

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Chardon* [2019] QSCPR 4

PARTIES: **THE QUEEN**  
(respondent)  
**v**  
**JOHN WILLIAM CHARDON**  
(applicant)

FILE NO/S: SC No 801 of 2018

DIVISION: Trial Division

PROCEEDING: Pre-trial hearing

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 1 May 2019

DELIVERED AT: Brisbane

HEARING DATE: 5 March 2019

JUDGE: Douglas J

ORDER: **That the application be refused**

CATCHWORDS: EVIDENCE – ADMISSIBILITY – EXCLUSIONS: PREJUDICIAL EVIDENCE – Where defendant charged with murder – where no body of alleged victim recovered – where domestic violence complaint made by alleged victim against defendant almost eight years prior to alleged murder – whether evidence of alleged domestic violence incident relevant to the history of the relationship between defendant and alleged victim – whether evidence of alleged domestic violence incident irrelevant and therefore not admissible under s 132B of the *Evidence Act 1977* (Qld) – whether evidence of alleged domestic violence incident of limited probative value – whether evidence of alleged domestic violence incident may have significant and unfair prejudicial effect on defendant at trial – whether unfair in all the circumstances to admit evidence of alleged domestic violence incident pursuant to the discretion under s 130 of the *Evidence Act 1977* (Qld)

EVIDENCE – GENERAL PRINCIPLES – EVIDENCE LAW – OTHER MATTERS – Where defendant charged with murder – where no body of alleged victim recovered – where communication via

telephone and SMS occurred amongst and between defendant, daughters by an earlier marriage and an employee of the defendant – where communications said to relate to disposal or concealment of evidence relevant to the alleged murder – whether evidence of communications sufficient to demonstrate a conspiracy in relation to the disposal or concealment of evidence relating to the alleged murder – whether evidence of communications admissible on the principles discussed in *R v Tripodi* and *Ahern v The Queen*

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

*Ahern v The Queen* (1988) 165 CLR 87

*R v Tripodi* (1961) 104 CLR 1

*Roach v The Queen* (2011) 242 CLR 610

COUNSEL: M Green for the respondent  
A Kimmins and M Longhurst for the applicant

SOLICITORS: Director of Public Prosecutions (Qld) for the respondent  
Paddington Law for the applicant

## Introduction

- [1] John William Chardon is charged with the murder of his wife, Novy Chardon. The defendant has brought two applications to exclude evidence from his trial. The first relates to an incident of alleged domestic violence said to have occurred in 2005 almost eight years before the disappearance of Novy Chardon in 2013.
- [2] The second application relates to the admissibility of statements by the defendant and his daughters by an earlier marriage, Angela and Candice Chardon, involving an employee of the defendant, Franca Canzoneri, said to evidence a common conspiracy between the defendant and his daughters to dispose of or conceal evidence relating to the alleged murder and to be admissible on the principles discussed in *R v Tripodi*<sup>1</sup> and *Ahern v The Queen*.<sup>2</sup>
- [3] It is convenient to set out the background facts relevant to the domestic violence incident and the disappearance of Novy Chardon as well as the evidence sought to be supported on the *Tripodi* principle. For the purposes of these applications, that evidence was not treated as contentious and is set out essentially as summarised for the respondent.

## The previous alleged domestic violence incident

---

<sup>1</sup> (1961) 104 CLR 1, 7.

<sup>2</sup> (1988) 165 CLR 87, 94-95, 99-100.

- [4] The previous alleged domestic violence incident relates to a complaint made on 28 May, 2005. Novy Chardon was the complainant and her account was recorded. Ultimately no formal complaint proceeded to finalisation. In short, she indicated that she was handcuffed and the defendant had placed a pillow over her face, stopping her from breathing. Attending police noted her wrists were swollen and red, with bruises starting to appear and that her eyes were bloodshot. Photographs were taken at the time. She was pregnant at the time of the alleged assault.
- [5] Julia Bladen provided a statement to police regarding Novy Chardon contacting her around the time of the previous alleged domestic violence incident. She recalled Novy Chardon telling her the defendant had put handcuffs on her and was lying on her stomach when she woke up. He then placed a pillow over her face so she could not breathe. She stated the assault only stopped because their daughter started crying.

