SUPREME COURT OF QUEENSLAND

CITATION:	*R v LBD* [2023] QCA 266
PARTIES:	**R** **v** **LBD** (appellant)
FILE NO/S:	CA No 177 of 2023 DC No 91 of 2022
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Maroochydore – Date of Conviction: 11 September 2023 (Cash KC DCJ)
DELIVERED ON:	22 December 2023
DELIVERED AT:	Brisbane
HEARING DATE:	21 November 2023
JUDGES:	Mullins P, Bond JA and Crow J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where the appellant was convicted of one count of choking in a domestic setting and one count of common assault that were domestic violence offences – where the two offences were committed on the same occasion during an argument between the appellant and the complainant – where the prosecution relied on five uncharged acts as evidence of the relationship between the complainant and the appellant to give context to the events that constituted the charges and also as evidence of propensity to commit acts of violence against the complainant in heated arguments – where the trial judge directed the jury on dealing with relationship evidence as context and also as evidence of propensity – where the direction did not expressly state, but conveyed, that if the jury accepted that any of the uncharged acts demonstrated the appellant's propensity to commit any of the offences they could use that propensity to assess whether the complainant's evidence about the relevant offence was credible and reliable – whether the direction to the jury was wrong or inadequate *Evidence Act 1977* (Qld), s 103CB, s 103Z, s 103ZC *Pfennig v The Queen* (1995) 182 CLR 461; [1995] HCA 7,

cited
R v Roach (2009) 213 A Crim R 485; [2009] QCA 360, considered
Roach v The Queen (2011) 242 CLR 610; [2011] HCA 12, considered

COUNSEL: T A Ryan KC, with H Edwards, for the appellant
M A Green for the respondent

SOLICITORS: BJH Law for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MULLINS P:** On 11 September 2023, the appellant was convicted after trial in the District Court before a jury of one count of choking in a domestic setting (count 2) and one count of common assault (count 3). Both counts 2 and 3 were domestic violence offences. The appellant was acquitted of one count of assault occasioning bodily harm (count 1) and one count of choking in a domestic setting (count 5). It was the same complainant for counts 1-3 and 5.

[2] The appellant appeals against his conviction on two grounds:

1. A miscarriage of justice occurred because the learned trial judge wrongly directed the jury that uncharged acts of domestic violence could be used as propensity evidence in proof of the appellant's guilt of the charged offences where the Crown disavowed reliance on it for that purpose at the commencement of the trial.

2. Even if the evidence of uncharged acts could properly have been used as propensity evidence in proof of the appellant's guilt of the charged offences, a miscarriage of justice occurred because the jury were wrongly, and inadequately, directed about the way in which it might be used.

Background and evidence relating to the charges

[3] The complainant had been in a relationship with the appellant between February 2015 and March 2021 and there were two children of the relationship born respectively in December 2015 and February 2017. The family relocated in October 2018 from regional Victoria to a regional town in Queensland where the appellant had purchased a home.

[4] Count 1 was based on an allegation that during an argument in or about December 2019 at the residence of the appellant and the complainant in Queensland, the appellant bit the complainant's arm. The complainant's evidence about this incident was that she did not remember what they had been arguing about. The complainant said she was sitting on the couch, the appellant grabbed her on the shoulder, pushed her back into the couch, leant down, and bit her on her right upper arm so hard that her arm bled. A couple of days after the incident the complainant took a photo of the bruising on her arm where she said the appellant had bitten her (exhibits 1 and 2). During cross-examination, the appellant's trial counsel had the complainant demonstrate that she could bite her own arm but she denied that she did so. The appellant in giving his evidence denied that he did anything to cause the bruising on

the complainant's arm that was shown in the photograph. The appellant did not recall seeing the bruise on the complainant's arm.

[5] Counts 2 and 3 concerned conduct that arose out of an argument between the appellant and the complainant on 8 March 2021. The complainant said they were in the laundry when the appellant put his right hand around the complainant's throat, pushed her back by the throat up against the wall and squeezed her throat until the complainant could not breathe (count 2). The complainant estimated that she was unable to breathe for around 10 seconds. The complainant could not remember how they got from the laundry to the lounge room but the complainant was bent over the arm of the couch with the appellant's hand in the back of her hair banging her head and face into the couch five or six times. The complainant said the appellant let her go, she went to their daughter's bedroom and picked her up, the appellant then grabbed the sleeve of her dress and dragged the complainant to the front door and he pushed her out the front door.

