SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCR 2010 0026

P N J

Applicant

v

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

JUDGES	MAXWELL P, BUCHANAN and BONGIORNO JJA
WHERE HELD	MELBOURNE
DATE OF HEARING	23 February 2010
DATE OF ORDER	31 March 2010
DATE OF JUDGMENT	21 April 2010
MEDIUM NEUTRAL CITATION	[2010] VSCA 88

EVIDENCE – Admissibility – Criminal proceedings – Coincidence evidence – Whether sufficient degree of similarity – Whether significant probative value – Whether court must consider possibility of concoction or contamination – Coincidence evidence inadmissible – *Evidence Act 2008* (Vic) s 98.

CRIMINAL LAW – Appeal – Interlocutory appeal – Admissibility of evidence – Nature of appeal – Whether appellate court should decide for itself whether evidence admissible – *R v Zhang* (2005) 227 ALR 311, *L v Tasmania* (2006) 15 Tas R 381, considered.

CRIMINAL LAW – Appeal – Interlocutory appeal – Judge's certificate – Decision concerns admissibility of evidence – Cross-admissibility relevant to severance – Decision affects conduct at trial – *Criminal Procedure Act 2009* (Vic) – s 295(3)(a), (b).

Appearances:	Counsel	Solicitors
For the Applicant	Ms S Leighfield	Victoria Legal Aid
For the Crown	Mr G S C Silbert SC with Mr J S Bessell	Mr C Hyland, Solicitor for Public Prosecutions

MAXWELL P
BUCHANAN JA
BONGIORNO JA:

1 The applicant has been presented on 14 counts of sexual assault against teenage boys, ranging from buggery to indecent assault of a male, and also on three counts of common assault. The offending is alleged to have occurred between 24 March 1965 and 27 January 1967 at a Youth Training Centre in the eastern suburbs ('the Centre'). The accused worked at the Centre in a supervisory role as a youth officer and the complainants were residents.

2 Each of the complainants was, at the time of the alleged offending, between about 14 and 16 years of age. They are now men in or approaching their sixties. The applicant is now aged 79.

3 As part of its case the Crown gave notices pursuant to ss 97 and 98 of the *Evidence Act 2008* (Vic) ('EA') that it intended to lead both 'tendency' and 'coincidence' evidence against the accused on his trial. The leading of such evidence requires a pre-trial determination of the admissibility of the evidence sought to be relied upon. Argument was heard by the trial judge, Judge Coish, on the Crown's application and on 9 February 2010 his Honour ruled that the coincidence evidence sought to be led was admissible. He determined that the tendency evidence was not admissible, however.

4 Counsel for the applicant then sought a certificate from the judge, pursuant to s 295(3)(a) of the *Criminal Procedure Act 2009* (Vic) ('CPA'), to enable an interlocutory appeal to be brought to this Court against the decision on coincidence evidence. His Honour granted that certificate. (We deal with the question of the certificate later in these reasons.) After hearing argument on the application for leave to appeal, we reserved our decision. On 31 March 2010, we announced that leave to appeal would be granted and the appeal allowed; the ruling in respect of the coincidence evidence was set aside and we ruled instead that the evidence was inadmissible.[1] We said we would publish our reasons subsequently. These are those reasons.

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1 CPA s 300 (2)(b)(i).

The coincidence notice

5 As regularly occurs in sex offence cases, the prosecution wished to conduct a single trial in which evidence of each of the complainants would be cross-admissible. In the present case, it was contended, the evidence of each of three complainants (C, F and P) was admissible against the applicant in relation to the counts based on the allegations made by each other complainant.

6 The coincidence notice served by the prosecution under s 98 EA identified, as the 'two or more events' sought to be proved, the various sexual acts alleged by each complainant to have been committed by the applicant. According to the notice, the evidence would be adduced to prove that the applicant did 'the particular acts' alleged by each other complainant and that he had 'a particular state of mind', namely, that he did so intentionally.

7 As the trial judge recognised, the effect of s 98(1) EA was that the evidence could not be admitted unless the Court was satisfied that

> having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it [was] improbable that the events occurred coincidentally.

8 The touchstone of admissibility under s 98(1) is similarity. And the degree of similarity must be such as to render the evidence of *significant* probative value, either by itself or having regard to other evidence to be adduced by the prosecution.[2] In *CGL v Director of Public Prosecutions*,[3] in which the same issue arose on an interlocutory appeal, the prosecution conceded that the correct approach to assessing the probative significance of asserted similarities was to be found in the judgment of Winneke P in *R v Papamitrou*.[4] That was, of course, a pre-*Evidence Act* decision. In the present case, counsel for the applicant pointed out that the New South Wales Court of Criminal Appeal had likewise treated pre-*Evidence Act* learning on this issue as instructive.

