Uncharged Acts or Discreditable Conduct[1]

Another Dilemma in Criminal Trials (a paper delivered by His Honour Judge Forde to a Bar Association Seminar, Banco Court , 15th July 2008.)

Introduction

1. **A preliminary reading of HML does produce some confusion. The head note in (2008) 82 ALJR 723 provides some assistance. It is useful if one makes some observations to put the case into context and to determine its importance. It is necessary to touch briefly on the facts. The accused was convicted in the South Australian District Court of two counts of unlawful sexual intercourse made up of one act of fellatio and one of anal intercourse in a period of a week with his nine year old daughter. The uncharged acts occurred in Victoria and consisted of sexual misconduct over five years. The accused could not be charged in South Australia with the offence of maintaining an unlawful sexual relationship based solely on the two charges. Such evidence of uncharged acts was previously relevant to show the nature of the relationship between the parties.[2] There is a plural view[3], which means in ordinary parlance, probably the majority, which suggests that to use the term "uncharged acts" is now an impugned view. The use of the term "discreditable conduct"[4] is more appropriate as not all "uncharged acts" are of a criminal nature and so subject to a charge being laid. Such evidence is relevant to show the "sexual interest" of the accused towards the complainant.[5] It is not intended to deal in any detail about the other cases of SB or OAE as the main issues are dealt with in HML. It is important to note that many of the difficulties discussed in HML can be overcome if the prosecution rely on the charge of maintaining an unlawful sexual relationship.[6] That charge may not be appropriate in some cases because of isolated incidents over a long period of time. HML thus has some importance in Queensland. It is intended also tonight to talk about the role of counsel in a criminal trial when legal issues need to be discussed before addresses.**

2. It is important to know that at the outset of a criminal trial, the prosecutor should be asked by the trial judge whether there are any uncharged acts to be part of the evidence and what the purpose is of such evidence, in other words

---

[1] HML v The Queen; SB v The Queen ; OAE v The Queen [2008] HCA 16 per Hayne J at [129] and [169]
[2] KRM v The Queen [2002] HCA 11, (2001) 206 CLR 221 at [31] per McHugh and [134] per Hayne j referred to by Gleeson CJ at [2] in HML [2008] HCA 16 and Heydon J at [330]
[3] [2008] HCA 16.
[4] Per Gleeson J at [1] and Kirby J at [46] and Gummow J at [41] who both substantially agreed with Hayne J at [129] and [169]
[5] Gleeson CJ at [7] describing it as motive; per Hayne J at [148] and [156] and Heydon J at [331]; Crennan J at [426]; Kiefel J at [493] and [512].
[6] S229B of Criminal Code; per Heydon J at [259].

its relevance. This evidence of other sexual conduct other than the conduct founding the charges being tried, may be relevant for more than one reason[7] A prosecutor must be aware if the complainant is to refer to other discreditable conduct. Most sex cases are subject to a preliminary hearing or pre-recording and so it should be obvious prior to the actual trial commencing before a jury. Not all such conduct is criminal and so cannot be described as an uncharged act, thus the change in terminology. In *HML* it was the purchase of a G string by the accused for his daughter. In a case I had recently it was the purchase of a raunchy book. Both items in the context of the cases were arguably part of the sexual attraction of the accused to the complainant.

3. It should not be thought that this discussion is confined to sex cases. On my last sittings at Bundaberg a father was charged with assaulting his two sons. There was a history of gratuitous discipline. As it involved a domestic situation, the evidence was admissible under the provisions of s 132B of the Evidence Act to show the nature of the relationship between the parties. S132A refers to the admissibility of similar fact evidence and collusion. Outside a domestic situation, a history of violence or discreditable conduct may be relevant to describe the attitude of an accused or the nature of the relationship to put the subject offences into context[8] It should be noted that *HML* seemed to be limited to sexual cases where consent was not an element[9].

The relevance of the *Pfennig*[10] Case.

