DISTRICT COURT OF QUEENSLAND

CITATION:	*R v Dilger* [2022] QDCPR 55
PARTIES:	**R** (Applicant Crown) **v** **CLARENCE LEONARD DILGER** (Respondent Defendant)
FILE NO:	Indictment No 300 of 2021
DIVISION:	Criminal
PROCEEDING:	Application pursuant to s 590AA of the *Criminal Code 1899* (Qld)
ORIGINATING COURT:	District Court
DELIVERED ON:	30 August 2022
DELIVERED AT:	Townsville
HEARING DATE:	11 July 2022
JUDGE:	Coker DCJ
ORDER:	**1. That the Crown be permitted to lead Similar Fact Evidence, namely evidence of the facts of the Defendant's 2017 conviction for production of cannabis.**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – SIMILAR FACT – ADMISSIBILITY – whether evidence of a previous conviction should be allowed as sought by the Crown – where there is a proper purpose for the admission of that evidence – whether the purpose of identifying an offender is an admissible purpose – whether the probative value outweighed the prejudicial effect – whether the adequacy of the evidence passed the 'Pfennig' test.
CASES:	*Sutton v The Queen* [1984] 152 CLR 528, considered. *R v Hoch* [1988] 165 CLR 292, cited. *Pfennig v The Queen* [1995] 182 CLR 461, cited. *R v Delgado-Guerra* [2001] QCA 266, considered. *Dair v The State of Western Australia* [2008] WASCA 72, considered. *R v Nibigira* [2018] QCA 115, considered.
COUNSEL:	J.A. Francis for the Applicant Crown E.G. Basset for the Respondent Defendant

SOLICITORS: Director of Public Prosecution (Qld) for the Applicant Crown
Resolute Legal for the Respondent Defendant

Introduction

[1] Before the Court at the present time is an application brought by the Crown, seeking leave to lead evidence of Clarence Leonard Dilger's conviction in 2017. That conviction related to a plea of guilty in respect of a charge relating to production and trafficking in cannabis. Clarence Leonard Dilger, herein after referred to as the Respondent, is currently charged upon an indictment dated the 25th of September 2020 with four counts contained within a seven-count indictment involving three defendants. The counts relevant to the Respondent are counts 1, 2, 3, and 5 and are in these terms:

Count 1 Section 5 161Q(a)(b)(i) Drugs Misuse Act 1986, Penalties and Sentences Act 1992 Form 352	that between the twenty-sixth day of April, 2018 and the twenty-seventh day of November, 2018 at Townsville & elsewhere in the State of Queensland, CLARENCE WILLIAM DILGER, RODNEY JAMES GREEN and REBECCA RACHAEL WILLIAMSON carried on the business of unlawfully trafficking in the dangerous drug cannabis.
Count 2 Section 10(1)(a) Drugs Misuse Act 1986 Form 358	that on the twelfth day of June, 2018 at Townsville in the State of Queensland, CLARENCE LEONARD DILGER and had [retracted] in their possession $68,500 in Australian currency for use in connection with the commission of the crime of trafficking in a dangerous drug.
Count 3 Section 9(1)(c) Drugs Misuse Act 1986 Form 357	that on or about the seventh day of August, 2018 at Toomulla in the State of Queensland, CLARENCE LEONARD DILGER unlawfully had possession of the dangerous drug cannabis. And the quantity of the dangerous drug exceeded 500 grams.
Count 5 Section 10(1)(b) Drugs Misuse	that on the twenty-seventh day of November, 2018 at Cow Bay in the State of Queensland, CLARENCE LEONARD

Act 1986 Form 358	DILGER had in his possession a mobile phone that he had used in connection with the commission of the crime of trafficking in a dangerous drug.

[2] The application is based upon the similarity, as said to exist, in relation to the offending in 2014 and in the offending now the subject of the charges contained within the indictment, counts 1, 2, 3, and 5.

[3] In 2014, it is said that the Respondent was observed by video surveillance emptying cannabis into a concealed drum in a remote area near Toomulla Beach north of Townsville, and it was then, upon the Crown case, alleged that he knew that this cannabis would be collected by associates of his who intended to traffic in it in the Townsville area. He was convicted of production upon his own plea, and that was determined in 2017.

[4] In 2018, four years after this said offending, there is footage of a person who the Crown says broadly matches the physical description of the Respondent, and that that closed-circuit television footage shows that person visiting and inspecting a concealed drum in a remote area at Cungulla Beach near Townsville which, upon the Crown case, was used for the supply of cannabis to a co-accused, Rodney James Green. It was intended, the Crown says, for Green to traffic in that cannabis, but that when it became clear that the original drop-off point was compromised, then the Respondent and the co-accused, Green, used drums again located in or near Toomulla Beach, but at this time in the Clemant State Forest to continue the proposed trafficking in cannabis.

