DISTRICT COURT OF QUEENSLAND

CITATION:	*R v DJM* [2020] QDCPR 19
PARTIES:	**THE QUEEN** (respondent) **v** **DJM** (applicant/defendant)
FILE NO/S:	Indictment No 500 of 2018
DIVISION:	Criminal
PROCEEDING:	s 590AA application
COURT:	District Court, Maroochydore
DELIVERED ON:	7 April 2020
DELIVERED AT:	Maroochydore
HEARING DATE:	23 January 2020
JUDGE:	Long SC, DCJ
ORDER:	**Count 1 is to be tried separately to the other counts on the indictment.**
CATCHWORDS:	SEXUAL OFFENCES – COUNTS AGAINST MULTIPLE COMPLAINANTS – JOINT OR SEPARATE TRIALS – SIMILAR FACT EVIDENCE – Where the defendant is charged with sexual offences of a similar type committed on separate occasions against two complainants – Whether the evidence is cross-admissible between counts – Whether separate trials be conducted in respect of the charges against each complainant – Admissibility of tendency or propensity evidence
COUNSEL:	AJ Kimmins for the applicant GJ Cummings for the respondent
SOLICITORS:	McMillan Criminal Law for the applicant Office of the Director of Public Prosecutions for the respondent

Introduction

[1] By indictment presented on 4 December 2018, the defendant is charged with 12 sexual offences. Count 1 charges an offence of indecent treatment of a child under 12, in respect of the female complainant G. The remaining counts charge offences in respect of the female complainant A, being nine offences of indecent treatment of a child under 12 (counts 3-10 and 12) and two offences of digital rape (counts 2 and 11).

[2] The defendant makes application for a ruling that count 1 be tried separately to the remaining counts.

[3] It is alleged that, as charged in counts 1 through 6, the defendant offended when she was aged approximately 12 to 20 years, between 1 June 2003 and 29 June 2011. Accordingly, for those counts, her potential liability is in respect of a "child offence" as defined in the *Youth Justice Act* 1992 ("*YJA*"). However and pursuant to s 140(1) of the *YJA* this proceeding is to be taken against her "as if [she] were an adult at the time of the commission of the child offence" and if found guilty she must be sentenced as an adult. Although, in such circumstances it may be noted that s 144 of the *YJA* will apply and require the court to have regard to:

> "(a) the fact the offender was a child when the child offence was committed; and
> (b) the sentence that might have been imposed on the offender if sentenced as a child."

[4] In respect of the complainant A, the offences are alleged to have occurred when she was aged between 4 and 10 years and the defendant aged between 14 and 20 years and as a consequence of the relationship between their respective families, particularly as developed through a common church connection or association. The allegation of rape in count 2, is an allegation that the defendant removed the child's nappy when she was aged 4 or 5 and licked her genitals and inserted her tongue into her vagina. In respect of count 11, the allegation is as to digital penetration of the child's vulva when she was aged 9 or 10 years. In respect of the remaining counts the allegation in each is as to touching or rubbing the child, particularly in the area of her genitals.

[5] As to count 1 and in respect of the complainant G, it is alleged that she was aged 11 and the defendant approximately 12, when the offence occurred. The description of which is provided to the Court, as follows:

> "The complainant slept over at the defendant's house on two occasions. On the first occasion she slept in the bedroom of the defendant's younger sister, [M].
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> On the second occasion she slept in the defendant's room in a double bed with her. They turned off the light to go to sleep and the defendant asked her what 'stage' she had gotten to with someone. She replied that she knew the 'holding hands stage' and the 'kissing stage' but was not sure what the others were.
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> The defendant told her about the other 'stages', then rolled over onto the complainant so that they were face to face. She had one leg in between the complainant's leg and one leg over her right leg and she rubbed her vagina up and down on the complainant's vagina.
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> The defendant moved off to the side slightly and rubbed her vagina on the complainant's leg for a while. The complainant did not know what to do and 'froze'. When she was finished she rolled over onto her side and went to sleep."

