15/99; [1999] VSCA 93

SUPREME COURT OF VICTORIA — COURT OF APPEAL

R v TEKTONOPOULOS

Winneke P, Charles and Batt JJ A

13-14 April, 25 June 1999 — [1999] 2 VR 412; (1999) 106 A Crim R 111

CRIMINAL LAW – PROPENSITY EVIDENCE – SIMILAR FACT EVIDENCE – S398A(2) *CRIMES ACT* 1958 DISCUSSED – EVIDENCE ADMITTED TO CORROBORATE COMPLAINANT'S EVIDENCE – WHETHER RELEVANT TO A FACT IN ISSUE – SIMILAR FACT EVIDENCE NOT OF A SUFFICIENTLY SPECIAL CHARACTER REASONABLY TO IDENTIFY ACCUSED – WHETHER TRIAL JUDGE IN ERROR IN ADMITTING EVIDENCE: *CRIMES ACT* 1958, S398A.

Section 398A(2) of the *Crimes Act* 1958 ('Act') provides:

> (2) Propensity evidence relevant to facts in issue in a proceeding for an offence is admissible if the court considers that in all the circumstances it is just to admit it despite any prejudicial effect it may have on the person charged with the offence.

In the early hours of the morning of 2 December 1997, an intruder carrying a torch and a knife similar to a kitchen knife entered through a window of a bedroom at the front of premises in Kennedy Street, Richmond. The intruder then indecently assaulted a female who was in the room. About 12:30am on 5 December 1997, T. was seen to enter the front garden premises of a house in Gardiner Street, Richmond and attempt to open a front window. T. was arrested and denied having been on the premises in Kennedy Street on 2 December and denied having assaulted the complainant. After a search of T's car, a pocket knife was found in the glove box and a torch in the console. At the identification parade, the complainant identified T. as the intruder on 2 December. T. was subsequently charged with the offences committed on 2 December. At the trial, evidence was led of the events which occurred at Gardiner Street on 5 December. The Crown sought to tender such evidence as "propensity evidence" pursuant to s398A of the Act on the ground that it corroborated the complainant's identification of T. The trial judge ruled that the evidence was admissible. T. was later found guilty of the charges. Upon appeal—

HELD: Appeal allowed. New trial ordered.

1. The legislative purpose of s398A of the Act is to abrogate the "no other reasonable explanation" test for admissibility of propensity evidence as developed in *Hoch v R* [1988] HCA 50; (1988) 165 CLR 292; 81 ALR 225; (1988) 62 ALJR 582; 35 A Crim R 47 and *Pfennig v R* [1995] HCA 7; (1995) 182 CLR 461; (1995) 127 ALR 99; (1995) 69 ALJR 147; 77 A Crim R 149 in favour of the "just to admit the evidence despite its prejudicial effect" test adopted by the House of Lords in *DPP v P* [1991] 2 AC 447; [1991] 3 All ER 337; (1991) 93 Cr App R 267; [1991] 3 WLR 161. The test which s398A(2) requires is not far removed from that which was usually applied in Australia before *Hoch*.

2. The test of admissibility of propensity evidence requires the judge to balance probative force against prejudicial effect. Before similar fact evidence is admitted, the judge must be satisfied that the probative force of the evidence clearly transcends its merely prejudicial effect. It is the probative force (or cogency) of the evidence in comparison with the impermissible prejudice that it may produce which determines admissibility.

***Sutton v R* [1984] HCA 5; (1984) 152 CLR 528; 51 ALR 435; (1984) 58 ALJR 60; 11 A Crim R 331, applied.**

3. Whether the propensity evidence has the requisite degree of probative force in relation to the crime charged so as to render it "just", for the purposes of s398A(2) to admit it must necessarily be decided on a case-by-case basis. Similar fact evidence will only be received with great caution because in such cases the risk of prejudice is ordinarily at its highest, particularly where the evidence is tendered for the purpose of establishing the identity of the accused as the offender. Accordingly, courts have insisted in such cases that there should be something in the evidence in the nature of a "striking similarity" or a "signature" or other "special feature" with the offences charged, which strongly points to the accused as the offender.

4. In the present case, the "fact in issue" to the proof of which the propensity evidence was relevant was the identity of the offender in Kennedy Street on 2 December and not the adequacy of the complainant's evidence. The evidence of the events at Gardiner Street on 5 December were extremely prejudicial to T. The only similarities which existed to constitute "similar facts" were that

the events on 2 and 5 December occurred in the early hours of the morning at premises in Richmond in which one of the occupants was a young woman. There were significant dissimilarities including the fact that the offender at Kennedy Street, whilst carrying a knife and a torch, entered the dwelling and assaulted a female. There was no evidence that T. had committed these acts at Gardiner Street. There was nothing said by the judge which suggested that the events at Gardiner Street had any "striking similarity" or "hallmark" or "underlying unity" which when looked at in the light of the other evidence, made it objectively improbable that the offences charged were not committed by T. Accordingly, as the similar fact evidence did not possess a high probative value, it was not open to the judge to rule that it was just to admit it notwithstanding its prejudicial effect.

