidence before the Court that the complainant had ever called the police on any of the previous occasions on which the appellant had assaulted her. On the voir dire, she said that on one occasion, someone else in the building in which she was living had called the police; on the trial proper, she said that on another occasion, the appellant himself had called the police. In those circumstances, it is impossible to see how the many occasions on which, although she might have been expected to do so, she had refrained from contacting the police, could explain the appellant's expressed expectation that she would do so this time. (On the other hand, the absence of evidence of earlier occasions would not have left the jury confronting any hiatus in the evidence. The fact that by the time the comment was made, the appellant had already repeatedly assaulted the complainant on this occasion would of itself have been perfectly sufficient to account for his expectation.) The evidence was not relevant on that basis.

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6 At 354.

[17] And while, as counsel for the appellant pointed out, it might have been relevant for the jury to know that the complainant had, to the knowledge of the appellant, an injured arm, so they could appreciate that he meant to cause pain when he pulled on it, it added nothing to that understanding to learn that he was the author of the injury. No other relevant aspects of the relationship or of the significance of the appellant's previous violence were identified; in contrast, for example, with the case in which episodes of violence or threats towards a child might be led to explain a failure to complain or submission to sexual assault. This evidence was concerned only with the appellant's violent acts; it said nothing about the complainant's responses.

[18] Counsel for the appellant here relied on statements in the judgments of Gummow, Kirby and Hayne JJ in *HML v The Queen*, as to the ways in which evidence of uncharged acts was probative in relation to the sexual offences charged, to suggest that those judges had concluded that context evidence lacked relevance. But their judgments were not primarily concerned with relevance, as opposed to admissibility. At the highest for the appellant, Hayne J (with whom Gummow J agreed[7]) suggested that evidence tendered as context evidence, or as explaining the accused's confidence to offend or the complainant's failure to complain, might be characterised as going only to collateral issues.[8] That might give rise to debate about the elusive boundary between collateral and relevant facts, particularly where credibility is concerned, but it is unnecessary for me to consider the matter further, because, in my view, the evidence had in fact a more particular, and stronger, effect than that for which the Crown contended.

[19] In seeking to have the evidence admitted, the Crown spoke in terms of needing it to provide context for the incident and to ensure that the jury was not considering the complainant's account in a vacuum. Although it disclaimed any reliance on propensity, in reality, the way in which it sought to give that context and to fill that vacuum was by adducing evidence of the appellant's disposition to aggression against the complainant. The bland references to "context" or "relationship" evidence were not incorrect, but they offered nothing to explain how the evidence was probative; they failed to acknowledge the propensity reasoning underlying the proposed use of the evidence. As Mason CJ, Deane and Dawson JJ explained in *Pfennig*, the categories of propensity evidence and relationship evidence "are not exhaustive and are not necessarily mutually exclusive".[9] And as Dawson J observed in *S v The Queen*,[10] in relation to the admission of evidence of earlier acts of intercourse in an incest case:

> "…when such evidence is admitted in a case of this kind its relevance is said to lie in establishing the relationship between the two persons involved in the commission of the offence, or the guilty passion existing between them, but it is in truth nothing more than evidence of a propensity on the part of the accused of a sufficiently high degree of relevance as to justify its admission. Cf. *R. v. Ball* ([1911] AC 47)."[11]

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7 Gummow J, at p 362, agreed with Hayne J's reasoning in disposing of the *HML* appeal, with one reservation not relevant here.

8 At 396-397.

9 At 465.

10 (1989) 168 CLR 266.