The Principles

[6] It was effectively uncontentious that this application was to be approached on the basis of the well-established principles that:

(a) Pursuant to s 567(2) of the *Criminal Code*, the joinder of more than one indictable offence in the same indictment depends upon the application of a test that the "charges are founded on the same facts or are, or form part of, a series of offences of the same or similar character or a series of offences committed in the prosecution of a single purpose";

(b) There is a requirement of "nexus" in addition to the requirement of "similar character" between the offences, in the sense of "a feature of similarity" which in all the circumstances enables the offences to be described as a series and which requires the application of "a test in which time, place and other circumstances of the offences as well as their legal character or category are all factors which are considered for the purpose of seeing whether the necessary features of similarity and connection are present";[1]

(c) In *R v Collins; ex parte Attorney-General*,[2] having regard to the evident underlying policy of the section in allowing the joinder of

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1 *R v Cranston* [1988] 1 Qd R 159 at 164.

2 [1996] 1 Qd R 631, McPherson JA and Lee J at 637.

charges which may be "properly and conveniently dealt with together", it was observed to be "obviously desirable both in the interests of the due and expedient administration of criminal justice and in the interests of finality of litigation in relation to the particular accused, that there be a single and final inquiry into matters which arise out of or which essentially involve common issues of fact or law";

(d) Although not required for there to be such sufficient nexus, in cases where the evidence relating to the joined allegations is cross-admissible in proof of the other allegations, the necessary nexus is established;[3]

(e) However and in cases involving allegations of sexual misconduct, it is recognised that, in the absence of such cross-admissibility that the potential for impermissible prejudice from inappropriate reliance on inadmissible evidence, is usually such as to warrant an order for severance,[4] pursuant to s 597A of the *Criminal Code*;

(f) Despite the decision in *Hoch v The Queen*,[5] sections 597A(1AA) and 132 of the *Evidence Act* 1977 have effect to prevent the Court from having regard to the potentiality of concoction or suggestion as undermining the potential probative value of the evidence of the complainants, in the application of that test; and

(g) The test to be applied to determining whether the evidence is cross-admissible is established in *Pfennig v The Queen*,[6] in terms that:

> "[T]he basis for the admission of similar fact evidence lies in its possessing a particular probative value or cogency such that, if accepted, it bears no reasonable explanation other than the inculpation of the accused in the offence charged. In other words, for propensity or similar fact evidence to be admissible, the objective improbability of its having some innocent explanation is such that there is no reasonable view of it other than as supporting an inference that the accused is guilty of the offence charged".

And as later emphasised in *Phillips v The Queen*:[7]

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3 Cf: *R v MAP* [2006] QCA 220 at [37].

4 See *Phillips v The Queen* (2006) 225 CLR 303 at [7]; *De Jesus v The Queen* (1986) 61 ALJR 1 at 3; 68 ALR 1 at 4-5; and *Hoch v The Queen* (1988) 165 CLR 292 at 294. Cf: *R v McNeish* [2019] QCA 191 at [72].

5 (1998) 165 CLR 292.

6 (1995) 182 CLR 461 at 481.

7 (2006) 225 CLR 303 at 320-321.

> "... The 'admission of similar fact evidence… is exceptional and requires a strong degree of probative force'. It must have 'a really material bearing on the issues to be decided'. It is only admissible where its probative force 'clearly transcends its merely prejudicial effect'. '[I]ts probative value must be sufficiently high; it is not enough that the evidence merely has some probative value of the requisite kind.' The criterion of admissibility for similar fact evidence is 'the strength of its probative force'. It is necessary to find 'a sufficient nexus' between the primary evidence on a particular charge and the similar fact evidence. The probative force must be 'sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused'. Admissible similar fact evidence must have 'some specific connection with or relation to the issues for decision in the subject case'…" (citations omitted).

