IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B 76 of 2010

BETWEEN:

BBH
Applicant

And

THE QUEEN
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Publication certificate

1. These submissions are in a form suitable for publication on the Internet.

Part II: The issue

2. A person is charged with maintaining a sexual relationship (a "relationship offence") and a number of specific sexual offences with a child complainant.

3. A witness, other than the complainant, can give evidence of another occasion within the period of the relationship capable of constituting a sexual act between the applicant and complainant.

4. First, to be admitted, does that evidence have to satisfy the test in *Pfennig v. The Queen* (1995) 182 CLR 461? If it does, then secondly, does the evidence fail the test because, if viewed in isolation, one could speculate that there is an innocent explanation for it?

Part III: Section 78B of the Judiciary Act 1903 certificate

5. No notice should be given pursuant to s 78B of the *Judiciary Act 1903.*

Respondent's Submissions
Filed on behalf of the respondent on 1 July 2011
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Form 27D
Rule 44.03.3

Part IV: Facts

6. In relation to paragraphs nine and 10 of the applicant's submissions the following circumstances surrounding what the complainant's brother W observed during a family camping trip should be added. W, who was approximately 11 years old, left the campsite to go on a tractor ride that everybody was supposed to be on. He realised that he had left behind a pocketknife that he had received as a Christmas present. When he returned unexpectedly to the campsite to get his pocketknife he saw his 12 year old sister bent over as if touching her toes and undressed from the waist down. The applicant had his hand on her waist and his face was close to her bottom. W did not interrupt them but turned around and, without retrieving the pocketknife, went back to join the others. W never mentioned the incident until many years later when the police investigated the complaint by his sister.

7. Contrary to the claim in paragraph 19 of the applicant's submissions Keane JA did not cite *O'Leary v. The Queen* (1946) 73 CLR 566 as support for the finding in [41] that W's evidence was relevant because it established the maintaining offence. He cited *O'Leary* as supporting the finding in [40] that evidence was relevant "because it was apt to render more intelligible and credible allegations which otherwise might be seen to be unintelligible and incredible in terms of the usual relationship between father and daughter."

Part V: Statutory material

8. The applicant's statement of applicable statutes is accepted.

Part VI: Argument

9. The evidence did not have to satisfy the *Pfennig* test because it was relevant and admissible to prove the relationship offence pursuant to s. 229B of the Code; to explain the nature of the relationship so the jury could evaluate the credibility and intelligibility of the complainant's evidence; and it was capable of supporting part of the complainant's evidence. If the *Pfennig* test did apply then there was no reasonable view of the evidence, in the context of the whole of the prosecution case, which was consistent with innocence.

10. The applicant was convicted on an indictment that contained one count of maintaining an unlawful sexual relationship with his daughter (the complainant), a child under the age of 16 years, pursuant to s. 229B of the *Criminal Code* (the Code) between 3 July 1989 and 31 March 1999, four counts of indecent treatment of a child defined in s. 210 of the Code and four counts of sodomy defined in s. 208 of the Code alleged to have been committed within that period.

11. The complainant gave direct evidence of the acts the subject of the specific charges and of other acts where the applicant regularly digitally penetrated her vagina, performed cunnilingus on her and sodomised her, including when on family camping trips: T 42.48, 53.2 & 64.51.

12. The Crown led evidence from W of one specific occasion, on such a camping trip, when he returned unexpectedly to the campsite to see the complainant bent over as if touching her toes and undressed from the waist down. The applicant had his hand on her waist and his face was close to her bottom. They were unaware of his presence and W did not disturb them and walked away. In cross-examination, W agreed that what he saw was consistent with the applicant looking for an ant or bee sting.

13. The applicant gave evidence denying the alleged conduct.

14. The applicant objected to the admission of W's evidence on the basis that it was inadmissible because the complainant did not remember it occurring: T 3.50 - 4.10 & 65.30 - 66.10.

15. The Crown contended that the evidence of W was relevant and admissible because:

(1) it was evidence of an act capable of constituting an offence of a sexual nature in proof of the relationship of a sexual nature in s. 229B; and

(2) it demonstrated a "guilty passion".

16. The trial judge admitted the evidence because it was relevant to place the alleged conduct in context by showing that the applicant had a sexual interest in the complainant: at T 66.25.

