CITATION: *[2008] NTMC 037*

PARTIES:	KERRY LEANNE RIGBY
	v
	RICHARD KERR
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Criminal
FILE NO(s):	20706385
DELIVERED ON:	28 May 2008
DELIVERED AT:	Darwin
HEARING DATE(s):	16 May 2008
JUDGMENT OF:	Mr Daynor Trigg SM

CATCHWORDS:

Criminal Code – section 188(2)(k)
Evidence – admissibility – tendency evidence.
Evidence – admissibility – to rebut accident.
Boardman v DPP [1974] 3 AllER 887
Hoch v The Queen (1988) 165 CLR 295
Thompson v R (1988-1989) 169 CLR 1
Pfennig v The Queen (1995) 182 CLR 461
R v Gum [2007] SASC 311

REPRESENTATION:

Counsel:

Complainant:	Ms Ganzer
Defendant:	Ms McLaren

Solicitors:

Complainant:	Summary Prosecutions
Defendant:	Ms McLaren

Judgment category classification: A
Judgment ID number: [2008] NTMC 037
Number of paragraphs: 75

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20706385

[2008] NTMC 037

BETWEEN:

KERRY LEANNE RIGBY
Complainant

AND:

RICHARD KERR
Defendant

REASONS FOR DECISION

(Delivered 28 May 2008)

Mr Daynor Trigg SM:

1. On 10 April 2007 information was taken out against the defendant charging him as follows:

> On 25 January 2007 – At Casuarina, Northern Territory of Australia:
>
> 1. Unlawfully assaulted Verna Macauley;
>
> And that the said unlawful assault involved the following circumstance of aggravation, namely:
>
> (i) that the said Verna Macauley was indecently assaulted
>
> contrary to s 188(2) of the Criminal Code.

2. The matter came before me on 16 May 2008. At this time, the prosecution was represented by Ms Ganzer and the defendant (who appeared) was represented by Ms McLaren. It was indicated to me

that the matter was to proceed as a contested hearing. Prior to the charge being read, I pointed out to prosecution that there was no allegation of any aggravating circumstance in relation to the defendant being a male and Ms Macauley being a female. Accordingly, Ms Ganzer sought leave to amend the information to add a further circumstance of aggravation as follows:

(ii) That the said Verna Macauley was a female and the defendant was a male.

3. Ms McLaren did not object to this amendment to the information and the amendment was accordingly made. The amended information was then read to the defendant and the defendant pleaded not guilty to the charge and each circumstance of aggravation.

4. The first witness called in a prosecution case was the alleged victim, Verna Macauley.

5. Ms Macauley gave evidence that she was a Library Assistant and had been for some 16 years. On 25 January 2007, she was rostered to work at the Casuarina Library. She said that at 2.30pm that day, two sisters had been booked to have access to computer numbers two and four. She checked the screen and noticed someone was logged onto a computer who had not booked in.

6. Ms Macauley said that the Casuarina Library had seven computers for use by patrons. Six of these were in a circle and were together. The seventh one was separate and was for use by persons with disabilities.

7. Ms Macauley said that when she went to the computer area, she noticed the defendant logged onto computer number three, she believed he had a booking. She went on to say that the defendant

was known to her as he came into the Library usually once a week and usually to use the computers.

8. Ms Macauley said she approached the person who was using computer number four without a booking and was talking to him. She turned left towards where the defendant was seated at computer number three. She then said that the defendant reached out his right hand and grabbed her right breast and squeezed it for about two to three seconds. She said that his fingers were out spread and he brought them in.

9. Ms Macauley said she was very angry and brushed or hit his hand away. She said that she said to the defendant "you touched my breast" and "don't touch my breast". She said that the defendant said nothing to her in reply but just looked at her.

10. Ms Macauley said she gave no permission to the defendant to touch her and she was not in any relationship with the defendant.

11. Ms Macauley said she went to the reference desk and informed Nadia that the defendant had grabbed her breast and from there she went straight into the Chief Librarian's Office and told her that the defendant had grabbed her breast and she didn't want to serve him ever again.

12. Ms Macauley said she was very upset and very angry.

13. In cross-examination, Ms Macauley agreed that she had seen the defendant coming into the Library for about ten years and he had never touched her before. Although she did say that he once asked if he could give her a hug and she was a bit shocked by this and reported it, albeit not in writing.

14. In cross-examination, Ms Macauley agreed that the defendant touched her breast when she turned towards him. It was then put to her that this was an accident, as he was trying to tap her on the shoulder or back. To this suggestion, she said "no, his whole hand grabbed my breast".

15. Ms Macauley said she spoke to a number of Police Officers (she suggested three), as she wanted to know what she could do. She said she wanted to get a Trespass Order against the defendant and wanted to think about whether she was going to lay charges, which she eventually decided to do.

16. At the end of cross-examination, it was again put to Ms Macauley that she knew it was only an accident and she responded "I disagree, the fact he actually squeezed my breast indicated to me that it was deliberate".

17. The evidence of Ms Macauley, if accepted, would be sufficient to raise a case to answer to the charge and each circumstance of aggravation.

18. The next witness called in the prosecution case was Nadia Safar. Ms Safar had been a Library Officer for 25 years and had worked in all four Libraries in the Darwin area. On Thursday, 25 January 2007 she was working at the Casuarina Library on the circulation desk. She was working on a computer.

19. Ms Safar said she saw the defendant go to the circulation desk and ask for help from Ms Macauley and Ms Macauley went over to the computer area to assist him. She then heard voices and could tell Ms Macauley was really upset and was telling the defendant something but she couldn't hear what she was saying. Ms Macauley then came up to her and said "Mr Kerr touched my breast, what should I do?" Ms Macauley was so upset that she told her to go and see Karen.

20. Ms Safar did not witness the incident in question.

21. In cross-examination, Ms Safar agreed that the defendant had visited the Library for a long time and in that time, he had never touched her breast or touched her or spoken to her inappropriately. However, it became apparent in cross-examination that Ms Safar was aware of incidents being reported in their "Incident Book" concerning the defendant going back to 2004 and said that staff needed to be aware of the defendant. However, Ms Safar disagreed that she was prejudiced against the defendant or anyone.

22. The next witness called was Karen Conway who was the Manager of Library Services. She confirmed Ms Macauley came and saw her in her office and Ms Macauley was visibly upset and appeared very upset.

23. Ms Conway said that Ms Macauley said to her "he touched my breast" and further, "she was helping someone next to him and he turned and grabbed her breast".

24. Ms Conway said that after the defendant had left the Library, she asked Ms Macauley to write up the incident in the Incident Book and later, asked her if she wanted the matter reported to Police.

25. In cross-examination, Ms Conway agreed that she knew the defendant as a patron of the Library for probably ten years and that she would have served him on occasions. She went on to say that the defendant had never touched her inappropriately and she had not seen the defendant touch anyone else inappropriately.

26. In cross-examination it was suggested to Ms Conway that when she asked the defendant to leave the Library, he protested his innocence and she answered "maybe, I'm not sure". It was further put to her that the defendant said it was an accident and she again answered

"maybe". It is clear that Ms Conway was not clear in relation to whether these events had occurred.