### **The events leading up to the disappearance of Novy Chardon**

- [6] On 10 February 2013, Frederika Wong provided a statement to police. Ms Wong was a friend of Novy Chardon having known her for nine to 10 years. Ms Wong recalled that around the end of 2009, Novy Chardon told her that the defendant was having affairs with very young women when he travelled overseas and she was upset about it. Ms Wong recalled that, around the end of 2010 or early 2011, Novy Chardon told her that the defendant called police in relation to a domestic violence incident where she had broken a vase when she was having an argument with the defendant. She told Ms Wong that she and the defendant were separated and living in separate rooms in the house. She also told Ms Wong that the defendant had said, if she wanted to separate, she could not have the children because of the domestic violence order against her. Ms Wong stated that, during this time, Novy Chardon had a boyfriend called "Ben". Ms Wong stated that this relationship was not serious and that Ben broke up with Novy Chardon around November 2012.
- [7] Ms Wong also said that, around lunch time on 6 February 2013, she attended Charles Cooper Lawyers with Novy Chardon. Novy Chardon asked Ms Wong for an affidavit about her relationship with the defendant.
- [8] On 11 February 2013, Mr Charles Cooper, a solicitor acting for Novy Chardon, provided a statement to police. Mr Cooper stated that at about 12:30pm on 6 February 2013, Novy Chardon attended his office with Ms Wong. This meeting was in relation to the preparation of a letter to the defendant on behalf of Novy Chardon advising that divorce proceedings were to be commenced and outlining a proposed property settlement. The letter drafted by Mr Cooper detailed substantial assets of the marriage including a house at Upper Coomera, a company, Candan Industries Pty Ltd, two associated factories in Chetwynd Street, Loganholme, \$867,815 in superannuation, a wine collection worth \$200,000 and \$400,000 invested in a coal mining company. The letter detailed a suggested division of property as a settlement to be split 50/50 between the defendant and Novy Chardon. The defendant was also asked to vacate the family home as soon as possible and he was asked to continue to pay Novy Chardon \$1,200 per week until the property settlement was finalised. Mr Cooper confirmed he sent this letter via email to the defendant's email address at 3:06pm on the same day. It is not known when the defendant read this email.

- [9] After the meeting at Charles Cooper Lawyers, Ms Wong and Novy Chardon separated to collect their children. Ms Wong said that, later that afternoon, Novy Chardon arrived at her house with her daughter. Ms Wong stated they went to Officeworks to print her affidavit and then dropped the daughter home at Upper Coomera. Ms Wong stated that the defendant was in the driveway, however he did not say anything.
- [10] Ms Wong stated that she and Novy Chardon then went to Yoki Thai Restaurant on Oxley Drive, Runaway Bay and saw Ms Wong's husband, Simon Wong. Novy Chardon talked to Ms Wong's sister-in-law, Yoki Wijittra Wong. Ms Wong stated that she left the restaurant with her husband between around 10:00pm to 10:20pm and attended her other sister-in-law's house to pick up her children. Ms Wong stated that Yoki arrived about 15 minutes later. Ms Wong asked how Novy Chardon was. Yoki told Ms Wong that Novy Chardon was fine and that she had left the restaurant to drive home.
- [11] Ms Wong stated that she had attempted to telephone Novy Chardon on multiple occasions on 7 February 2013, however her phone was switched off. Ms Wong thought this was unusual and attended her house at Upper Coomera at about 5:30pm to check on her. As Ms Wong walked into the kitchen, she saw the defendant and his two daughters, Angela and Candice Chardon. The defendant told Ms Wong that Novy Chardon left the night before. The defendant stated that Novy Chardon never cleaned the house and it was filthy. The defendant told Ms Wong that Novy Chardon packed her bag, her computer and her computer tablet, and left the home. The defendant also later told police that his daughters came to the house during the morning of 7 February 2013.
- [12] The defendant led Ms Wong to Novy Chardon's bedroom where he showed her that he had cleaned the carpet in the bedroom and tidied the rest of the room. Ms Wong had bare feet and said that she felt that the carpet was a bit wet, so she knew that it must have been steam-cleaned. Ms Wong stated that it appeared that the whole room had been steam-cleaned. The defendant told Ms Wong that he did it all himself. Ms Wong noted that "knick-knacks" belonging to Novy Chardon, that were usually kept on the left bedside table, were no longer there. Of particular interest, Ms Wong recalled that a maroon Persian carpet runner approximately two metres long was missing from beside the bed. During examination of the house, this Persian carpet was not located.
- [13] Ms Wong stated that she and the defendant then walked out towards the garage away from the children. The defendant asked Ms Wong if she wanted to have an affair. Ms Wong stated that the defendant grabbed her hand and asked her to feel his penis and made further sexual comments. Ms Wong left the premises.
- [14] Ms Wong has not had any contact with Novy Chardon since leaving Yoki Thai Restaurant between around 10:00pm and 10:20pm on 6 February 2013. Ms Wong stated that this is out of character for Novy Chardon.
- [15] At approximately 1:15pm on 9 February 2013, Deborah Manduapessy contacted police and stated she was concerned for the welfare of her close friend, Novy Chardon.
- [16] Ms Manduapessy stated that Novy Chardon normally sent her up to 20 text messages a day, however she had not heard from her since 6 February 2013. Ms Manduapessy stated this was extremely out of character for Novy Chardon. Ms Manduapessy thought it was appropriate to