17. The trial judge made clear to the jury that the evidence could only be used to support the evidence of the complainant (T 175.15), warned against impermissible propensity reasoning (T 163.10) and directed the jury in relation to the limited way they could use W's evidence at T 167.25-168.20:

> *"That evidence has been called by the prosecution because they say it is evidence of the relationship between the complainant and the accused and part of the background against which evidence of their conduct or the accused's conduct falls to be evaluated, that it gives you a true and realistic context which will assist you in deciding whether the complainant's evidence against the accused in respect of the charges is true. Put another way, they say it's evidence capable of establishing the guilty passion or the sexual interest by the accused in the complainant, or by proving an unnatural or unexpected relationship of sexual intimacy between the father and the daughter.*
>
> *But before you can use it in that way you must be satisfied of these things: first of all, you must be able to satisfy that it's honest evidence, so that the mother is telling the truth about it, what she saw, or that [W] is telling the truth, is being honest about it. That it's reliable. That they haven't been mistaken about it, that they are accurate about what they saw. Then you must be satisfied that what it was that they saw does show a sexual interest, you know, an unnatural or unexpected natural interest by father and daughter and that it doesn't have an innocent explanation. If you were satisfied of those things, then the prosecution say the existence of the relationship demonstrated by those incidents helps you evaluate and decide that the complainant's evidence is true. They are not charges in themselves, that's the way in which the evidence is sought to be used."* (See also T 175.10).

18. The applicant contends that there should be a re-trial in this matter because W's evidence was wrongly admitted, as it had to satisfy the common law "no rational explanation" test in *Pfennig* and the evidence would have failed that test. The applicant relies on *Pfennig*, *Phillips v. the Queen* (2006) 225 CLR 303 and *HML v. The Queen* (2008) 235 CLR 334. However, those three cases did not involve an indictment charging a statutory relationship offence like s. 229B of the Code.

19. This Court considered the elements constituting the relationship offence in s. 229B of the Code in *KBT v. The Queen* (1997) 191 CLR 417; and whether a "propensity warning" was required when evidence was led to prove the relationship in an equivalent section in *KRM v. The Queen* (2001) 206 CLR 221.

20. Section 229B was introduced into the Code in July 1989 by s. 23 of the *Criminal Code, Evidence Act and Other Acts Amendment 1989* (Qld) and, up to 3 July 1997, it relevantly provided that:

10 *"229B.(1) Any adult who maintains an unlawful relationship of a sexual nature with a child under the age of 16 years is guilty of a crime and is liable to imprisonment for 7 years.*

(1A) A person shall not be convicted of the offence defined in subsection (1) unless it is shown that the offender, as an adult, has, during the period in which it is alleged that the offender maintained the relationship in issue with the child, done an act defined to constitute an offence of a sexual nature in relation to the child, other than an offence defined in section 210(1)(e) or (f), on 3 or more occasions and evidence of the doing of any such act shall be admissible and probative of the maintenance of the relationship notwithstanding that the evidence does not

20 *disclose the dates or the exact circumstances of those occasions.*

(1B)……

(1C)……

(1D)……

(2) A person may be charged in 1 indictment with an offence defined in subsection (1) and with any other offence of a sexual nature alleged to have been committed by the person in the course of the relationship in issue in the first mentioned offence and the person may be convicted of and punished for any or all of the offences so charged.

(2A)……

30 *(3)……"*

21. Section 229B of the Code was amended on 4 July 1997 by s. 33 of the *Criminal Law Amendment Act 1997* (Qld) which was in effect until 31 March 1999 but the amendments are not material to the issue of the admissibility of the evidence of W.

22. In *KBT* it was held by Brennan CJ, Toohey, Gaudron and Gummow JJ at p. 422 that:

> *"The offence created by s 229B(1) is described in that sub-section in terms of a course of conduct and, to that extent, may be compared with offences like trafficking in drugs or keeping a disorderly house. In the case of each of those latter offences, the actus reus is the course of conduct which the offence describes. However, an examination of sub-s (1A) makes it plain that that is not the case with the offence created by s 229B(1). Rather, it is clear from the terms of sub-s (1A) that the actus reus of that offence is the doing, as an adult, of an act which constitutes an offence of a sexual nature in relation to the child concerned on three or more occasions."*

23. Section 229B of the Code permits the admission of relevant evidence of the relationship. In *KRM* Kirby J said at p. 256 [102]-[103]:

> "Relationship offences and particularity: *Although I have called the offence with which the appellant was charged in count 18 of the presentment a "relationship offence", this Court made it plain in KBT that proof of the elements of the offence requires the jury to be agreed as to the commission of the same three or more acts constituting offences of a sexual nature committed against the child in question. Beyond proof of these elements, necessary to establish the offence , it is also essential that the jury be agreed, to the requisite standard, that the accused has maintained a "sexual relationship with a child under the age of sixteen".*
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> *As Pincus JA pointed out in R v Kemp [No 2], the very nature of a "relationship" tends to open up, as relevant, evidence of a general kind concerning the behaviour of the accused towards the complainant alleged to be in the "relationship". Where the relationship in question is a criminal one, involving a child of the specified age, proof of its existence will depend, in large part, upon acceptance of the evidence of the complainant. But it may also depend, as in this case, upon evidence from the complainant's mother or other family member or proof of facts from which a "guilty passion" can be inferred and from which the existence of the "relationship", as contemplated by the Act, may be deduced."* (Citations omitted)

24. The fact in issue in the trial was whether there was a relationship of a sexual nature between the applicant and complainant and the applicant acted on that as alleged.