27. The evidence of Ms Safar and Ms Conway was admissible as evidence of first complaint. No objection was made to this evidence, and in my view rightly so. However, what Ms Macauley said to Ms Safar and Ms Conway is admissible as evidence of what she said, but not as evidence of the truth of what she said. The actions and words of Ms Macauley immediately after the alleged indecent assault are "admissible and relevant to show consistency of conduct and negative consent, but does not amount to corroboration.....because it was not from an independent source" (from the decision of Lord Simon in *DPP v Kilbourne* [1973] 1 AllER440 at 463).

28. Prior to any further oral evidence, a transcript of the defendant's electronic record of interview (hereinafter referred to as "EROI") was sought to be tendered (although some parts were blacked out). Ms McLaren advised that there were passages of the EROI that she objected to, and she was also objecting to some later evidence to be called by the prosecution by way of "tendency" evidence. The record of interview transcript became Exhibit P1, on the basis that I would subsequently rule on whether the parts objected to would remain part of the tender or not, after I had heard the relevant evidence.

29. Ms McLaren stated:

> There are a few pages there where my client is being questioned about past behaviour in the library. It would boil down to whether Your Honour is going to allow the similar fact evidence. I suppose if Your Honour allows it Your Honour will also allow that line of questioning which is recorded in the EROI, but otherwise I suppose Your Honour can exclude it.

30. The relevant pages that Ms McLaren was referring to would appear to be pages 22 to 25 of ExP1, where the following exchanges occurred:

HOOPER-DUFFY: Alright um Richard have you had any other problems at the

libraries in the past or anything?

KERR: Yes I have, that particular library the city library.

HOOPER-DUFFY: Yep.

KERR: Young women they've encouraged me, smiled, perhaps touched my hand, I've replied to that, I've got into trouble over that too, I've sent affidavits to the council chamber over it and I understand, this is hypothetical what I'm gonna say now that the woman that does the legal matters for the shire was dismissed.

HOOPER-DUFFY: So why ah so can you just go through that again, why?

KERR: Yeah well I'll add a bit more.

HOOPER-DUFFY: You said in the past that there has been incidents.

KERR: Yeah.

HOOPER-DUFFY: Can you just explain what, again what you mean by that.

KERR: Yes I did, the, I'll say it again, when some young woman smiles at me and encourages me to be friendly with her I mildly reply, that's about it.

HOOPER-DUFFY: What do you, sorry what do you –

KERR: Does that make sense?

HOOPER-DUFFY: Not really I, what does that mean to?

KERR: Well what, well supposing this girl woman sitting beside you now started grinning at me and smiling flashing her breasts backwards and forwards I would, I would say that was encouraging me to be friendly with her.

HOOPER-DUFFY: And then.

KERR: That doesn't make sense either I expect.

HOOPER-DUFFY: Then, sorry then what would you do?

KERR: Well I'd probably grin back at her, could have done anything, wouldn't even touch her.

HOOPER-DUFFY: And in these past incidents did you do anything when these people were smiling at you?

KERR: What do you mean by that?

HOOPER-DUFFY: Well that's why I'm asking I'm just trying, trying to get to.

KERR: Yeah.

HOOPER What you meant, why, cos then you said you went and supplied

an affidavit, what, why did you do that?

KERR: Well when somebody in the council or official does, um blames me for doing something I've always, always think its better to reply to them in the proper way.

HOOPER-DUFFY: What were they blaming you for doing?

KERR: For making a nuisance of myself in a public library, that's what it would be.

HOOPER-DUFFY: How so, what were you doing?

KERR: I wasn't doing anything, just something-flirting that's the word I had but – the young person in the library was probably, it's a long time ago, was probably flirting at, flirting with me and I would have flirted back, well what do I mean by flirting, well I just would have said friendly things to her I suppose, that doesn't make sense either.

HOOPER-DUFFY: Did you touch her or anything like that?

KERR: No, oh I could have, I don't remember, it would have only been on the hand.

HOOPER-DUFFY: Okay.

KERR: No I don't suppose I would have, no I wouldn't have because I've had enough experience in Australia to know that it's always don't touch, don't touch so I just don't do it.

HOOPER-DUFFY: Okay and is that the only incident you can think of that might of happened in the past?

KERR: As far as I know yes. But if, if you suggest something I'll- .

HOOPER-DUFFY: Oh no I'm asking you.

KERR: .. I'll try and remember a bit more.

HOOPER-DUFFY: I'm just trying to work out whether this is an isolated incident or whether it's happened before or what I don't know.

KERR: John Banks was quick to tell me we've had a previous incidence in the library here, I answered to him straight away I was encouraged, I just replied to it and that's what I'm telling you.

31. I rule on the admissibility of these passages later in these reasons. However, parts of ExP1 were not objected to and form part of the evidence herein.

32. In ExP1 the defendant gave his version of what happened on a number of occasions. Initially at page 6 he said:

HOOPER-DUFFY: What can you tell me about that incident?
KERR: Ah well I had went into the library as I usually do and asked for a computer but the girl who I know pretty well told me I'd have to wait a while for it possibly two o'clock I'm not sure of that I think it was two o'clock. Then two o'clock came I went up to the desk and asked "can I have my computer now" and I was told yes then I said well usually the last few weeks when I've asked for a computer I've always gotta wait, the person that's on it refuses to move and I was told I could have computer three. I moved towards computer three which was a straight line from the desk. The person was still there I had to wait a while, the librarian who was coloured possibly from New Guinea brown skin, I sort of looked at her then the person on he computer moved, I sat down at the computer then this librarian I don't know any names moved up behind me, I turned around to – to look at her, I poked my finger out like this to poke in the back to stop her to ask is this number three and at the same time she turned around and turned into my finger which was like this. And apparently it nudged or poked her in the breast. Then the chief librarian come out with a surprise to me and said "Mr Kerr will you shut the computer down and leave the library". I looked at her in surprise and said "Okay we'll do what you request, do what you ask me to do" and she said "thankyou" and I shut the computer down and away I went. I put all-I wrote all this on a affidavit which a JP has signed which means I'm in trouble if it's a false statement. Do you want me to go over that again?

HOOPER-DUFFY: No that's alright, is there anything else you want to add to that?
KERR: That's about it.

It is clear from this initial account that the defendant is asserting that his finger "apparently nudged or poked her in the breast". In addition, he doesn't make any mention at this point in time that Ms Macauley said anything or reacted in any way. Nor does he make any mention of saying anything to the chief librarian other than "Okay we'll do what you request, do what you ask me to do".

He gave further information at pages 13 to 15 of ExP1 including a demonstration of his actions (which I have no idea of, as the DVD of the EROI was never tendered into evidence) as follows:

HOOPER-DUFFY: Okay was she walking past you or walk straight up behind you or, can you remember?

KERR: Course I can exactly, um let's see, the computers there, the desks here, I'm sitting there.

HOOPER-DUFFY: Yep.

KERR: Is this quite alright what I'm doing?

HOOPER-DUFFY: Yeah no go for it.

KERR: She came from here, she was about here and there was another person coming from this direction, she started then conversation, say something to this person.

HOOPER-DUFFY: Hmmhmm.

KERR: That's when I'm, I reached, reached around to attract her attention like I'm doing now.

HOOPER-DUFFY: Yeah.

KERR: With my finger.

HOOPER-DUFFY: You were pointing it sort of trying to poke ..

KERR: No, no I was trying to nudge her in the back, just a tap.

HOOPER-DUFFY: Yep.

