

1 (Unrevised)
2 (Her Honour Judge Gaynor)

3 R U L I N G

4 HER HONOUR: The accused man faces 14 charges alleging various
5 sexual assaults upon eight complainants contained in the
6 one indictment. The defence seeks severance of that
7 indictment between all eight complainants. The
8 prosecution seeks a joint trial involving all
9 complainants and in support of his application seeks to
10 adduce evidence of tendency and coincidence.

11 Section 170 of the Criminal Procedure Act states
12 the charges on an indictment must be heard together
13 unless an order is made under s.193 of that Act. Section
14 193(1) allows a court to order separate trials if, for
15 the purposes of this case, pursuant to s.193(3)(a) if
16 contended an accused may be prejudiced by being so
17 charged; or (c) for any other appropriate reason.
18 Section 194(2), however, states that despite the
19 provisions of s.193 and any rule to the contrary, if two
20 or more charges for sexual offences are joined in the
21 same indictment, it is presumed those charges will be
22 heard together. Section 194(3) states the presumption is
23 not merely rebutted because evidence on one charge is
24 inadmissible on another charge.

25 In summary in its Notice of Tendency evidence, the
26 prosecution seeks to prove tendency by the accused to (a)
27 act in a particular way, that is to offend sexually
28 against young boys he had access to including students at
29 the school in which he taught by various methods which
30 was outlined; and (b) to have a particular state of
31 mind, namely a sexual interest in boys aged between 12

1 and 16 who are away from their families to whom he could
2 obtain access alone and then act on that interest by
3 sexually offending against them in various ways.

4 Likewise, in summary in its Notice of Coincidence
5 Evidence, the prosecution seeks to prove that it was not
6 a coincidence that the accused, a Catholic priest and
7 teacher at a Catholic boarding school, used various
8 similar methods to obtain the attendance of students to
9 his office where he would sexually assault them. Tables
10 outlining the evidence relied upon by the prosecution in
11 support of each application were attached. That evidence
12 also includes testimony of uncharged acts by a witness X,
13 who was the complainant in a case heard in the Melbourne
14 Magistrates' Court in 1992 where the accused was
15 convicted of three charges of indecent assault and
16 imprisoned for 24 months.

17 In his application for severance, defence counsel
18 submits a joint trial would carry a high risk of
19 prejudice to the accused essentially, as I understand it,
20 because of a jury's difficulty in complying with
21 appropriate directions relating to tendency and
22 coincidence evidence and because the accused's ability to
23 effectively challenge evidence of sexual offending by a
24 total nine witness would be compromised by sheer weight
25 of numbers. He submitted the tendency and coincidence
26 evidence sought to be relied upon by the prosecution did
27 not have the necessary significant probative value
28 required for its admission. This was because of the fact
29 that near all the offending took place at a particular
30 school provided no more than environment setting for the
31 alleged offending which was not orchestrated by the

1 accused and he submitted that precursors to the alleged
2 abuse were varied, as was the form of the alleged
3 offending and hence revealed no pattern of behaviour or
4 distinctive behaviour.

5 He submitted that a nine year gap in time between
6 the allegations contained in Charges 1 to 5 and offences
7 6 to 14 reduce the probability that the accused was
8 driven by the same tendency at each stage. He submitted
9 the complainant in Charges 1 and 2 stood in a separate
10 category as he did not meet the accused through the
11 school attended by the other complainants, was not
12 alleged assaulted by him there and was never taught by
13 him and the alleged sexual offending was different to
14 other offending alleged. He also opposed use of X's
15 evidence submitting it described sexual behaviour
16 distinctly different to that alleged by other
17 complainants, noting there was also a question as to
18 whether X was 16 at the time and capable of consenting.

19 Pursuant to s.97(1)(b), s.98(1)(b) and s.101(2) of
20 the Evidence Act 2008, evidence of tendency and
21 coincidence is not admissible unless it has significant
22 probative value and if adduced by the prosecution in
23 criminal proceedings, unless the probative value of the
24 evidence substantially outweighs any prejudicial effect
25 it may have. Tendency evidence may be used by a jury to
26 infer that an accused person has a tendency to behave in
27 a particular way and/or to have a particular state of
28 mind, thus making it more likely he committed an alleged
29 offence. Coincidence evidence comprises two or more
30 events containing similarity in the events themselves, or
31 in the circumstances surrounding them and may be used by

1 a jury to decide it is improbable the events occurred
2 coincidentally and thus inferred the witnesses are
3 telling the truth. Both are forms of circumstantial
4 evidence.

5 I turn now to the alleged offending. It spanned a
6 17 year period from 1973 to 1990. All the complainants
7 bar one were students at a Catholic boys secondary
8 college either as day boys or boarders. Charges 1 to 5
9 cover the years 1973 to 1977. Charges 6 to 14 cover the
10 years 1987 to 1990. It is conceded that in the
11 intervening gap the accused was not posted at the
12 college.

13 Complainant A met the accused, who was then eight
14 years older than he, when he was about eleven or twelve
15 and the accused aged seventeen or eighteen, and was in
16 his final years of school and a friend of A's older
17 sister.