9 Counsel cited what was said by Simpson J (with whom McClellan CJ at CL agreed) in

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2 Section 98(1)(b).

3 [2010] VSCA 26 ('*CGL*').

4 (2004) 7 VR 375 ('*Papamitrou*').

R v Fletcher,[5] as follows:

> 59 It is true that in the determination of criminal charges, for policy reasons, the common law steadfastly resisted, except in rare instances, the use of evidence of criminal acts other than the acts the subject of the charges. For example, in *Hoch v The Queen* … the majority of the High Court held:
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> > Assuming similar fact evidence to be relevant to some issue in the trial, the criterion of its admissibility is the strength of its probative force: … that strength lies in the fact that the evidence reveals 'striking similarities', 'unusual features', 'underlying unity', 'system' or 'pattern' such that it raises, as a matter of common sense and experience, the objective improbability of some event having occurred other than as alleged by the prosecution.
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> 60 While the concluding words of that passage are not entirely apposite to the present issue *(being more apposite to a consideration of what is now called coincidence evidence),* the substance of the passage is. The strength of the evidence tendered by the prosecution as tendency evidence lay in its capacity to establish the objective probability of the truth of the complainant's account of the appellant's conduct. *The evidence of GG was capable of lending support to the allegations made by the complainant by reason of striking similarities, underlying unity, system or pattern.* Of course, decisions such as *Hoch* no longer govern the admissibility of evidence of tendency (see *Ellis*). But that does not necessarily render cases such as *Hoch* irrelevant. *There is no reason why the reasoning that led the High Court to accept the admissibility of similar fact evidence in appropriate cases before the enactment of the Evidence Act should not guide the reasoning process in the evaluation of whether tendered evidence is capable of having, or would have, significant probative value.*[6]

10 Although the Court was there dealing with tendency evidence rather than coincidence evidence, what was said is clearly pertinent to the current task. This is especially so given that Simpson J described what was said in *Hoch v The Queen*[7] as being apposite to the consideration of coincidence evidence. Like her Honour, we do not regard the adoption of this approach as in any way inconsistent with what the New South Wales Court of Criminal Appeal said in *R v Ellis*.[8]

11 As the High Court stated in *Hoch*,[9] the probative value of evidence of this kind –

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5 (2005) 156 A Crim R 308.

6 Ibid 322. *Hoch* was relied on for the same purpose in *AE v R* [2008] NSWCCA 52: see [26] below.

7 (1988) 165 CLR 292 ('*Hoch*').

8 (2003) 58 NSWLR 700.

9 (1988) 165 CLR 292.

> lies in the improbability of the witnesses giving accounts of happenings having the requisite degree of similarity unless the happenings occurred.[10]

Their Honours cited the well-known passage from the speech of Lord Wilberforce in *R v Boardman*,[11] as follows:

> This probative force is derived, if at all, from the circumstance that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by experience and common sense, either all be true, or have arisen from a cause common to the witnesses or from pure coincidence.[12]

12 As the authorities make clear, there is no single criterion for determining whether the asserted similarities are sufficient to render the evidence of 'significant probative value'. The decision in *Papamitrou*[13] made clear (as had the High Court in *Pfennig v The Queen*[14]) that it is not necessary to demonstrate 'striking similarity'. In *Papamitrou*[15] Winneke P went on to say that it was 'of little consequence' whether the asserted similarities were said to provide an 'underlying unity' or a common 'modus operandi' or a 'pattern of conduct'.[16]

The asserted similarities

13 In *CGL*,[17] the prosecutor had provided the trial judge with a written submission identifying what were said to be the similarities between the accounts given by the respective complainants. That did not occur in the present case, but his Honour was able to glean from the prosecutor's oral submissions the following list of similarities, which he set out in his ruling:

> It is submitted on behalf of the DPP that there are many similarities in these events and circumstances. Those similarities are: the age of the complainants, 14 to 16 years; their status as residents of the [Centre]…; the accused, an employee … at that centre, was in a position of authority; the sexual activity occurred either in the complainants' sleeping quarters or the accused's sleeping quarters; it was initiated by the accused; it commenced with masturbation and progressed to oral sex, and in the

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10 Ibid 295.

11 [1975] AC 421.

12 Ibid 444. See also *R v DCC* (2004) 11 VR 129, 137 (Eames JA, with whom Callaway and Nettle JJA agreed).

13 (2004) 7 VR 375.

14 (1995) 182 CLR 461, 482.

15 (2004) 7 VR 375.

16 Ibid 391.

17 [2010] VSCA 26.