[Ed. note: "Propensity evidence" has been discussed in the following:
- ***R v Best* [1998] 4 VR 603; (1998) 102 A Crim R 56;**
- ***R v TJB* [1998] 4 VR 621; (1998) 102 A Crim R 74;**
- ***R v Mateiasevici* [1999] VSCA 120; [1999] 3 VR 185; (1999) 108 A Crim R 223;**
- ***R v Cogley* [1999] VSCA 123; [1999] 3 VR 366; and**
- ***Propensity for Change: Crimes (Amendment) Act* 1997 (Vic), *Similar Facts* (1999) 23 (1) Crim LJ 26.]**

WINNEKE P:

1. In the early hours of the morning of 2 December 1997, an intruder entered, through a window, a bedroom at the front of premises at 2 Kennedy Street, Richmond. It was dark, but the intruder carried a torch. He also had a knife.

2. The bedroom was occupied by a young woman who was asleep in the only bed in the room. (I will call her "the complainant".)

3. Shortly after the intruder entered the room, the complainant awoke. She became conscious of his presence and demanded to know what he was doing. He said he was "looking for a man". She said that he spoke to her in "whispered tones". He came forward to where she was in the bed and switched on the torch. It remained on until he left the room some 10-15 minutes later. He asked her to lift up her top and said that, if she did as she was told, he would not harm her. Thereafter he touched her on the nipples and the vagina. He asked her to perform other sexual acts, but she refused. He showed her a knife he was carrying and said "See this, you have to do what I ask". She said the knife was 15-20 centimetres long, had a sharp and straight blade and not "serrated". It was "like a kitchen knife". He told her he had come in through the window. At all times she was lying on her back and he was standing. When he left the room, he left through the same window by means of which he had gained entry. He told her to pull the bed-clothes over her head as he left. She was later to say that, although it was dark she could see the intruder's face in the glow of the torch.

4. Shortly after the intruder had left, the complainant called the police. During the course of the day she was asked a number of questions. She was also asked to look at books of photographs which the police had. In one of these books was a photograph of the applicant. She did not identify him as the intruder but selected a photograph of another man. She said she selected that photograph because it was a "90%-95% likeness" to the intruder. She had told police that the intruder had a "full head of hair". She had given this as part of a description which she had provided to assist police to compile a computerized image of the intruder. She also said that the intruder was wearing a "dark green or brown rain jacket". Both the photograph which she selected and the computerized image were provided to this Court. The striking difference between each of these documents and the applicant is that the documents disclose a person with a full head of hair whereas the applicant has markedly receding hair.

5. Notwithstanding the matters referred to in the preceding paragraph, the police suspected the applicant. They determined to put him under surveillance. At about 12:30am on 5 December they saw him enter the front garden of premises on the corner of Gardiner Street and Murphy Street, Richmond. After a short time, he was seen to leave the premises and walk along Murphy Street. He was later observed to return to the premises and place his hands on the pane of a window at the front of the premises "attempting to open it". The room, to which the window belonged, was lit. Shortly after, the applicant left the premises and was arrested by the police in the street. He was "empty handed". Subsequent inquiries revealed that the house was occupied by a husband and wife; the room facing the street was a study and, at about 12:30am, the wife was in the study at a desk facing the street. The window had curtains drawn, but they were ill-fitting and there was about a 5 centimetre gap.

6. The applicant was taken to the "Rape Squad" offices at the St. Kilda Road police complex. There he was interviewed over a substantial period of time. He denied having been at or in the Kennedy Street premises on 2 December and denied having assaulted the complainant. He repeatedly said "I wasn't there" and "it wasn't me". He said that he was at home asleep from 11pm on 1 December. He lived with members of his family at premises in Richmond not far from either Kennedy Street or Gardiner Street. Before being told that he had been observed, he denied having been in the Gardiner Street premises on 5 December. He said he had lost some of the "trim" from his car whilst driving along Murphy Street. He had parked his car in Murphy Street and had walked back to pick up the pieces he had lost. He had returned to the car with some of them, and had then come back to look for more when he was arrested.

7. Whilst the interview with the applicant was being conducted, the police made a number of inquiries. They had collected the applicant's car from the spot where it had been parked in Murphy Street, some 200 metres east of Gardiner Street. In the glove box of the car they found a pocket-knife in a pouch. They also found a small yellow torch in the console of the car. The applicant told police that he used the knife for his work. In the course of the interview he was told that police were going to search his car and, in response to their request whether there was "anything we might find", he said: "Well, you'll find a pocket knife in my glove box which I use for work ... ." It was also accepted at trial that the torch would only operate so long as pressure was applied to the button. Pieces of "trim" were found in the back seat of the car.

8. The premises at Kennedy Street and Gardiner Street were tested for fingerprints. No fingerprints of the applicant were found either in the bedroom or on the window of the Kennedy Street premises; nor were any prints of his found on the window of the Gardiner Street premises.

9. A search was made of the applicant's own premises. No clothing of the type described by the complainant as having been worn by her assailant was found.

10. The interview conducted between the police and the applicant on 5 December at the police complex was suspended whilst an identification parade was conducted. The complainant identified the applicant as the person who was in the bedroom at Kennedy Street. In her evidence she said that the applicant: "got straight away my attention because I saw the man who had broken into my room."