[6] The appellant's evidence was to the effect that during the argument that they were having on 8 March 2021, he had the complainant's mobile phone and ran away from her into the laundry and the complainant punched him in the face and body four or five times. He said he never assaulted the complainant by grabbing, squeezing or pushing her neck in the ways that she had described in her evidence or otherwise on any occasion, including 8 March 2021. The appellant denied that he pushed or moved her head face first into the lounge. The appellant accepted that on 8 March 2021 he grabbed the complainant by the sleeve and pushed her out the front door, telling her to get out of his house. Count 3 had been particularised as the appellant's doing any one or more of four acts: holding the back of the complainant's head by her hair, moving or pushing her head into a couch, grabbing her or dragging her to a door, and pushing her out the door. The trial judge directed the jury, however, that on the way the prosecution had run the case, the jury could find the appellant guilty of count 3 only if they accepted the complainant's evidence about that part of the incident beyond reasonable doubt and it was not open to them to convict the appellant if they came to the view that nothing else happened other than the appellant's pushing the complainant out the door.

[7] When the complainant was driving away from the residence with their daughter in the Prado vehicle registered in the appellant's name to collect their son from kindergarten after the incident the subject of counts 2 and 3, she said she looked in the rear vision mirror and noted that her neck was red. At the kindergarten, the complainant saw one of her friends, Ms B, who gave evidence that the complainant "was a little bit shaken up" and had a red mark on her neck.

[8] On the following day (9 March 2021), when the complainant was at work she said she took a photo of the bruising on her neck (exhibits 3 and 4). She could not explain why the photo that was exhibit 4 was date-stamped 12 March at 8.41 am. The complainant suggested that exhibit 4 may have been a screenshot of the photo that the complainant had taken of the bruising on her iPhone. She said the bruising was located where the appellant's hand had been on her throat.

[9] The complainant separated from the appellant after the incident on 8 March 2021.

[10] The conduct that was the subject of count 5 was alleged to be the appellant's holding or grabbing the complainant's throat or neck and hindering or restricting her

breathing on 15 April 2021 at the complainant's new residence. The complainant had friends over to her new residence, including Ms B, and had not answered the telephone calls and the messages from the appellant. He arrived at the residence and was angry. He told the complainant that he was taking the Prado and wanted the keys. The complainant said he grabbed her handbag and she was chasing him, when the appellant pushed her against the wall at the top of the stairs and had her by the throat against the wall with his right hand. The complainant identified by reference to the plan of the townhouse (exhibit 5) that the appellant had pushed her against the section of the wall next to the doorway of the master bedroom which was to the left as one came up the stairs. Ms B heard both the appellant and the complainant yelling about the keys but did not see anything when they were upstairs. The complainant said that Ms M, another of her friends who was present, yelled out and the appellant pulled away and left the residence. Ms M's evidence was to the effect that, when she got to the top of the stairs, she saw the appellant's holding the complainant by the throat against the timber linen door (which was to the right of the stairs as one came up the stairs) and she yelled at him to let the complainant go which he did. (The prosecutor conceded in his address to the jury that there was an inconsistency in the evidence adduced by the prosecution as to the location of the alleged holding of the complainant's throat by the appellant in this incident.) Ms M said that the period in which she had seen the appellant holding the complainant's throat was "quite brief". The appellant denied any contact between his hand and the complainant's neck when he was upstairs on this occasion.

[11] The complainant stated that the incident on 15 April 2021 was not like the previous incident on 8 March 2021:

> "It wasn't as long, and it wasn't as hard. He just … grabbed me by my throat and pushed me back."

[12] The complainant estimated that the appellant held her throat for a few seconds, it was hard enough that she needed to cough to get breath and it was not to the point where she "was panicking".