25. In the joint judgment of French CJ, Hayne, Crennan and Kiefel JJ in *Roach v. The Queen* (2011) 85 ALJR 558 they said at p. 561 [12] that "the first requirement which must be fulfilled, for evidence to be admissible, is that it be relevant".

10 26. Evidence is relevant "if it could rationally affect, directly or indirectly, the assessment of the probability of the existence of the fact in issue in the proceeding" and "explain a statement or event that would otherwise appear curious or unlikely": see Gleeson CJ in *HML* at p. 351 [5] and [6] and Crennan J at p. 477 [423].

27. The joint judgement in *Roach* accepts at p. 561 [13]: "as Gleeson CJ observed in *HML v. The Queen*, evidence may be relevant if it assists in the evaluation of other evidence."

28. The act that W observed was capable of being indecent treatment of a child
20 defined in s. 210 of the Code and relied on as an act in proof of the relationship offence. This was not a case where the act would not constitute a criminal offence for example, like the purchase of lingerie in *HML* at p. 384 [111] and p. 399 [172]-[175].

29. To determine the relevance and admissibility of the evidence it must be viewed in the context of the whole of the evidence in the setting of the prosecution case and on the assumption that the evidence of the complainant and W would be accepted as true: see *Roach* at p. 565 [35] and *HML* per Hayne J at p. 385 [118].

30. Any criminal act viewed in isolation may be amenable to a number of innocent
30 explanations. In this case W conceded in essence, when viewing the act in isolation, he could speculate that the applicant was looking for a bee sting or ant bite.

31. However, there was no evidentiary basis for that scenario because the applicant denied the act ever happened: see T 75.25 & 118.35. It is not incredible or

unreasonable, given the long course of alleged sexual conduct, that the complainant does not remember the incident. No doubt if the 12 year old complainant were stung in such a tender area requiring the intimate assistance of her father neither would have forgotten such an extraordinary and remarkable event. W's reaction to what he saw does not suggest he thought it was innocent.

32. The evidence is not to be viewed in isolation. When W's evidence is viewed in the context of the whole of the evidence in the prosecution case, as Keane JA said at [41], "the suggestion that the appellant was looking for an ant bite or bee sting might well have been thought to strain credulity too far".

33. In any case, Keane JA, with whom Holmes JA and Lyons J agreed, was correct to find at [41] that W's evidence of the specific act was relevant to establish the maintaining offence. Consequently, as is clear from *KRM* and from what Pincus JA said in *R v. Kemp (No. 2)* [1998] 2 Qd R 510 at pp. 512-513 the evidence did not have to satisfy the "no reasonable view" test in *Pfennig* because the "evidence of such other sexual acts may be admitted in direct to proof of the relationship alleged" under s. 229B of the Code.

34. The fact that the judge did not direct the jury that they could use W's evidence as proof of the maintaining offence count was unduly favourable to the applicant and demonstrates that there is no substantial miscarriage of justice.

35. At common law relevant evidence is admitted unless an exclusionary rule operates to exclude it. The general rule is that the prosecution may not adduce evidence of other misconduct on the part of the accused, if that evidence shows that the accused had a propensity to commit crime or the offence in question, unless the evidence is sufficiently highly probative of a fact in issue to outweigh the prejudice it may cause: see *Roach* at p. 562 [14].

36. The joint judgement in *Roach* states at p. 561 [11] that "the rule in *Pfennig* operates as an exclusionary rule with respect to similar fact evidence tendered for a particular purpose": see also p. 564 [28] and p. 565-566 [39].

37. In *Pfennig* the Crown relied on a piece of evidence from a witness other than the victim as a similar fact or as evidence of a propensity which was an indispensable link in proof of the offence. The evidence, without which there was no case, was used to prove the offence. In that case a majority of this Court refined the general rule and held that the evidence would have to satisfy the more stringent "no rational explanation" test because that is the test the jury would have to apply to the evidence: at p. 483.

38. The evidence of W did not have to satisfy the "no rational explanation" test because it was not to be used as a similar fact or as evidence of a propensity in proof of the specific offences as in *Pfennig*. The Crown relied on the direct evidence of the complainant to prove the elements of each offence.