KERR: And she turned away to the other person, my finger went like that and then she turned around towards me and the finger went, went into her body as she turned and that's, I understand, I didn't see her, she apparently got in a temper over it.

HOOPER-DUFFY: Did she say anything to you then?

KERR: Yes I think so.

HOOPER-DUFFY: What did she say can you remember?

KERR: "how dare you touch me" or this is hypothetical I can't say for sure that that's true "how dare you touch me" or something very similar to that.

HOOPER-DUFFY: Did she say anything about her breasts or anything?

KERR: Oh possibly.

HOOPER-DUFFY: But you can't be sure?

KERR: That about sums it up.

HOOPER-DUFFY: Okay no worries that's fair enough.
KERR: But if, if she says she did I couldn't say that she was lying.

HOOPER-DUFFY: Okay. So you said she got upset?
KERR: Apparently yes because the libe, when the chief librarian came to me she said to me that the woman out there is very upset at what's happened, she's going off her tree but don't hold me that mightn't be the gospel truth. She's very upset going growling about what you did.

HOOPER-DUFFY: Okay.
KERR: And as I already said when the chief librarian said I'd like you to leave straight away I did, okay I'll do what you say straight away.

HOOPER-DUFFY: Okay no worries.
KERR: Because I ..

HOOPER-DUFFY: Did you say anything to her?
KERR: Who?

HOOPER-DUFFY: Ah the chief librarian when she asked you to leave did you say anything to her?
KERR: Yes I did I said "alright I will"

HOOPER-DUFFY: Sorry what did you say?
KERR: "Alright I will"

HOOPER-DUFFY: Okay you didn't say "I didn't do anything wrong" or anything like that?
KERR: I possibly did.

HOOPER-DUFFY: Okay well I don't know I'm just asking you whether you, whether you protested your innocence at that stage.
KERR: Yes I would have I'm sure I would have.

HOOPER-DUFFY: Okay. Alright.
KERR: I went that's not true or I didn't do it on purpose or something very similar to that, those words.

Here the defendant is saying that his finger "went into her body" but no mention of Ms Macauley's breast. As to what he said to Ms Conway (as noted above) he initially made no mention of saying anything to her about the alleged incident. However at the end of the above transcript he rapidly moves from "possibly" protesting his innocence, to "would have" to "I'm

sure I would have" to "I went that's not true". Later at page 16-17:

HOOPER-DUFFY: Yep. At that time she turns and your um finger or hand or finger you were saying that you were --
KERR: Finger.

HOOPER-DUFFY: --pointing or poking, um may have nudged or poked her in the breast.
KERR: You got that wrong it, it not may have, it did.

HOOPER-DUFFY: Okay it did, okay.
KERR: Yeah.

HOOPER-DUFFY: Okay no worries. And she got upset and said "how dare you touch me"
KERR: I'm not sure of that.

HOOPER-DUFFY: Something similar.
KERR: Something similar.

HOOPER-DUFFY: She walked off, a couple of minutes later the chief librarian came out is that right?
KERR: Yeah, yeah.

Now for the first time the defendant acknowledges that he made contact with Ms Macauley's breast, and not just that he may have, but that he "did". He also now acknowledges that Ms Macauley did say something to him before she walked away. Later at pages 17-18:

HOOPER-DUFFY: Okay. Alright well the woman that um you touched um she's alleging that it wasn't a poke it was a full hand and you groped her on the breast.

KERR: Well that's entirely incorrect. That's absolutely and entirely incorrect.

HOOPER-DUFFY: Okay.
KERR: Could you say that again, she's alleging that I intentionally ah handled her breast is that what she's saying?

HOOPER-DUFFY: That's what she's alleging yes.
KERR: Well that's a complete lie -- as I wrote on the affidavit, why

would, I should have brought it with me why would a 70 year old man want to interfere with any woman young or old?

And finally at pages 25-26:

CHAMBERS: Okay you said earlier um when Brendan was, when you mentioned that you'd touched this lady on the breast with your finger and Brendan put it to you that she made the allegation that you used your whole hand and groped her breast, your comments were that "I'm 70 years old why would I do that?

KERR: Something similar yes.

CHAMBERS: Something like that okay. So if you're 70 years old why would you flirt with a young woman?

KERR: Why? Well if, if any young woman flirts with me I just naturally reply to it.

CHAMBERS: Okay.

KERR: Anywhere.

CHAMBERS: And how would you reply?

KERR: Oh I just smile back to them and talk or make comments.

CHAMBERS: Alright.

KERR: Is that a satisfactory answer I don't suppose it is?

CHAMBERS: Alright so being 70 doesn't stop you from flirting?

KERR: Well if they flirt with me first yes I'll flirt with them.

CHAMBERS: Okay so why should I believe that being 70 won't stop you from groping somebody?

KERR: Why was, I just don't do those sort of things.

CHAMBERS: Okay and –

KERR: Could, could we hold on that for a while?

CHAMBERS: Alright.

KERR: Why would I want to ah interfere with any person male or female with my hands?

CHAMBERS: Okay, alright and when, Richard when you said you put your finger out and she turned into it, is that right?

KERR: That's, yes.

CHAMBERS: Okay and she said something to you when that happened?
KERR: Yeah how, this may not be correct but it was something like "how dare you touch me" then she fled out the back.

CHAMBERS: Okay did you say anything to her?
KERR: I don't think so but I could have.

CHAMBERS: Hmmhmm.
KERR: Like sssss—

CHAMBERS: What did you think when she said something to you?
KERR: I didn't take any notice at all.

CHAMBERS: Okay alright and
KERR: That's about it I didn't take any notice at that at all-

CHAMBERS: Okay you
KERR: I just went back to the computer.

33. Having conceded that his finger "did" (not may have) touch Ms Macauley's breast, and she said "something like "how dare you touch me"," and having noticed that she "fled out the back" it is, in my view, most unusual that the defendant would make no attempt to apologise to her or explain himself if it was truly an accident. It would also, in my view, be unusual behaviour to not take any notice at all and simply go back to the computer.

34. In my view, a number of the defendant's responses in ExP1 were unusual. Some of these were as follows:

At page 2:

HOOPER-DUFFY: Okay can you just tell me what that means?
KERR: Well it I suppose it means that what I say to you is gotta be the gospel truth.

HOOPER-DUFFY: That's true as well but um you also have to understand that you don't have to talk to me if you don't want to.
KERR: I will I said earlier I'm enjoying it so far.

And at page 4:

HOOPER-DUFFY: Okay. Alright we'll continue on. Richard are you okay at the moment are?
KERR: Course I am.

And at page 5:

HOOPER-DUFFY: Um
KERR: Gee what's coming you're going to a lot of trouble to-

HOOPER-DUFFY: No that's alright it's just all policies and procedures okay?
KERR: Yeah.

HOOPER-DUFFY: Because it's ah going, it might go to court.
KERR: Yeah.

HOOPER-DUFFY: We have to make sure that every things ..
KERR: Well I hope it does cos that'll be an adventure too.

And at page 7:

HOOPER-DUFFY: Okay. How long have you been living in Darwin?
KERR: Ten point seven five years.

And at page 8:

HOOPER-DUFFY: Okay. So you sat down at ah computer three the one you were told to sit at?
KERR: Ah I think, I think I'd better say yes to that.

And at page 10:

HOOPER-DUFFY: But you sat down at that computer.
KERR: Yes.