11 At 275 (citation footnoted in original).

[20] The question, then, is as to the relevance of the propensity disclosed by the evidence of the earlier assaults. In their judgment in *Pfennig*, Mason CJ, Deane and Dawson JJ distinguished between general and specific propensity evidence:

> "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 connexion with or relation to the issues for decision in the subject case."[12]

[21] Importantly, here, the evidence was not directed to showing a propensity at large on the appellant's part to behave aggressively. Instead, (if accepted) it showed his particular disposition in his treatment of the complainant; which was a proclivity when, as the complainant put it, he had had "that one too many Chardonnays", to assault her in just the way he was alleged to have done in the incident the subject of the charge. It illustrated an animosity towards the complainant, particularly when he was intoxicated. It might have been hostile anger manifested in violence towards her, rather than the guilty passion expressed through sexual assault, of the sexual offence cases, but its effect was similar. By providing that particular context for the charged assault, which otherwise might indeed have been "out of the blue", the evidence made the appellant's conduct on that occasion intelligible, and it made it more probable that he assaulted the complainant as she said. It was thus relevant to whether the charged act took place.

[22] There is nothing novel in the use of evidence of earlier acts of violence in proof of a charge of assault or murder,[13] although the rationale for its admission may vary and, on occasion where its real function is to prove a particular relevant propensity, that is not explicitly recognised. *R v Garner*,[14] a decision of the New South Wales Court of Criminal Appeal, is worth mentioning because as here, the charge was assault occasioning bodily harm. The question was as to the admissibility of evidence of previous uncharged assaults of the victim. Sugerman J said this as to how the evidence was probative:

> "The case for the Crown was that, although extended over a considerable period, this was all one connected series of instances, none of which could have been isolated and presented in a fashion which was other than unreal and unintelligible without reference to all the others.
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> A sufficient nexus, it may be said, existed between the various instances of the defendant's conduct in that they were all directed to the same person and more especially to attempts by him to run away, so as to suggest that, more probably than not, on the occurrence of another instance of the complainant attempting to run away he would be treated with the cruelty which had been manifested on earlier occasions. Thus the evidence has not so much an element of propensity at large to crime or to particular crimes, as one of a

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12 At 483.

13 See, eg, *O'Leary v The King* (1946) 73 CLR 566; *R v Chevathen & Dorrick* [2001] QCA 337; *R v Anderson* (2000) 1 VR 1; *R v Walker* [2007] QCA 446; *R v Kingston* [2008] QCA 193.

14 (1963) 81 WN (Pt 1) (NSW) 120.

> tendency to react in a particular way to the complainant generally, and more particularly to certain conduct on his part…"[15]

Maguire J also discussed the related questions of admissibility and relevance:

> "In my opinion evidence was admissible as to the relationship between Rasmussen [the complainant] and the accused over the period of five or six months preceding November 1962. If, for instance, instead of assaulting Rasmussen on these earlier occasions the accused had been heard to express great hostility to or contempt for him, I think that evidence to that effect would have been admissible on the question of whether Rasmussen was assaulted by the accused in November. Furthermore, if actual threats to injure Rasmussen had been made from time to time, I consider that evidence of such threats would have been admissible. Such evidence would have been logically probative in relation to the issue which had to be submitted to the jury at the trial. If the earlier conduct of the accused went beyond expressing hostility or threats and amounted to actual physical violence towards Rasmussen, I cannot see that evidence of it would become inadmissible because it disclosed other offences on the part of the accused. Such evidence should be regarded not merely as evidence that the accused had committed other offences but as disclosing an atmosphere of hostility towards Rasmussen during the period of their relationship. This, I think, would be relevant and legally admissible; not for the purpose of showing that because the accused had committed other offences he was likely to have committed the one charged against him, but as part of the background of the relationship between the two men and as establishing (if accepted by the jury) an atmosphere which would render it less unlikely that the offence charged would have been committed in the circumstances which arose on the occasion of that assault, having regard to the past relationship of the principals.
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> To regard such evidence as inadmissible would be to insist that the incident in November 1962 be considered in isolation and in an atmosphere of unreality."[16]

Plainly enough, the relevance of the evidence in that case lay in demonstrating that the accused had a tendency or propensity to assault the complainant which was relevant in making it more likely that the charged assault had occurred. In *R v Mills*,[17] the Court of Criminal Appeal in this State referred to the reasoning in *R v Garner* with approval.

[23] In the present case, because the evidence of the appellant's previous assaults on the complainant was relevant in the ways I have explained, it was admissible by virtue of s 132B.