The course of the trial

[13] The prosecutor opened the case for the jury in relation to the counts and other incidents of abuse or controlling behaviour by the appellant against the complainant and other occasions involving some physical violence.

[14] Ultimately five incidents of abuse that were not charged on the indictment were relied on by the prosecutor as evidence of the relationship between the complainant and the appellant. The following brief description of each of these incidents is taken from the complainant's evidence.

[15] In mid-2016, the complainant shook the appellant awake and asked him to feed their baby which the appellant refused to do as he had football the next day. The complainant pulled the pillow from under the appellant's head and the appellant then grabbed her by the shoulders and shoved her back and head into the mattress. This was referred to as the bed incident.

[16] In around June 2018 following an argument in which the appellant had told the complainant she was stacking the firewood incorrectly, the complainant stormed back into the house and, when she saw the appellant's phone, she threw it into a

paddock. The appellant grabbed the complainant and pushed her face into the sheep manure and told her never to throw or touch his phone again. This was referred to as the firewood incident.

[17] In August 2018, the appellant and the complainant were having an argument, when the appellant grabbed the complainant by the throat and banged her head against the wall. This was referred to as the grabbing the throat incident.

[18] There were occasions in 2019 in which the appellant urinated onto the complainant's legs. One of these occasions occurred when the complainant was showering and she could not get away. These were referred to as the urination incidents.

[19] In January 2020, the appellant pushed her in the upper chest area, grabbed the complainant by the sleeve of her dress and pulled her out of the house, locking her and the children outside. This was referred to as the removal from the house incident.

[20] After the opening, the trial judge inquired of the prosecutor as to whether the relationship evidence was being tendered for context or whether it was being tendered to prove a particular propensity by the appellant. The prosecutor responded "for context, although there is that occasion he's previously grabbed her by the throat". The prosecutor stated that his "focus" was on the context and the trial judge pointed out that the appellant's trial counsel was entitled to know the purpose for which the relationship evidence was being tendered. The prosecutor confirmed that it was being tendered to give context to the events that constituted the charges.

[21] The trial was taking place soon after the commencement of the substantive provisions of the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023* (Qld) (*Domestic Violence Amendment Act*) on 1 August 2023. Before the commencement of the *Domestic Violence Amendment Act*, relevant evidence of the history of the domestic relationship between a defendant to a criminal proceeding for an offence defined in chapters 28-30 of the *Criminal Code* (Qld) and the person against whom the offence was committed was admissible in the proceeding pursuant to s 132B of the *Evidence Act 1977* (Qld) (Act). Section 132B was repealed by the *Domestic Violence Amendment Act* which inserted s 103CB into the Act which is in substance to the same effect as s 132B but not limited to offences in chapters 28-30.

[22] The complainant was cross-examined on incidents in which it was asserted she pushed or punched the appellant or threw things at him. The complainant denied most of the propositions that were put to her in cross-examination but did concede that she had defended herself and "pushed back", "hit back" and "kicked" when she had been intimidated or had been hurt by the appellant. She admitted to pushing the appellant when she was angry after he had told her friend Ms B to leave their house during a party in October 2020. The complainant also conceded that on one occasion she had thrown a mandarin at the appellant that broke a tile on the splashback of the kitchen.

[23] At the conclusion of the prosecution case and in the absence of the jury, the trial judge raised the issue of the direction on the relationship evidence, referred to the

decision of the High Court in *Roach v The Queen* (2011) 242 CLR 610 and the judgment of Holmes JA (with whom Keane JA and A Lyons J agreed) in *R v Roach* (2009) 213 A Crim R 485, and suggested that submissions were required from both counsel on the proposition that where there is evidence of actual domestic violence, it almost always has a potential use to prove a propensity. The prosecutor conceded that some modified direction as to propensity might be required. The matter was raised again the next day with counsel in the absence of the jury. The appellant's trial counsel accepted that the trial judge needed to deal with the use the jury might make of the evidence of the alleged violence by the appellant at other stages in the relationship. Counsel stated that he did not have a final position, because the jury was about to hear "the other side of the equation".

[24] As the appellant had denied any incident where he grabbed the complainant by the throat, the appellant's evidence on the other four uncharged incidents was as follows.