There was evidence from the officer who conducted the parade that the complainant had said words to the effect: "I'm pretty sure that its number 4" but requested that the man so identified spoke to her. The applicant was then asked to say "I am looking for a man" and "if you do what I want you to do I will not hurt you". In her evidence, the complainant said that she had previously indicated to police that she would recognize the assailant "better by voice than sight" because she was, by training, equipped to recognize voices.

11. At the conclusion of the interview on 5 December, the applicant was charged with the offences that had occurred at Kennedy Street. They included "entering the premises as a trespasser with intent to commit a sexual assault" (burglary) and two counts of indecent assault. These were the three counts of which he was convicted by a jury in June 1998.

12. Much of the evidence led at the trial related to the events which had occurred at Gardiner Street on 5 December. Thus evidence was given by the police (some of whom described themselves as members of the "Rape Squad") of their observations of the applicant's movements in the Gardiner Street premises; of the recovery and search of the applicant's car including the finding of the torch and the knife; and of the denials by the applicant that he had been on the Gardiner Street premises.

13. The applicant's trial counsel had strenuously objected to the admissiblity of this evidence on the grounds that it had no probative value and certainly none which clearly transcended its prejudicial effect. The Crown sought to tender the evidence as "propensity evidence" pursuant to s398A of the *Crimes Act* 1958, submitting that it was "corroborative" of the complainant's direct identification of the applicant. It could therefore be used by the jury, so it was submitted, to "support and confirm" her evidence.

14. In ruling that the evidence was admissible, the trial judge referred to the provisions of s398A and to certain remarks concerning the purpose of the section made by the Attorney-General in her speech introducing the *Crimes (Amendment) Bill* into Parliament in 1997. His Honour then said:

> "The test which I am to apply ..., accordingly, is whether I consider that, in all the circumstances, it is just to admit the evidence in question despite any prejudicial effect it may have on the accused man. That test is essentially the test which was promulgated by the House of Lords in the case of *"P"* [[1991] 2 AC 447; [1991] 3 All ER 337; (1991) 93 Cr App R 267; [1991] 3 WLR 161] and which was subsequently confirmed in the case of *"H"* [*R v H* [1995] 2 AC 596; [1995] 2 All ER 865; 1995 2 WLR 737; [1995] 2 Cr App R 437]."

15. His Honour then referred to various statements made by the judges of the High Court in *Pfennig v R* [1995] HCA 7; (1995) 182 CLR 461; (1995) 127 ALR 99; (1995) 69 ALJR 147; 77 A Crim R 149, and concluded:

> "The observations which have been made in those various passages to which I have made reference, were concerned largely with the question as to whether the propensity evidence was capable of affording a foundation for a conclusion beyond reasonable doubt that the accused had committed the instant offence. Indeed, identity was at the heart of the decision of the High Court in *Pfennig*.
>
> Similar fact evidence, or propensity evidence, may sometimes be led, of course, for the purpose of negating a possible defence, such as mistake or something of the kind, or as affording evidence of a requisite mental state.
>
> In [this matter], the propensity evidence [is] not sought to be led to either of those ends. As I have indicated, it [is] rather sought to be led as corroboration of the evidence of [the complainant]. In that regard the issue is whether the propensity evidence is 'relevant to facts in issue' in the proceedings. It seems to me that the evidence is relevant to such a fact in issue, whether that fact in issue be regarded as being the accuracy of the identification made by [the complainant], or whether the fact in issue be defined as being the identity of her assailant."

16. The primary submission made on the applicant's behalf before this Court was that the trial judge was in error in admitting into evidence the events which occurred in Gardiner Street on 5 December (grounds 2, 3 and 4). It was submitted that the evidence of those events was not "relevant to a fact in issue" in the trial and, in any event, such probative value which it had was insufficient as to make it "just" that it should be admitted.

17. I agree with the submission that the trial judge should not have admitted into evidence the events which occurred at the premises in Gardiner Street. Before stating the reasons why, in my view, the evidence was wrongly admitted, it is necessary to say something about s398A of the *Crimes Act*. [*After setting out the section, His Honour continued*] ...

18. The purpose and scope of this section has recently been considered by this Court in *R v Best* (1998) 4 VR 603; (1998) 102 A Crim R 56. It becomes clear from the judgment of Callaway JA (with whom Phillips CJ and Buchanan JA agreed) that the legislative purpose of s398A was to abrogate the "no other reasonable explanation" test for admissibility of propensity evidence, as developed by the High Court in this country in *Hoch v R* [1988] HCA 50; (1988) 165 CLR 292 at 296; 81 ALR 225; (1988) 62 ALJR 582; 35 A Crim R 47 and *Pfennig v R* [1995] HCA 7; (1995) 182 CLR 461; (1995) 127 ALR 99; (1995) 69 ALJR 147; 77 A Crim R 149, in favour of the "just to admit the evidence despite its prejudicial effect" test enunciated by the House of Lords in *DPP v P* [1991] 2 AC 447; [1991] 3 All ER 337; (1991) 93 Cr App R 267; [1991] 3 WLR 161.