[7] Such principles are also noted in *R v McNeish*[8] ("*McNeish*"), a decision particularly relied upon by the prosecution. For the defendant, specific reference was also made to:

(a) The following observations of McMurdo P, in *R v PV*; *ex parte A-G*:[9]

> "Section 567(2) *Criminal Code* would ordinarily appear to permit joinder of counts in such circumstances because the charges form part of a series of offences of the same or similar character. But because of the special potentiality for prejudice in trials of sexual offences[10] the charges can only be joined if the acts constituting the charge or charges involving one complainant would be admissible on the trial of the charge or charges concerning the other complainant: *Hoch v The Queen*.[11] The evidence of each complainant would be admissible on the trial of the offence or offences concerning the other only if there was no reasonable view of the evidence other than as supporting an inference that the respondent was guilty of the offence or offences charged: *Pfennig v The Queen*.[12] In other words, the evidence will only be admissible if, when considered with the whole of the prosecution evidence, (assumed as truthful and reliable), it is reasonably capable of excluding all innocent hypotheses: *R v O'Keefe*[13]; and

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8 [2019] QCA 191.
9 [2004] QCA 492.
10 *De Jesus v The Queen* (1986) 68 ALR 1.
11 (1988) 165 CLR 292.
12 (1995) 182 CLR 461, Mason CJ, Deane and Dawson JJ, 482-483.
13 [2000] 1 Qd R 564, 573.

(b) The observations of Kirby J in *HML v The Queen*[14] (also made in reference to the decision in *De Jesus v The Queen*):

> "It is therefore the duty of courts, and of prosecutors, to ensure the fairness of the trial, especially so because accusations of criminal offences against children are specially likely to arouse feelings of prejudice and revulsion in the community which will normally be shared by jurors."

[8] The prosecution submission is to seek particular support for its position as to the cross-admissibility of the evidence relating to all counts on the indictment, "by reference to the restatement and application of those principles" in *McNeish*.[15] In that regard, the prosecution submission noted that the difference in "alleged conduct is the most substantial part of the present application"[16] and having so noted, then sought to draw attention to passages in *McNeish* to the effect of pointing out that differences as to the particular acts that constitute different offences may not detract from the cogency and cross-admissibility of such evidence.[17]

[9] The decision in *McNeish* may be noted to proceed in substantial reference to the decision of the High Court in *Hughes v The Queen* ("*Hughes*"),[18] and further noted that the majority decision in *Hughes* proceeded not only upon the application of the test in s 97 of the *Evidence Act* 1995 (NSW) but also and in contrast to the dissenting judgments, upon the basis that the test of "significant probative effect" in that statutory provision, did not involve or incorporate the test and approach adopted under the common law, in *Pfennig v The Queen* ("*Pfennig*").[19] As noted by McMurdo JA in *McNeish*, it has been recognised by the High Court that such legislation "has made substantial changes to the common law rule, resulting in a test of admissibility which is less demanding".[20]

[10] However, it is also to be noted that the majority approach in *McNeish* was to regard aspects of the plurality approach in *Hughes* as nevertheless "equally applicable under the common law".[21] It was then observed that the first consideration is to identify the

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14 [2008] HCA 16.
15 Prosecution written submissions at 3.1.
16 Ibid at 3.4.
17 See *McNeish* at [40].
18 (2017) 263 CLR 338.
19 (1995)182 CLR 461.
20 *R v McNeish* [2019] QCA 191 at [79], with reference to *IMM v The Queen* (2016) 257 CLR 300 at 311 [35]; [2016] HCA 14 at [35]; *Hughes v The Queen* (2017) 263 CLR 338 at 347 [13]; [2017] HCA 20 at [13]; *R v Bauer* (2018) 92 ALJR 846 at 861-2 [52]; [2018] HCA 40 at [52].
21 At [48].

factual issue sought to be proved by the evidence, or as was exemplified by reference to *Hughes*, the tendency of the defendant which is sought to be identified.[22] Secondly, "having identified the tendency, it is necessary to decide whether the evidence, if accepted, would prove that tendency".[23] And it was then further stated:

> "[51] *Third*, it is necessary to consider whether the evidence of the uncharged acts, if accepted, contains some feature which links the doing of the uncharged acts with the charged offence by reference to a particular issue in the case, whether that is identity, the issue of the commission of the offence or some other issue. That feature may demonstrate a tendency to act in a particular way, proof of which increases the likelihood that the account of the offence under consideration is true. That was the case in *Hughes*, in which proof that the accused was an adult of mature years who had a sexual interest in girls under 16 years of age and a willingness to act upon that interest by committing uncharged sexual offences against such girls opportunistically, in circumstances involving a high risk of detection, tended to make the commission of that particular offence more probable.
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> [52] *Fourth*, and finally, it is necessary to consider whether the probative force of the evidence, upon the assumption that the jury will accept it, is sufficient to overcome its prejudicial effect. In this context, "prejudicial effect" is constituted by the use of the evidence, by the jury, for an impermissible purpose. It would be impermissible for a jury to use evidence of uncharged acts to reason that, because the accused is a discreditable person, the accused is guilty or is deserving of conviction irrespective of guilt. It would be impermissible for a jury to reason that, because the accused is guilty of one offence then the accused must be guilty of the charged offence. Other cases will present the potential for other kinds of impermissible reasoning. In every case it is the risk of such impermissible reasoning that is the relevant "risk of prejudicial effect" that must be considered against the probative value of the evidence." (citations omitted)

[11] The fourth requirement is a reference to the application of the *Pfennig* test,[24] and subsequently in the judgment, it is observed:

> "[56] Probative force is another way to refer to the weight of evidence. Evidence is relevant if it makes a fact in issue either more or less probable. Weight of evidence, or probative value, is the degree of probability generated by the evidence. Evidence will have a prejudicial effect if there is a risk that the jury might use the evidence against the accused in a logically irrational manner. In *Pfennig*, McHugh J remarked that probative value and prejudicial effect are incommensurables. That is to say, they have no common

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22 Ibid.
23 At [49].
24 Ibid at [36].

> standard of comparison. McHugh J observed that the real question that is posed is not whether probative value "outweighs" prejudicial effect but whether the interests of justice require the evidence to be admitted despite the risk of its misuse. Whether it is called a weighing of probative value against the risk of prejudice to the accused or whether it is called a consideration of the interests of justice, the task remains the same. The need to decide this issue is one of the many familiar, if difficult, tasks that trial judges have to perform by considering relevance to particular identified issues, cogency, the nature of the risk of an impermissible path of reasoning to guilt and whether directions can alleviate or remove such risks. The decision is not a discretionary decision; it is a decision about a matter of law." (citations omitted)

[12] Notably, no issue is raised as to joinder of the several counts relating to the complainant A and therefore, in respect of the application at the principles to be derived from the decision in *HML v R*[25], as confirmed in *R v Bauer*,[26] and in respect of cross admissibility in proof of a defendant's sexual interest in a single complainant and preparedness to act upon that interest. In the majority judgment in *McNeish* and after noting the requirement of satisfaction of the "Pfennig test" for the admission of evidence of other offending or misconduct in proof of any particular allegation, it was observed:

> "[37] When the Pfennig test is applied to evidence that the accused has committed uncharged sexual offences against a single complainant, the test will usually, if not invariably, be satisfied because there can be no rational explanation for the accused's uncharged acts, which for this purpose the judge must assume the jury will accept happened, other than guilt. In short, their tendency as proof, if accepted, is unequivocal. That is why, as McHugh J pointed out in *Pfennig*, "day after day in the criminal courts" evidence of propensity is led to prove other acts between the accused and the complainant.
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> [38] In *R v Bauer*, a unanimous High Court decided that, in cases decided under the propensity evidence provisions in the *Evidence Act* 2008 (Vic) and its analogues in other States, there is no requirement that there be "some special feature" of the evidence of uncharged acts involving a single complainant. In Queensland, despite the test for admissibility requiring a higher threshold under the applicable common law, the same reasoning applies.
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> [39] In cases about uncharged acts against persons other than the complainant the position is different. In multiple complainant cases the evidence must have "a really material bearing on the

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25 (2008) 235 CLR 334.

26 (2018) 359 ALR 359.