[25] In respect of the bed incident, the appellant conceded that there was an occasion when the complainant was attempting to wake him in relation to assist in feeding the baby at nighttime and the complainant pulled the pillow out from under his head. He denied assaulting the complainant on that occasion.

[26] The appellant conceded that he and the complainant had an argument about woodchopping where he was critical of how the complainant was throwing the wood into a pile and he stated that the complainant threw his mobile phone into the paddock. He said that he yelled at the complainant and denied pushing the complainant to the ground and pushing her face into sheep manure.

[27] The appellant denied urinating on the complainant in the various locations of which she gave evidence, although he conceded that "it probably would have happened", if they were in the shower together.

[28] The appellant conceded that he had locked the complainant out of the house after a New Year's event but that it was in January 2021 not January 2020.

[29] The appellant gave evidence of incidents during which he said that the complainant had pushed him or punched him or threw things at him.

[30] Before the trial judge summed up, his Honour read out to counsel (in the absence of the jury) the direction which he proposed to give to cover the evidence that each of the complainant and the appellant was violent towards the other on occasions.

[31] The appellant's counsel's response to the proposed direction was that it should be fashioned to address the extent to which each of the complainant and the appellant were alleged to have resorted to violence in the relationship. The appellant's counsel specifically requested the trial judge when giving the direction to cover the categories of the evidence to which it applied without necessarily going into the details of that evidence. The appellant's counsel also requested the trial judge to give a direction based on s 103Z(2) of the Act and the further clarification of s 103Z(2)(d) found in s 103ZC(2) of the Act.

[32] The appellant's counsel anticipated the trial judge's direction on the relationship evidence by addressing the jury in these terms:

> "His Honour will instruct you about what you can and can't do with what is called propensity reasoning in relation to allegations of – of other domestic violence, I use that in the broader sense, when you're considering the proof of the charges. And most obviously there's the choking allegation of the 15th of April, the choking allegation of the 8th of [M]arch and then the uncharged choking allegation. His Honour will instruct you as to what the law says you can do with those things and how you consider whether or not you accept one and, if you do, what you then do with the others."

[33] The prosecutor in his address referred the jury to the fact that the trial judge would direct them in terms of how they could approach the complainant's evidence "of other things in the relationship" and gave the example of the grabbing the throat incident. The prosecutor stated:

> "It's evidence that you might regard or may help you in demonstrating a tendency or propensity on his part that when – in heated arguments or conflict to act with – to have – for some sort of violence."

The impugned direction

[34] The impugned direction must be considered in the context of the whole summing up. The jury were instructed that it was for them to decide whether they accepted or rejected a witness' evidence and given the usual general directions on factors that may assist in the assessment of a witness' evidence. In outlining the elements of each of the counts, the trial judge emphasised that the prosecution case depended on proving beyond reasonable doubt that each incident occurred as described by the complainant in her evidence. In relation to each count, the trial judge reminded the jury of the evidence of the complainant, the appellant and, where applicable, other witnesses. The critical nature of the complainant's evidence to the prosecution case was reinforced by the standard *Liberato* direction.

[35] The direction given in the summing up on the allegations of domestic violence within the relationship was in substance that foreshadowed by the trial judge with the suggestions for the direction made by the appellant's trial counsel and was as follows:

> "So you have heard evidence of other allegations of domestic violence within this relationship, apart from the four specific allegations that you are to decide.
>
> There is evidence from both [the complainant], where she alleges [the appellant] was violent toward her, and there is evidence from [the appellant] that [the complainant] was violent toward him. That is all evidence which might set the context for the matters that you particularly have to decide, but there are some specific directions that I need to give you as it relates to [the complainant's] allegations that [the appellant] was violent toward her on other occasions. There is limited use that you might make of that.
>
> I am not going to remind you of the evidence. It has been canvased in the course of addresses. You would recall there is a description of