19. However, as Callaway JA pointed out in *Best* (at 612), the flexibility of the test now provided in s398A(2) "means that, properly applied, it will not greatly alter the conduct of criminal trials". This is because, as his Honour said, propensity evidence will be admissible whenever it is just to do so "in all the circumstances"; and the circumstances will sometimes include the impossibility of conducting the trial in a sensible fashion unless the evidence is received. The fact is that the test which s398A(2) now requires is not far removed from the test which was customarily applied in Australia before *Hoch* (*supra*). In *Sutton v R* [1984] HCA 5; (1984) 152 CLR 528; 51 ALR 435; (1984) 58 ALJR 60; 11 A Crim R 331, Brennan J described the test of admissibility as follows (CLR 547-8):

> "Before the trial judge is at liberty to admit similar fact evidence he must be satisfied that the probative force of the evidence clearly transcends its merely prejudicial effect ... . It is the probative force (or cogency) of the evidence in comparison with the impermissible prejudice that it may produce which determines admissibility ... ."

This test required the judge to balance probative force against prejudicial effect. The test now described in s398A(2) is, as I have said, not far removed from that test because, as Toohey J said in *Pfennig's* case (CLR 507):

> "Evidence that an accused has committed other relevant offences must inevitably have a prejudicial effect. But, in the language of *DPP v P* [1991] 2 AC 447; [1991] 3 All ER 337; (1991) 93 Cr App R 267; [1991] 3 WLR 161, it may nevertheless be 'just' to admit the evidence. The reference to just aptly conveys the notion that it is not only the interests of the accused that are involved. The legitimate interests of the Crown and of the community cannot be overlooked."

20. It was not the intention of s398A(2) to set at nought the body of common law principles which courts in this country and England had formulated over a period of more than 100 years, commencing with *Makin v Attorney-General (NSW)* [1894] AC 57; [1894] LR AC 57; [1891-1894] All ER 24, which were designed to guide and inform as to the circumstances in which propensity evidence will satisfy the ultimate test of admissibility. The effect of these principles is that evidence of the commission of offences other than those charged, or indeed evidence of conduct which shows generally that the accused is a person of bad character, is prima facie inadmissible because the antipathy which it is apt to engender may unjustly erode the presumption of innocence (*Sutton v R* [1984] HCA 5; (1984) 152 CLR 528 at 545; 51 ALR 435; (1984) 58 ALJR 60; 11 A Crim R 331 per Brennan J; *Perry v R* [1982] HCA 75; (1982) 150 CLR 580 per Murphy J at 593-4; 44 ALR 449; (1983) 57 ALJR 110). Before such evidence may be admitted it must have such a probative force in relation to the offence charged as to justify its admission notwithstanding its inherent prejudicial effect (cf. *Sutton's* case, *supra*, per Dawson J at 565).

21. Although not defined, there seems no reason to doubt that the "propensity evidence" of which section 398A(2) speaks is evidence which is received notwithstanding that it discloses the commission of offences other than those with which the accused is charged. These were the terms in which Mason CJ, Deane and Dawson JJ in *Pfennig* (*supra* at 464-5) described "propensity evidence", but as Callaway JA pointed out in *Best* (*supra* at 608) such evidence is not limited to "crimes" but extends to other discreditable conduct reflecting the bad character of the accused.

22. Courts have traditionally spoken of propensity evidence as falling into discrete categories. In *Pfennig,* Mason CJ, Deane and Dawson JJ said (at 464-5) that, although it will always be evidence of propensity, it "may be propensity evidence which falls within the category of similar fact evidence, relationship evidence or identity evidence". "Similar fact" evidence has, in the past, been broken into sub-categories, depending upon the purpose for which it is being tendered. Thus it has been admitted to prove identity of an offender, or to prove system or intent, or to negate accident or mistake or some other defence.

23. The courts, as I have indicated, have always admitted propensity evidence with great caution and, because it is inevitably attended by prejudice, have required it to go beyond mere disposition to commit crimes or particular kinds of crime and to have a "strong probative force" in respect of the offence charged (*Markby v R* [1978] HCA 29; (1978) 140 CLR 108 at 117; 21 ALR 448; (1978) 52 ALJR 626) or a probative force which clearly transcends its prejudicial effect (*Perry*, *supra*, at 604 per Wilson J at 609 per Brennan J; *Sutton v R*, *supra*, at 547-8 per Brennan J at 559-60 per Deane J; *Thompson v R* [1989] HCA 30; (1989) 169 CLR 1 at 16 per Mason CJ and Dawson J; (1989) 86 ALR 1; (1989) 63 ALJR 447; 41 A Crim R 134). However, as McHugh J pointed out in *Pfennig*, *supra* at 516, it was difficult to see why, in developing the "no other reasonable explanation" test, the courts had previously seen fit to go beyond the test enunciated in *Markby* and had insisted upon a test which required the judge to weigh the probative value of the propensity evidence against its prejudicial effect. Whether one applied the test formulated in *Markby* or the "no other reasonable explanation" test, any "weighing" by the judge became superfluous. For this, and other, reasons he proposed a test of admissibility analogous to that contained in s398A(2) of the *Crimes Act*.