The discretion to exclude

[24] Section 130 of the *Evidence Act* preserves the discretion to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit it. Since

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15 At 122.

16 At 129.

17 [1986] 1 Qd R 77 at 86.

what is then involved is a discretionary exercise, rather than the resolution of questions of admissibility, the onus falls on the accused to show that the evidence should be rejected. Here the appellant contended for the exercise of the discretion on the *R v Christie*[18] basis: the unfairness lay in the risk of prejudice caused by the evidence, which outweighed its probative effect. In *HML v The Queen*, Gleeson CJ observed that while the "legitimate tendency [of propensity evidence] to inculpate" did not constitute prejudice, the fact that it might be taken by a jury "to prove too much" did; and another form of prejudice was the difficulty for the defendant in testing the evidence of uncharged acts.[19]

[25] As is clear from what appears above, the evidence ought, in my view, to have been considered on the basis that it was in truth evidence of the type variously described as "disposition" or "tendency" or "propensity" evidence. But the result of considering the evidence in that light is simply to make the case for exercising the discretion against its exclusion stronger. It was probative in establishing the nature of the appellant's regular response to the complainant, making it much more likely that he had on 13 April 2006 reacted to her in the same way. Its prejudice was identified at first instance as consisting in the demonstration of that propensity; but that prejudice, of course, coincided with its probative effect. Any difficulty it might have created for the appellant in meeting the complainant's allegations, some of which were unparticularised, had to be weighed against its strong probative value. An exercise of discretion recognising the true function of the evidence would, in my view, have similarly led to its admission.

The standard of proof required

[26] It is not, strictly speaking, necessary to consider whether the learned judge should have directed the jury that it had to be satisfied of the uncharged acts beyond reasonable doubt before relying on them, since neither of the grounds for the appeal against conviction is directly based on it; but the issue was raised in submissions as directly related to the appeal grounds.

[27] As has already been mentioned, different views were taken by the members of the High Court in *HML v The Queen* as to the direction, if any, to be given about the standard of proof of uncharged acts. Gleeson CJ observed that if the evidence were an indispensable step in reasoning towards guilt it might be necessary and appropriate to give such a direction (consistently with *Shepherd v The Queen*[20]). In other cases, he said, it was "ordinarily neither necessary nor appropriate for a trial judge to give separate directions about the standard of proof of uncharged acts."[21] Kirby J said that once it was accepted that relationship evidence, including evidence of uncharged acts, could be received only if it met the *Pfennig* test and was relevant to a step in reasoning towards guilt, it followed that the jury must be directed to follow the criminal standard of proof. Thus, a jury should be warned that it could only find that an accused had a sexual interest in the complainant if that were proved beyond reasonable doubt.[22] Hayne J, with whom Gummow J agreed, similarly related the standard of proof beyond reasonable doubt for uncharged acts to the *Pfennig* test of admissibility, because the purpose of the evidence, and the basis for its admission, was to establish a step in proof of the prosecution case.[23]

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18 [1914] AC 545.
19 At 354–355.
20 (1990) 170 CLR 573.
21 At 361.
22 At 371.
23 At 406.

[28] Crennan J referred[24] to what Dawson J said (with the agreement of the majority) in *Shepherd v The Queen*:[25] a direction that facts must be found beyond reasonable doubt should not be given where it would be unnecessary or confusing, or where it was inappropriate to do so because the evidence was not indispensable to a finding of guilt. Heydon J, as already mentioned, found it unnecessary to decide the point, while Kiefel J accepted that evidence admitted to show that an accused had a sexual interest in the complainant required a direction as to proof of the sexual interest as an intermediate fact.[26]

[29] In *R v Sadler*,[27] the Victorian Court of Appeal described the ratio of the decision in *HML v The Queen* as limited to cases where evidence of uncharged sexual acts was admitted under the *Pfennig* test, and accordingly was relied upon as a step in reasoning to a conclusion of guilt. Where *Pfennig* did not apply, *HML v The Queen* had no bearing on