> things said by [the appellant] which might be in the category of insulting or demeaning language. There is then descriptions by [the complainant] of occasions when he has been violent toward her, including an occasion when he, she says, grabbed [her] by the throat.
>
> It is that evidence particularly I am addressing, but do not forget you have regard to all of the evidence, including [the appellant's] description of what he says was violence by [the complainant] toward him. You need to keep in mind [the appellant] is charged only with the four allegations that you are to decide. He is not on trial for any of these other allegations. He is not on trial for being a bad husband. That is not part of what you need to decide.
>
> The evidence of the other acts of violence alleged by [the complainant] has limited relevance. First, it might give context to the allegations that you are required to decide. That is, without hearing the full history of the relationship, the allegations you are to consider might seem to have occurred out of the blue, so to speak. Secondly, the Prosecution relies upon this evidence to show that [the appellant] has a propensity or a tendency to commit acts of violence against [the complainant] in heated arguments or conflicts.
>
> It is for you to decide whether you are satisfied this other conduct occurred and, if it did, what you make of it. But you must not decide [the appellant] is guilty only from this evidence. You always need to consider whether you are satisfied beyond reasonable doubt that [the appellant] did the four things that are said to constitute counts 1, 2, 3 and 5.
>
> If you are not satisfied these other acts of violence alleged by [the complainant] occurred, or if they occurred but they do not show [the appellant] had a propensity or a tendency to commit an offence of the type alleged, you cannot use that evidence to assess whether [the appellant] is guilty of any of the four allegations you are to decide. Now, if [the appellant] did these other things you might think that it reflects poorly upon his character, but that does not matter if you do not think that it demonstrates a propensity to commit the offences alleged in counts 1, 2, 3 and 5."

[36] The impugned direction was immediately followed by the direction based on s 103Z(2) and s 103ZC(2) of the Act and the trial judge expressly stated that the further general directions given "about the broad evidence of the relationship and domestic violence" that the jury had heard applied "whether it is domestic violence alleged by [the complainant] to have been committed by [the appellant], or by [the appellant] alleged to have been committed by [the complainant]".

[37] No redirection was sought by the appellant's trial counsel in respect of the impugned direction.

Ground 1 – giving the impugned direction when the prosecutor at the commencement of the trial only relied on it for context

[38] To the extent that ground 1 is based on the response of the prosecutor at the commencement of the trial when the trial judge raised the issue of the purposes for which the prosecutor proposed to use the relationship evidence, the ground cannot succeed, as by the conclusion of the trial the prosecutor was relying on the relationship evidence for both context and propensity and the appellant's trial counsel had conceded appropriately that a direction of the type that the trial judge proposed should be given to the jury.

[39] To the extent that ground 1 characterises the trial judge's direction as directing the jury that the uncharged acts of domestic violence could be used as propensity evidence in proof of the appellant's guilt of the charged offences that does not reflect the complexity of the detailed direction that was given and is therefore not an accurate description of the effect of the direction. The prosecution was not relying on the uncharged acts of domestic violence as evidence of propensity that could be used to prove that the appellant was guilty of the charged offences in accordance with the rule in *Pfennig v The Queen* (1995) 182 CLR 461 at 481-483 where propensity or similar fact evidence is described as "a special class of circumstantial evidence" and it is admitted on the basis that "the objective improbability of its having some innocent explanation is such that there is no reasonable view of it other than as supporting an inference that the accused is guilty of the offence charged".

[40] The appellant therefore cannot succeed on ground 1 on the terms in which it is framed.

Ground 2 – was the impugned direction wrong or inadequate?

[41] The focus of the submissions on the appeal was on ground 2 and whether the impugned direction was wrong or inadequate in the circumstances of the trial in directing the jury about the way in which the evidence of the uncharged acts of violence could be used by the jury. The starting point for dealing with this ground is a consideration of the purposes for which the jury was entitled to use that evidence.

[42] The impugned direction was based on directions found in Chapter 70 of the *Supreme and District Courts Criminal Directions Benchbook* for where relationship evidence is admitted for context and where evidence of violence in a domestic relationship is received to show a defendant's propensity or tendency to commit acts of violence against the relevant complainant. The latter direction is based on Holmes JA's reasons in *Roach* at [19]-[23]. The appeal to the High Court in *Roach* was dismissed. There was some qualification in the joint judgment of French CJ and Hayne, Crennan and Kiefel JJ to the observations made by Holmes JA in the Court of Appeal in *Roach* at [19]-[23] but the qualification did not negate the possibility in an appropriate case of the use of prior violence in a domestic relationship as evidence of a propensity on the part of the accused person to make it more probable that the accused person assaulted the complainant as the complainant said the accused person did without the need to satisfy the *Pfennig* test.

