SUPREME COURT OF QUEENSLAND

CITATION:	*R v MBO* [2011] QCA 280
PARTIES:	**R** **v** **MBO** (appellant)
FILE NO/S:	CA No 217 of 2010 DC No 6 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Bundaberg
DELIVERED ON:	11 October 2011
DELIVERED AT:	Brisbane
HEARING DATE:	15 April 2011
JUDGES:	Fraser and White JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – OTHER OFFENCES – where the appellant was convicted after a trial of five counts of indecent dealing with his daughter and one count of common assault against his son – where the appellant challenges the conviction on count 1 on the basis of lack of adequate particularity – whether the charges on count 1 were sufficiently particularised CRIMINAL LAW – EVIDENCE – PROPENSITY, TENDENCY AND CO-INCIDENCE – ADMISSIBILITY AND RELEVANCY – PROPENSITY EVIDENCE – EVIDENCE OF UNCHARGED ACTS – where the appellant contends that evidence of harshness and physical violence against the complainants and the complainants' mother ought not to have been admitted – whether the primary judge erred in not discharging the jury following this evidence – whether this resulted in an unfair trial *Criminal Code* 1899 (Qld), Ch 28 - 30 *Evidence Act* 1977 (Qld), s 130, s 132B

BRS v The Queen (1997) 191 CLR 275; [1997] HCA 47, cited
Crofts v The Queen (1996) 186 CLR 427; [1996] HCA 22, cited
Gipp v The Queen (1998) 194 CLR 106; [1998] HCA 21, considered
HML v The Queen (2008) 235 CLR 334; [2008] HCA 16, considered
KRM v The Queen (2001) 206 CLR 221; [2001] HCA 11, cited
Pfennig v The Queen (1995) 182 CLR 461; [1995] HCA 7, considered
R v CAH (2008) 186 A Crim R 288; [2008] QCA 333, cited
R v KS (2007) 176 A Crim R 419; [2007] QCA 335, cited
R v Nugent [2011] QCA 127, cited
R v PAB [2008] 1 Qd R 184; [2006] QCA 212, cited
R v UC [2008] QCA 194, cited
Roach v The Queen (2011) 85 ALJR 558; [2011] HCA 12, considered
S v The Queen (1989) 168 CLR 266; [1989] HCA 66, cited

COUNSEL: S J Hamlyn-Harris for the appellant
M J Copley SC for the respondent

SOLICITORS: Robertson O'Gorman for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA**: I have had the advantage of reading the reasons for judgment of White JA.

[2] As White JA has noted in [63] of her Honour's reasons, the evidence of the appellant's harsh and violent conduct against his children was admitted on the basis that, if accepted, it tended to demonstrate how the appellant treated his children in front of other family members and to explain why the children did not complain about the appellant's sexual misconduct of which they gave evidence. That evidence was therefore admissible because it was relevant by way of assisting in the evaluation of the children's evidence of the sexual misconduct alleged against the appellant.[1] In conformity with that ground for the admission of the evidence, in the passage quoted in [64] of White JA's reasons the trial judge directed the jury that, if it accepted the evidence, the jury could only use it "to understand the true nature of the relationship between the parties, and to place the specific allegations in context."

[3] In that context, a question arises about the necessity for the trial judge's further direction, which is also quoted in [64] of White JA's reasons, that the jury could only use that evidence if the jury was satisfied of it beyond a reasonable doubt.

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[1] See *Roach v The Queen* (2011) 85 ALJR 558 at 561 [12] per French CJ, Hayne, Crennan and Kiefel JJ.

[4] There are decisions of the Court[2] in which *HML v The Queen*[3] has been treated as requiring as a condition of the admissibility of evidence of uncharged sexual acts by an accused person against a complainant, that the evidence satisfies the test for propensity evidence in *Pfennig v The Queen*[4] (that there is no reasonable view of the evidence consistent with the accused person's innocence), and as requiring the trial judge to direct the jury only to use such evidence if the jury is satisfied beyond reasonable doubt that those acts occurred.

[5] More recently, in *Roach v The Queen*,[5] the High Court considered a case in which evidence was adduced that an accused man charged with assault occasioning bodily harm had assaulted the complainant on prior occasions. In conformity with the basis upon which that evidence was admissible and was admitted, the jury was directed that it was not evidence of the accused man's propensity to assault the complainant, but that it provided a context which enabled the jury to understand the complainant's evidence and the relationship between the complainant and the accused. The plurality noted that *Pfennig v The Queen* was "a case about the fact of propensity as circumstantial evidence in proof of the offence charged" and that it was not "a case involving evidence that happened to show propensity" which had other, sufficient probative value.[6] (The contentious evidence in *Roach v The Queen* was in the latter category.) The plurality went on to hold that, having regard to the footing on which the evidence was admissible and admitted, and to the directions about the use to which the jury might put the evidence, it was not necessary or appropriate for the trial judge to give the jury any direction about the standard of proof to be applied to that evidence.[7] In that case the evidence was admissible as "evidence of the history of the domestic relationship" under s 132B of the *Evidence Act* 1977 (Qld). That provision does not apply in relation to sexual offences, but that does not seem to render this aspect of the plurality reasons irrelevant in such cases.

[6] In this case, the evidence of the appellant's harshness and violence did not suggest, and the jury was not asked to find that it did suggest, any propensity by the appellant to commit the sexual offences against his daughter with which the appellant was charged. The evidence arguably suggested that the appellant had a propensity for violence of the kind alleged in count 3, which charged the appellant with assaulting his son. However, the evidence was not admitted to prove that or any other propensity by the appellant and the trial judge's directions unequivocally required the jury to restrict its use of the evidence to different and legitimate purposes. On the authority of *Roach v The Queen*, the better view seems to be that it was not necessary for the trial judge to give the jury any direction about the standard of proof to be applied to that evidence. For these reasons, the trial judge's direction to the jury that it could only use the evidence if the jury was satisfied of it beyond a reasonable doubt may have been too favourable to the appellant.

[7] I have expressed these tentative views because the point strikes me as one which has some general importance, but it is not necessary to decide it in this appeal, and the

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2 *R v UC* [2008] QCA 194 at [4] per McMurdo P and at [44] per Muir JA (Cullinane J agreeing); *R v CAH* (2008) 186 A Crim R 288 at 299 [21] per McMurdo P (Mackenzie AJA and Dutney J agreeing).

