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COURT OF APPEAL (ENGLAND) — CRIMINAL DIVISION

R v BARRINGTON

Dunn LJ, Phillips and Drake JJ

13, 28 November 1980 — [1981] 1 All ER 1132; [1981] 1 WLR 419; (1981) 72 Cr App R

CIRCUMSTANCES IN WHICH SIMILAR FACTS EVIDENCE ADMISSIBLE.

FACTS: The accused was charged on indictment with indecently assaulting the complainants, three young girls, at X's house. The prosecution alleged that he had lured the complainants to the house on the pretext that they were required as baby-sitters but that he had, in fact, wanted them for his own sexual purposes, because, once there, he had shown them pornographic pictures, asked them to pose for photographs in the nude and indecently assaulted them. The complainants gave evidence to that effect. The accused contended that the evidence was a tissue of lies and that each complainant had her own private motive for concocting a story against him. In order to show that the complainants were telling the truth and that the accused was operating a system, the prosecution called, with the leave of the judge, three young girls, B, S and A, who said that they, too, had been lured to the house on the pretext of baby-sitting and then shown pornographic pictures and asked to pose for photographs in the nude. Not one of them, however, said that the accused had indecently assaulted hero The accused was convicted. He appealed, contending that the evidence of B, S and A was incapable of amounting to similar fact evidence because it did not include evidence of the commission of offences similar to those with which he had been charged and accordingly should not have been admitted.

HELD: Evidence of similar facts which did not include evidence disclosing the commission of an offence similar to that charged but which related solely to the surrounding circumstances could be admitted if it was evidence of facts which were strikingly similar to those surrounding the commission of the offence charged. The evidence of B, S and A had therefore been properly admitted because (a) it revealed features which were strikingly similar to the circumstances surrounding the commission of the offences charged and was of positive probative value in determining the truth of the charges against the accused in that it tended to show that he was guilty of the offences charged, and (b) because there was no suggestion that it should have been excluded on the ground that its prejudicial effect outweighed its probative value.

***R v Scarrott* [1978] QB 1016; (1978) 1 All ER 672, applied.**

[This appeal once again raises the question as to the admissibility of what is called similar fact evidence, especially in sexual cases. In particular it raises the question of whether evidence of similar facts falling short of similar offences with which an accused is charged can ever be admissible. The following passages from the judgment as to when similar fact evidence is admissible may be of assistance.]

The judge dealt with the similar fact evidence and said:

> "There is a body of evidence which you have had in this case which can be described and called "similar fact" evidence evidence of system. It relates, members of the jury, primarily to the evidence of Bernadette and the two other sisters, coupled with the evidence of the three girls against whom offences are alleged. Bernadette and the other sisters do not give any direct evidence of the charges in the indictment, and moreover, members of the jury, the evidence they gave does not pretend to prove that the accused committed or even attempted to commit on them the offences charged in the indictment ... These girls' evidence is relevant in so far as it goes to show that Brian Barrington was at the material time using the same technique and methods of luring girls into no. 49 for the purpose of performing acts of physical indecency with them".

The judge then listed six pieces of evidence which he left to the jury as capable of constituting similar fact evidence. First the baby-sitting proposition. Second, the boasting claims to the girls about his position as a script-writer of well-known television programmes, and a friend of the stars. Third, Meredith was described as a professional photographer. Fourth, the evidence about the £200 prize for nude photographs. Fifth, the evidence that all the girls were shown pornographic pictures and pornographic magazines. And, sixth, the technique, as the judge described it, that was employed to try to get the girls to strip eventually for nude photographs. The judge concluded:

"And you may think that the nude photographs were merely part of the leading to what is said to be the eventual indecent assaults of various kinds and descriptions."

The judge then went on to deal with the question of corroboration. He said this:

"If you are satisfied that the evidence of these girls, coupled with the other girls or even taken by themselves (it is really "taken by themselves" I ought to say), taken to prove that there was an intention on the part of this defendant to get those girls into the house, one after the other, for indecent purposes that could amount to corroboration. It is for you to say whether it does or whether it does not".

The judge, at the end of his summing up, came back to that and said:

"There is what I will refer to as the similar fact evidence, the evidence of system, and that is the evidence of Bernadette and the two other sisters. You know what I am referring to, and that I have directed you could be corroboration. It is for you to decide whether it is in fact corroboration, and members of the jury, the prosecution have submitted to you or they have not put that matter before you as corroboration; they have only put it as evidence of similar facts".