4. Pfennig's case establishes the rule that governs the admission of evidence that will reveal an accused person's commission of discreditable acts other than those that are the subject of the indictment[11]. The charges in HML related to fellatio and intercourse by the accused with his daughter. The discreditable conduct related to a long course of sexual misconduct over five years. The

[7] HML v the Queen [2008] HCA 16 at [123] per Hayne J.
[8] See Wilson v The Queen (1970) 123 CLR 334; (1970) HCA 17; where evidence of the pre existing relationship was found to be relevant as it went to show the jurors were not to decide the case in a vacuum. This is discussed by Crennan J in HML at [428].
[9] [2008] HCA 16 per Hayne J at [102]. Reasons for doing so see Phillips v The Queen (2006) 225 CLR 303 at 317-318.
[10] (1995) HCA 7; (1995) 182 CLR 461, R v Phillips op cit 308.
[11] Per Hayne J at [113].

test for admissibility applying the Pfennig rule is "whether there is a rational view of the evidence that is consistent with the innocence of the accused[12]". Heydon J commented that various reasons were given for the admissibility of the evidence of uncharged acts (his terminology) but it included that the uncharged acts were capable of demonstrating that HML had a sexual attraction for his daughter and that this tended to provide an explanation as to why the offending in Adelaide where the charged acts may have occurred[13].

5. It followed, according to Heydon J, that the use of the uncharged acts went beyond supporting a motive to engage in sexual misconduct[14]. It showed a disposition to act on that motive, and to so do so nearly as frequently as opportunity permitted. This use of the evidence is not relevant only to the complainant's credit. It is relevant to the issue of whether the charged acts took place[15].
6. In an interesting aside, Heydon J said that circumstantial evidence is that kind of evidence of which uncharged acts is an example[16]. Gleeson CJ commented that Pfennig's case was a circumstantial case. He said that uncharged acts may be relied upon as evidence of motive i.e. the form of particular propensity involved in a sexual interest of a parent. In that situation, a warning should be given to the jury against employing it in that manner:

> Where, however, it is pursued, then the Pfennig reasoning, that is, reasoning about propensity as a circumstantial fact making more likely the offence charged, is in point.[17]

For completeness, it should be noted that Hayne J[18] stated

> **(t)he evidence of other conduct and events is tendered as circumstantial evidence of the kind described by Dixon J in Martin**

---

[12] Pfennig op cit at 483 and referred to by Hayne J at [106]. In Phillips, it involved propensity evidence within the category of similar fact evidence p 307 at 24.
[13] Per Heydon J at [264] for a description of the uncharged acts. See [256]
[14] Gleeson CJ at [5] and [7]- held that the uncharged acts or discreditable conduct were relevant to motive.
[15] Per Heydon J at [275].
[16] At [274].
[17] At [26]; for details of the NSW legislation which refers to motive; see [273] per Heydon J
[18] At [181].

v Osborne[19]" And it is because it is circumstantial evidence of that kind that the test in Pfennig is to be applied. The evidence of other events and conduct is tendered in proof of the charged acts.

In contrast, Crennan J found that the cases before the court were not circumstantial cases. She found that the uncharged acts in the three cases were similar fact evidence but that it was not led for that purpose. Her honour distinguished propensity evidence as discussed in Pfennig and the evidence of the uncharged acts before the High Court[20]. However both her honour[21] and Kiefel J[22] seem to accept that in the cases before them, that the sexual interest shown by the accused reflected the nature of the relationship and that the evidence of tendency, if proved, was admissible making it more likely that the accused committed the offences.

7. Gleeson CJ remarked that in *HML* and the other two cases before the High Court, the probative value of the evidence of the uncharged acts would have justified the Pfennig standard. Propensity warnings were given. Gleeson CJ suggests that in some cases fairness is best served by confining the evidence of uncharged acts to brief and general evidence that the occasion the subject of an alleged offence was not an isolated instance but part of a wider pattern and behaviour. In that event no separate question of a standard of proof arises unless it was an indispensable link in the chain of evidence necessary to prove guilt[23]. There may be cases where the nature of the uncharged acts is inconclusive.