3 (2008) 235 CLR 334.

4 (1995) 182 CLR 461.

5 (2011) 85 ALJR 558.

6 (2011) 85 ALJR 558 at 566 [41].

7 (2011) 85 ALJR 558 at 567 [49]; see also at 566 - 567 [44] - [45].

Court did not have the benefit of full argument or reference to the numerous decisions which bear upon the point.

[8] Subject to those observations, I respectfully agree with White JA's reasons. I agree that the appeal should be dismissed.

[9] **WHITE JA**: The appellant was convicted after a trial in the District Court at Bundaberg of five counts of indecent dealing with his daughter and one count of common assault in respect of his son. His daughter was born in September 1978 and was aged between approximately five and fifteen at the time of the alleged offences. Her brother was 18 months older and was aged between seven and eight years when the alleged assault occurred.

The grounds of appeal

[10] The appellant was given leave to amend Ground 2 of his grounds of appeal and to add a further Ground 3. The grounds, as argued, were:

Ground 1:

The learned Primary Judge erred in finding that there was a case to answer in relation to Count 1 on the indictment. The learned Judge erred in finding that the complainant had particularised a single event in relation to Count 1.

Ground 2:

The learned Primary Judge erred in not discharging the jury after the witness [the mother] gave evidence that she had also been sexually abused by the Defendant and evidence of physical violence by him.

Ground 3:

A miscarriage of justice has resulted from the prejudicial effect of evidence of extensive physical violence by the appellant towards the complainants [the daughter, the son and their mother] in the circumstances of the trial in which there were significant inconsistencies in the prosecution evidence, and the Crown case depended on an assessment by the jury of the credibility and reliability of the evidence of the complainants.

The charges and particulars

[11] At the commencement of the trial the prosecutor entered a *nolle prosequi* with respect to Count 4 which was a further count of indecent dealing because he was unable to particularise it adequately and distinguish it from other uncharged conduct. Accordingly, counts 5, 6 and 7 were renumbered as counts 4, 5 and 6 (to avoid any confusion if the counts were referred to by number before the jury). Each count covered a year[8] and was referenced to the daughter's birthday. She contended that the sexual abuse, consisting mostly of oral sex, occurred very regularly. One act was charged in each period and particulars were given. As renumbered and particularised the charges were:

Count 1:

Indecently dealing with [the daughter] a girl under the age of 14 years between 19 September 1983 and the 21 September 1984.

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[8] Count 4 was two years.

Particulars:

"When the complainant was 5 years old, she had just come out of hospital having set her hair alight. The defendant removed her nappy, and masturbated whilst calling her beautiful and gorgeous. He ejaculated."

Count 2:

Indecently dealing with [the daughter] a girl under the age of 14 years between 19 September 1984 and 21 September 1985.

Particulars:

"When the complainant was 6 years old, the defendant forced her to perform oral sex upon him."

Count 3:

Unlawfully assaulting [the son] between 19 September 1984 and 21 September 1985.

Particulars:

"Count 2 was witnessed by [the son]. The defendant beat him with a hose repeatedly."

Count 4:

Indecently dealing with [the daughter] a girl under the age of 14 years between 19 September 1986 and 21 September 1988.

Particulars:

"When the complainant was 8 or 9, her grandparents arrived from Sydney. During this time the defendant forced her to perform oral sex in the afternoon. He then placed her on top of him and moved his penis up and down against her vagina. He put cream on his penis after ejaculating."

Count 5:

Indecently dealing with [the daughter] a child under the age of 16 years between 19 September 1991 and 21 September 1992 with the circumstance of aggravation that she was his lineal descendent.

Particulars:

"When the complainant was 13, the defendant forced her to perform oral sex on him."

Count 6:

Indecently dealing with [the daughter] a child under the age of 16 between 19 September 1991 and 21 September 1992 with the circumstance of aggravation that she was his lineal descendent.

Particulars:

"On the same occasion as count [5], the defendant fingered her vagina. Afterwards he sent her to watch the goats, she fell asleep so he dragged her back to the house and locked her in the toilet."

Overview

[12] The mother met and married the appellant in Cairns when she was 16 and he was 25. The son was born in 1977 and the daughter in 1978. Prior to and for a time after their birth the family lived in an isolated place between Cairns and Mossman. Some years later when the daughter was "four, nearly five" the family moved to Cairns and lived in a caravan. It seems that the appellant had injured his back in a mine accident on the property and, as a consequence, was in receipt of a disability pension. The mother worked outside the home. The family moved from Cairns to a property of about four hectares 15 kilometres south of Innisfail. The mother worked in Innisfail for approximately eight weeks after the move. The property had no facilities and the family lived in the caravan they took with them from Cairns. They established an exotic fruit and tropical fruit orchard on the property. In the earlier years the mother principally did the heavy outside work assisted by the children. As the years passed the son did more of the heavy work, much of which was done manually without the assistance of machinery.

[13] The caravan was described as "quite a large caravan"[9] – a 26 foot caravan – with bunks for the children at one end, the kitchen and sitting area in the middle and the parent's bedroom at the other end separated from the rest of the caravan by a concertina door. The caravan had two entrances, one near the parent's bedroom and the other near the children's bunks. Shortly after arrival a shed with enclosed sides was erected over the caravan. The family lived in the caravan from 1983 to 1987. It was virtually destroyed by a cyclone in 1986. The mother's parents gave them money to build a besser block residence on the land. Although described as small each child had a bedroom.

[14] The children attended school at the closest township for about nine months in grade one and grade two respectively. Thereafter, according to the mother, at the insistence of the appellant, they were home schooled by her, although the appellant also participated in their supervision. They were provided with a program by distance education. Their progress was assessed externally and they were said to achieve good academic results.

[15] The mother and the daughter and son described a harsh routine imposed by the appellant. The appellant roused the family at 4.00 am when the children did school work until breakfast. They were then required to tend the many animals on the property – between 15 and 16 goats, a number of dogs, cats and poultry - as well as the irrigation system for the trees. They did school work until about 10.00 or 11.00 am in the morning and then worked outside in the orchard for the rest of the day. The mother worked outside the living quarters in the orchard laying and tending to the irrigation system and to the orchard. She described harsh discipline towards the children by the appellant. She described particular events including putting the daughter's head in a bucket of water, dragging her over gravel and beating her with lawyer cane. The mother was away from the property from time to time. Her parents lived in Sydney.