HOOPER-DUFFY: And then checked is that right?
KERR: Then the young, young woman is that correct came from behind and I want, I made, to make sure I asked her is this number three Is that, that a good answer, a reasonable answer?

HOOPER-DUFFY: Oh I'm look this is your story you're telling it how it happened, I obviously I wasn't there.
KERR: Yeah.

HOOPER-DUFFY: So I'm just trying to ..
KERR: Yeah okay.

HOOPER-DUFFY: ..to work out- .
KERR: We'll doin pretty good so far.

And at page 11:

HOOPER-DUFFY: It's all, the computers already on isn't it, it's just at a- .
KERR: Yes.

HOOPER-DUFFY: .council log on screen?
KERR: Yes, yes it is, it's on but I gotta put the needle over on to, to what I wanna use.

HOOPER-DUFFY: Okay.
KERR: You possibly call that a mouse that's hypothetical to me and I don't like hypothetical- .

HOOPER-DUFFY: Okay
KERR: .. statements.

And at page 12:

HOOPER-DUFFY: Yep how, how long after, when you sat down how many minutes do you reckon it was before you.
KERR: That the woman came up behind me?

HOOPER-DUFFY: Yep.
KERR: Oh possibly one and a half two but you could say something else that would prove me a liar.

HOOPER-DUFFY: Well I don't know I wasn't there so I'm asking your _
KERR: Okay fine, possibly two minutes.
And further at page 12:

HOOPER-DUFFY: So the librarian is behind you?
KERR: No she came from behind.

HOOPER-DUFFY: Okay and that, this in your words the coloured librarian is that right?
KERR: Well that's getting a bit nasty really- .
HOOPER-DUFFY: No I ..
KERR: ..for a woman, woman is coloured she might not like that.

HOOPER-DUFFY: No that's just what you said before I'm sorry I'm not trying to be nasty to anyone, it's just what, the terminology that you used that's all.
KERR: Yeah I seem to remember she had slightly brown skin.

HOOPER-DUFFY: Okay no worries that's fine that sounds a little bit more diplomatic doesn't it.
KERR: Dunno.

HOOPER-DUFFY: Okay, brown skin alright.
KERR: There's a girl in the supermarket the same colour skin and she's from New Guinea.

And at pages 15-16:

HOOPER-DUFFY: You went to the library to use the computer, ah you were told to you use computer three, you went and waited behind someone who was already on computer three.
KERR: Just hold it I think the woman I spoke to first which I regard as a friend as sort of a half friend her name might have been something like Maggie or some similar M-A-D-Y does that make sense?

HOOPER-DUFFY: I don't know, I don't know everyone that works there obviously.
KERR: Well half it makes sense, half of it doesn't to me, fancy a girl having a name like Mady but that's what it was spelt like.

And at page 18:

HOOPER-DUFFY: That's why we're giving, that, this is your opportunity to tell your side of the story.
KERR: Okay.

HOOPER-DUFFY: Which you're doing and we appreciate that and that's why we're called investigators, we're trying to investigate what actually happened.
KERR: Yeah well it's a pleasure to talk to you.

And at page 34:

HOOPER-DUFFY: I have indeed. Look I think we'll wrap it up there okay Richard?
KERR: Yeah well I hope I've cooperated with you.

HOOPER-DUFFY: You've been very cooperative.
KERR: What you want to know.

HOOPER-DUFFY: Have ah we threatened you to talk with us today?
KERR: Oh heck no, I've enjoyed it right up to this moment.

HOOPER-DUFFY: Are you happy with the way police have treated you today?
KERR: Certainly, cause I am.

35. The next witness called in the prosecution case was a Police Officer, Brendan Hooper-Duffy. Effectively, no questions were asked of him in evidence in chief and he was made available to the defence for cross-examination.

36. In cross-examination, Hooper-Duffy had said he had looked through the defendant's records and the defendant had no criminal records in the Northern Territory. He went on to say that Ms Macauley first reported the matter to Police on 31 January 2007, at which time she initially declined to make a complaint to Police. He later spoke to her at the Library as she was not sure of the processes of making a complaint and she then decided to go ahead with a complaint and this was on Friday, 2 February 2007. Arrangements were then made for Ms Macauley to attend the Police Station to give a statement and the statement was done on 13 February 2007.

37. Ms Ganzer then sought to lead oral evidence from a number of witnesses which she said would be similar fact witnesses and the purpose of the evidence was to rebut "accident" as raised by the defendant in his record of interview. As noted previously Ms McLaren objected to this evidence being lead. I allowed the evidence to be called by the prosecution on the basis that I would hear the evidence de bene esse and then at the end of the evidence, allow argument from both counsel and then rule as to whether I would admit the evidence and consider it as part of the prosecution case. This decision is my ruling on that evidence.

38. Hereafter, when referring to this evidence in general I will refer to it as the “tendency evidence”, and to the witnesses who gave it as the “tendency witnesses”.

39. The first “tendency witness” called was Trudi Maly. Ms Maly was a Clinical Librarian at the Royal Darwin Hospital, but in October 2004, was working for Northern Territory Libraries. She said that at that time, she was called over by the defendant to assist him with a problem he was having and as she leant over to use the mouse and look at the computer screen, the defendant turned towards her and started playing with her name tag that was on top of her left breast. She said this went on too long (probably about ten seconds) and she said to the defendant in a firm voice not to touch her. She said it felt rather inappropriate and when she said to the defendant not to touch her, the defendant said something like “I wasn’t”.

40. Ms Maly also confirmed that she did not give permission to be touched and was not in any relationship with the defendant. She continued to assist the defendant after this incident, although she did report the incident, but not immediately, perhaps a few weeks later.

41. In cross-examination, it was suggested to Ms Maly that she gave the defendant the impression that she was friendly to him. She responded that it was her job to be polite. She went on to say that she was not overly friendly with the defendant because she had colleagues warning her not to get too close to him. She went on to say that she was not overacting and she believed that it was inappropriate, but she dealt with it by telling him off and saying no.

42. She was asked whether she was flirting with the defendant at any stage and she responded “no”.

43. The next “tendency witness” called was Ruby Lindberg who had been a Librarian since 1996. She said that in about 2004 or 2005, the defendant (who was a regular client of the Library), put his hands around her waist and pulled her towards him like a hug. She did not know the defendant very well at the time and was never in a relationship with him. She said she pulled away and said “please don’t do that again”. She said thereafter she avoided the defendant. She said there was no reason for it to happen and she had given no permission. She said that she felt very uncomfortable.

44. In cross-examination, she agreed that she could not remember the date or the year of the incident. She denied that she was quite friendly to the defendant and denied that she was talking and smiling and being friendly towards him. She agreed that she reported the incident (but not to Police).

45. It was suggested to Ms Lindberg that this incident did not happen at all. Ms Lindberg responded that “yes it did, as it was documented in NT Library, so it did happen”. She went on to agree that she thinks the defendant is a creepy old man and that his actions were inappropriate. Then Ms McLaren asked her if it was “inappropriate and perverse” and she responded “absolutely”.