[43] The appellant in *Roach* had been convicted of one count of assault occasioning bodily harm. The following summary of the offending and the relationship evidence in *Roach* is taken from the judgment of Holmes JA at [3]-[5]. The complainant had been in a sexual relationship of an intermittent nature with the appellant between early 2004 and mid-April 2006. The appellant who was

intoxicated visited the complainant on 13 April 2006 at 12.45 am. He went straight to the refrigerator to get a drink and when the complainant said he ought not to help himself, he punched her face and arms with a closed fist and then pulled on her left arm which he had previously injured. He said something to the effect that he knew she would ring the police, so he may as well make a "good job of it" and punched her another eight times. The evidence of prior violence that was admitted was that in early 2004 the appellant had thrown a handful of silver at the complainant, hitting her forehead and making her face bleed. After that he had often assaulted her by punching her. About eight months after the first assault, he had, while intoxicated, punched the complainant in the face numerous times before knocking her to the ground which caused injuries to her left arm. Over 2005, the appellant assaulted her on many occasions by punching her, with closed fists, in the face and arms.

[44] The trial judge in *Roach* had permitted evidence to be adduced of the other assaults by the appellant upon the complainant in the course of their relationship pursuant to the then s 132B of the Act and had given a direction that the history of the relationship between the complainant and the appellant in that case had been led for the very specific and limited purpose to give the jury a true and proper context to understand properly what the complainant said happened in the subject incident. The trial judge directed the jury that they were not to use the evidence as evidence of propensity. The purpose of Holmes JA's observations in *Roach* was to point out (at [22]) that, apart from giving context, evidence of that type "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".

[45] A ground of appeal before the Court of Appeal in *Roach* was that irrelevant evidence of earlier acts of violence against the same complainant was admitted which raised whether it was necessary for the trial judge to apply the rule in *Pfennig* in determining admissibility. That ground was rejected at [13]-[14] on the basis that the then s 132B of the Act governed admissibility and the *Pfennig* test did not apply. The same ground was advanced in the appeal to the High Court.

[46] After the joint judgment in the High Court in *Roach* had explained (at [28]-[34]) that, as a matter of statutory construction of s 130 and s 132B of the Act, the test in *Pfennig* was not to be applied and at [35]-[38] that the rule in *Pfennig* was not a qualification to the admission of evidence of domestic violence in the history of a relationship pursuant to s 132B, the joint judgment stated at [39]:

> "The rule in *Pfennig* had no application in this case, even if the evidence was to be used as evidence of the appellant's propensity, as the Court of Appeal held. The fact that the Court differed from the trial judge as to the relevance of the evidence is therefore not critical to the outcome of this appeal. Nevertheless, the assumption upon which the Court proceeded, that relationship evidence may not be relevant other than as propensity evidence, is not unimportant and requires further consideration."

[47] The joint judgment showed (at [40]-[44]) that it was not the case that "evidence of the history of a relationship, including the conduct of one party to it towards the other, is not relevant other than as to the other person's propensity" and then stated at [45]:

> "In the present case the evidence, if accepted, was capable of showing that the relationship between the appellant and the complainant was a violent one, punctuated as it was with acts of violence on the part of the appellant when affected by alcohol. Without this inference being drawn, the jury would most likely have misunderstood the complainant's account of the alleged offence and what was said by the appellant and the complainant in the course of it. To an extent Holmes JA acknowledged this in the conclusions to her reasons. Whilst her Honour identified the relevance of the evidence as showing the particular propensity of the appellant, she also concluded that it made the appellant's conduct in relation to the alleged offence intelligible and not out of the blue." (*footnote omitted*)

[48] The High Court in *Roach* did not reject that, in an appropriate case, relevant evidence of domestic violence admitted under s 103CB of the Act for the purpose of providing the context of the domestic parties' relationship may also show the propensity of the accused person to behave in a certain way in certain situations towards the complainant, but modified the observations of Holmes JA in *Roach* (at [19]-[23]) that the probative value of the relationship evidence was as propensity evidence. The High Court dismissed the appeal in *Roach* as the trial judge had confined the use of the relationship evidence to context only and the direction that was given in the trial about the use of that relationship evidence as context was sufficient.