contact police with her concerns as she was aware Novy Chardon and her husband, the defendant, had recently been having marriage difficulties.

- [17] A triangulation of Novy Chardon's telecommunications service established that the service was last used at 10:21pm on 6 February 2013 from the Gaven cell tower. Two text messages were sent at that time. Enquiries with Telstra revealed that the handset was turned off since that time.
- [18] Call charge records identify the last recorded activations of Novy Chardon's telecommunications service were on 6 February 2013, namely:
1. At about 7:59pm, the defendant telephoned Novy Chardon for 82 seconds;
  2. At about 9:27pm, Novy Chardon called a telecommunications service ending in 929 for 14 seconds. Her phone's cell tower location was Runaway Bay;
  3. At about 10:08pm, Novy Chardon received an SMS from a telecommunications service ending in 929. Her phone's cell tower location was Biggera Waters; and
  4. At about 10:21pm, Novy Chardon sent an SMS to a telecommunications service ending in 929. Her phone's cell tower location was Gaven.
- [19] There were no further activations of Novy Chardon's telecommunications service after this time. The cell tower locations of Runaway Bay and Biggera Waters at 9:27pm and 10:08pm are consistent with Novy Chardon being at Yoki Thai Restaurant, Runaway Bay, as described by Ms Wong. Her cell tower location of Gaven at 10:21pm is consistent with her travelling in the direction from Yoki Thai Restaurant, Runaway Bay to 93 Bridie Drive, Upper Coomera.
- [20] The telecommunications service ending in 929 referred to in paragraph 18 above is subscribed to Amir Hossein Ghapanchi. On 11 February 2013, police spoke with Mr Ghapanchi who confirmed he was friends with "Ben", who was friends with Novy Chardon. Mr Ghapanchi produced his mobile telephone handset and told police that Novy Chardon had requested assistance from Mr Ghapanchi to create a website for her new business. She also stated in the SMS that she was getting divorced and that the solicitor was charging a large sum of money. Mr Ghapanchi did not respond to the message.
- [21] On 9 February 2013, police spoke to the defendant on his mobile phone. The defendant advised police that he was currently at the Marriott Hotel, Jakarta, Indonesia with his two children by Novy Chardon. The defendant explained that the business trip to Indonesia was planned however he decided at the last minute to take the children with him, as Novy Chardon refused to look after them. He stated that this cost him an extra \$13,500 as he flew business class. The defendant stated that on the morning of 8 February 2013, he informed the head of the children's primary school that he was taking them overseas for two to three weeks.
- [22] On 10 February 2013, a further triangulation was attempted in relation to Novy Chardon's mobile phone. It confirmed the mobile telephone had not been switched back on since it had last been checked.