[16] The daughter gave evidence of sexual abuse over a lengthy period from about the age of five to 15 when she left home to stay in a youth shelter. The abuse diminished after she started her menstrual periods at about 13 and a half years. The son ran away on several occasions and stayed in the youth shelter.

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9 AR 48.

The daughter joined him on the second occasion when she was 15 and the mother left to live in a women's shelter and, eventually, a flat. She had police protection to remove her possessions and those of the children from the property. After leaving the property the daughter started drinking alcohol and then using illegal drugs at weekends. She eventually moved to Melbourne and operated a beauty salon which she sold after five years. By 2005 she suffered severe psychotic problems from excessive consumption of alcohol and illicit drugs and was admitted to hospital. Thereafter she maintained she had no further bad episodes.[10]

[17] Statements were taken from the mother in 1994 which were inconsistent with later statements. Similarly, the daughter's discussion with the two shelter volunteers, who gave evidence, differed in her account given later in 2007 to police, and at trial, in terms of particulars. The appellant neither gave nor called evidence. His case in terms of the cross-examination was that the daughter was "difficult", that sexual misconduct did not occur, that discipline was firm not harsh and that earlier statements by the mother and the son did not support the daughter's allegations and that there were many inconsistencies in her several accounts.

Conduct of the trial

[18] Evidence at the trial was given by the mother, the daughter (then aged 32); the son (then aged 33); and two youth shelter workers to whom complaints of sexual abuse of the daughter by the appellant were made in 1994 and 1995 when the daughter was approximately 16 to 17 years of age.

[19] The defence sought unsuccessfully the severance of count 3, the common assault charge against the son. There is no complaint on this appeal about that decision. The son's evidence corroborated the daughter's on count 2 and it was because he had witnessed that conduct that he alleged he was beaten by the appellant.

[20] Over defence opposition the trial judge allowed a screen to be erected near the appellant which operated as a barrier between the daughter and her father when she was giving evidence.

[21] It was foreshadowed by the prosecutor, in the absence of the jury, that evidence would be led of uncharged conduct of strong discipline by the appellant to the children as evidence of the relationship within the family. He indicated that there would also be evidence of uncharged acts of regular sexual misconduct against the daughter. The prosecutor noted that the witnesses may need to be controlled so that the trial was not diverted from the relevant issues in the charges. Of that potential body of evidence defence counsel below said:

> "Can I say for the record on that point, that it – it was indicated that I might argue the inadmissibility of evidence of violence and it's on the basis of discussions that I've had with my learned friend in respect of the limited use that he intends to make of that evidence and the control he intends to exert in evidence-in-chief. And on the basis of decisions, such as that in the Queen v. PAB [2006] Queensland Court of Appeal number 212, that I don't pursue any arguments in respect of that evidence at this time."[11]

As it turned out, it was not the evidence-in-chief which raised matters to which the appellant takes objection, but mostly during the extensive cross-examination. The

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10 AR 149.

11 AR 27.

mother was often non-responsive in her answers and occasionally offered, gratuitously, her opinion about the regime imposed by the appellant and comment on the charges. She had denied any sexual or other misconduct by the appellant to police making enquiries in 1994.

[22] Before turning to the Grounds of Appeal it is useful to set out the evidence in respect of each count although Ground 1 can be considered separately from the other grounds when discussing count 1.

Count 1

[23] The particulars provided were that:

> "When the daughter was five years old she had just come out of hospital having set her hair alight. The defendant removed her nappy and masturbated whilst calling her beautiful and gorgeous. He ejaculated."

The daughter gave evidence that she set fire to her long hair with a cigarette lighter which she had found. The family was then living in Cairns. The mother said when she arrived the daughter was in the car with her head wrapped in a wet towel. The daughter was taken to hospital in Cairns where she remained in intensive care for some days and thereafter for two weeks in the children's ward. She had her fifth birthday in hospital. The mother recalled that the family moved to the property on her daughter's fifth birthday. The mother worked away from the property for about eight weeks after the family moved to the property - she travelled by train as she was unable, then, to drive.

[24] The daughter said that at the age of five she (and, inferentially, her brother) was still wetting the bed at night and was made to wear nappies "until we were a lot older than we probably should" and sometimes plastic pilchers. Her father would wake her in the morning and change her nappy. She gave general evidence that he would masturbate whilst she was lying naked in front of him. She was asked by the prosecutor:

> "Can you recall a specific incident of this occurring? Can you recall any – or perhaps I can ask you this? -- Yep.
>
> How frequent was that event at around that time at the age of five? -- A lot, happened a lot, and this is something that I've had a lot of difficulty with pinpointing times and dates to, I guess, when you are a child, and it – you are sexually abused on a daily basis, whether it's through the night being woken up, or through the day being molested or being molested in the shower, it's very difficult to be able to pinpoint specific -----
>
> Okay? -----times and dates to these things, and this specific time I'm saying that I was five, I could pinpoint times and a date to this because it wasn't long after I was in hospital and burnt my hair off, and we'd moved to – the parents had moved the caravan to the property on – in Innisfail.
>
> This event that you're telling us about, can you recall your father saying anything whilst performing the action you described? -- No, I guess I was just very much used to him physically abusing me, and it was just – it was forced, it was something that I had to do, and I couldn't resist because he would physically hurt me.