24. Whether the propensity evidence has the requisite degree of probative force in relation to the

crime charged so as to render it "just", for the purposes of s398A(2), to admit it must necessarily be decided on a case-by-case basis. For that reason it is not possible to develop a set of guidelines which can be universally applied. It would, however, appear from authority and practice that the nature of the evidence sought to be tendered and the purpose to which it is proposed to be put has a part to play. Indeed, ever since *R v Ball* [1911] AC 47; (1911) 6 Cr App R 31, it does not seem to have been doubted that, in a sexual offence case, evidence of criminal or other discreditable conduct is admissible to establish the "guilty relationship" or "sexual passion" existing between the complainant and the accused provided that suitable warnings are given by the judge to the jury against its impermissible use. As Callaway JA said in *Best* (at 612):

> "It must, however, be pointed out that the difficulties of applying the *Pfennig* case to relationship evidence do not apply to the test in [s398A(2)]. So long as the qualifications expressed earlier are not forgotten, it is appropriate that any division of propensity evidence be inadmissible unless its probative value makes it just to admit the evidence despite any prejudicial effect it may have on the accused. Mere background evidence (cf. *Gipp v R* [1998] HCA 21; 194 CLR 106; 155 ALR 15; 72 ALJR 1012 at [179] [181]-[182] per Callinan J) is unlikely to meet the test but legitimate evidence of relationship will usually be admitted. That is because, if proper directions are given, the probative value of such evidence ordinarily outweighs its prejudicial effect."

Furthermore, in cases other than those involving sexual offences, "relationship" evidence disclosing discreditable conduct on the part of the accused has been admitted to prove motive or to explain the conduct of the accused (*Wilson v R* [1970] HCA 17; (1970) 123 CLR 334; (1970) 44 ALJR 221).

25. However, when the propensity evidence sought to be tendered, whether in sexual cases or not, is in the nature of "similar fact" evidence, the courts will only receive it with great caution because it is in such cases that the risk of prejudice is ordinarily at its highest. This is particularly so in cases where the evidence is tendered for the purpose of establishing the identity of the accused as the offender. In such cases the risk is high that the jury will reason, from the mere fact of established criminal propensity, that the accused is the offender. That is why the courts have insisted in such cases that there should be something in the evidence, in the nature of "striking similarity" with the offences charged, which strongly points to the accused as the offender. Although the House of Lords in *DPP v P*, *supra* (a case in which the accused was alleged to have committed sexual offences against multiple complainants) rejected the proposition that "striking similarity" was an essential pre-requisite of admissibility of similar fact evidence in all cases, Lord Mackay of Clashfern LC (with whom the other Law Lords agreed) said (at 462):

> "Where the identity of the perpetrator is in issue, and evidence of this kind [that is, propensity evidence] is important in that connection, obviously something in the nature of what has been called in the course of the argument a signature or other special feature will be necessary. To transpose this requirement to other situations where the question is whether a crime has been committed, rather than who did commit it, is to impose an unnecessary and improper restriction upon the application of the principle."

26. In confirming the more stringent "no other reasonable explanation" test, Mason CJ, Deane and Dawson JJ in *Pfennig*, itself a "similar fact case", agreed (at 484) that "striking similarity, underlying unity and other like descriptions of similar facts are not essential to the admission of such evidence" but went on to say that "usually the evidence will lack the requisite probative force if the evidence does not possess such characteristics". Similar views were advanced by Gibbs CJ in *Sutton's* case, *supra*, where his Honour said that (535):

> "... in applying the test of admissibility which I have stated, practical assistance will in many cases be obtained from considering whether there is a 'striking similarity' between the similar facts and the fact in issue. The present is such a case: the issue being identity, the question is whether each of the crimes was committed in a manner so strikingly similar to the others that a jury could reasonably conclude that the same person was guilty of all the crimes."

(See also *Perry*, *supra*, at 610 per Brennan J; and *Thompson*, *supra*, at 39 per Gaudron J)

27. **Application of principles to the facts of the present case**

The Director submitted, although not with conviction, that this Court should state that a determination by a trial judge to admit propensity evidence under s398A(2) is one made in the exercise of a discretion. For my own part I cannot accept that submission. The question, as the

trial judge accepted, is one of law and not discretion, although it must involve matters of degree and value judgment in which the experience of the judge will play a prominent role (*Sutton v R*, *supra*, at 548, 553-4 per Brennan J; *DPP v Boardman* [1975] AC 421 at 444-5; [1974] 3 All ER 887; (1975) 60 Cr App R 165; [1974] 3 WLR 673; 60 CR A131). In truth, the trial judge has no discretion because if he concludes that the evidence is sufficiently probative as to render it just to admit it despite its prejudicial effect, he must admit it; if it is sufficiently prejudicial so as to render it unjust to admit it, he must exclude it. There seems to me to be little room for the "Christie discretion" (*R v Christie* [1914] AC 545; [1914-15] All ER 63; (1914) 10 Cr App R 141). Indeed, as McHugh J pointed out in *Pfennig* (515):

> "Once it is accepted that the prejudicial effect of the evidence is a matter going to admissibility, no scope remains for the exercise of the discretion to reject probative evidence in criminal trials on the ground that it is unduly prejudicial to the accused."