- [23] On 25 and 28 February 2013 the defendant attended Coomera Police Station and participated in formal recorded interviews in company with his solicitor, Craig Newport. During these interviews the defendant stated that he last spoke with Novy Chardon at 11:00pm on 6 February 2013 in the hallway of his house in relation to the solicitor's (Mr Cooper's) letter. The defendant stated that Novy Chardon did not want to talk about the letter and that he did not continue the conversation and went to sleep in his separate bedroom.
- [24] The defendant stated that he was not concerned about Novy Chardon's disappearance as she regularly disappeared for two to three days at a time and refused to tell him about whom she was with and where she went.
- [25] The defendant stated that he took a sleeping tablet and slept to 6:00am on 7 February 2013. The defendant discovered Novy Chardon was gone at about 6:30am. He also observed that two suitcases, makeup, an iPad, a laptop and Novy Chardon's Volvo were missing. He then decided to clean her bedroom carpet which was heavily stained with food and soft drink. He hired a vacuum from Woolworths for that purpose. The defendant stated that her bedroom was the only carpet he cleaned in the house. He said that he cleaned the house tiles with water, ammonia and methylated spirits.
- [26] He stated that he always turned off his mobile telephone at night. He denied making any calls that evening and said his mobile telephone was switched off. During the record of interview on 25 February 2013, the defendant denied he left his home after arriving home from work at about 4:00pm on 6 February 2013.
- [27] During the interview, on 28 February 2013, it was put to the defendant that he was depicted on CCTV footage attending his office at Loganholme on 6 February 2013 at about 7pm. He could not provide any reason as to why he had done so. A review of the security data at his office identified that the office alarm was disarmed at 6:58:39pm on Wednesday, 6 February 2013. This is the night that Novy Chardon was last seen. The alarm was re-armed at 6:59:59pm. CCTV security footage depicted the defendant arriving in his black Toyota Landcruiser four wheel drive 769-KYR. He unlocked the gate and parked his vehicle out of camera shot, directly outside the entrance to the main office. Several minutes later he departed in his vehicle. It is not possible to identify whether any other person was in the defendant's vehicle.
- [28] During the interview the defendant was provided with a copy of call charge records for his mobile phone for 6 and 7 February 2013. The defendant declined to comment on activity depicted in the records between 11:00pm on 6 February 2013 and 8:00am on 7 February 2013. It was stated that his barrister would need to review the documents and explain their contents to him and his lawyer before any comment could be made. At this time the interview was terminated.
- [29] Call charge records in relation to the telecommunications services used by the defendant, Angela Chardon and Candice Chardon for the period between 1 February 2013 and 11 February 2013 were obtained. Those records show a number of communications among them on the night of 6 February 2013 and the morning of 7 February 2013, namely:
1. At about 9:05pm on 6 February 2013, the defendant called Angela for 22 seconds;

2. At about 10:35pm on 6 February 2013, the defendant called Angela for 10 seconds;
3. At about 10:39pm on 6 February 2013, Angela sent the defendant a text message;
4. At about 12:55am on 7 February 2013, the defendant sent Angela a text message;
5. At about 12:55am on 7 February 2013, approximately 15 seconds later, the defendant sent a further text message to Angela;
6. At about 7:16am on 7 February 2013, the defendant called Angela for 28 seconds;
7. At about 7:32am on 7 February 2013, the defendant called Candice for 18 seconds; and
8. There were several more voice calls and SMS messages between the defendant and Angela throughout the day on 7 February 2013.

[30] The cell tower locations of the defendant's telecommunications service during these communications were Willow Vale, Upper Coomera and Boykambil, all consistent with him being in the vicinity of his home address at Upper Coomera. The cell tower locations of Angela's telecommunications service during these communications were Bundall, consistent with her being in the vicinity of her home address at Surfers Paradise.

**The evidence said to be admissible on the *Tripodi* principle**

[31] The relevant evidence sought to be led on the *Tripodi* principle relates principally to conversations and text messages exchanged among Franca Canzoneri, Angela and Candice Chardon and the defendant between 18 and 23 February 2013. Some further introductory evidence comes from about November 2012 when Colin Ford, an employee of a company controlled by the defendant, during a clean-up of the company's premises, found a box with the handle and barrel of a pistol in it wrapped in cloth. He says that he handed the box to Angela Chardon.

[32] Ms Canzoneri was also an employee of the defendant's company. She stated that on either Monday, 18 or Tuesday, 19 February 2013, Candice Chardon asked her if she could collect something from Candice's house and give it to Angela Chardon. Ms Canzoneri agreed and collected a cardboard box from Candice Chardon's residence.