18 His allegations comprise two charges indecent
19 assault on a male. The first, Charge 1, was alleged
20 touching by the accused of A's groin over his clothes at
21 the movies, which they attended together some time in
22 1973 or '74.

23 The second, Charge 2, allegedly occurred in 1975 or
24 '76 when A was on a school day retreat at a catholic
25 college where the accused was training to be a priest.
26 The accused allegedly saw A, invited him into his
27 bedroom, talked to him about sexual feelings, pulled out
28 A's penis, masturbated it and at the same time pulled out
29 his own penis and masturbated that.

30 Thereafter all the complainants were students at
31 the Catholic secondary boys college where the accused was

1 ultimately vice-principal and where all the other alleged
2 offending occurred.

3 Charge 3, indecent assault on a male between
4 January and June 1975 involved Complainant B, a 12 year
5 old, Year 7 boarder. One morning boys in his dormitory
6 were ordered, four at a time, to a room at the end of the
7 dormitory, wearing only a singlet and underpants for a
8 medical examination. In the room with the accused and
9 two other priests they were ordered to look straight
10 ahead, pull their underpants to their knees, and the
11 accused allegedly walked to A, grabbed hold of his penis,
12 held it up and fondled his testicles for about 60
13 seconds.

14 Charges 5, and 4 and 5, indecent assault on a male
15 in 1977, involves C, a Year 10 boarder at the school,
16 aged 15 or 16, who fell asleep on a school infirmary bed
17 where he was sent in the late afternoon after taking an
18 antihistamine for a bee sting. He was woken by a group
19 of students brought into the infirmary by the accused,
20 allegedly, who forced them to drink one or two mugs of
21 Milo, which C found tasted strong and acrid, so drank
22 only part of one, hiding his mug. Lights were turned out
23 and C fell asleep and woke, feeling groggy, hearing a boy
24 in another bed crying out, "What are you doing?", and,
25 "I'll tell my parents what you are doing", while the
26 accused stood over him, threatened him verbally and made
27 him drink another Milo after which the boy went quiet.

28 The accused then allegedly went around the beds
29 where other boys slept, lifting blankets and making
30 comments like, "You've got a small dick". At C's bed he
31 pulled back blankets, allegedly masturbated C's penis

1 with his hands under his pyjamas, ran his fingers over
2 C's bottom and anus, squeezed his testicles and penis
3 hard together, saying words such as, "You're useless",
4 presumably because C's penis did not become erect, then
5 punched him in the stomach. According to C another
6 priest came in as the accused was lifting blankets on the
7 beds and told him he must resist. The accused replying,
8 God had made him that way and that the other priest was
9 the same as him.

10 Excuse me, have we got the - yes, it was charges 4
11 and 5 - sorry, Charge 6, indecent assault in 1987
12 involved D, a 14 year old day boy at the college who
13 reported to the accused's office one afternoon to hand
14 him school work during a week's suspension from school.
15 The accused allegedly invited him to play a game on his
16 computer then leaned over him to open a drawer containing
17 lollies and cigarettes, asking if he liked anything
18 there. As D then stood up the accused allegedly grabbed
19 him on the testicles through his clothes and leaned in as
20 if to kiss him. D told the accused to "fuck off",
21 punched him and ran from the room, rode home and told his
22 parents. They went to the school and were told D should
23 leave the college.

24 Charge 6, indecent assault of 1987 allegedly
25 occurred one night at the school in the accused's bedroom
26 where E, aged 15 to 16 and a Year 10 boarder, habitually
27 went to drink Scotch and smoke cigarettes with the
28 accused at his invitation after lights out. The accused
29 was then the college deputy principal, who looked after
30 the Year 10 and 11 dormitory. That evening the accused
31 and E allegedly drank three quarters of a bottle of

1 Scotch together, E becoming drunk and lying on the
2 accused's bed, again at the accused's invitation.

3 The accused then allegedly sat on the bed, rubbed
4 his leg over his clothes, moving higher, eventually
5 rubbing his penis over his jeans. "E" jumped up and ran
6 out avoiding the accused thereafter.

7 Charge 7, indecent assault, in 1988 involved "F" a
8 12 year old, Year 7, border who allegedly went to the
9 accused's office to play games on the computer at about
10 10.00 pm one night at the accused's invitation. After
11 about 20 minutes, the accused allegedly offered "F" a
12 lemonade drink which "F" drank straight down as he was
13 thirsty. He then felt dizzy and fell asleep waking in a
14 foetal position on the floor by the desk feeling pain in
15 his anus and discovered the accused on top of him
16 allegedly pushing his penis in and out of his bottom but
17 could not move from under the accused.

18 He allegedly felt the accused ejaculate after about
19 10 seconds. The accused climbed off and "F" ran straight
20 from the office back to his dormitory where he lay
21 crying. He was thereafter unable to defecate and the
22 following weekend went home and was taken by his mother
23 to the doctor for constipation and given suppositories at
24 the consultation according to the doctor's report
25 occurring on May 16, 1988.

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