In this sense, s398A "prescribes a rule that must be satisfied before a particular class of evidence is admissible, not a discretion to exclude evidence that is admissible" (*R v TJB* [1998] 4 VR 621; (1998) 102 A Crim R 74 per Callaway JA at VR 631-2). I note, however, that the Court in *TJB* left open the question as to whether the section leaves any room for the exercise of a "Christie discretion" (as to which see: "Clough, *A Rational View of Propensity Evidence?"* (1998) 20 Adel LR 287 at 306-8).

It is, accordingly, open to an appellate court to review his Honour's ruling and substitute its own judgment on the facts before it, although, as I say, it would be loath to do so if it were apparent that the trial judge had reached his determination in accordance with proper principle.

28. In this case his Honour was being asked to admit evidence of similar facts (namely the events which occurred at Gardiner Street on 5 December) in order to prove the identity of the offender who committed the proven offences which took place in the house at Kennedy Street on 2 December. The evidence remained evidence of identity for the purposes of admission whether or not, once admitted, it was open to be used by the Crown "to bolster or confirm" the evidence of direct identification given by the complainant. Within the meaning of s398A(2), the "fact in issue" to the proof of which the propensity evidence was relevant was the identity of the offender in Kennedy Street and not the adequacy of the evidence of the complainant. Identification evidence is not limited to identification from memory or photograph. Where the fact in issue is "who committed the offence?", identification can take the form of physical identification, confession, or fingerprints or other circumstantial evidence of which evidence of "similar facts" is a species (*Sutton v R*, *supra* at 538 per Murphy J). However, where the circumstantial evidence sought to be led to prove identity is proof of other crimes or discreditable conduct on the part of the accused, it becomes a particular type of circumstantial evidence which is subject to the special exclusionary rule (*Sutton*, *supra*, at 548 per Brennan J, 564 per Dawson J). To suggest that the test of admissibility is in some way to be circumscribed because the evidence was to be used to "corroborate" the complainant's identification is, at it seems to me, to misdescribe the fact in issue to which it is said the evidence is relevant. Although the evidence in question (although not strictly "corroborative"), might have been used, if admitted, as an additional piece of circumstantial evidence upon which the identity of the offender might be proved, its admissibility had to be tested first. As Lord Mustill pointed out in *R v H*, *supra*, at 615, questions of admissibility and corroboration often overlap, but are not the same. As he said:

> "If the evidence cannot be admitted the question whether if admitted it would be corroborative is academic."

This, as I see it, must be so because, once the evidence is in, the prejudice which the exclusionary rule seeks to avoid will have its full effect.

29. As I have noted, in ruling the evidence admissible, the learned judge said that "similar fact evidence … may sometimes be led … for the purpose of negating a possible defence, such as mistake … or as affording evidence of a requisite mental state. In the matter with which I have been concerned, the propensity evidence was not sought to be led to either of those ends. As I have indicated, it was rather sought to be led as corroboration of the evidence of [the complainant]. In that regard, the issue is whether the propensity evidence is 'relevant to facts in issue'."

His Honour concluded that, in his opinion, the evidence was relevant to a fact in issue, "whether the fact be regarded as the accuracy of the identification made by the complainant or the identity of the assailant".

30. On any view it seems to me that his Honour misdirected himself. He appears to have been influenced by the fact that the Crown was seeking to use the evidence as "corroboration" of the complainant's identification and that a fact in issue was the accuracy of that identification. Indeed, in the course of argument as to the admissibility of the evidence, his Honour had said to the applicant's counsel:

> "If one ignores the identification evidence [of the complainant] the Crown could not conceivably by proving what it alleges occurred on the 5th prove that your client committed the offence of (sic) the 2nd. No possibility. … The way in which the Crown seeks to admit the evidence is … as corroboration of the correctness of the evidence of [the complainant]."

For the reasons stated, this seems to me to mistake the fact in issue towards which the propensity evidence was directed. But, in any event, his Honour, as I see it, did not in the course of his ruling give reasons why the propensity evidence had the type of probative force which the law requires to render it "just" to admit it. Nor did he seek to expose its prejudicial effect. There is no doubt that the evidence was extremely prejudicial to the accused. However, there was nothing to which his Honour pointed which suggested that the events at Gardiner Street had any "striking similarity" or "hallmark" or "underlying unity" which, when looked at in the light of the other evidence, made it objectively improbable that the offences charged were not committed by the applicant. Indeed the only similarities which existed, as it appears to me, between the events constituting the charged offences and those said to constitute "similar facts" are that each occurred in the early hours of the morning at premises in Richmond in which one of the occupants was a young woman. But there were significant dissimilarities: the offender at Kennedy Street entered the dwelling and sexually assaulted a female inmate; the applicant did not; the offender at Kennedy Street carried a knife and a torch; the applicant did not; the offender at Kennedy Street entered a darkened room in which the occupant was asleep; whatever the applicant was endeavouring to do at Gardiner Street he did not do that; indeed he left the premises without having entered them.