> Okay. You were telling us about father would take your nappy off and then masturbate -----? -- Yep.
>
> ----- you remember that? -- Yep.
>
> Can you remember whether anything was said at a particular incident? -- No."[12]

[25] In cross-examination defence counsel asked her:

> "Can you - let me put it this way; my understanding from your evidence was that you can't pinpoint any particular event where that happened, but rather you say that that was happening on a regular basis, is that your evidence? -- Yes, but I can pinpoint this specifically because I – we – I hadn't long been to the property, being – moved to the farm, and I had burnt my hair off and was placed in intensive care unit, had my fifth birthday in Cairns in intensive care unit, three days, and then in the children's ward for two weeks, and taken from there, very soon afterwards, to the family property in [description]."[13]

[26] Defence counsel asked if she was pinpointing the sexual abuse by reference to the incident where her hair was burnt or whether she could only recall abuse happening on a regular basis rather than one specific incident. The daughter responded:

> "It was first – what's the word – my first gathering of thoughts of this happening to me, and then, from then on -----
>
> And you're quite certain now -----?-- ----- my memories are very clear.
>
> And you're quite certain now that that occurred once you'd moved to the caravan? -- That's right.
>
> Now, just to be clear, the incident where your hair was burned involved an accident on your part, when you were using a cigarette lighter that you'd found; is that right? -- Four years of age – yes.
>
> Not five? -- Fifth birthday in hospital."[14]

Counsel reminded the daughter that she first made this allegation in her statement to police in 2007 and not in her first encounter with police in 1994. The mother denied that the children were wearing nappies when they were five.

[27] After the close of the prosecution case defence counsel submitted that there was no case to answer on count 1 for want of particularity, that is, that the daughter had not given evidence consistent with the particulars, in that she did not give evidence of the words particularised. The primary judge rejected that submission.

[28] In his summing up the judge identified the weakness in the particulars of the evidence recalled by the daughter and read her evidence identifying the occasion.

Ground 1 - Discussion

[29] The appellant contends that the daughter's evidence did not, in fact, identify any specific incident but was evidence as to general misconduct by the appellant in her

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12 AR 105.
13 AR 121.
14 AR 122.

presence while she wore nappies. In *S v The Queen*[15] the accused was charged with three separate counts of incest. None of the counts specified the day upon which the act of incest was alleged to have occurred merely on a date unknown during a 12 month period. No particulars (although requested) had been given. Dawson J said:

> "This form of pleading [that is, "on a date unknown"] is quite proper where the date is not an essential part of the alleged offence and, of itself, does not render a count bad for insufficiency of particulars."[16]

The evidence of the complainant had disclosed numerous acts of intercourse which continued over two years until she left home at a particular age. In her evidence she had said sexual intercourse occurred "every couple of months for a year". She was unable to be more specific. His Honour said:

> "Each [count in the indictment] charged only one offence and gave rise to no duplicity. Had the evidence revealed only one offence in each of the years in question, there could have been no complaint about the form of the indictment. But the evidence disclosed a number of offences during each of those years, any one of which fell within the description of the relevant count. Because of this there was what has been called a "latent ambiguity" in each of the counts … That ambiguity required correction if the applicant was to have a fair trial."[17]

[30] His Honour continued:

> "There was, I think, obvious embarrassment to the applicant in having to defend himself in relation to an indeterminate number of occasions, unspecified in all but two instances, any one of which might, if it occurred in one of the relevant years, constitute one of the offences charged. There was the additional embarrassment that the years in the second and third counts overlapped so that if an occasion fell within the overlapping period it was not possible to determine whether it was an offence charged by count two or by count three.
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> The occasions upon which the offences alleged took place were unidentified and the applicant was, in effect, reduced to a general denial in pleading his defence. He was precluded from raising more specific and, therefore, more effective defences, such as the defence of alibi. Because the occasions on which he was alleged to have committed the offences charged were unspecified, he was unable to know how he might have answered them had they been specified. It is not to the point that the prosecution may have found it difficult or even impossible to make an election because of the generally unsatisfactory evidence of the complainant. An accused is not to be prejudiced in his defence by the inability of the prosecution to observe the rules of procedural fairness."[18]

[31] Recently this court in *R v Nugent*[19] said:

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15 (1989) 168 CLR 266.
16 At 272.
17 AR 274.
18 AR 274-275. See also *R v KS* [2007] QCA 335 at 36-42.
19 [2011] QCA 127.

> "It is well-established that to warrant conviction, the evidence must establish a particularized charge, particularized in such a way that the jury identifies a specific occasion on which the alleged offence occurred, and the manner in which it occurred, sufficient to distinguish that offence from other uncharged acts admitted, say, to establish the relationship between the accused and the complainant."[20]

[32] Although not entirely clear, it may be that the daughter's evidence as quoted above[21], suggested to the jury that this was the first occasion of sexual abuse. The daughter gave evidence of continuous sexual abuse from about the age of five to 15 and of many events of abuse involving the removal of her nappy when she was five but she gave specific evidence of this event. Although she did not recall in her evidence the particularised words that she was "beautiful" and "gorgeous", there was the necessary specificity in her evidence so that this occasion stood out from the "indeterminate number of occasions".[22] The specificity was such that the appellant could have maintained a particular defence and did insofar as defence counsel emphasised to the jury the mother's evidence that the children were not wearing nappies at the age of five; and also that the family lived so close to each other that had anything been occurring the mother, at least, would have noticed.

[33] In my view the primary judge did not err in not withdrawing count 1 from the jury.

Counts 2 and 3

[34] It is convenient to consider the evidence about these two counts together. When the daughter was aged six her mother was absent from the property. Her brother was outside doing chores on the property and she was in the caravan. The appellant had come out of the shower in his towel, lay on the bed and told her to "give him oral sex".[23] He forced her head on to his penis. She was clothed. Her brother opened the door of the caravan which gave entry to the parent's bedroom. The daughter said, "… my father obviously had a big erection and he – my – my brother was staring at us".[24] She saw her brother at the door. The appellant jumped up, started swearing at the boy, grabbed him by the ear, abused him, and pushed him out of the caravan door. The daughter said she could hear her brother screaming and crying. The father returned into the bedroom, closed the door and instructed the daughter to continue giving him oral sex until he ejaculated.

[35] When he was approximately eight years old the son said he recalled opening the door to the parent's bedroom and seeing his father lying naked on the bed and his sister holding the appellant's penis. He said "I was just – copped the shock and I just raced out… as fast as I could from the caravan".[25] He was asked what his sister was doing with the appellant's penis and answered "[o]bvious to me that she was playing with it".[26] He said that her head and shoulders were not far from the appellant's penis. He said that his father hopped off the bed and started chasing him:

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20 At [5] per de Jersey CJ with whom Chesterman JA and Margaret Wilson AJA agreed.
21 At [26].
22 *S v The Queen* (1989) 168 CLR 266 At 274.
23 AR 106.
24 AR 107.
25 AR 174.
26 AR 174.