[33] Ms Canzoneri stated that she did not see Angela that evening and stored the box in her garage area. She stated that police conducted a search of the factory that the defendant's company operated on 20 February 2013. She said that, after she went home that afternoon, she had a conversation with Angela regarding the search. She also advised Angela about the box she had received from Candice.

[34] She recalled that they went down to the garage and Angela opened the box in her presence and pulled out something wrapped in black plastic. She asked Angela what it was and recalled touching the item and feeling something round and hard that felt to her like handcuffs. Angela

told her not to touch it and that she knew what it was. Angela removed the item from the box and disposed of the box. The item was then placed into a bag. Angela could not put the bag in her own storage area as she had lost her key. The item was then placed in "Jo's" storage unit. "Jo" was identified as an older lady with the body corporate of the unit complex.

- [35] Lawfully intercepted information in relation to Ms Canzoneri's mobile phone on Wednesday, 20 February 2013, at 8:59pm, identified a telephone call received by Ms Canzoneri from the defendant using a telephone other than his mobile phone with a number ending in 9466. This conversation related to the police executing a search at the defendant's business premises, 65-67 Chetwynd Street, Loganholme on that day. The defendant and Ms Canzoneri discussed the actions of police during the search warrant and questions they asked Ms Canzoneri. Ms Canzoneri detailed to the defendant her responses to those questions, and provided further information about what areas were searched and what was seized. Ms Canzoneri also made reference to a Channel 9 news story about the search. During that call, the defendant instructed Ms Canzoneri to immediately go to Candice Chardon's house and to call him when she got there.
- [36] There was a further telephone call on Wednesday, 20 February 2013, at 9:21pm, from Ms Canzoneri to Candice. Ms Canzoneri told Candice that the defendant wanted to talk with her but not on her phone, and had asked Ms Canzoneri to go over to Candice Chardon's place.
- [37] In a voice call on Wednesday, 20 February 2013, at 9:47pm, from Candice using Ms Canzoneri's telecommunications service to the defendant on the above-mentioned number ending in 9466, Candice said "Dad? Can you call me back please? Yeah, call me back on this phone". The defendant said "Okay, I'll call you back, I want you to listen to me very quickly, I want you to do exactly what I want you to do, okay? And then go and do it".
- [38] The defendant telephoned from his service ending in 9466 to Ms Canzoneri's mobile phone one minute later at 9:48pm. Candice answered the call. Ms Canzoneri was heard speaking to Candice in the background. At the start of that call the defendant said "Oh okay, now listen you know that stuff you've, you know that stuff you've got there?" ... "Go and get rid of it right now".
- [39] There followed a discussion between the defendant and Candice indicating that it had been disposed of and could not be found. Candice said that Ms Canzoneri helped her out with it. There was then some further discussion between the defendant and Candice regarding the search of the factory. Candice said "Well there's um, anything anything you ever gave to me is no longer here so". After that, Ms Canzoneri was heard calling out "Everything's sorted" and later "It's all sorted". The defendant told her to "Keep mum about it" and Candice said "Franca and Ange sorted that one out".
- [40] In her police statement, Ms Canzoneri said she asked Candice why she lied to her father about the item as Angela still had it and it was in "Jo's" storage. She stated she did not see Angela at work on the following day (Thursday, 21 February 2013).
- [41] Ms Canzoneri stated that on Friday, 22 February 2013, she drove Angela to the airport. On the following evening (Saturday, 23 February 2013) she sent the following text messages to Candice:



1. At 8:34pm – Ms Canzoneri to Candice – “Can u organize to get that stuff cause Jo is cleaning her storage tomorrow”;
2. At 8:36pm – Candice to Ms Canzoneri – “I’ll come get it tonight. Half hour ok?”;
3. At 8:38pm – Ms Canzoneri to Candice – “I’m not home but tomorrow morn cause Jo wants me to help her..so I stalled her a bit today fkkk!!! I don’t know where to put it! I’ll take it out and put it somewhere then I’ll text ya when to come so she’s not there I’ll let u know!”;
4. At 10:02pm – Candice to Ms Canzoneri – “Ok on my way”; and
5. At 10:02pm – Ms Canzoneri to Candice – “Have u got rub bag?”.<sup>3</sup>

[42] Ms Canzoneri stated that Candice arrived and Ms Canzoneri directed her to where the item was. She saw Candice put on blue plastic gloves and enter “Jo’s” storage. Candice told Ms Canzoneri that she could not find the item. Ms Canzoneri said Candice was “freaking out” and said they had to find the item. Ms Canzoneri asked what it was and Candice said “It was Dad’s handcuffs and gun pieces”.