> issues to be decided" or have a "sufficient nexus" with the evidence on the charged offence. As the Court put it in *Bauer*, the logic of probability reasoning dictates that there must ordinarily be some feature that links the two sets of evidence together. This is because usually the fact that an accused has committed an offence against A proves nothing about whether the accused committed the same offence against B.
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> [40] However, in sexual offence cases, it is not necessary that the *particular acts* that constitute the uncharged offences and the particular acts that constitute the charged offence be of the same kind. Evidence of uncharged sexual offences may be relevant and highly cogent even if the acts that constitute those offences are different from the charged offence."

[13] Further to such considerations, the applicant draws attention to the decision of the High Court in *McPhillamy v The Queen* ("*McPhillamy*"),[27] as to a decision made subsequently to that in *Hughes* and indicative of a different outcome as to an application of the "significant probative value" test in s 97(1) of the *Evidence Act* 1995 (NSW).

[14] In the context of a test which is to be applied as a matter of law or application of principle, whether prescribed by statute or pursuant to the common law, and rather than an exercise of discretion,[28] it may be usefully noted that the appeal in *McPhillamy* was allowed and a retrial ordered in respect of six counts of sexual offending against an 11 year old altar boy in the public toilets of the St Michael and St John's Cathedral, Bathurst, on two separate occasions between 1 November 1995 and 31 March 1996, upon a conclusion as to the wrongful admission and use of tendency or propensity evidence given by two men, B and C, and described in the plurality judgment, as follows:[29]

> "[6] "B" and "C" each gave evidence that he was a boarder at St Stanislaus' College, Bathurst ("the College") in 1985. Each had turned 13 in that year. At the time, the appellant was an assistant housemaster at the College. "B" said that on an occasion when he was homesick and upset he had gone to the appellant's bedroom. The appellant cuddled him and this progressed to him rubbing "B"'s genitals. On a second occasion, the appellant approached "B" as "B" stood naked by his locker after showering. The appellant "grabbed both my arse cheeks and tried to, you know, separate them so to speak". This did not last long because "B" "gave him a

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27 (2018) 361 ALR 13.

28 See paragraph [11], above, and *Pfennig v R* (1995) 182 CLR 461 at 478 and 483.

29 Per Kiefel CJ, Bell, Keane and Nettle JJ, ibid at [6]-[7].

mouthful". "B" later received a caning for swearing at the appellant.

[7] "C" gave evidence of an occasion when he too had been homesick and upset and had visited the appellant in the appellant's room. The appellant massaged "C"'s shoulders and back. The massage progressed to the groin area and in the course of it, the appellant touched "C"'s genitals. On a subsequent occasion, the appellant massaged "C", who was again feeling homesick. On this occasion "C" fell asleep on the appellant's bed and woke to find the appellant kneeling beside him with his head near "C"'s groin. "C" felt a sensation of wetness around his penis. He got up and left the room. About a week later, the appellant apologised, saying that he had done the wrong thing and that he could be in a lot of trouble for it."

The tendency or propensity alleged to be demonstrated by the appellant was "to, by his conduct, demonstrate a sexual interest in male children in their early teenage years who were under his supervision".[30] Such tendency was contended to be probative of the allegations made by A and as summarised as being and made in the following circumstances:[31]

"[4] "A" gave evidence that on a Saturday night before mass, the appellant had followed him into the toilet and masturbated in front of him. He had encouraged "A" to masturbate and he had briefly touched "A"'s penis as he demonstrated how to masturbate. The appellant had ejaculated. After this, the appellant and "A" left the toilet and the service commenced. The remaining offences occurred a few weeks later. On a Saturday night before mass, the appellant again followed "A" into the toilet, where he masturbated in front of him, encouraged "A" to masturbate and commenced to manually stimulate "A"'s penis. The appellant then said that he would show "A" "something even better" and he performed oral sex on "A". After this, the appellant required "A" to perform oral sex on him. Shortly after commencing to do so, "A" began to gag and cry. The appellant comforted him and they left the toilet together. Later the appellant told "A" that he was "sorry that it had gone that far".