> "Well, I didn't get very far before, yeah, he found a piece of hose, garden hose, on his path and I tripped and fell. Got caught up in some bushes and then he proceeded to flog me with a piece of garden hose, backwards and forwards, backwards and forwards, 25, 30 times, he just -----"[27]

The son said that he was shielding his face with his hands but he was struck "…everywhere, across the arms, shoulders, back, legs, just whipped me everywhere".[28] He recalled crying in pain and screaming.

[36] It was not suggested that the children then or later had colluded in their evidence, rather they did not regard themselves as being "close".

Count 4:

[37] This count was pleaded as occurring on a date unknown between 19 September 1986 and 21 September 1988 and particularised as having occurred during the daughter's eighth or ninth year when her grandparents were visiting for two weeks from Sydney. The dates were able to be cross-referenced with a diary kept by the mother. The misconduct alleged occurred one afternoon while the mother and son were on an outing with the grandparents. The daughter explained that the appellant received regular back massages from the son or from herself to ease the pain of his back injury. On this particular occasion she was giving him a back massage. He instructed her to give him oral sex and took her clothes off. She described what occurred:

> "We had no clothes on and he had an erection and he placed me on top of him with no clothes on and was making me rub myself - my vagina on his penis until he came on his stomach …"[29]

She added that he was also masturbating her, conduct which he had commenced while she was giving him oral sex. She described him as having his fingers on her vagina. She did not suggest that he had penetrated her. She told the appellant that she was feeling very sore so he put Vaseline on his penis.[30]

Counts 5 and 6:

[38] The daughter described an event when she was thirteen and a half, just before she started her menstrual periods. Her mother and brother were not in the house. She supposed they must have been somewhere on the property. She was in the parent's bedroom giving her father oral sex, he was masturbating her and while doing so penetrated her vagina with his finger. She told him that it hurt very much and that he was not to do it any more. The daughter said that she saw some blood and was in pain. She said the appellant became very physically violent because she would not let him continue. The oral sex constituted count 5 and the penetration constituted count 6. The daughter further pinpointed this event as occurring at about 3 o'clock in the afternoon and she was sent outside by the appellant to graze the goats. She said the previous night he had kept her awake sexually abusing her[31] and she fell asleep in the sun while watching the goats. The appellant saw her

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27 AR 175.
28 AR 175.
29 AR 110.
30 AR 111.
31 The mother's evidence was that she (the mother) was a sound sleeper, AR 97.

asleep, grabbed her by the hair and dragged over a barbwire fence, down the blue metal driveway through some mud and into the house. She sustained a wound to her buttocks.

[39] The daughter said she was dragged into a bedroom, held down by her mother and brother while her father continued to beat her. He then locked her in the toilet for three days with minimal food, letting her out when others wished to use it. The mother said the following about what was, in all likelihood, the same occurrence:

> "[The daughter] was 12, 11, 12, 13 and we had a gravel driveway and she had disobeyed her father and he had got her and dragged her, she had shorts on, and I can't – I don't – a top, and he had dragged her down the gravel driveway, which – with force and forced – which was quite a lengthy driveway and half her clothes were ripped and torn off and then he insisted and pushed her into a very small toilet cubicle in the house and proceeded to do terrible things to her. Pull her around and hurt her and hit her constantly, constantly thrash her and then pulled her clothes off and she was left in her bra and her underwear.
>
> In - when you say "left in her bra" where was she at that time? -- She was in a little small toilet cubicle.
>
> And what sort of access was there to the toilet cubicle? -- There was only one door and it was a sliding door and there were no locks on the door at that time and the only way he kept her in there was wired it, he wired it up.
>
> How long for? -- It was a very long period of time. I don't remember how long it was but it was a very long period of time."[32]

The mother denied striking her daughter herself but recalled holding her in the bedroom.

[40] The brother recalled an incident when his sister was about 12 when she let the goats roam where they should not have been. He said:

> "He [the appellant] grabbed her by the hair; my sister had beautiful long flowing hair; he grabbed her by the hair and dragged her; when I say "drag her", he pulled her along, but as he pulled her along, my sister fell over, he just proceeded to drag her, and he dragged her and dragged her till he got to the house.
>
> And what happened at the house? -- He dished out some punishment to her.
>
> Which was what? -- I know she stood attention at the wall for a fairly long period of time.
>
> Mmm? -- But what he'd done, it – I do remember very clear that he – as she was being dragged, she was wearing denim pants, and wore a hole in the denim pants right into her skin and left a very big weeping, bleeding wound on her – on her buttocks."[33]

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32 AR 52.

33 AR 177.

The brother said it was an exaggeration to say his sister was locked in the toilet for three days, but suggested "… there was times when she was left in there for seven, eight hours, yes."[34]

Complaint

[41] The co-ordinator at the youth shelter in Innisfail when the daughter (and the son) were housed there had many conversations over a year or 18 months with the daughter about her father and the family's domestic circumstances in about 1994. The co-ordinator was first asked to recall those conversations relating to complaints about sexual abuse in 2007 when she provided police with a statement. She said:

> "What I can recall specifically was [the daughter] telling me that she - she felt that there was no privacy in the home where she was living. There was no – no locks on the doors, that her father would come into the bathroom when she would be in the shower.[35] The only lock on the door was to a toilet and the lock was on the outside and occasionally she would be punished by being locked in the toilet."[36]

Defence counsel sought to confine the witness's answers to sexual misconduct. She recalled the daughter speaking of sitting on her father's lap in the living room while they were watching television and feeling his erection through her nightie. The daughter had not spoken of this in her evidence. The witness also recalled conversations with the daughter about her father coming in to her bedroom at night when she pretended to be asleep, of rolling over and of her father touching her breasts.[37]

[42] A carer at the shelter gave evidence of witnessing the daughter coming with her parents to get the brother from the shelter. He refused to leave. She noted the daughter wished to stay. She witnessed a fight with the appellant and saw him roughly pull her from the car and saying that she could stay there. The carer recalled conversations about physical abuse and being told:

> "… she said that her father used to come into the shower at times and do oral sex with her and also that he used to come into her bedroom at times. There's a lot of times that she told me like of violence and then she would add to it, like little things about, 'And I would often get sexually abused', which was he used to have oral sex with her mostly."[38]

Discussion

Ground 2

[43] This ground concerns an answer given by the mother in cross-examination. Objection was immediately taken by defence counsel, in the absence of the jury, which was not upheld. The question and answers objected to were:

> "And that it was your belief that [the appellant] had never interfered with [the daughter]? You told the police that, didn't you? -- Well, I couldn't believe it. I could not believe it that happened.