Counsel for the appellant made no complaint about the direction as to the evidence of the three girls being capable of corroborating the evidence of the complainants if the evidence of the three other girls was admissible. Indeed in the light of the remarks of Lord Cross in *Director of Prosecutions v Kilbourne* [1973] AC 729 at 760; [1973] 1 All ER 440 at 464; (1972) 57 Cr App R 381; [1973] 2 WLR 254, it would have been impossible for him to have done so, Lord Cross said:

"Once the "similar fact" evidence is admitted – and it was common ground that it was properly admitted in this case – then of necessity it "corroborates" – ie strengthens or supports – the evidence given by the boy an alleged offence against whom is the subject of the count under consideration".

Archbold states:

"(1) The decisions of the Court of Appeal are not consistent on another point, namely whether the "striking similarity" must relate to the commission of the offence as opposed to the surrounding circumstances. In *R v Novac and others* (1976) 65 Cr App R 101 the facts were very like those in *Johannsen v R* (1977) 65 Cr App R 101 ..."

Archbold then cites a passage from *R v Novac* (1976) 65 Cr App R 101 at 112:

"If a man is going to commit buggery with a boy he picks up, it must surely be a commonplace of such an encounter that he will take the boy home with him and commit the offence in bed. The fact that the boys may in each case have been picked up by Raymond (one of the appellants) in the first instance at amusement arcades may be a feature more approximating to a unique or striking similarity. ... It is not, however, a similarity in the commission of the crime. It is a similarity in the surrounding circumstances and is not, in our judgment, sufficiently proximate to the commission of the crime itself to lead to the conclusion that the repetition of this feature would make the boys' stories inexplicable on the basis of coincidence."

Archbold then continues:

"(2) In *R v Scarrott* (1978) 1 All ER 672, (1978) QB 1016 the court was faced with the apparent conflict between the approach of the differently constituted courts in *R v Johannsen* and *R v Novac and others* to barely distinguishable facts. After referring to the use by the court in *R v Novac and others* of the rather strange word ... "proximate" the court made it plain that they preferred the approach of the court in *R v Johannsen*. They said that "it would be wrong ... to elevate the passage" (cited in (1), *ante*)" ... into a statement of law. They also pointed out that "in one of the most famous of all cases dealing with similar fact evidence, the *Brides in the Bath case* (*R v Smith* (1915) 84 LJKB 2153, (1914-15) All ER 262; (1915) 84 LJKB 2153) the court had regard to the facts that the accused man married the women, and that he insured their lives. Some surrounding circumstances have to be considered in order to understand either the offence charged or the nature of the similar fact evidence which it is sought to adduce and in each case it must be a matter of judgment where the line is drawn."

Some surrounding circumstances have to he considered in order to understand either the offence charged or the nature of the similar fact evidence which is sought to be adduced and in each case it must be a matter of judgment where the line is drawn. One cannot draw an inflexible line as a rule of law ... We therefore have to reach a judgment on the evidence of this particular

case, and to determine whether the evidence adduced, that is the similar fact evidence adduced, possesses such features that it is a proper exercise of judgment to say that the evidence is logically probative, that it has positive probative value in assisting to determine the truth.

We accept and follow the reasoning of Scarman LJ in *R v Scarrott*. The various facts recited by the judge in this case as constituting similar facts were so similar to the facts of the surrounding circumstances in the evidence of the complainants that they can properly be described as 'striking'. That they did not include evidence of the commission of offences similar to those with which the appellant was charged does not mean that they are not logically probative in determining the guilt of the appellant. Indeed we are of opinion that taken as a whole they are inexplicable on the basis of coincidence and that they are of positive probative value in assisting to determine the truth of the charges against the appellant, in that they tended to show that he was guilty of the offences with which he was charged.

In deciding whether or not to admit similar fact evidence the judge will always assess whether the prejudice caused outweighs the probative value of the evidence. In this appeal counsel has not suggested that if the evidence is admissible it should be excluded on the ground that it is prejudicial. We are satisfied that the evidence was properly admitted and accordingly, for the reasons we have given, the appeal is dismissed.