31. Because his Honour did not, in the course of his reasons, provide any detailed explanation as to why he regarded the similar fact evidence as having the very high probative value which, in accordance with the principles to which I have referred, the law requires it to possess, it is not easy to see why he regarded it as "just" to admit it notwithstanding its prejudicial effect. However, because the offences with which the applicant was charged required proof that the offender was a person bent on sexual assault, it would seem that his Honour must have concluded that the similar fact evidence was capable of demonstrating that the applicant was intending to enter the Gardiner Street premises for the purposes of sexually assaulting the inmate. Indeed this was the basis upon which the prosecution asked the judge to admit the evidence, saying:

> "The Crown contention would be that he was there for sexual purposes."

That process of reasoning, if such it was, would in my view go beyond legitimate inference and involve speculation that the applicant was at the Gardiner Street premises on a preliminary "reconnoitre" with a view to collecting his torch and knife and then returning to the premises to break in and assault the female occupant.

32. The process of reasoning which I have assumed in the preceding paragraph is borne out by the directions which his Honour ultimately gave to the jury. Having warned the jury that "you cannot prove that a man committed a burglary simply because you prove that he is a burglar", his Honour went on:

> "So that it would … be quite wrong [to] conclude that [the applicant] was at Gardiner Street for the purpose of committing an offence of some kind. Let us assume that even if you were satisfied that he was there for the purpose of breaking into that property, then or later on, and in that regard of course you will realize that he did not have the torch or the knife with him, even if you decided that he was there with a view to breaking into the premises and with a view to indecently assaulting a woman in the premises, and I am not suggesting for a moment you would be satisfied of that, … that cannot possibly assist you in saying that he was therefore the person who committed the offence against [the complainant]. All it can do is to form part of the circumstantial evidence which may support … the identification made by [the complainant]. It cannot, of itself, prove that he committed the offence."

33. These directions prompted a question from the jury in this form:

> "We have been unable to come to a unanimous decision. We were wondering whether you could advise us on how we should weigh corroborative evidence in conjunction with an I.D.?"

34. In the course of giving further directions, his Honour again told the jury that they could only use the "similar fact" evidence as "corroboration" of the complainant's identification. Having referred to the Crown's submissions on that matter, his Honour went on:

> "... and the Crown says that you should be able to infer that he was intending to commit some offence and ... you should be able to infer that it was an offence involving breaking into the house and sexually assaulting a female within it. That he had in his car, which was parked nearby, a knife and a torch, and that in those circumstances, the Crown says when you look at all those things ... you ought to regard that as supporting the evidence of [the complainant] ... .
>
> Now, in relation to that, it seems to me that the first thing you need to do is to form a judgment about what he was doing in the early hours of the morning in Gardiner Street. ... You would consider all that evidence and make a judgment as to what in your view was the purpose of his being there on that morning ... . You may say he was there with the view of breaking into the place, or 'casing' it with the view of coming back and breaking into it later on and assaulting a female whom he had seen inside ... . Then you form some judgment as to what he is doing. Having formed the judgment as to what he is **[16]** doing it is then a question for you to ask yourselves, and each of you may have a different view about this, as to whether that evidence, as to what he was doing that night and the other matters relied upon by the Crown, are such as to support [the complainant's] evidence ... . But there does not have to be agreement reached. What is necessary at the end of the day ... is that you are all agreed upon the verdict ..."

35. These directions were the subject of strong exception taken by the applicant's trial counsel on the basis that the jury were being asked to speculate about what the applicant was doing or intending to do in Gardiner Street in order to establish the "similar facts" said to be probative of the offences charged. His Honour declined to further direct saying that the jury had been told that, whatever view they formed of the applicant's intentions, they could not use the "similar fact" evidence to say that the applicant had committed the offence in Kennedy Street; and that they had been told that they could only use the evidence as "corroboration" and only then after forming a view as to what he was doing in Gardiner Street.

36. His Honour's directions serve to confirm my view that the evidence was inadmissible. If the evidence, taken at its face value, did not have sufficient cogency to establish that the applicant was the offender at Kennedy Street, as his Honour seems to have accepted, then it was no more than evidence of criminal propensity which, in accordance with authority, should not have been admitted. Furthermore, as it seems to me, the directions demonstrate that it was his Honour's view that the events which occurred at Gardiner Street could only have probative value in the event that "some judgment" was made as to what the applicant was doing, or intending to do, at the Gardiner Street premises. This invited speculation as to whether the applicant had a sexual intent whilst at Gardiner Street and whether, to make good that intent, he was intending to leave the premises for the purposes of returning to his car to collect a torch and a knife, the "tools of trade" which had been used by the offender in Kennedy Street. Even then the available evidence strongly suggested that the "tools" were not those used by the offender at Kennedy Street. This chain of reasoning, notwithstanding the arguments of the Director to the contrary, in my view is an impermissible one because it depends for its validity upon an assumption that the applicant was the offender at Kennedy Street and then importing the *modus operandi* of the offender at those premises into the events at Gardiner Street in order to fix the applicant with the required sexual intent so as to provide the "striking similarity" needed to support the admissibility of the evidence. Although it is, of course, true that a court cannot assess the probative force of similar fact evidence without taking into account the rest of the case which the evidence is tendered to support, it is equally true that it cannot assume that the accused has committed the crime charged to render admissible evidence of the so-called similar fact (per Gibbs CJ, *Sutton v R*, *supra*, at 533). As Brennan J said in *Perry v R*, *supra*, at 612:

> "To seek to prove a fact in issue by a chain of reasoning which assumes the truth of that fact is, of course, a fallacy, repugnant alike to logic and to the practical processes of criminal courts."