[5] The Crown therefore seeks the opportunity to lead evidence of the facts of the earlier conviction to show that the Respondent is one and the same person as that who is shown in the 2018 footage, at Cungulla Beach.

[6] It is unnecessary to provide detailed information or background in relation to the offending which gave rise to the charges in 2014 or to the offending which related to the charges now the subject of the indictment before the Court. Suffice it to say that there were police operations concerned with the trafficking of cannabis in the Townsville area in early 2014 and that, similarly, there was a further police operation again concerned with trafficking of cannabis in the Townsville area which

commenced in November of 2017. It is said that the evidence in relation to this matter is of such similarity that it is evidence which could and should properly be able to be relied upon, in relation to the identification of the Respondent.

[7] It is the case, however, that in a criminal trial, evidence offered by the Prosecution said to be relevant, solely for the purposes of showing that the accused is the "kind of person who would be likely to commit the offence charged", is not admissible, except in circumstances where it is offered as rebuttal evidence where the accused might suggest that he is not such a person. However, if evidence is sought to be relied upon by the Prosecution as relevant for some other purpose, it is then admissible, notwithstanding that it reveals that the accused may be a person of that kind.

[8] That, however, is subject to the discretion of the Court. It is that application that is before the Court now, and the basis that the Crown relies upon for the admission of the evidence relating to the conviction for the offending in 2014 lies in it, the Crown says, possessing a particular probative value or cogency such that, if accepted, it bears no reasonable explanation other than the inculpation of the Respondent in the offences now charged.

[9] The law in relation to the matter is mixed, and I say that particularly in the sense that both the Crown and Defence have detailed the bases upon which it is said that the evidence should either be admitted or excluded. Both understandably refer to *Pfennig v R [1995]* 182 CLR 461 where a number of statements relating to the use of evidence of this nature are detailed. In particular, the Crown relies upon the following:

> *The trial Judge ... must recognise that propensity evidence is circumstantial evidence and that, as such, it should not be used to draw an inference adverse to the accused unless it is the only reasonable inference in the circumstances. More than that, the evidence ought not to be admitted if the trial judge concludes that, viewed in the context of the Prosecution case, there is a reasonable view of which it is consistent with innocence.*

[10] The position of the Crown here is to say that that is simply outside what could possibly be considered as anything other than bearing no reasonable explanation other than the inculpation of the accused person and, as such, becomes admissible.

[11] The Defence, referring similarly to the comments of the Judges of the High Court in *Pfennig*, noted the following:

> *The evidence of propensity needs to have a specific connection with the commission of the offence charged, a connection which may arise from the evidence giving significant cogency to the Prosecution case or some aspect or aspects of it.*

[12] However, the Defence goes on to note that the Court indicated:

> *Because propensity evidence is a special class of circumstantial evidence, its probative force is to be gauged in the light of its character as such. But because it has a prejudicial capacity of a high order, the trial Judge must apply the same test as a jury must apply in dealing with circumstantial evidence and ask whether there is a rational view of the evidence that is consistent with the innocence of the accused.*

[13] I shall come to those conflicting perspectives in relation to the matter in due course but note that the Queensland Court of Appeal in *R v Nibigira [2018]* QCA 115 spoke specifically about the admissibility of similar fact evidence. In fact, Justice of Appeal Gotterson, as his Honour then was, supported by the Chief Justice and Justice of Appeal McMurdo, indicated that the High Court had re-affirmed that similar fact evidence is prima facie inadmissible because of its prejudicial effect.

[14] His Honour then went onto note that there were many decisions of high authority which together sought to formulate statements as to the stringency required for admission of similar fact evidence. Some of those such statements included:

i. The admission of similar fact evidence is exceptional and requires a strong degree of probative force.

ii. It must have "a really material bearing on the issues to be decided".

iii. It is only admissible where its probative force "clearly transcends its merely prejudicial effect".

iv. Its probative value must be sufficiently high. It is not enough that the evidence merely has some probative value of the requisite kind.

v. The criterion of admissibility for similar fact evidence is "the strength of its probative force".

vi. It is necessary to find a sufficient nexus between the primary evidence on a particular charge and the similar fact evidence.

vii. The probative force must be sufficiently great to make it just to admit the evidence notwithstanding that it is prejudicial to the accused.

viii. Admissible similar fact evidence must have some specific connection with or relation to the issues for decision in the subject case.

[15] As I noted, the High Court in *Pfennig v The Queen* made reference to the evidence of propensity needing to have a specific connection with the commission of the offence charged. And so there is that clear difficulty in relation to the balance between the assistance that can be drawn from propensity evidence as opposed to the possibility of prejudice that arises in it. The High Court in *R v Hoch [1988]* 165 CLR 292 noted as follows:

> *Assuming similar fact evidence to be relevant to some issue in the trial, the criterion of its admissibility is the strength of its probative force ... that strength lies in the fact that the evidence reveals "striking similarities", "unusual features", "underlying unity", "system" or "pattern" such that it raises, as a matter of common sense and experience, the objective improbability of some event having occurred other than as alleged by the Prosecution.*

[16] In other words, the Crown here says that the nature of what occurred in 2014 and what is alleged to have occurred and to have involved the Respondent in 2018 is evidence of such a similarity that it would:

> *... render it objectively improbable that a person other than the accused committed the act in question, that the relevant act was unintended, or that it occurred innocently or fortuitously.*

If as is suggested by the Crown to be the case here, then such evidence is admissible and evidence relevant to the issue.