[49] The joint judgment in the High Court in *Roach* at [47] explained what directions should be given by a trial judge when the relationship evidence was not only relied on for context but also to show that a defendant had a tendency or propensity to behave towards the complainant in the manner which was the subject of the relevant charge:

> "The importance of directions in cases where evidence may show propensity should not be underestimated. It is necessary in such a case that a trial judge give a clear and comprehensible warning about the misuse of the evidence for that purpose and explain the purpose for which it is tendered. A trial judge should identify the inferences which may be open from it or the questions which may have occurred to the jury without the evidence. Those inferences and those questions should be identified by the prosecution at an early point in the trial. And it should be explained to the jury that the evidence is to allow the complainant to tell her, or his, story but that they will need to consider whether it is true."

[50] On this appeal, the appellant had no difficulty with the direction given by the trial judge that the evidence of the uncharged acts of violence might give context to the allegations the jury were required to decide. The appellant argued that it was insufficient for the jury to be informed that the prosecution also relied on the evidence of the uncharged acts of violence to show the appellant had "a propensity or a tendency to commit acts of violence against [the complainant] in heated arguments or conflicts" without explaining to the jury how they could use that propensity or tendency in deciding whether the appellant was guilty of the counts on the indictment.

[51] The appellant particularly focused on that part of the direction to the jury in relation to this use of the uncharged acts that "It is for you to decide whether you are satisfied this other conduct occurred and, if it did, what you make of it". It was submitted that the only assistance that was given to the jury was the direction that they must not decide that the appellant was guilty only from the evidence of the uncharged acts of violence and that they needed to consider whether they were satisfied beyond reasonable doubt that the appellant did the four things that were said to constitute respectively counts 1, 2, 3 and 5. It was argued that the further direction that was given to the effect that, if the jury were satisfied that the other acts of violence did not show that the appellant had a propensity or a tendency to commit an offence of the type alleged, they could not use that evidence to assess whether he was guilty of any of the four allegations they had to decide, was about how not to use the evidence. It was therefore submitted there was a gap in the directions, as if the jury were satisfied that any of the acts of violence showed that the appellant had a propensity or a tendency to commit an offence of the type alleged against the complainant, there was no explanation given by the trial judge of the next step in the reasoning process in relation to using that finding of propensity in considering whether the appellant was guilty of the relevant count.

[52] Where there are multiple uncharged acts of violence relied on to establish propensity of a defendant to commit offences of different types, a trial judge would usually assist the jury by identifying which of the uncharged acts, if accepted by the jury, would relate to which of the offences. When giving the impugned direction, the trial judge referred generally to the descriptions by the complainant of occasions when the appellant had been violent towards her and made specific reference only to the grabbing the throat incident (which was obviously of most relevance to counts 2 and 5). In giving the impugned direction, the trial judge acceded to the appellant's trial counsel's request to avoid detailing the evidence of the uncharged acts. There can therefore be no criticism in this matter that the impugned direction did not descend to any detail in explaining the use of the uncharged acts in relation to the respective counts.

[53] Without attempting to redraft the impugned direction, the matters which needed to be covered in the direction to deal with the relationship evidence as context and also as evidence of the appellant's propensity to commit acts of violence against the complainant when they were arguing were:

(a) the evidence of the uncharged acts of violence had limited relevance to the jury's task of deciding whether the prosecution had proved beyond reasonable doubt each of the four counts;

(b) the uncharged acts were relied on by the prosecution to give context to the incidents which were the subject of the four counts that the jury had to decide as, without hearing the full history of the relationship, the allegations which were the subject of the four counts might seem to have occurred "out of the blue";