[5] "A" did not report these assaults to anyone. He said that the appellant had told him that he, "A", was gay and that he needed to be careful because "everybody would turn against me". "A" made his first complaint about these assaults in April 2010 when he approached the Professional Standards Office of the Catholic Church seeking compensation. In a signed complaint, "A" falsely stated that the appellant had anally penetrated him on the second occasion. "A" later

30 Ibid at [13].
31 Ibid at [4]-[5].

agreed to accept $30,000 from the Church by way of compensation. The Professional Standards Office forwarded "A"'s complaint to the police. In November 2012 "A" made a statement to the police. In that statement, "A" volunteered that his earlier allegation of anal penetration was false. At the trial, "A" agreed in cross-examination that he had been aware that the appellant had been charged with sexual offences against boys at the time he made his complaint to the Professional Standards Office." (citations omitted)

[15] The conclusion of the plurality was expressed as follows:

"[27] Proof of the appellant's sexual interest in young teenage boys may meet the basal test of relevance, but it is not capable of meeting the requirement of significant probative value for admission as tendency evidence. Generally, it is the tendency to *act* on the sexual interest that gives tendency evidence in sexual cases its probative value. The tendency on which the prosecution relied was to act on the appellant's sexual interest in male children in their early teenage years who were under his supervision. The evidence demonstrating that tendency was confined to "B"'s and "C"'s evidence of events that occurred in 1985. As Meagher JA noted, there was no evidence that the asserted tendency had manifested itself in the decade prior to the commission of the alleged offending against "A".

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[30] *Cox* was concerned with the *relevance* of the evidence of the earlier conviction. It may be accepted that the evidence that the appellant had acted on his sexual interest in young teenage boys on the occasions with "B" and "C" is relevant to proof that he committed the offences alleged by "A", but it is not admissible as tendency evidence unless it is capable of significantly bearing on proof of that fact. In the absence of evidence that the appellant had acted on his sexual interest in young teenage boys under his supervision in the decade following the incidents at the College, the inference that at the dates of the offences he possessed the tendency is weak.

[31] Moreover, where, as here, the tendency evidence relates to sexual misconduct with a person or persons other than the complainant, it will usually be necessary to identify some feature of the other sexual misconduct and the alleged offending which serves to link the two together. The suggested link in this case is the appellant's tendency to act on his sexual interest in young teenage boys who were under his supervision. The supervision exercised by the appellant as assistant housemaster in 1985 over vulnerable, homesick boys in his care has little in common with the supervision exercised in his role as acolyte over "A", an altar boy, when the two were at the Cathedral for services in 1995-1996. The evidence does not suggest that "A" was vulnerable in the way that "B" and "C" were vulnerable. The tendency to take advantage of

young teenage boys who sought out the appellant in the privacy of his bedroom is to be contrasted with "A"'s account that the appellant followed him into a public toilet and molested him.

[32] "B"'s and "C"'s evidence established no more than that a decade before the subject events the appellant had sexually offended against each of them. Proof of that offending was not capable of affecting the assessment of the likelihood that the appellant committed the offences against "A" to a significant extent. It rose no higher in effect than to insinuate that, because the appellant had sexually offended against "B" and "C" 10 years before, in different circumstances, and without any evidence other than "A"'s allegations that he had offended again, he was the kind of person who was more likely to have committed the offences that "A" alleged. The tendency evidence did not meet the threshold requirement of s 97(1)(b) of the Evidence Act. This conclusion makes it unnecessary to address the submissions respecting s 101(2) of that Act." (citations omitted)

[16] Edelman J, whilst agreeing with the plurality reasoning, added some additional reasons, which emphasised the lack of sufficient linkage of the evidence of B and C to proof of the alleged offending against A, and by comparison with the *Hughes* decision, his Honour observed:

"[34] In *Hughes v R*, in the same context as this appeal, involving tendency evidence being led to establish the commission of the offence rather than the identity of the offender, the majority said:

> "The assessment of whether evidence has significant probative value in relation to each count involves consideration of two interrelated but separate matters. The first matter is the extent to which the evidence supports the tendency. The second matter is the extent to which the tendency makes more likely the facts making up the charged offence."