8. It seems that both Gleeson CJ and Heydon J arrive at a similar position to that of Hayne J given the particular facts of the cases before them. For example, Hayne J commented that once the evidence was admitted it was capable of being used as a separate element in the course of reasoning towards guilt. That statement seems to receive support from Gleeson CJ[24] and Hayne J[25] In fact, Hayne J commented that where there are other sexual offences or discreditable conduct committed by an accused against the complainant, the test in Pfennig will usually be applied. It will be

[19] (1936) 55 CLR 367 at [375].
[20] At [456] and [457].
[21] At [426].
[22] At [512].
[23] Per Gleeson CJ at [29] and [31].
[24] At [29] and [31].
[25] At [169].

less likely to apply if the other conduct does not constitute a sexual offence e.g. buying a G string or raunchy book. If the evidence is admitted having satisfied the test in Pfennig, then it is a strong weapon in the prosecution case[26]. In effect, it can be used to show that the accused was guilty of other similar offences . If accepted the evidence of other discreditable conduct would show that this accused had used this complainant as an object of sexual gratification[27].

Standard of Proof

9. The nature of the directions which would then be required are set out in the judgment of Hayne J[28]. Once the discreditable conduct is used in that way, the jury should be directed that if they are satisfied beyond reasonable doubt that the other acts occurred that conclusion may help them in deciding whether the charges under consideration in the indictment are established. This standard was accepted generally by the Court where it is an indispensable link or admitted following the Pfennig test.[29]

General Propensity Warning

10. It may be difficult for a jury to distinguish between a specific propensity warning and a general propensity warning. In the past, where uncharged acts are part of the case, a warning is given that if the jury are satisfied that these other acts occurred, they should not reason that the accused is the type of person who commits this type of offence and "it would be wrong for you to reason that it is likely that he committed a charged offence or offences". That latter direction does not sit comfortably with the direction suggested by Hayne J[30] viz. that if the jury are satisfied of the discreditable conduct, "it is more likely that the accused did what is alleged in the charge under consideration". The problem has been averted to by Crennan J[31] and Hayne J[32]

[26] The proper approach is described clearly by Heydon J at [287].
[27] Per Hayne J at [178].
[28] At [131] and [132] and [133].
[29] Per Gleeson CJ at [29-32]; Kirby J at [61] and [81]; Gummow J at [41]; who agreed with Hayne J; Crennan J at [477]; Kiefel J at [506].
[30] At [132].
[31] At [467].
[32] At [201].

11. On the other hand, Heydon J held that the evidence of uncharged acts was similar fact evidence capable of showing the accused's disposition to assault his daughter sexually as a step towards proving his guilt of the charged acts. He distinguished between a general disposition which requires a warning and the specific propensity admissible to show that the accused committed the particular crime charge[33].

Observations on HML

12. To continue to talk about uncharged acts and their relevant to showing the nature of the relationship between the parties, may attract some criticism that such directions are "impugned[34]". Strangely, the trial judge's directions, although correct before and accepted in HML are now obsolete. Fortunately for the trial judge, he identified the use to which the evidence could be put and that included showing some sexual attraction of the accused towards the complainant. The trial judge also directed the jury that the uncharged acts, as they then were, should be proved beyond a reasonable doubt. The trial judge also gave a warning about using such uncharged acts as propensity on the part of the accused to show that he was someone who was likely to commit such offences. As the directions favoured the accused the appeals were dismissed. In fact, the prosecution, in an appropriate case, may rely on the discreditable or criminal conduct which is not charged to show a disposition to act on the part of the accused and to assist in the proof that the charged acts took place.