46. The next “tendency witness” called was Helen Edney. Ms Edney also worked for NT Libraries. She said that in 2005 the defendant asked her for assistance on one occasion. The defendant was a regular. She went and pulled a chair next to the defendant and sat next to him to guide him through the computer. She said the defendant put his hand across onto her knee and she asked him to remove it. She said she was wearing trousers at the time and the defendant did remove his hand. She said that the defendant said to her that he liked her ankles and she should show them more. Ms Edney was also never in

a relationship with the defendant and could not recall every seeing the defendant outside of the Library. She said there was no reason for what he did and she gave no permission.

47. Ms Edney said there was another incident which she thought was in 2005, although she could not recall the date. She said the defendant again called her over and asked for assistance and when she went towards him, he put his hand across her breast and said "your name is?" as if he was reaching for her name tag. She said his hand connected with the top of her breast and it was his whole hand placed across her left breast and he squeezed her breast. She said that the incident lasted a matter of seconds. She said at the time she stepped back, but she couldn't recall what she said. She said she reported the matter to a Supervisor and she felt uncomfortable about the incident. She gave no permission and she said she avoided the defendant thereafter.

48. In cross-examination it was put to Ms Lindberg that the knee incident was totally false and she disagreed. She further disagreed that she was friendly towards the defendant, but said she was required to speak to him as a client. She was asked whether she was flirting with the defendant and she replied "no".

49. Ms Lindberg was adamant that the defendant did squeeze her breast and it was not the sort of behaviour she would expect. She said it was inappropriate and not welcome. She said the incident affected her and she avoided the defendant after that. She went on to say that when she first reported the incident, others would say things had happened to them as well.

50. The next "tendency witness" called was Mary Hamon. She had worked with the Library since 1988. She knew the defendant as a frequent attendee at the Library. She said that about three years ago

she had her hand on the mouse and the defendant touched her arm, but not in a normal everyday way. She said it made her feel a bit sick inside. She said the defendant touched her left forearm from the wrist up to the elbow and said "you're looking nice today".

51. Ms Hamon said she was in no relationship with the defendant, she gave him no permission and there is no reason for him to touch her. She said that she told her Manager.

52. Ms Hamon also said that prior to that, he had, when she was using the mouse, placed his hand on top of her hand. She said she did not report this incident, but again gave no permission and there was no invitation.

53. In cross-examination, Ms Edney agreed that she knew the defendant for about eight years through the Library. It was suggested to Ms Edney that the incidents did not occur and she was exaggerating her evidence. She disputed this.

54. The final "tendency witness" called was Carmel Newman. Ms Newman is now a Library Technician, but had been working as a Library Assistant for a number of years. She said that the defendant would come in every week and he started to touch her inappropriately. She said he would rub his hand up her arm, he would take hold of her arm and he'd rub his hand up her back. She said she could not recall times or dates. She said the first time it occurred she dismissed it as being too close and when he did it again, she said to him "don't do that" and backed away from him. She said after that she didn't go out of her way to help him. She said the defendant would come in and ask for her by name and she stopped looking after him. She said after a while she helped him again and he started to touch her again. She said she went and told her Manager and informed her Manager that she would not deal with the defendant again. In the course of her

evidence, Ms Newman became visibly upset and was tearful when recanting her story. She said that she had to go outside the Library building to go to the bathroom to avoid the defendant so he could not see her. She said "sorry, it's just not right for people to do that".

55. In cross-examination, it was put to Ms Newman that she was friendly to the defendant and she said that she was no friendlier than to other customers. It was again suggested to her that her behaviour could have been interpreted as flirtatious and she disagreed with this. When it was put to her that she was exaggerating her evidence, she replied "no, I'm terrified of him, I don't work in public Libraries anymore because of him".

56. Ms Newman was clearly visibly upset during parts of her evidence, uncomfortable to be in the same room as the defendant and very upset about the behaviour that she believed that he had committed towards her.

57. That concluded the prosecution case. At the end of the evidence I heard submissions from Ms Ganzer. Ms Ganzer said that she relied on the five "tendency witnesses" to rebut the suggestion in ExP1 that the contact was an accident. She said that the five "tendency witnesses" would indicate that it was improbable that the touching was an accident. She said that the probative value of the evidence must outweigh the prejudicial effect of the evidence.

58. Ms Ganzer relied on two cases, being *Lundie v Western Australia*, being a decision of District Court Judge Yates reported in [2006] WADC 184 and *R v David Christopher Gum* a decision of the South Australian Court of Criminal Appeal reported in [2007] SASC 311.

59. At the end of her submissions, Ms Ganzer again confirmed that the Crown relies on the evidence to rebut accident and not as evidence of any propensity of the defendant to inappropriately touch females.

60. Ms McLaren suggested that the first issue in relation to admission of the evidence of the five last witnesses was relevance, noting the defendant is not charged with any of these alleged incidents.

61. In relation to the Western Australian case referred to, Ms McLaren pointed out there was a special section in the *Evidence Act* in Western Australia and the position was therefore different to Common Law.

62. Ms McLaren sought to rely heavily on the case of *Perry v R* [1982] 150 CLR 580.

63. I now turn to consider the law in relation to the admissibility of the evidence of the five "tendency" witnesses.

64. In the case of *Boardman v DPP* [1974] 3 AIIER 887, which was a decision of the House of Lords, Lord Cross of Chelsea reflected the majority view and said at page 908:

> "My Lords, on the hearing of a criminal charge the prosecution is not as a general rule allowed to adduce evidence that the accused has done acts other than those with which he is charged in order to show that he is the sort of person who would be likely to have committed the offence in question the reason for this general rule is not that the law regards such evidence as inherently irrelevant, but because it is believed that if it were generally admitted jurors would in many cases think that it was more relevant than it was — so that, as it is put, it's prejudicial effect would outweigh it's probative value. Circumstances, however, may arise in which such evidence is so very relevant that to exclude it would be an affront to common sense."

And further at page 909:

> "<u>The question must always be whether the similar fact evidence taken together with the other evidence</u> would do no more than

raise or strengthen a suspicion that the accused committed the offence with which he is charged or would point so strongly to his guilt that only an ultra-cautious jury, if they accepted it as true, would acquit in face of it. In the end — although the admissibility of such evidence is a question of law not of discretion — the question as I see it must be one of degree." (emphasis added)

It follows, in my view, from this decision that it is only evidence that would satisfy the underlined words that would be capable of admittance into evidence. In the same case Lord Wilberforce stated at pages 897-8:

> "The basic principle must be that the admission of similar fact evidence (of the kind now in question) is exceptional and requires a strong degree of probative force. This probative force is derived, if at all, from the circumstance that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by experience and common sense, either all be true, or have arisen from a cause common to the witnesses or from pure coincidence. The jury may, therefore, properly be asked to judge whether the right conclusion is that all are true, so that each story is supported by the other(s).
>
> I use the words "a cause common to the witnesses" to include not only (as in R v Sims [194611 AIIER 697) the possibility that the witnesses may have invented a story in concert but also that a similar story may have arisen by a process of infection from media of publicity or simply from fashion. In the sexual field, and in others, this may be a real possibility; something much more than mere similarity and absence of proved conspiracy is needed if this evidence is to be allowed. This is well illustrated by Kilbourne's case [1973] 1 AIIER 440 where the judge excluded "intra group" evidence because of the possibility as it appeared to him, of collaboration between boys who knew each other well. This is, in my respectful opinion, the right course rather than to admit the evidence unless a case of collaboration or concoction is made out." (emphasis added)