[17] Categories of relevance have been the subject, again, of commentary and consideration by the Courts in the past and include rebutting coincidence, showing that there is a system of discreditable conduct so as to prove intent, or to show a particular modus operandi. It is also useful and relevant in circumstances where it gives rise to a need to prove the identity of an offender as is the situation that arises in relation to this particular matter.

[18] In the outline provided by the Crown in relation to this matter, there are then a number of references to cases relating to the use of similar fact evidence in order to support the identification of a defendant. In particular, I was referred to *Sutton v The Queen* [1984] 152 CLR 528 and *R v Delgado-Guerra* [2001] QCA 266, as well as the comments of Justice of Appeal Thomas, as his Honour then was. Reference was also made to other decisions utilising similar facts for the purposes of identification, including *Dair v The State of Western Australia* [2008] WASCA 72, where specific reference was made to the use of similar fact evidence in relation to identification of a suggested offender.

[19] Ultimately, what is argued by the Crown is that there are similarities able to be discerned from the footage taken in 2014 and the observations contained within the closed-circuit television footage of 2018 but that there is other evidence also which is supportive of there being only one rational utilisation of the similar fact evidence. It is argued on the part of the Crown that the evidence sought to be relied on from the 2014 case is not led to show that the Respondent is disposed to use drums as dead drops in the particular region of Toomulla Beach for the exchange of cannabis for cash or that he had a disposition to deal in cannabis generally. Rather, it is argued that it is strongly probative of the issue that the Respondent, as seen in the 2014 footage, is also the person seen in the surveillance footage that is available in relation to these proceedings.

[20] Similarities sought to be relied upon by the Crown, though suggested by the Defence not to have such a probative value or connection as to be admissible, include the nature of the drums used and the remoteness but similarity of the area in which it is said some offending occurred, particularly following what is described by the Crown as the compromising of the Cungulla site. As such, the Crown argues that to not admit the 2014 evidence in the trial would be, as they suggest, “an affront

to common sense", and it would mean that a person who was previously convicted upon their own plea of similar behaviours to those alleged in relation to the current indictment would not be able to be considered as the same person observed behaving in the manner in which it is said that the Respondent here acted only four years later. In other words, the Crown argues, as was suggested in Hock, that:

> *It is objectively improbable that a person other than the accused committed the act in question, that the relevant act was unintended, or that it occurred innocently or fortuitously.*

[21] As such, the Crown says that the similar fact evidence is admissible as evidence relevant in relation to that aspect of the proceedings.

[22] The Defence's argument in relation to the matter is that there are significant disparities between what was pled guilty to by the Respondent in 2017 relating to offending said to have occurred in 2014 and what is now alleged in the indictment that has been presented, with regard to offending in 2017. The Defence argues that the background particulars in relation to the alleged offending is entirely different as between 2014 and 2018. There are certainly differences that do arise in relation to the nature of the offending and the information behind it. However, there are clearly issues which give rise to that real consideration, as is the case here, that there are similarities such that it would be impossible to consider that there was any reasonable explanation other than that it would lead to the inculpation of the Respondent in the offence as charged.

[23] Such matters include, the Crown says, the surveillance evidence which identifies the associate, Green, at the site of drums secreted at both Cungulla Beach and at Toomulla Beach. Further, it is submitted that the electronic surveillance footage shows someone matching the Respondent's appearance at Cungulla, albeit, it is acknowledged, only in general terms, though there are incidental indicators arising from clothing and other items relevant in relation to the Respondent. Thirdly, it is suggested that there is corroborative evidence of the Respondent's presence in Townsville at the times suggested that the surveillance had occurred, notwithstanding that the Respondent was said, at the time of this offending, to have been living at Cow Beach, many hours north of that locality. Additionally, there is the evidence of meetings between the Respondent and the co-accused, Green,

during the period of the investigation and of numerous communications between the Respondent, the co-accused, Green, and Green's partner, Rebecca Rachel Williamson, discussing both Cungulla Beach and Toomulla Beach at and about the time of the alleged offending.

[24] Ultimately, the question then is whether I am satisfied that there is such similarity between the evidence that it has the probative value which is said to be relied upon by the Crown so as to outweigh any prejudicial effect that might arise as a result of the provision of such evidence to the jury. I am so satisfied that this is similar fact evidence that I intend to make the order as sought by the Crown in relation to this particular matter, and it is so ordered.