13. Maintaining a sexual relationship is in a different category[35]. In some indictments, the charged acts are the basis for proving the necessary relationship. Proof beyond a reasonable doubt of those acts are required and for any uncharged acts relied upon. Problems will arise in a maintaining case where there are many acts which are not specific yet relied upon by the prosecution. Theoretically, those uncharged acts may be the basis of the prosecution case under s 229B. Preferably, the relationship evidence should be confined to the charged acts. This allows the defence to be appraised of

[33] Per Heydon J at [345]: in Qld s229B of the Criminal Code is the relevant section.
[34] Per Hayne J at [236].
[35] See the remarks of Kirby J at [54-55]; Hayne J at [135] and Heydon J at [259].

the particulars. It is also consistent with the principle of procedural fairness referred to in S v The Queen[36]. It also makes the sentencing process more transparent if the actual charges are proved as distinct from an unknown number of uncharged acts.

14. I must say that I am more comfortable with the reasons in the judgment of Crennan J. Her honour limited the uncharged acts as explaining or making intelligible, the offences charged by providing a context which shows that they are part of continuing relations between the parties or that the uncharged acts are an integral part of the history of the offence charged[37]. The logic of Hayne J is difficult to fault save for the need for a general propensity warning. The evidence, once admitted, can be used for other purposes such as credibility and setting a context[38].

Defence Approach.

15. If the defence wish to avoid the consequences of a Pfennig type direction, then attention should be given to:

    a. The type of discreditable conduct

    b. The temporal connection between that conduct and the charged acts

    The type of discreditable conduct might be criminal in nature or just discreditable. For example, in HML, the purchase by the accused of a G string for his daughter might by itself be equivocal. In that event, it could not be said that the conduct was only consistent with guilt. The purchase of the raunchy book falls into the same category. However, if that conduct is also accompanied by an inappropriate touching, a more sinister view can be taken of the otherwise equivocal acts. In relation to the temporal connection between the discreditable conduct and the charged acts, it may be that inappropriate touching on the outside of the clothes (20) years before

[36] (1989) 168 CLR 266 at 271-272, 273-274,277; 281-282. Referred to in R v A [2002] QCA 536 per McPherson JA at [8].
[37] At [425].
[38] Per Hayne J with whom Kirby and Gummow agreed; Heydon J at [258]; Crennan J at [426] and Keifel J at [512-513].

before could not be particularly probative of say a rape 20 years down the track, absent any discreditable conduct in the interim. It may become a question of degree. The comments by Gleeson CJ that it might be unfair, in some cases, to detail the acts other than to say that there was general conduct over a period of time which was inappropriate. It then would fall short of the Pfennig test to allow a propensity direction. In some cases it may not meet the test that its value as probative evidence outweighs its prejudicial effect.

16. It is illustrative to look at the directions of the trial judge in HML. The evidence of other discreditable conduct viz sexual acts with his daughter the complainant over a period of time, was admitted on several grounds, some of which are now impugned by the HML majority reasoning .e.g. context, nature of the relationship. One test which did receive approval was that the conduct showed sexual attraction or interest of the accused in his daughter. A general propensity warning was given, that is, that the accused should not be considered as someone who was likely to commit the charged acts because of the other discreditable conduct. Finally, the standard of beyond reasonable doubt seems to have been accepted as required and the trial judge so directed. The Pfennig direction as illustrated in the judgement of Hayne J[39] was not given. If it had of been it would have favoured the prosecution. Therefore, it was decided that there was no prejudice to the accused as he got a more favourable direction than he was entitled to in view of the plural reasoning in HML. That approach of the trial judge in HML could be adopted in some cases where the nature of the evidence and its remoteness from the dates of the charged acts would not meet the Pfennig test. These issues may be determined by an appellate court in the near future.