39. *HML* was a fundamentally different case to the present one. *HML* did not involve a relationship offence (see Kirby at pp. 365-366 [55], p. 371 [63] and Heydon J at pp. 419-420 [259]) and considered the admissibility of evidence by the complainant of other non-specific acts of discreditable conduct in relation to specific sexual offences. The decision in *HML* does not hold that the *Pfennig* "no rational explanation" test applies in all circumstances where evidence is led which reveals criminal or discreditable conduct.

40. In the joint judgement in *Roach* at p. 566 [41]-[42] it was said that:

> *"In* HML v The Queen, *Gleeson CJ observed that it is necessary to consider Pfennig in its context. It was a case about the fact of propensity as circumstantial evidence in proof of the offence charged. It was not a case involving evidence that happened to show propensity. In such a case, if the evidence has other, sufficient, probative value, it may be necessary to give directions to the jury as to its specific use. If evidence is admissible on one issue, the fact that it may be logically, but not legally, relevant to another issue does not render it irrelevant and therefore inadmissible on the first issue.*
>
> *The purpose of the evidence in Pfennig may be contrasted with that for which the evidence in question was tendered in the present case. Here the complainant gave direct evidence both of the alleged offence and of the "relationship" evidence. The*

latter evidence, which included evidence of other assaults, was tendered to explain the circumstance of the offence charged. It was tendered so that she could give a full account and so that her statement of the appellant's conduct on the day of the offence would not appear "out of the blue" to the jury and inexplicable on that account, which may readily occur where there is only one charge. It allowed the prosecution, and the complainant, to meet a question which would naturally arise in the minds of the jury."

41. Gleeson CJ also said in *HML* at p. 357 [22]:

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"McHugh J pointed out in KRM *at 228-233 [20]-[30] that this Court assumed in* Gipp v The Queen *(1998) 194 CLR 106 that evidence of relationship that simply explains other evidence that directly implicates the accused, could not be subject to the "no rational explanation" test."*

42. Evidence of the kind in this case was admissible if it explains the nature of the relationship between the applicant and complainant or makes it more probable that the charged acts occurred (see *R v Bond* [1906] 2 KB 389 at p. 401; *Wilson v The Queen* (1970) 123 CLR 334 at pp. 338-9, 344 and *B v The Queen* (1992) 175 CLR 599 at pp.
20 601-602, 608, 610, 618.) and which tends to show that the applicant is guilty of the offence charged: see *R v Ball* [1911] AC 47 at p. 71 and *O'Leary v The Queen* (1946) 73 CLR 566 at pp. 574,575, 577-8, 582.

43. The direct independent evidence of W relating to the single act was admissible without having to satisfy the *Pfennig* test, because it was capable of confirming or supporting part of the evidence of the complainant: see *BRS v The Queen* (1997) 191 CLR 275; *R v Zorad* (1990) 19 NSWLR 91 at 103; *R v. Kerim* [1988] 1 Qd R 426 and *R v. Sakail* [1993] 1 Qd R 312.

30 44. Keane JA, with whom Holmes JA and Lyons J agreed, was correct to find that the evidence was relevant and admissible because:

- at [41] *"it tended to establish the maintaining offence"*;

- at [39] it *"was relevant to the issue of whether there was a sexual attraction on the part of the appellant to the complainant, to show the relationship that existed between the parties, and to provide the context in which the particular charged offences occurred."*;
- at [40], citing *O'Leary, "it was apt to render more intelligible and credible allegations which otherwise might be seen to be unintelligible and incredible in terms of the usual relationship between father and daughter."*; and,
- at [51] and [57], it was capable of affording support for the complainant's evidence.

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45. The evidence was also admissible because it allowed the prosecution to meet an obvious question that would have naturally arisen in the minds of the jury: see *Roach* at p. 566 [42] and *HML* per Kiefel J at p. 502 [513]. That is, did any family member observe any such behaviour during the course of the alleged relationship?

46. In any event, the evidence of W, when viewed in the context of the whole of the prosecution case, satisfies the stringent test in *Pfennig* because there is no reasonable view of it consistent with innocence: see *HML* per Hayne J at p. 399 [171].

20 47. Finally, any risk of undue prejudice in the form of the jury misusing the evidence, was dealt with by the judge correctly directing the jury to consider each count separately (T 148.50 - 150.30), not to engage in impermissible propensity reasoning and limiting the use to which the evidence could be put to supporting the evidence of the complainant. Importantly, the jury acquitted on some counts.

Part VII: Notice of contention or cross appeal

48. Not applicable.

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Dated: 1 July 2011.

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