(c) the uncharged acts were also relied on by the prosecution to show that the appellant had a propensity or a tendency to commit acts of violence against the complainant in heated arguments or conflicts;

(d) it was for the jury to decide whether they were satisfied that any of the uncharged acts of violence occurred and, if it did, what the jury made of it,

ie whether the jury relied on it solely to understand the context for the complainant's evidence of the incident the subject of the relevant count or whether the jury also relied on it for showing the propensity of the appellant to commit acts of violence against the complainant when they were having a heated argument;

(e) if the jury rejected the evidence of any of the uncharged acts, the jury must put that evidence aside;

(f) if the jury did not consider that any one or more of the uncharged acts of violence demonstrated the propensity of the appellant to commit acts of violence against the complainant when they were having a heated argument but merely showed him to be a poorly behaved partner or of poor character, that was an irrelevant consideration to the jury's task and the jury must put the evidence of the uncharged act or acts aside;

(g) if the jury accepted that any of the uncharged acts showed the appellant's propensity for violence against the complainant when they were arguing, the jury could use that propensity in assessing the complainant's evidence on the relevant count, as that propensity for violence against the complainant may have made it more likely that the complainant's evidence on that count was credible and reliable;

(h) even if the jury were satisfied of that propensity of the appellant, the jury could not reach a verdict of guilty on the relevant count unless they were satisfied that the complainant's evidence proved the elements of the relevant count beyond reasonable doubt.

[54] In giving the impugned direction, the trial judge was not explaining the complicated concept of similar fact evidence in accordance with *Pfennig* where the propensity evidence is relied as part of the circumstantial case against a defendant. Where the jury was satisfied by one or more of the uncharged acts of the propensity of the appellant to commit acts of violence against the complainant when they were having a "heated" argument or conflict, the impugned direction was dealing with a commonly understood concept of the propensity of a person to act in a certain manner in certain circumstances. The jury would have understood that to mean that when a person has a tendency or inclination to act in a certain way under certain conditions towards a certain person and it is alleged that they did act that way towards that person in those conditions, it made it likely that they did so act.

[55] All the requirements for a direction dealing with relationship evidence as context and also as propensity or tendency to commit acts of violence against a domestic partner set out in subparagraphs (a) to (h) of [53] above (other than subparagraph (g)) were expressly covered by the impugned direction. The requirement set out in subparagraph (g) could have been spelt out more clearly in the impugned direction, but it was implicit or clear enough from the impugned direction that if the jury considered the evidence of one or more of the uncharged acts of violence showed the appellant's propensity to commit acts of violence against the complainant when they were in the midst of a heated argument or conflict, that made it more likely that the complainant's evidence of the relevant allegation was credible and reliable. The impugned direction conveyed to the jury, in effect, that, if they thought that any of the uncharged acts demonstrated a propensity to commit any of the offences alleged in counts 1, 2, 3 and 5, they could use the evidence to assess whether he was guilty

of the relevant offence. It was a matter for the jury to then use the commonly understood concept of a person's propensity to act in a certain way in assessing the complainant's evidence on the relevant count. The general directions given by the trial judge in the summing up had instructed the jury on the necessity for them to assess the complainant's evidence to determine whether they were satisfied beyond reasonable doubt that each incident occurred as described by her. The impugned direction also conveyed that the jury could not decide the appellant was guilty only from the acceptance of propensity evidence, as they had to be satisfied beyond reasonable doubt that the appellant did each of the acts that was said to constitute counts 1, 2, 3 and 5. As Mr Green of counsel on behalf of the respondent submitted, to the extent the impugned direction expressed in the negative as to what the jury could not do with the propensity evidence, it was to the forensic advantage of the appellant. It focused the direction on the limits of the propensity evidence that could be used against the appellant, rather than repeating the complainant's evidence on the uncharged acts.

[56] The impugned direction in the context of the whole summing up was neither wrong nor inadequate in the circumstances of this trial. The appellant does not succeed on ground 2.

Order

[57] It follows that the order which should be made: Appeal dismissed.

[58] **BOND JA:** I agree with the reasons for judgment of Mullins P and with the order proposed by her Honour.

[59] **CROW J:** I agree with Mullins P.