(See also *Thompson*, *supra*, at 17 per Mason CJ and Dawson J)

If the evidence had no probative value on its own account, it could not receive such probative value by the circular process of reasoning described.

37. Quite apart from its inherent prejudicial effect, this evidence had the potential for particular prejudice to which his Honour did not specifically allude in his reasons supporting its admission. To admit it would inevitably invite speculation as to why members of the "Rape Squad" were keeping the applicant under surveillance at Gardiner Street. Furthermore it had the capacity to distract the jury from its task by inviting them to engage in a "mini-trial" to establish what had occurred at that location. Amongst other things, the Crown was proposing to invite the jury to find that the applicant lied to the police about the reasons for his presence at those premises and to use that fact as evidence probative of his guilt of the offences charged. To use a lie told in those circumstances as evidence probative of the offences charged seems to me to be wholly tenuous, but it is demonstrative of the prejudicial effect which admission of the evidence was likely to cause.

38. I have said sufficient to indicate why, in my view, it was not "just" to admit the evidence of the events at Gardiner Street pursuant to s398A(2). The Director sought to support the trial judge's ruling by taking us "root and branch" through the judgments delivered in *Pfennig* and submitting that the reasons given in that case justified the ruling in this case. Indeed the Director went so far as to submit that a conclusion in this case that the evidence was wrongly admitted would be tantamount to a finding that *Pfennig* was wrongly decided. Quite apart from the fact that it is, in my view, inappropriate to seek to support the admission of evidence in one case by reference to the facts of another case, as distinct from extracting principles, I cannot agree that the Director's submission is correct. This case is, in a sense, the obverse of *Pfennig* where the "similar fact" evidence was unchallenged and proved that the accused was the abductor of a young boy for the purposes of sexual assault. What was submitted in *Pfennig's* case was that the similar fact evidence, so established, could not prove that the offences charged had been committed or that the accused was the perpetrator. In this case it was not in doubt that the offences charged had been committed by some one. The question at issue was whether the "some one" was the accused and, to that end, whether the similar fact evidence which the Crown sought to tender was sufficiently probative to establish that fact. For the reasons which I have given, I do not believe it was capable of doing so. In my view the judge was in error in admitting it.

39. The application will have to be allowed. It is unnecessary to consider the other grounds of appeal or the application for leave to appeal against sentence. The only question is whether there should be a new trial or whether a verdict of acquittal should be entered. With some hesitation, I think that the identification evidence, apart from the "similar fact" evidence, is of sufficient strength to warrant the order for a new trial.

CHARLES JA:

40. I agree with the President that this appeal must be allowed and a new trial ordered.

41. As the President has said, the evidence of what occurred at Gardiner Street on 5 December 1997 was tendered by the prosecution to prove the identity of the offender who committed the offences which took place in the house at Kennedy Street on 2 December. I agree with the President that such evidence is received with great caution. To the authorities the President has cited for this view, I would add only the following. The explanatory memorandum to the *Crimes (Amendment) Bill*, which introduced in 1997 a new s398A(2) of the *Crimes Act* 1958, stated that the sub-section was in accordance with the test enunciated by the House of Lords in *DPP v P* [1991] 2 AC 447; [1991] 3 All ER 337; (1991) 93 Cr App R 267; [1991] 3 WLR 161. In *Pfennig v R* [1995] HCA 7; (1995) 182 CLR 461; (1995) 127 ALR 99; (1995) 69 ALJR 147; 77 A Crim R 149, Mason CJ, Deane and Dawson JJ referred, at 478-479, to what had been said by Lord Mackay of Clashfern LC in *P* at 460-462, and, after referring to the passage from the Lord Chancellor's speech quoted by Winneke P in para 25 above, said, at 479-480, that this represented an authoritative statement of the relevant law as it presently stands in the United Kingdom and New Zealand, and closely resembles that applying in Canada.

42. There was in the events at Gardiner Street no evidence of a character sufficiently special reasonably to identify the applicant (*P* at 460D-E) or anything in the nature of a signature or other special feature (*P* at 462F-G) which, when looked at in the light of all the other evidence, made it

objectively improbable that the offences at Kennedy Street with which the applicant was charged were not committed by him. I agree that the judge was in error in admitting the evidence for all the reasons given by the President.

BATT JA:

43. I have had the benefit of reading in draft the reasons for judgment of the President. I agree with his Honour's conclusion and proposed orders and with his reasons. I wish only to say that under s398A(2), whilst probative force and prejudicial effect necessarily fall for consideration, the exercise is, strictly, not one of measuring those incommensurable concepts against each other.

APPEARANCES: For the Crown: Mr GR Flatman QC (DPP) and Ms K Judd, counsel. PC Wood, Solicitor for Public Prosecutions. For the applicant: Mr PG Priest QC, counsel. Galbally Rolfe, solicitors.