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34 AR 205.

35 The appellant contends that the daughter made no reference to her father coming into the shower in her evidence, see written outline para 32, but she did in the passage quoted above at [24].

36 AR 157.

37 AR 158.

38 AR 163.

> Even simply from a logistics point of view, you couldn't believe it, is that right? -- Sorry?
>
> From a logistics point of view, given the four of you were together 24/7? -- It was just total disbelief because it was all being done to me and I had no idea. None whatsoever that he would possibly even think about doing that to my – our daughter."[39]

Defence counsel contended that that answer was an allegation that the appellant had been sexually abusing her and would lead to impermissible propensity reasoning by the jury. The judge responded that the reasonable inference was that the appellant was having sexual relations with his wife.

[44] The mother's response needs to be considered, not in isolation, but in the context of the preceding cross-examination:

> "You made a statement to the police back on the 27th of July 1994; do you remember that? -- I'm sure if it's my handwriting I did.
>
> Well, do you recall going to the police station and sitting down with a police officer who typed a statement and had you sign it? -- Could I have a copy of that please? Thank you. Yes, my signature's on that.
>
> And do you recall about a month after you provided that statement to the police that you again went to the police station and provided an additional statement? -- Yes, I think I do now, mmm-hmm.
>
> Did you want to have a look at that one? -- Yes, please. Thank you. Yes.
>
> If you could just put those to one side. You've already told us that you never during your time at the property at [description] witnessed any sexual misconduct by [the appellant] in respect of [the daughter]? In fact, you were shocked to learn of those allegations back in 1994, weren't you? -- Greatly shocked.
>
> …
>
> And you told the police that the four of you saw each other nearly 24 hours a day during that period? -- We did because there was only four of us."[40]

[45] The mother had made no complaint of unwanted sexual conduct towards her by the appellant. She spoke only of a hard life and made a relatively oblique reference to being "tortured later on" if she did not do as requested by the appellant. This was in the context of explaining why she held the daughter down while the appellant punished her for letting the goats roam.[41] Her evidence about the appellant's mistreatment was mainly of mistreatment towards the children.[42] For example, in cross-examination defence counsel had asked the mother:

> "[The appellant] had very traditional views about raising children; didn't he? -- He had brutal views about raising children."[43]

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39 AR 69.

40 AR 68-69.

41 AR 75.

42 Her evidence of having police protection referred to a period after she had left the appellant and wanted to retrieve her goods.

43 AR 64.

[46] It would not have been reasonable for the jury to infer that the mother was alluding to sexual impropriety against her in the impugned passage. Had that been a reasonable inference, that evidence would have been irrelevant. It might, more significantly, have led to impermissible propensity reasoning. But the trial judge, hearing the manner of delivery of that answer, did not think the evidence could have that effect.[44] Furthermore, read in context, that answer does not readily lead to the inference claimed for it. There was no error in not discharging the jury then.

[47] Defence counsel renewed her application for the jury to be discharged the following morning, again unsuccessfully, on the basis already discussed and on the further basis of "gratuitous comments about violence" made by the mother in response to questions which were entirely unrelated to "the issue of discipline in the home".[45] Counsel referred to particular non-responsive answers, for example, when asked about the physical injury that prevented the appellant from doing hard manual labour, the mother responded "[i]t was not physical injury that prevented him that stopped him from doing what he did to [the daughter]".[46] The mother was asked about the appellant's participation in the children's schooling to which she responded, "I don't remember him doing any schooling. I remember him doing a lot of screaming and yelling".[47] She repeated this answer after a somewhat sarcastic question by defence counsel. Defence counsel questioned the mother about the appellant not permitting the daughter to wear short skirts outside the property. The argumentative responses concluded in the following exchange:

> "Question: 'I take it from that that you're agreeing with me that [the appellant] didn't allow [the daughter] to wear short skirts when she went out?'
>
> Answer: 'That's correct, he didn't and he enforced it by slapping her and slapping her and slapping her, and she was not to present herself out in society like that.'"[48]

[48] On the appeal Mr Hamlyn-Harris for the appellant referred to other examples of physical violence mentioned by the mother which, cumulatively, would, he submitted, have prejudiced the jury impermissibly: the appellant would get the children up at 4.00 am[49]; that he engaged in harsh discipline[50]; holding the daughter's head in a bucket of water[51]; using lawyer cane to hit the children[52]; the daughter being dragged from the car and thrown on the ground outside the shelter[53]; doing a lot of screaming and yelling[54]; the daughter having no freedom at all[55]; the mother needing protection from the police and assistance in moving her property[56]; living under duress and abuse and torture[57]; threats to the mother by the

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44 *Crofts v The Queen* (1996) 186 CLR 427 at 440.
45 AR 82.
46 AR 82.
47 AR 82.
48 AR 82.
49 AR 50.
50 AR 51.
51 AR 53.
52 AR 54.
53 AR 54.
54 AR 59.
55 AR 64.
56 AR 66-68.
57 AR 72.

appellant when she was off the property[58]; and they were not permitted to go anywhere.[59]

[49] There is no doubt that many of the answers were not responsive to the questions but, on the other hand, others were and they largely came out of the questioning in cross-examination. The mother was asked about her relationship with the daughter after they had moved from the property and she described it as a "very fractured relationship".[60] Defence counsel observed that the relationship remained difficult to the present time "[b]ecause she [the daughter] has blamed you for many of her childhood problems, is that fair to say?" to which the mother responded:

> "She wanted me to get away when she was very young, from the situation that we were living under, under sheer duress and abuse and torture. Do you want to know why I didn't take them away?"[61]

To which defence counsel, no doubt wisely, said "no". While it might be said that it was an unresponsive answer, on another view it is an answer offering a larger explanation for the distressing state of affairs which were alleged to have existed in this family.

[50] The description of violence after the straying goats incident was associated with counts five and six and served to identify the occasion as it was clearly a traumatic event for all members of the family.