65. In *Hoch v The Queen* (1988) 165 CLR 295 Their Honours Mason CJ, Wilson and Gaudron JJ in a joint judgment stated:

> "3. The basis for the admission of similar fact evidence lies in its possessing a particular probative value or cogency by reason that it reveals a pattern of activity such that, if accepted, it bears no reasonable explanation other than the inculpation of the accused person in the offence charged. See Dixon J's discussion (at p 375) in Martin v. Osborne (1936) 55 CLR 367. In that same case Evatt J. pointed out that it bears that probative value or cogency not as a matter of deductive logic but by reason that it allows for "admeasuring the probability or improbability of the fact or event in issue, if we are given the fact or facts sought to be adduced in evidence" (at p 385).
>
> 4. Assuming similar fact evidence to be relevant to some issue in the trial, the criterion of its admissibility is the strength of its probative force. See Perry v. The Queen (1982) 150 CLR 580, at pp 586-587, 605 and 610; Sutton v. The Queen (1984) 152 CLR 528, at p 563; Req. v. Boardman [1975] AC 421, at pp 439 and 444. That strength lies in it raises, as a matter of common sense and experience, the objective improbability of some event having occurred other than as alleged by the prosecution.
>
> 5. Where the happening of the matters said to constitute similar facts is not in dispute and there is evidence to connect the accused person with one or more of the happenings evidence of those similar facts may render it objectively improbable that a person other than the accused committed the act in question, that the relevant act was unintended, or that it occurred innocently or fortuitously. The similar fact evidence is then admissible as evidence relevant to that issue.
>
> 6. Where, as here, an accused person disputes the happenings which are said to bear a sufficient similarity to each other as to make evidence on one happening admissible in proof of the others, similar fact evidence bears a different complexion for the issue is whether the acts which are said to be similar occurred at all. In such a case the evidence has variously been said to be relevant to negative innocent association (R. v. Sims [1946] KB 531) or as corroboration (R v. Kilbourne [1973] AC 729, at pp 749, 751 and 758) but the better view would seem to be that it is relevant to prove the omission of the disputed acts. See Boardman, per Lord Hailsham at p 452 and Lord Cross at p

458; Sutton, per Deane J. at pp 556-557. Certainly that is the thrust of its probative value. That value lies in the improbability of the witnesses giving accounts of happenings having the requisite degree of similarity unless the happenings occurred. So much is clear from the well known passage in the speech of Lord Wilberforce in Boardman, at p 444: "This probative force is derived, if at all, from the circumstance that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by experience and common sense, either all be true, or have arisen from a cause common to the witnesses or from pure coincidence."

7. Similar fact evidence which does not raise a question of improbability lacks the requisite probative value that renders it admissible. When the happenings which are said to bear to each other the requisite degree of similarity are themselves in issue the central question is that of the improbability of similar lies: see Sims, at p 540; Boardman, at pp 439 and 459-460. See also Rupert Cross, "R. v. Sims in England and the Commonwealth", Law Quarterly Review, vol. 75 (1959), p 333; Piragoff, Similar Fact Evidence (1981), pp 38-47.

8. This appears not to have been appreciated in Johannsen v. The Queen (1977) 65 CrAppR 101 and Reg. v. Scarrott 1978 QB 1016, but it is implicit in the observation of Lord Wilberforce in Boardman (at p 444) that "something much more than mere similarity and absence of proved conspiracy is needed if this evidence is to be allowed." His Lordship added: "This is well illustrated by Reg. v. Kilbourne [1973] AC 729 where the judge excluded 'intra group' evidence because of the possibility, as it appeared to him, of collaboration between boys who knew each other well. This is, in my respectful opinion, the right course rather than to admit the evidence unless a case of collaboration or concoction is made out."

9. His Lordship there posited that the possibility of concoction - not a probability or real chance of concoction - served to render such evidence inadmissible. Indeed we think that must be right. Similar fact evidence is circumstantial evidence, as is implicit in what was said by Dixon J. in Martin (at p 375) and as pointed out by Dawson J. in Sutton (at pp 563-564). In Sutton (at p 564) Dawson J. expressed the view, with which we agree, that to determine the admissibility of similar fact evidence the trial judge must apply the same test as a jury must apply in dealing with circumstantial evidence, and ask whether there is a

rational view of the evidence that is inconsistent with the guilt of the accused.

10. In cases such as the present the similar fact evidence serves two functions. Its first function is, as circumstantial evidence, to corroborate or confirm the veracity of the evidence given by other complainants. Its second function is to serve as circumstantial evidence of the happening of the event or events in issue. In relation to both functions the evidence, being **circumstantial evidence, has probative value only if it bears no reasonable explanation other than the happening of the events in issue. In cases where there is a possibility of joint concoction there is another rational view of the evidence. That rational view - viz. joint concoction - is inconsistent both with the guilt of the accused person and with the improbability of the complainants having concocted similar lies. It thus destroys the probative value of the evidence which is a condition precedent to its admissibility.**

11. Thus, in our view, the admissibility of similar fact evidence in cases such as the present depends on that evidence having the quality that it is not reasonably explicable on the basis of concoction. That is a matter to be determined, as in all cases of circumstantial evidence, in the light of common sense and experience. It is not a matter that necessarily involves an examination on a voir dire. If the depositions of witnesses in committal proceedings or the statements of witnesses indicate that the witnesses had no relationship with each other prior to the making of the various complaints, and that is unchallenged, then, assuming the requisite degree of similarity, common sense and experience will indicate that the evidence bears that probative force which renders it admissible. On the other hand, if the depositions or the statements indicate that the complainants have a sufficient relationship to each other and had opportunity and motive for concoction then, as a matter of common sense and experience, the evidence will lack the degree of probative value necessary to render it admissible. Of course there may be cases where an examination on the voir dire is necessary, but that will be for the purpose of ascertaining the facts relevant to the circumstances of the witnesses to permit an assessment of the probative value of the evidence by reference to the consideration whether, in the light of common sense and experience, it is capable of reasonable explanation on the basis of concoction. **It will not be for the purpose of the trial judge**

making a preliminary finding whether there was or was not concoction.

12. In the present case it is clear from the evidence that the several complainants had a close relationship as well as opportunity to concoct their accounts of the offences charged. One complainant was ill disposed towards the applicant even before the events the subject of the counts in the indictment were said to take place. There is no feature of the case which displaces concoction as a reasonable explanation of the several accounts. The evidence of the several complainants lacked the requisite probative force necessary to render it admissible as similar fact evidence in relation to the other offences charged. There was therefore a miscarriage of justice by reason that the evidence was wrongly admitted and by reason of the refusal of the application for separate trials." (emphasis added)

66. Accordingly, the strength of the "tendency" evidence is one of logic, but only if there is no reasonable possibility of concoction or contamination. However, this was not a matter on which Ms McLaren addressed her submissions. Even though not raised by Ms McLaren, I consider that it is still necessary for me to consider this aspect as, in my view, it is a live issue on the evidence.