[43] They decided to call Angela and Candice said not to mention the handcuffs and gun pieces over the phone. A telephone call from Ms Canzoneri to Angela on Saturday, 23 February 2013, at 10:33pm, went unanswered and to voicemail.

[44] At 10:35pm, Ms Canzoneri called Angela and asked Angela what had happened to the item, referring to it in code as “bag of clothes that we put in Jo’s storage”. Ms Canzoneri said she was with “the girl with the blue hair” (referring to Candice). Angela said she “got rid of it to the Salvos” and that she “got rid of all that stuff it’s sorted”.

## **The issues**

### ***Admissibility of the previous alleged domestic violence incident***

[45] The argument for the defendant in respect of the evidence of the previous alleged domestic violence incident was that the evidence should be excluded because it was not relevant to the history of the relationship between the defendant and Novy Chardon and, therefore, not admissible under s 132B of the *Evidence Act 1977* (Qld) and that it was otherwise unfair in all the circumstances to admit the evidence because it was of limited probative value and may have significant and unfair prejudicial effect on the defendant at his trial. Section 132B(2) of the *Evidence Act* permits relevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed to be admitted in evidence in the proceeding.

---

<sup>3</sup> Apparently “rub bag” is short for “rubbish bag”.

[46] The application of the section was considered in *Roach v The Queen*.<sup>4</sup> The judgment of the plurality recognised that the section had a potentially wide operation and went on to say:<sup>5</sup>

“... It is not restricted in its application to similar fact evidence tendered to prove propensity on the part of the accused, which is the focus of this appeal. Its purpose is to ensure that in criminal trials evidence of the history of domestic violence is put before a jury, or other arbiter of fact, so long as it is relevant to an issue in those proceedings. Relevance is the only requirement stated for admissibility. It may be assumed that that legislative choice was made with knowledge of the decision in *Pfennig*, which had been made some two years earlier and which effected an important change. It was not necessary for the rule in that case to be expressly excluded, as the appellant submitted. The sole basis to be applied for admissibility, relevance, is clearly stated.

Section 132B must, however, be read with s 130, which, as earlier observed, preserves the common law discretion to exclude evidence on the ground of unfairness. Evidence relevant and therefore admissible under s 132B may nevertheless be rejected, if a trial judge considers that the evidence will be productive of unfairness in the trial of the accused.

The question which then arises from the appellant’s argument is whether the rule in *Pfennig* may be imported into s 130. It would be necessary for that rule to operate within s 130 for it to have an effect upon the question of admissibility, which is otherwise governed by s 132B. The discretion referred to in s 130 is the only possible basis for the exclusion of evidence of a domestic relationship which satisfies the test of relevance of s 132B.

There seems no reason to doubt that the question of unfairness, to which s 130 refers, would ordinarily be resolved by reference to the common law principle, expressed as the exercise of a discretion, that the probative value of the evidence in question must exceed the potential prejudice to the accused if the evidence is not to be excluded. It may be accepted that the concern in *Pfennig* was as to the highly prejudicial effect that similar fact evidence of propensity may have for an accused; although such an effect alone cannot be said to be unfair if the evidence has high probative value. More to the point, the possibility that a jury might reason to guilt, when such a conclusion is not compelled, might be productive of unfairness. It may be said that the rule in *Pfennig* addresses that problem. But it does so in a way quite different from the exercise of a discretion.

The rule in *Pfennig* accepts the probative force of evidence of propensity. Indeed in *Pfennig* the evidence in question was a necessary step in the prosecution case towards a conclusion of guilt. This does not mean that the rule is concerned with the sufficiency of evidence otherwise admissible in proof of guilt. Its focus is upon the propensity evidence itself. The rule requires a trial judge, when

---

<sup>4</sup> (2011) 242 CLR 610.