[51] As was accepted by defence counsel below, evidence of physical violence without a sexual misconduct element is admissible in a trial concerning, as here, charges of indecent dealing against a child. In *R v PAB*[62] evidence of numerous acts of physical violence by the appellant who had been charged with counts of indecent treatment of a girl under the age of 12 and rape, was admitted over objection. Of this body of evidence Keane JA, with whom the President and Muir J, as his Honour then was, agreed, applied the reasoning in *KRM v The Queen*[63] concerning uncharged sexual conduct. His Honour said it was:

> "… apt to provide an explanation for conduct which might otherwise seem to be inexplicable and unbelievable as between step-parent and child. This evidence tends to show that there was, in the relationship between the appellant and the claimant, a distinct absence of the care and regard which would ordinarily be expected to attend that relationship."[64]

And:

> "The basis for the admission and legitimate use by the jury of such evidence [of a physically abusive relationship] is that evidence of non-sexual misconduct may facilitate an understanding of the relationship between the accused and the complainant."[65]

Later his Honour said:

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58 AR 77.
59 AR 79.
60 AR 72.
61 AR 72.
62 [2006] QCA 212.
63 (2001) 206 CLR 221.
64 At [23].
65 At [24].

> "In this case, the evidence of the violence which infected the relationship between the appellant and the complainant might legitimately be used to enable the jury to 'understand the context of the incidents that were the subject of the charges'".[66]

[52] Keane JA noted the following passage in *Gipp v The Queen*[67] where McHugh and Hayne JJ said:

> "No doubt the evidence of general behaviour, if accepted, proved the commission of other criminal acts. But it was not tendered as propensity evidence. If the evidence had been tendered to prove propensity, it would have required careful direction in accordance with the principles emphasised by this Court on numerous occasions in recent years.[68] Moreover, as *BRS v The Queen*[69] shows, if evidence admitted for reasons other than propensity in fact reveals a criminal or reprehensible propensity on the part of the accused, a trial judge must carefully direct the jury as to the use which they can make of the evidence.[70] In *BRS*, McHugh J pointed out:
>
> > 'If the evidence is admitted for a reason other than reliance on propensity, the judge must direct the jury that they can use the evidence for the relevant purpose and for no other purpose. In some cases, the judge may need to be more specific. He or she may need to direct the jurors that they cannot use the evidence for an identified purpose. If the evidence is admitted because the Crown wishes to rely on the accused's propensity as an element in the chain of proof, it is especially necessary that the judge give the jurors clear directions as to the manner in which they may use the propensity evidence.'
>
> In this case, the learned judge correctly directed the jury that the background evidence went to show the nature of the relationship between the appellant and the complainant so that they could understand the context of the incidents that were the subject of the charges."[71]

[53] It would have been plain to the jury that the mother was giving highly emotional responses to some of the questions, and, being confronted with her own earlier statements denying that anything untoward had occurred of a sexual nature between the daughter and the appellant, might be seen to be offering justification for her inaction in respect of the dysfunctional nature of the family. The reference to "torture", as submitted by Mr M Copley SC for the respondent, readily fell into the category of gratuitous opinion evidence and would not reasonably be taken by the jury to mean very much. The trial judge expressly instructed the jury that this body of evidence about violent acts could only be used "to understand the true nature of the relationship between the parties" and to put the specific allegations into context.[72]

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66 At [25].
67 (1998) 194 CLR 106; [1998] HCA 21.
68 See, eg. *Pfennig v The Queen* (1995) 182 CLR 461.
69 (1997) 191 CLR 275.
70 *BRS v The Queen* (1997) 191 CLR 275 at 305-306.
71 (1998) 194 CLR 106 at [77]-[78]; pp 132-133; [1998] HCA 21.
72 AR 228.

[54] Counsel asked the trial judge not to refer to any inference that the jury might draw from the mother's evidence that "it was all being done to me".

[55] The trial judge in exercising his discretion not to discharge the jury did not err.

Ground 3

[56] This ground concerns the contention that a miscarriage of justice has resulted from the overall prejudicial effect of evidence of extensive physical violence by the appellant towards the son and the daughter as well as to their mother. This was argued to be particularly so where there were significant inconsistencies in the prosecution evidence and the jury needed to be persuaded beyond reasonable doubt of the credibility and reliability of the evidence of the complainant. Accordingly, this evidence would have impermissibly inclined the jury against assessing those inconsistencies dispassionately.

[57] The summing up, about which there is no specific complaint, although Mr Hamlyn-Harris noted in oral submissions that there was no propensity reasoning warning, emphasised that the jury should dismiss all feelings of sympathy and prejudice, whether for or against the defendant (or anyone else). His Honour warned the jury that no such emotions should have any part to play in their decision. They were instructed to approach their task dispassionately, deciding the facts on the whole of the evidence.[73] His Honour warned the jury that if they had reasonable doubt about the truthfulness or reliability of the daughter's evidence, whether by reference to her demeanour or for any other reason, then that needed to be taken into account in assessing her overall truthfulness or reliability.[74]

[58] His Honour related the evidence of the two witnesses from the youth shelter and correctly told them how they could approach this evidence as supporting the daughter's credibility or not. He warned them that they could not regard those statements as proof of what actually had happened. He noted that any inconsistencies might cause the jury to have doubts about the daughter's credibility or reliability.

[59] The primary judge told the jury the use they could make of uncharged sexual conduct and any violence by the appellant alleged against members of the family. His Honour instructed the jury that they could only use that latter evidence if they were satisfied of it beyond reasonable doubt. If they did not accept that evidence [to that standard] then

> "that finding will bear on whether or not you accept the complainant's evidence … relating to the charges before you beyond reasonable doubt."

If the jury did accept this evidence:

> "… then it can only be used by you in relation to the charges before you in the specific way in which I now direct. The evidence may be used by you to find in this case – sorry, may only be used by you to understand the true nature of the relationship between the parties, and to place the specific allegations in context."[75]

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73 AR 219.
74 AR 222.
75 AR 228.

The primary judge related the daughter's evidence in relation to each of the counts specifically as well as the need for each to be within the time frame alleged in the indictment. He carefully identified the inconsistencies in the daughter's evidence as well as identifying the long period between the events and the appellant being charged. He noted with care and in some detail the respective cases which included the recitation of inconsistencies stressed by defence counsel. His Honour's scrupulous manner of doing so would have reinforced them.