67. On the evidence it is clear, and I find, that Ms Macauley and each of the five "tendency" witnesses:

- Worked for NT libraries at the same time and over a number of years;
- Worked from time to time in the four libraries in the top end;
- Were well acquainted with the defendant;
- Were aware of an "incident book" into which reports of incidents that occurred could be and were at times recorded;

- May well have been personally acquainted (or even friends) with each other (although this was never adequately covered in evidence, I would have expected the prosecution to lead this evidence if it was not the case);

- May have discussed the defendant and this and/or their allegations against him with some or all of the other witnesses (again, this was never adequately covered in evidence, and I would have expected the prosecution to lead this evidence if it was not the case) either prior to making their reports, or prior to giving evidence, or both;

- May well have read the “incident book” in relation to incidents allegedly involving the defendant either prior to making their reports, or prior to giving evidence, or both (again, this was never adequately covered in evidence, and I would have expected the prosecution to lead this evidence if it was not the case);

- May have had reason to harbour ill-feelings towards the defendant (in addition to any ill-feelings that one would expect if each of their allegations were correct) if they were aware of (and sensitive to) the ill-feelings of others, or aware that the defendant’s actions had adversely affected other librarians (even to the extent of at least one of them leaving so as to get away from the defendant) - (but again, this was never adequately covered in evidence, and I would have expected the prosecution to lead this evidence if it was not the case).

68. It was the prosecution that was seeking to lead this circumstantial evidence (of allegations that were not admitted by the defendant, nor the subject of findings of guilt in other proceedings). Accordingly, in my view, it was incumbent upon the prosecution to go into a lot more detail than they did in order to negative any possibility of concoction or contamination of the evidence led from the five “tendency”

witnesses. It was not for the defence to elicit this in cross-examination. As in *Reg v Kilbourne* (supra) as expressly approved by the High Court in *Hoch v The Queen* (supra) “intra group” evidence (and I find that the five “tendency witnesses” were “intra group” – namely all library staff within NT libraries) is inadmissible where there is the possibility of concoction (not a probability or real chance of concoction).

69. I expressly do not find that there has been any concoction between the witnesses. On the contrary, taken individually I was impressed generally with each of them as witnesses and would have no reason to disbelieve them on their oath. But that is not the point. As the prosecution have failed to negative the possibility of concoction, in my view, the evidence of the five “tendency witnesses” is not admissible against the defendant in this case.

70. In order to complete for consideration of this area of the law I move to consider the most recent cases (which, in my view, do not alter the position I have arrived at).

71. In the High Court decision of *Thompson v R* (1988-1989) 169 CLR 1 at pages 15-18 Mason CJ and Dawson J said in their joint judgment:

> The principles upon which similar fact evidence may be admitted have in recent years been examined by this Court in Markby v The Queen 40 ; Perry v The Queen 41 ; Sutton v The Queen 42 ; and Hoch v The Queen 43 . It is established that similar fact evidence ought not be admitted if it tends to show only that the accused has committed another offence or other offences. Proof of the commission of other offences, without more, merely demonstrates a criminal propensity and the prejudicial nature of evidence of this kind is greater than any relevance which it might have. As was observed in Sutton 44 , to admit such evidence would be to invite the jury to proceed upon prejudice or suspicion rather than proof. But if the evidence of the other offence or offences goes beyond showing a mere disposition to commit crime or a

particular kind of crime and points in some other way to the commission of the offence in question, then it will be admissible if its probative value for that purpose outweighs or transcends its merely prejudicial effect. The cases in which similar fact evidence may have sufficient additional relevance to make it admissible are not confined, but recognized instances occur where the evidence is relevant to prove intent or to disprove accident or mistake, to prove identity or to disprove innocent association: see Markby 45 ; Sutton 46 ; Harris v Director of Public Prosecutions 47 .

Although the admissibility of similar fact evidence is restricted by the requirement that it must have sufficient probative force, the use to which it may be put when admitted is no different to that of other circumstantial evidence. That use was explained by Dixon J in Martin v Osborne 48 :

"If an issue is to be proved by circumstantial evidence, facts subsidiary to or connected with the main fact must be established from which the conclusion follows as a rational inference. In the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed. The circumstances which may be taken into account in this process of reasoning include all facts and matters which form constituent parts or ingredients of the transaction itself or explain or make intelligible the course of conduct pursued."

In the present case the fact in issue which the prosecution sought to establish by tendering the similar fact evidence was that the deaths of the two sisters were deliberately caused by the applicant and did not occur by accident. It may be put that way, for if the deaths were not accidental, it follows inescapably that the applicant murdered the two girls either by shooting both of them in the head or by shooting one and killing the other by the infliction of some other head injury.

The nine points of similarity advanced by the prosecution and apparently accepted by the trial judge went too far. In considering whether the deaths at Richardson displayed the necessary degree of similarity to the deaths of the two sisters, it was impermissible to include as a fact the matter which it was

sought to prove, namely, that the deaths did not occur by accident. The points of similarity accepted by the trial judge assumed that the two sisters were shot through the head, as were the victims of the Richardson killings. That was tantamount to assuming the truth of the fact in issue which the similar fact evidence was tendered to prove. As Brennan J pointed out in Sutton [49]:

"It is a canon of logic, rather than of law, that one cannot prove a fact by a chain of reasoning which assumes the truth of that fact. That canon has a particular application in determining the cogency and hence the admissibility of similar fact evidence. When the Crown seeks to tender similar fact evidence as the foundation for inferring a fact to be proved in a trial, it is erroneous to assume the truth of the fact to be proved in determining the cogency of the evidence. ... That proposition does not preclude reference to direct evidence of the fact to be proved in determining the cogency of similar fact evidence. Similar fact evidence tending to confirm the existence or occurrence of such a fact may be confirmed by direct evidence of the same fact."

We would only add to that passage the comment that there does not seem to be any reason why the evidence of the fact to be proved which confirms the similar fact evidence, or adds to its cogency, should be confined to direct evidence.

The similarity between the killings at Richardson and those of the two sisters was to be considered in the light of the whole of the evidence. That evidence included the damage to the skull of each of the two girls which was said by an expert medical witness to have been caused, or to be consistent with having been caused, by a shot at close range from a .22 calibre rifle. It included evidence suggesting that the two deaths occurred before the car caught fire. There were also the inconsistent stories told by the applicant about the contents of the petrol container in the car and there was evidence which was consistent with the car and the bodies of the deceased having been doused with petrol. In addition there was evidence that the fire started under the bonnet of the car which, when coupled with evidence that the applicant had removed himself from the immediate vicinity, was inconsistent with any attempt by him to extricate either of the two girls from the car. And expert evidence was given that the collision could not have happened in the way in which the applicant said that it did.

Finally, there was the family relationship between all of the deceased and the relationship of the applicant to the family.

Thus there was evidence that the two sisters died as a result of head injuries inflicted upon them, in one case, if not the other, by a shot fired at close range from a small calibre firearm. There was evidence that the bodies were subsequently incinerated in a fire deliberately started or accelerated by the use of petrol. There was evidence that the collision between a tree and the car in which the bodies were found was not accidental but staged. Such evidence, albeit disputed by the applicant, served to strengthen the cogency of the similar fact evidence and to assist in determining whether the similar facts were admissible. Once admitted, those facts were available to enable the jury to determine whether or not to accept the prosecution case, including the disputed evidence. Upon that disputed evidence alone, if accepted, and without regard to the similar fact evidence, it would have been open to the jury to conclude that the two sisters did not die accidentally but were murdered by the applicant. But in considering whether they entertained any reasonable doubt about such a conclusion, the jury were entitled to have before them evidence of the murders committed by the applicant at Richardson. The similarity between the circumstances of those murders and the circumstances of the earlier deaths of the two sisters was sufficiently striking to eliminate coincidence as a reasonable hypothesis and to lead to the conclusion that the two sisters did not die accidentally but at the hand of the applicant. The similar fact evidence was, therefore, admissible.