<sup>5</sup> (2011) 242 CLR 610, 621-623 at [31]-[38].

determining whether the evidence of propensity is to be admitted before the jury, to apply the standard which the jury must eventually apply. The judge must ask whether there is a rational view of the propensity evidence, seen in the setting of the prosecution case, which is consistent with the accused's innocence. If the judge so concludes, the evidence ought not to be admitted.

The rule in *Pfennig* was said to be applied in order to resolve "the tension between probative force and prejudicial effect". It therefore addressed the same factors as are relevant to the common law discretion. However, the rule resolves that tension without more. The majority in *Pfennig* were at pains to point out that no exercise of discretion was involved, but rather the application of a rule of law. No conclusion as to whether the evidence may operate unfairly is thereby reached as it is in the exercise of the discretion, by balancing the evidence's probative force and its prejudicial effect.

So understood, the rule in *Pfennig* cannot be imported into the exercise of the power confirmed by s 130, which is in the nature of a discretion. If the rule applied, it would not be possible for a trial judge to test for unfairness in a manner consistent with that discretion. The rule operates in such a way that there would be no room for the exercise of any discretion.

The foregoing permits two conclusions to be reached. The application of the rule in *Pfennig* would not be consistent with the common law discretion which is preserved by s 130. It follows that if the exclusionary rule in *Pfennig* was to apply to evidence of the kind in question, it would be necessary to express it as a qualification of s 132B. Absent such a qualification, and subject to the exercise of the s 130 discretion, evidence of domestic violence in the history of a relationship is admissible so long as it is relevant."

- [47] Here, the evidence of the previous alleged domestic violence incident in 2005, although relatively remote in time to the disappearance of Novy Chardon in 2013, seems to me to be relevant having regard to the more contemporaneous available evidence of the nature of the relationship between Novy Chardon and the defendant. She had been taking medication for anxiety, suffered panic attacks and told others that she and the defendant had formally separated. There is also available evidence of verbal abuse in the relationship and concern expressed by Novy Chardon as to how the defendant would react to the letter from her lawyer sent to him on 6 February 2013.
- [48] The evidence said to be admissible on the *Tripodi* principle of the disposal of handcuffs and gun parts at the direction of the defendant also makes the earlier evidence of the use of handcuffs by him in 2005 of real significance in the prosecution case. The prosecution theory is that the defendant took steps to overcome resistance by Novy Chardon probably involving the use of handcuffs in order to permit her removal from the home and killing elsewhere. That evidence is also said to be relevant to the improbability of the defendant's account that Novy Chardon simply left the house that evening and had no further contact with anyone known to her.
- [49] Having regard to my conclusion that the evidence relevant to the disposal of the handcuffs and weapon parts is admissible, it seems clear to me that this evidence of the earlier event

involving the use of handcuffs on Novy Chardon by the defendant is relevant to the prosecution case against him and, therefore, admissible under s 132B. Nor could it be said to be of such limited probative value as to have a significant and unfair prejudicial effect on him so as to make it unfair to the defendant to admit that evidence pursuant to the discretion under s 130 of the *Evidence Act*.