> "existing law as to the purposes for which evidence of uncharged acts of a non-sexual nature may be tendered, or as to the directions which a trial judge should give to the jury concerning the use which may be made of such evidence and the standard to which such uncharged acts must be proved."[28]

In *FDP v R*,[29] the New South Wales Court of Criminal Appeal distinguished between evidence of earlier violent acts by the accused towards the complainant and evidence of uncharged sexual acts. The latter, it said, had such a high potential to prejudice the accused that it was the subject of the special rules adopted by some members of the Court in *HML v The Queen* for admissibility and use, including the requirement that it be proved beyond reasonable doubt. There was no suggestion, the Court said, that any other form of propensity evidence had to be proved to that standard.

[30] It is not necessary in the absence of a relevant appeal ground finally to decide the point here, but in the absence of direct High Court authority, there seems no reason to do other than apply *Shepherd v The Queen*. The evidence of previous assaults in this case, while (if accepted) making it more likely that the charged act occurred, fell far short of being essential to the jury's reasoning to a conclusion of guilt. It could properly have convicted on the basis simply of the complainant's account of the charged assault. The evidence does not seem to me to constitute an "indispensable link" in the chain of proof so as to require a direction that it be proved beyond reasonable doubt.

Sentence

[31] The appellant was 54 years old at the time he assaulted the complainant. He had two prior convictions for assault. The first was aggravated assault on a female, in 1994; it was rather similar to the conduct the subject of this charge, involving violence, including punches to the face, inflicted on an earlier partner, but it was less protracted. It was dealt with by way of fine. The second assault was on the

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24 At 490.
25 (1990) 170 CLR 573 at 579.
26 At 502.
27 (2008) 20 VR 69.
28 At 89.
29 [2008] NSWCCA 317.

complainant, in 2004, and was among the incidents of which she gave evidence before the jury. In respect of it the appellant was convicted of common assault and breach of a domestic violence protection order. On that occasion he was sentenced to 38 days which he had spent in pre-sentence custody, but he had spent a further period of approximately one month on remand which was not declared. There were some other minor matters of no particular relevance on his criminal history.

[32] The learned sentencing judge described the assault as cowardly and despicable, committed on a complainant who was physically and mentally fragile and, having little self-esteem, looked to the applicant for protection. It was persistent, lasting for about 10 minutes, and after it the appellant had done nothing to help the complainant. On the other hand, his Honour said, the injuries were not of the most serious kind which could be sustained in an offence of the type: the complainant had bruising to both arms and one side of her face. The appellant had a good work record, including some military service, and favourable references were tendered on his behalf. The relationship was a volatile one in which alcohol had played a part. The learned sentencing judge also took into account the month spent in custody by the appellant in 2004, not credited in any previous sentence, and in consequence set the parole date about one month earlier than might otherwise have been the case.

[33] The appellant argued that the sentence was manifestly excessive in the circumstances. The assault was committed on the spur of the moment; the appellant had desisted of his own volition, and before the complainant suffered any significant injury. It was three years since the offence was committed, during which the appellant had been in full-time employment, had stopped drinking alcohol and had incurred no further criminal convictions. A sentence of 18 months imprisonment was appropriate to the case of a far more persistent offender using a higher degree of violence, with a greater degree of premeditation.

[34] The Crown relied on *R v King*.[30] That case concerned an applicant in his twenties who pleaded guilty to two counts of assault occasioning bodily harm, as well as one count of wilful damage and three counts of unlawful use of a motor vehicle. Each of the assault counts concerned attacks on his de facto wife. In the first, he threw her against a fence, causing bruising and lacerations to her head, and then destroyed some furniture. In the second, at a time when she was 10 weeks pregnant, he grabbed her by the hair, dragged her across a street, threw her to the ground and then punched her repeatedly in the face and on the back and head while threatening to kill her. A sentence of two years imprisonment, suspended after nine months with an operational period of three years, was held not to be manifestly excessive.