72. The passages above quoted from Lord Cross were quoted with approval in the joint judgment of Mason CJ, Deane and Dawson JJ in *Pfennig v The Queen* (1995) 182 CLR 461 at paragraph 47. Their Honours went on to say in paragraphs 60 to 63:

> "60. Where the propensity or similar fact evidence is in dispute, it is still relevant to prove the commission of the acts charged (Boardman [1975] AC at 452, 458-459; Sutton (1984) 152 CLR at 556-557; Hoch (1988) 165 CLR at 295). The probative value of the evidence lies in the improbability of witnesses giving accounts of happenings having the degree of similarity unless the events occurred. Obviously the probative value of disputed similar facts is less than the probative value those facts would have if they were not disputed. But the prejudicial effect of

those facts may not be significantly reduced because the prejudicial effect that the law is concerned to guard against is the possibility that the jury will treat the similar facts as establishing an inference of guilt where neither logic nor experience would necessitate the conclusion that it clearly points to the guilt of the accused. Because propensity evidence is a special class of circumstantial evidence, its probative force is to be gauged in the light of its character as such. But because it has a prejudicial capacity of a high order, the trial judge must apply the same test as a jury must apply in dealing with circumstantial evidence and ask whether there is a rational view of the evidence that is consistent with the innocence of the accused (Hoch (1988) 165 CLR at 296 (where Mason CJ, Wilson and Gaudron JJ expressed agreement with the remarks of Dawson J in Sutton (1984) 152 CLR at 564). See also Harriman (1989) 167 CLR at 602. Here “rational” must be taken to mean “reasonable” (See Peacock v. The King (1911)13 CLR 619 at 634; Plomp v. The Queen (1963)CLR 234 at 252) and the trial judge must ask himself or herself the question in the context of the prosecution case; that is to say, he or she must regard the evidence as a step in the proof of that case. Only if there is no such view can one safely conclude that the probative force of the evidence outweighs its prejudicial effect. And, unless the tension between probative force and prejudicial effect is governed by such a principle, striking the balance will continue to resemble the exercise of a discretion rather than the application of a principle.

61. In our view, the principles stated above which derive from Hoch correctly state the law with respect to the admissibility of similar fact evidence. Those principles have not been disavowed by any subsequent decision of this Court and they were accepted and applied by the trial judge in this very case. The discussion in Hoch was expressed in terms of evidence of similar facts rather than propensity evidence. That was because the evidence in that case lent itself to that classification though, in the light of the possibility of concoction, it was held to be inadmissible.

62. There has been a tendency to treat evidence of similar facts, past criminal conduct and propensity as if they each raise the same considerations in terms of admission into evidence. The difficulty is that their probative value varies not only as between themselves but also in relation to the circumstances of particular cases. Thus, evidence of mere propensity, like evidence of a general criminal disposition having no identifiable

hallmark, lacks cogency yet is prejudicial. On the other hand, evidence of a particular distinctive propensity demonstrated by acts constituting particular manifestations or exemplifications of it will have greater cogency, so long as it has some specific connection with or relation to the issues for decision in the subject case. That evidence, as has been said, will be admissible only if its probative value exceeds its prejudicial effect. But that statement, it seems to us, is of little assistance unless it is understood that the evidence sought to be admitted is circumstantial and as such raises the objective improbability of some event having occurred other than that asserted by the prosecution; in other words, that there is no reasonable view of the evidence consistent with the innocence of the accused. In stating the question in that way, we point out, as Lord Cross of Chelsea suggested in Boardman ([1975] AC at 457), that the purpose of the propensity evidence is to establish a step in the proof of the prosecution case, namely, that it is to be inferred, according to the criminal standard of proof, that the accused is guilty of the offence charged. Accordingly, the admissibility of the evidence depends upon the improbability of its having some innocent explanation in the sense discussed.

63. Acceptance of the statement of principles stated above means that striking similarity, underlying unity and other like descriptions of similar facts are not essential to the admission of such evidence, though usually the evidence will lack the requisite probative force if the evidence does not possess such characteristics. What is more, that approach conforms with the approach that now exists in the United Kingdom, Canada and New Zealand."

73. In the case of *R v Gum* [2007] SASC 311, Vanstone J said at paragraphs 28-30:

28 The general principle is that "evidence that reveals that the accused is a person of bad character is not admissible if it proves no more than that he or she has a general disposition or propensity to commit crime or crime of a particular kind": Pfennig v The Queen (1995) 182 CLR 461, per McHugh J at 512, citing Makin v Attorney-General (NSW) [1894] AC 57. Propensity evidence may be relevant because of the light it throws on any of a number of issues in a case. For example, it might assist in proving identity or intention, or in disproving accident or mistake or innocent association: Thompson v The Queen (1989) 169 CLR 1, 16.

> 29 It might achieve its purpose by reason of it bearing striking similarities with the offence for which the accused is on trial. But restricting its admissibility to cases of striking similarity gives too much weight to a particular manner of stating the principle and such expressions are not definitive: Director of Public Prosecutions v Boardman [1975] AC 421, 452-453; Director of Public Prosecutions v P [1991] 2 AC 447, 460-461; Pfennig at 478-484. It may show a pattern or system or underlying unity or inextricable connexion when viewed alongside the other conduct alleged: Moorov v H.M. Advocate (1930) J.C. 68, 73-74 per the Lord Justice-General (Lord Clyde); Thompson per Deane J at 32 and Gaudron J at 39-40. But the common thread running through all such descriptors is that the evidence must raise the improbability of the events having occurred other than as alleged by the prosecution: Hoch v The Queen (1988) 165 CLR 292, 295. The utility of such evidence has been described as allowing for "admeasuring the probability or improbability of a fact or event in issue ... given the fact or facts sought to be adduced": Martin v Osborne (1936) 55 CLR 367, 385.
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> 30 The sole criterion for its admission is the strength of its probative force: Hoch at 294, rather than any judgement that one or more of the above labels is apt to fit it. The degree of probative force required has been described as such that to exclude the evidence would be "an affront to common sense": Boardman at 456; and as such that it "clearly transcends its merely prejudicial effect": R v Perry (1982) 150 CLR 580, 609 per Brennan J; Phillips v The Queen (2006) 225 CLR 303, at 320 per the Court. The test though, in this country, is that its probative value or cogency must be such that "if accepted, it bears no reasonable explanation other than the inculpation of the accused person in the offence charged": Hoch at 294; Pfennig at 483; Phillips at 323.

74. For the above-mentioned reasons I rule that the evidence of the five "tendency witnesses" is not admissible and I therefore remove it from my considerations. Likewise, it follows that the questioning of the defendant in relation to other incidents in libraries at pages 22 to 25 of ExP1 (as set out in full above) must also be deleted from the evidence and removed from my deliberations.

75. I will proceed to decide the case on the remainder of the evidence. The prosecution has closed its case, and I find that the admitted evidence is sufficient to raise a case to answer. I will now hear from Ms McLaren as to whether the defendant wishes to give or call any evidence in the defendant's case.

Dated this 28th day of May 2008.

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Daynor Trigg
STIPENDIARY MAGISTRATE