[35] As to the first matter – the extent to which the evidence supports the tendency – the jury were directed that the alleged tendency of the appellant was to act in a particular way that demonstrated "a sexual interest in male children in their early teenage years who were under his supervision". The evidence of "B" and "C" provided some support for the appellant having that tendency at the time of trial. It assisted to establish that the appellant had a state of mind involving a sexual interest in early teenage male children under his supervision and a willingness to act upon that state of mind. But that support was not strong. Unlike in *Hughes*, where the tendency evidence was also expressed in reasonably general terms, the evidence in this case was given only by two witnesses. Their

evidence involved two incidents that occurred a decade before the date of the alleged offences against "A".

[36] As to the second matter – the extent to which the tendency makes more likely the facts making up the charged offence – the tendency was expressed at a high level of generality. The reference to supervision was as a matter of context: it was not alleged that the appellant had a tendency to abuse his authority over children in any particular way, such as taking advantage of the homesickness of "B" and "C", in order to facilitate acts of the nature of the alleged offending. Nor was it alleged that the appellant had a tendency to act impulsively with a risk of detection. Nor was it alleged that the acts, or their circumstances, bore any similarity to the alleged offences, other than as demonstrating a sexual interest in early teenage boys. The tendency was described no more specifically than "acting" upon the appellant's sexual interest in early teenage male children under his supervision."

The Contentions

[17] It is in this context that the prosecution submission is that:

"The evidence of each complainant demonstrates a particular tendency by the female defendant to have a sexual interest in pre-pubescent girls within the circle of family friendship shared by both complainant families and action to give vent to that interest corresponding to the opportunities within that circle of family friendship:

- As stated previously, it is an unusual or even striking feature, based on the scarcity of appellate cases involving a similar defendant, that the defendant was not only a female, but a female of young age from juvenile to young adult acting consistently on sexual attraction or interest towards both complainants as females of younger age then herself. It might be distinguished from the situation of an adult male defendant, and for that matter, a feature that exceeds even what might be argued to be the aggressive sexual proclivities of a male youth or 'entirely unremarkable' similarity. That she was a young female would also have added to the trust the complainant families had in her with respect to the complainants in the context of family friendships within a conservative religious community.

- Both complainants were pre-pubescent girls. It is acknowledged that [G] was approximately 11 years of age, while [A] ranged from 4-5 years of age to 9-10 years of age (the latter of course being closer to the corresponding age of [G] at the time of the offence against her). Of course, it is also acknowledged that there was a different age disparity between the defendant and [G] (approximately one or two years) then between the defendant and [A] (approximately 10 years). However, that age disparity is consistent with the particular tendency and action to give vent to it as submitted by the respondent, reflecting as it

> does the greater opportunity for offending with respect to [A] and the more embolden action (and evolution from more exploratory action with a girl of similar age) by the defendant as she grew older in the same circle of family friendship.
>
> - The opportunity for the offences against both complainants arose from the same, indeed mutual, circle of family friendships – itself within a narrow parochial community of very idiosyncratic religious denomination…and place of worship in the small regional town of Gympie.
> - As in *Hughes* and *McNeish*, the defendant was secure enough in her position as a young female within the family friendship to consistently offend even when others, including responsible adults, were present and there was a real risk of discovery, albeit more so with respect to the offences involving [A].
> - Although there is the variant in the number and nature of offences, to the extent that it matters, there is the same focus on the vaginal or genital area for both complainants.
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> …….

The significant probative force of the evidence stems from the objective improbability that two pre-pubescent girls from the same narrow religious community and even narrower mutual circle of family friendships would, without colluding, each falsely allege that the young female applicant engaged in sexual activity towards them in those similar surrounding circumstances. The applicant seeks to avoid this significant probative force by focussing instead upon the differences, particularly in degree, in the specific offending acts, and the age disparity between the defendant and the complainants, but this demonstrates a similar flaw of argument as in *McNeish* that it misconceives what is meant in the *Pfennig* test. The misconception arises because the probative force of the similar fact evidence is assessed in isolation when its force should actually be assessed in conjunction with the whole of the evidence.

In respect of each complainant, the evidence about the other complainant compellingly increases the probability of the complainants being true, a probability of which the jury would otherwise be unaware – the similar fact evidence does not specifically aid in proof of the details of the sex offending which is proved by other relevant prosecution evidence.