[35] The sentence in *King* was imposed on a much younger man, who had pleaded guilty, and it was somewhat more severe than that here, but there are other distinguishing features which explain that severity: the long criminal history of the applicant in that case, including, it seems, a number of offences of assault and breaches of domestic violence orders which had led to his serving previous short sentences; and the fact that he was being sentenced for two assaults occasioning bodily harm, one committed on a pregnant complainant, and three unlawful use charges at the same time.

[36] Also of assistance for comparative purposes are some of the authorities referred to in Keane JA's judgment in *King*. The first is *R v Pierpoint*.[31] In that case, the

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30 [2006] QCA 466.

31 [2001] QCA 493.

applicant was separated from his de facto wife but maintained some level of contact for the purposes of access to their children. During a dispute, she told him to leave her house and dialled for the police. He cut off the telephone; she struck him and he assaulted her. In the course of the assault, the applicant threw the complainant to the floor, partially choked her, punched her and covered her face with a pillow. The attack ended when police arrived. The complainant sustained bruising and soreness. The applicant pleaded guilty, and the report of the case does not suggest that he had any criminal history. A sentence of 18 months imprisonment with a recommendation for eligibility for parole after six months was set aside and a sentence of 12 months imprisonment suspended immediately (because three months imprisonment had already been served) with an operational period of 12 months was imposed instead.

[37] In *R v Von Pein*,[32] the applicant and complainant similarly had ended a de facto relationship but remained in contact because of their children. The complainant was staying at the applicant's house. She hit him in order to wake him. He responded by assaulting her, hitting her with a belt six times on her leg. Then, when she went to a telephone box to call the police, he followed her, grabbed her by the hair, pushed her face against the telephone box and pulled her out by the hair. When police arrived to question him he was aggressive. Threatened with capsicum spray, he slammed a door, catching one of the officer's hands and causing a very slight injury. That applicant went to trial on the charges against him and upon conviction was sentenced to 18 months imprisonment. He had some criminal history, including prior acts of violence against the complainant and the same police officer. He had previously been sentenced to six months imprisonment for assault, and had served other short periods of imprisonment for drug offences and dishonesty offences.

[38] The Court accepted that the complainant's conduct in waking the applicant and hitting him precipitated his violent reaction and noted that he was affected by alcohol at the time. The injuries sustained were minor and did not, it was said, warrant the imposition of 18 months imprisonment without provision for early release, even having regard to the applicant's past criminal record. The applicant had a favourable work record; he had children to care for; and the complainant did not wish him imprisoned. This sentence of 18 months imprisonment was varied by an order that it be suspended after the applicant had served six months imprisonment, with an operational period of three years.

[39] In *R v Johnson*,[33] the 38 year old applicant had pleaded guilty to two counts of assault occasioning bodily harm and one of wilful damage. He had committed two assaults on a woman with whom he had been in a relationship described by her as "casual". On each occasion he went to her house and took her around the neck or throat and pushed her to the ground, causing lacerations and bruising. On a third occasion, he stood outside her house calling her offensive names and then threw a garden statue through the front window because she did not wish to talk to him. He had what was described as an extensive criminal history, including a conviction for a breach of a domestic violence order some 10 years earlier and two more recent offences of assault occasioning bodily harm which had led to sentences of imprisonment. As well, he had a history of offences of dishonesty, having

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32 [2002] QCA 385.

33 [2002] QCA 283.

completed his parole on the last of those the day prior to the first of the assaults. That criminal history, together with the repeated nature of the offending against the same complainant, and the fact that the last of the assaults was committed while on bail, led the Court to conclude that a sentence of two years imprisonment, suspended after eight months with an operational period of three years, was not manifestly excessive.

[40] My examination of those authorities leads me to the conclusion that the head sentence in this case was at the high end of a proper sentencing range, but not outside it, having regard to the appellant's previous conviction for assault of the same complainant and what the learned judge correctly described as the latter's particular frailty and vulnerability. The fixing of a parole release date after eight months is unremarkable – perhaps slightly on the generous side – in circumstances where the appellant went to trial on the charge.

Orders

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

[42] **A LYONS J:** I agree with the reasons of Holmes JA and with the orders she proposes.