[60] The appellant contends that evidence of the appellant's physical violence and general harshness towards the family would lead to impermissible propensity reasoning. At the time when the appeal was heard the High Court had not given its decision in *Roach v The Queen*[76]. Mr Hamlyn-Harris requested the court to refrain from handing down judgment until after that decision was received. No further submissions were made after *Roach* was decided.

[61] In *Roach* the appellant was convicted after a trial of one count of assault occasioning bodily harm. The appellant and complainant had been in an intimate sexual relationship for over two years before the assault. For part of that period the appellant had been the complainant's carer. The assault occurred when he was visiting her during one of their separations. She remonstrated with him about certain conduct and he, on her account, reacted angrily by punching her numerous times including injuring her left arm which he had previously injured. After he left her unit she called police. They observed bruises on her arms and swelling to her left eye. Evidence of other assaults by the appellant upon the complainant in the course of their relationship was admitted. The charge against the appellant fell within the relationship provisions in s 132B of the *Evidence Act* 1977 (Qld). Before both this Court and the High Court the appellant had contended that in determining whether this body of evidence would be unfair to him the trial judge ought to have applied the rule in *Pfennig v The Queen*[77] and considered whether:

> "viewed in the context of the prosecution case, there is a reasonable view of [the relationship evidence] which is consistent with innocence".[78]

[62] The High Court rejected that argument noting that the correct starting point was s 132B which required the proposed relationship evidence to be relevant where a defendant has been charged with an offence in Chapters 28 to 30 of the *Criminal Code*.[79] The evidence sought to be admitted in *Roach* was, as the High Court and this court[80] found, propensity evidence, notwithstanding that the prosecution sought its admissibility solely as "relationship" evidence. Relevance was the sole legislative criterion and *Pfennig v The Queen* had no application. The court said:

> "The first requirement which must be fulfilled, for evidence to be admissible, is that it be relevant. The question as to relevance is whether the evidence, if accepted, could rationally affect the assessment by the jury of the probability of the existence of a fact in issue. It may do so indirectly. As Gleeson CJ observed in

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76 This occurred on 4 May 2011; [2011] HCA 12.

77 (1995) 182 CLR 461; [1995] HCA 7.

78 At 485.

79 Ch 28 – Homicide – Suicide – Concealment of Birth; Ch 29 – Offences endangering life or health; Ch 30 – Assaults.

80 *R v Roach* [2009] QCA 360.

> *HML v The Queen*, evidence may be relevant if it assists in the evaluation of other evidence."[81]

That statement, with respect, is true for all evidence, whether under s 132B or generally. Section 132B has no application to these proceedings.

[63] The trial was conducted on the basis that the evidence of harshness and, on occasion, physical violence by the appellant against the daughter and the son allowed the jury to understand, if they accepted that body of evidence, the manner in which this father openly, that is, in front of other family members, treated them and, as such, it provided an explanation for the lack of complaint about sexual misconduct by the daughter and by the son. The discretion mentioned in s 130 of the *Evidence Act* to reject evidence on the ground that its reception would be unfair to the accused is, as both the plurality and Heydon J expressed in *Roach,* distinct from the common law similar fact rule of admissibility enunciated in *Pfennig*. It was not suggested below that this evidence about the appellant's harsh discipline was to be admitted (or excluded) because it demonstrated a propensity to commit acts of sexual misconduct against the daughter. It could not have had that character.[82]

[64] The majority of the judges in *HML v The Queen*[83] concluded that where evidence of uncharged acts is admitted as relationship or context evidence, in the ordinary course the jury must be satisfied beyond reasonable doubt of those matters. That occurred here. The trial judge said:

> "Now, the prosecution has also placed before you evidence of other conduct by the defendant which it says proves certain matters which may be relevant to your consideration of the charges. That other evidence is the evidence of violence on his part towards other members of the family. You can only use that evidence if you're satisfied of it beyond a reasonable doubt. If you do not accept the evidence, then that finding will bear on whether or not you accept the complainant's evidence, that is [the daughter's] evidence, relating to the charges before you beyond a reasonable doubt. If you do accept this evidence, then it can only be used by you in relation to the charges before you in the specific way in which I now direct. The evidence may be used by you to find in this case - sorry, may only be used by you to understand the true nature of the relationship between the parties, and to place the specific allegations in context."[84]

[65] The question then is whether that body of evidence relating to physical violence by the appellant towards his family, has resulted in an unfair trial. A false picture of this family would be presented were that story not to have been before the jury. It was tested and tested vigorously in cross-examination and some concessions were extracted from the mother. The evidence of the son in respect of the appellant's

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81 At [12] (footnotes not included).

82 The discussion by Heydon J in *HML v The Queen* (2008) 235 CLR 334 at [320]; 445; [2008] HCA 16 and revisited in *Roach v The* Queen [2011] HCA 12 at [54] whether "relationship evidence" tendered as background must satisfy the rule stated in *Pfennig* in relation to similar fact evidence need not be further considered. On no view was this evidence "similar fact" or propensity evidence.

83 (2008) 235 CLR 334 per Gummow J at [41], Kirby J at [63], Hayne J at [247] and Kiefel J at [506]; [2008] HCA 16.

84 AR 228.

conduct towards his sister tended to modify slightly the more colourful evidence of the mother and, to a lesser extent, the daughter. But it also supported the daughter's evidence even though the trial judge confined it to count 5. The weaknesses in the prosecution case were explained to the jury carefully by the trial judge. His Honour's discretion not to discharge the jury after this body of evidence had been given has not miscarried.

Appellant's submissions

[66] The appellant himself filed submissions as well as a statement by his now partner. Since the appellant was represented by experienced counsel who did not refer to those documents it is unnecessary to consider them further save to observe that where the appellant seeks to introduce other arguments or evidence in relation to the matters that were dealt with at trial, he had his opportunity at trial to put those matters before the jury.

Conclusion and Orders

[67] The appellant has made out none of these grounds of appeal. I would dismiss the appeal.

[68] **ATKINSON J**: Subject to the observations of Fraser JA, with which I agree, I agree with the reasons of White JA. I also agree that the appeal should be dismissed.