The significant probative value with the similar fact evidence so enhances the collective force of the relevant prosecution evidence as to leave no reasonable view of the similar fact evidence consistent with innocence."

[18] The effect of the contentions for the applicant is that, as demonstrated by the approach of the court in *McPhillamy*,[32] the prosecution contention as to the use and probity of the evidence, as between the allegations of the separate complainants, here amounts to no more than the impermissible use of mere tendency or propensity evidence, in the sense of no more than potential proof that the applicant is the type of person who is more likely to commit offences of the type alleged. In other words, and whilst the evidence might have such relevance, it is not capable of satisfying the requirement of having specific or particular relevance to the proof of the other alleged offences, because it does not have capacity to make the commission of any particular other offence more probable by having specific connection with or relation to the issues for decision,[33] or to satisfy the test for admissibility in order to overcome the prejudicial effect of potential for misuse of the evidence.[34]

Discussion

[19] The decision in *McPhillamy* is useful in gaining further understanding of the approach taken by the High Court in *Hughes* and as far as that approach was adopted in the reasoning in *McNeish*. In particular that:

(a) The recognition of inappropriateness, in cases involving reliance on tendency or propensity reasoning to establish the commission of an offence or offences, of simple reliance upon to the extent of similarity or disimilarity of "operative context",[35] is not to deny the appropriateness of examination of the broader perspective or context or features of the alleged offending; and

(b) It remains most appropriate to do so, in order to determine the feature or features of the alleged conduct "which serves to link the two together";[36] and

(c) Thereby establishing more than that the alleged offender "was the kind of person who was more likely to have committed the alleged offences".[37]

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32 Reference was also made to *R v Nibigira* [2018] ACA 115.
33 See *Pfennig* at [485] and *McNeish* at [51].
34 *McNeish* at [52] noting that here it is the application of the "Pfennig test", rather than the test of "significant probative effect" which was applicable in the *Hughes* and *McPhillamy* decisions.
35 See *McNeish* at [44].
36 *McPhillamy* at [31]; citing *Hughes* at [64] and *Bauer* at [58].
37 *McPhillamy* at [32].

[20] In comparison to two particular contextual features noted in *McPhillamy*, there is not a similar dislocation of temporal connection to the allegations joined in this indictment.[38] However there may be similar observation levelled at the generality of the prosecution specification of the tendency or propensity said to be identified by the evidence.[39] Moreover, what is apparant are similar difficulties as to the identification of:

(a) Proof of even the generally asserted tendency or propensity; and
(b) Any sufficient feature linking the evidence in any sense of cross-admissibility in proof of the commission of other offending.

And of course, such considerations are necessarily antecedent to any ultimate consideration of the test for admissibility, in terms of assessment of the strength of probity of the evidence in order to overcome the prejudicial effect of potential misuse of the evidence.[40]

[21] Such difficulties, let alone the absence of any sufficient cogency in order to satisfy the test of admissibility in overcoming the prospective prejudicial effect of the evidence, may be particularly seen in the marked difference in comparison of the broader perspective or context of the conduct the subject of count 1, being in the nature of sexual exploration by the applicant with a similarly aged female friend, about 11 or 12 years of age, as opposed to allegations of her directing sexual attention to an appreciably younger child, an age difference of approximately 10 years and from the age of approximately 4 years. Neither is there any particular commonality of notion of trust in association with the respective complainants, and particularly difficult to discern any such consideration as a feature of the offending alleged in count 1. Nor any particular significance in noting that all of the allegations disclose an orientation of the applicant to female homosexuality, from an early age.

Conclusion

[22] It should therefore be concluded that the evidence relating to count 1 is not admissible in proof of the remaining counts on the indictment, and vice versa. And therefore appropriate to order that there be a separate trial in respect of count 1 on this indictment.

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38 At least on the basis that the offending in count one is alleged to have occurred between 1/6/03 and 1/6/04 and count two may be understood as being alleged to have occurred earlier rather than later, in the period between 28/6/05 and 29/6/11.

39 See *McPhillamy* at [35].

40 See *McNeish* at [48] – [52].