General comments about the duty of counsel at trial

17. In the recent decision of *R v Ku and ors*[40] (The Aurukun sentencing case) some comments were made about the duty of counsel in the sentencing process. It is not intended to talk of the problems of sentencing in maintaining cases where the jury may not have greed on the same charges-

[39] At 132-133.
[40] (2008) QCA 154

some serious, some less serious and yet unknown to the court. In this paper, it is intended to touch upon a few issues which may assist you in your duties in a criminal trial. It is assumed for the purposes of this paper, that defence counsel, if they are aware of a wrong direction in the summing up, will jump to their feet and help the trial judge direct according to law. It is also intended to ignore those cases where new points are raised on appeal either by counsel or the appellate court. It is important that counsel discuss with the trial judge before the addresses any point which counsel feels should be raised in addresses .e.g. mistake of fact, lies out of court, a Robinson[41] direction that the jury ought to scrutinize the evidence of the complainant carefully or the more significant direction in Longman[42] that it would be dangerous to convict because of the long period between the dates of the alleged charges, inconsistencies in the complainants evidence and the lack of any evidence confirming the complainant's version of events. In one case that I had a number of years ago, the prosecutor addressed on a lie out of court as evidencing a consciousness of guilt. It had no been raised before he addressed. It was clearly relevant to credit only. I corrected the position when I summed up. The Court of Appeal said that I should have intervened during the address of the prosecutor and corrected the matter immediately. It is embarrassing for everyone to do so; therefore, any issues of that nature should be raised before addresses.

18. One issue which seems to produce its fair share of re-trials is mistake of fact. The High Court have recently held in CTM v The Queen[43] that even if the defendant denies that he has raped or had carnal knowledge of the complainant, the trial judge should direct on mistake of fact as to whether she consented or her age if it is raised on the crown case. In record of interview in CTM the accused said that the complainant told him she was 16 and he thought that she was in year 10 which she was not. He was 17 and in year 11. The evidential burden required for mistake of fact was not established by an out of court sworn statement. In Cutts case[44], I did not direct on mistake of

[41] (1999) 197 CLR 162.
[42] (1989) 168 CLR 79.
[43] (2008) HCA 25 at [38] as per Gleeson CJ, Gummow, Creenan,Keifel JJ
[44] (2005) QCA 306.

fact where the defendant denied he had digitally raped the complainant. Such a direction was not sought at trial by the defence. However, the evidence in that case was very thin. The accused was a maxi taxi driver and a complete stranger to the complainant who relied upon taxis as she was in a wheel chair. The accused went inside her unit and asked if he could use her toilet. The accused demanded that the complainant who was physically and intellectually impaired bring her chair closer. This was, according to one appeal judge, who was in the minority sufficient to raise an honest and reasonable belief in the accused that she might be consenting. She had already rejected his advances The appeal was dismissed. In another case, there was expert testimony that the accused had problems understanding ordinary speech and would often respond inappropriately. The trial judge failed to direct the jury of the chronic paranoid schizophrenia from which the accused suffered and that it may be relevant to his honest and reasonable belief. A mistrial was declared[45]

19. Defence counsel should press for a direction on mistake of fact if it is raised in an arguable way even on the crown case. Also, if as counsel you feel that the judge may have overlooked an issue e.g *Markuleski* v *R*[46] direction that if the jury do not accept the evidence of the complainant on one charge, they are entitled to take it into account in considering the other charges. In a trial which I dealt with in Bundaberg recently, the original trial judge had left a sentence out of his summing up where the defendant had not given evidence. One successful ground of Appeal was that he had failed to mention that where a defendant had not given evidence, it should not be used to shore up the crown case or bolster the crown case[47] The problems of directions in maintaining cases was discussed in R v WO.[48]

20. As a trial progresses, the red lights should come on as to the issues that you require the judge to sum up or which you know he or she should sum up on. It does counsel no credit to sit quietly on an appeal point which may have been overlooked by the judge in a summing up. I trust that these comments

[45] R v Dunrobin [2008] QCA 116
[46] [2001] NSW CCA 290; also see R v LR (2005) QCA 368 at [67].
[47] R v Schneiders [2007] QCA 210 at [25]
[48] (2006) QCA 21.

tonight will allow you to approach your next criminal trial in a more analytical manner and allow you to fulfil your duty to your client and your duty to the court. R v Liebke[49] is a helpful case when discussing the role of counsel and a judge in a criminal trial.

[49] (2006) 230 CLR 559.