***Application of the Tripodi principle to the contested evidence***

- [50] The prosecution's submission was that the series of conversations between 18 and 23 February 2013, including the text messages, related to the disposal or concealment of an item which would offer evidence relevant to the alleged murder of Novy Chardon. Mr Green submitted that the conversations clearly demonstrated that there was a conspiracy between the defendant and his daughters, Candice and Angela, to involve Ms Canzoneri in relation to the disposal or concealment of evidence relating to the offence. He also submitted that the evidence reasonably established an independent connection, absent the evidence to be relied upon, of a common conspiracy between the defendant and his daughters after the offence. He submitted that was demonstrated by the calls on the evening of the offence where the defendant had lied to police and claimed to be asleep, the direct communications by the defendant himself through the lawfully intercepted telephone calls and the otherwise admissible evidence of Ms Canzoneri with the result that the statements made to Ms Canzoneri by the daughters were admissible against the defendant.
- [51] Mr Kimmins' submission for the defendant was that the evidence did not establish any conspiracy simply because Candice and Angela attended at the home and the factory premises on 7 February 2013. Nor, he submitted, could it be said that anything sought to be disposed of in the conversations between 18 and 23 February 2013 related to something used in any crime occurring on the evening of 6 February 2013, when the prosecution alleges the murder occurred. He submitted that, for example, the defendant may have been concerned about possession of the gun parts and handcuffs as illegal but quite irrelevant to any involvement in the alleged murder.
- [52] He drew my attention to a passage in *Ahern v The Queen*.<sup>6</sup> In the relevant passage in *Ahern* the court made a distinction between the admission into evidence of the acts and declarations of others outside the presence of the accused "in proof of larceny rather than conspiracy" in order to point out that: "Once there is reasonable ground for inferring a combination in cases other than conspiracy, acts and declarations of the participants in furtherance of the common purpose may be used to prove, not the fact of participation in the combination, but the offence charged."
- [53] Accordingly, Mr Kimmins sought to persuade me that the evidence from the conversations between the defendant and his daughters was not relevant to the offence of murder, the events having happened after the murder was alleged to have been completed. That was particularly the case because the prosecution was not in a position to show what the cause of death was or whether any of the weapon parts or handcuffs in the box were themselves used by the defendant against Novy Chardon on or about 6 February 2013.

---

<sup>6</sup> (1988) 165 CLR 87, 99.

- [54] Mr Green's submissions to the contrary included the argument that unlawful purposes associated with the commission of an offence can continue beyond the actual event itself, for example, with the purpose of concealing relevant evidence to avoid a conviction. In that context, he also relied upon what he described as the defendant's lie about being asleep during the evening of 6 and early morning of 7 February 2013, when the telephone records indicate that he was in touch with his daughters during that night into the following morning. He then pointed to the evidence from Ms Wong about the daughters being present at the Chardon residence later that afternoon. He argued that the calls of 20 February 2013 appeared to be precipitated by the factory search where previous searches had been confined to the domestic residence.
- [55] He submitted, therefore, that the defendant and his two daughters were pursuing an unlawful object of disposing of potentially incriminating evidence and that I should infer that the evidence was potentially incriminating because of the description of the objects as handcuffs and gun pieces and because the attempt to dispose of them occurred just about the same time or after the police had searched the defendant's factory.
- [56] He also pointed out that the defendant had instructed Candice to get rid of the thing that he had given her, the inference being that it was probably given to her on 7 February 2013 before the defendant left the country on 8 February 2013. He also argued that there was no unfair prejudice in relying upon this evidence as it was open to the defence to argue that there were potential innocent explanations behind both the possession of and disposal of the items in circumstances where it was also open to the defence to call the defendant's daughters to give evidence. That supported, he submitted, the admissibility against the defendant of the evidence from Candice Chardon to Ms Canzoneri that she was "freaking out" because she could not find the item, describing it as "Dad's handcuffs and gun pieces".
- [57] He submitted, therefore, that the prosecution could establish by evidence independent of that particular conversation that there was a conspiracy between the defendant and his daughters to dispose of incriminating evidence with respect to the primary offence of the alleged murder of Novy Chardon which made it admissible against the defendant in respect of that charge. The independent evidence of the conspiracy came from the defendant himself talking earlier about the disposal of the items.
- [58] It was also open to the defence, he submitted, to argue for alternative inferences that might be drawn in respect of that evidence. He pointed out also that Angela and Candice Chardon had refused to provide statements to police and were not witnesses readily available to the prosecution to assist in clarifying that evidence but that they may be available in the defence case.
- [59] In my view, there is sufficient evidence to establish a combination between the defendant and his daughters to dispose of potentially incriminating evidence. That has the consequence in these circumstances that the conversations between Ms Canzoneri and Candice and Angela Chardon during that period from 18 to 23 February 2013, leading to the identification of the objects to be disposed of as "Dad's handcuffs and gun pieces", are admissible against the defendant together with the statements conceded to be admissible made by the defendant in those lawfully intercepted communications.

## **Conclusion**

[60] I rule therefore that the evidence of the previous alleged domestic violence incident and the evidence sought to be established by the prosecution based on the *Tripodi* principle may be led on the trial of the defendant.