> case of C and F, anal intercourse; the accused was effectively teaching or instructing the complainants in respect of the sexual activity; the offending occurred over a similar time frame; there was a similar evolution or development in the sexual activity, moving from masturbation to oral sex, and anal intercourse in the case of two complainants.

14 His Honour noted that, in detailed oral and written submissions, counsel for the applicant had contended that there were no sufficient similarities, and that there were in fact many significant differences, such that the evidence should not be admitted. His Honour concluded, however, that the evidence was admissible. In his Honour's view, there were –

> many similarities in the events or circumstances described by each complainant such that it is improbable that the events described occurred coincidentally and I am satisfied the coincidence evidence the Director of Public Prosecutions seeks to adduce does have significant probative value. In my opinion I would properly describe the evidence of the complainants as strikingly similar in terms of the alleged acts and general circumstances of offending.

The nature of the appeal

15 A question arose, at the commencement of argument on the application for leave to appeal, as to the nature of the appeal from a ruling of this kind. As noted by Stephen Odgers SC in his *Uniform Evidence Law in Victoria*,[18] the New South Wales Court of Criminal Appeal has (by majority) held that a decision of this kind is reviewable on appeal only on the principles stated in *House v The King*.[19] That view was expressed by Simpson J (with whom McClellan CJ at CL agreed) in *R v Fletcher*,[20] and her Honour adopted the same approach (with the concurrence of Buddin J) in *R v Zhang*.[21] In the latter case, however, Basten JA in dissent expressed the view that the appeal court should decide for itself whether the relevant evidence was admissible.[22]

16 On this application, senior counsel for the Crown accepted that the Court should, if leave to appeal were granted, decide for itself whether the coincidence evidence was admissible. Unsurprisingly, counsel for the applicant concurred. We have approached the

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18 (2010) 426 [1.3.6830].

19 (1936) 55 CLR 499.

20 (2005) 156 A Crim R 308, 317.

21 (2005) 227 ALR 311, 344 ('*Zhang*'). See also *AW v R* [2009] NSWCCA 1 [45].

22 *Zhang* 322.

matter on that basis. With respect to those members of the New South Wales Court of Criminal Appeal who have taken a different view, we think that the analysis of Basten JA in *Zhang*,[23] together with that of Underwood CJ in *L v Tasmania*,[24] accords with the approach which this Court has consistently taken in dealing on appeal with questions of admissibility of evidence.

No sufficient similarity

17 In her submission to this Court, counsel for the applicant contended that the events relied on by the prosecution lacked 'any meaningful similarity'. According to the submission:

> 13. Some of the matters relied upon are essentially unremarkable in the context of trials concerning sexual offences against children – for example that the applicant is in a position of authority; and that the applicant initiated the sexual contact.
>
> 14. Some of the matters are a by-product of the context in which the alleged offending is said to have occurred: eg the identification of the place of the offending as [the Centre] necessarily places the applicant and the complainants in the position of officer and detainee; and necessarily accounts for any similarity in age as between complainants.

18 For his part, senior counsel for the Crown contended that it was these very matters which exhibited the necessary degree of similarity. The key features were said to be the following:

- the assaults were perpetrated by a person in authority over the victims;
- the victims were effectively 'captive';
- the victims were all of a similar age;
- the offender initiated the sexual contact; and
- the offences took place during the same general period, and at the same location.

19 It is, in our view, a mistake to treat as relevant similarities for this purpose features of the alleged offending which reflect circumstances outside the accused's control. In this case,

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23 Ibid.

24 (2006) 15 Tas R 381, 397-402.

a number of the asserted similarities simply reflected the setting in which the offending occurred. Each of the complainants was detained in the Centre. The limited age range of those eligible for such detention accounts for the similarity in ages, as counsel for the applicant pointed out. Likewise, the location of the alleged offending – either in the bedroom of the complainant or in the applicant's bedroom – reflected the custodial setting. The present case is quite different from that dealt with by Winneke P in *Papamitrou*,[25] where the accused was able to choose the various locations for the individual sexual acts, and used 'pretexts to isolate the girls from the company of others …' .[26]

20 To qualify as a relevant similarity in circumstances such as these, there must be something distinctive about the way in which the accused allegedly took advantage of the setting or context. In the present case, senior counsel for the Crown did not seek to identify any such distinctive behaviour, and we were not persuaded that there was any.

21 Counsel for the applicant had helpfully prepared a 'Table of Similarities and Dissimilarities', which we attach to these reasons. This was, with respect, an exemplary analysis, of the kind which is likely to be of great assistance to any court required to decide questions such as these. As the table shows, each complainant alleges that the applicant committed three types of sexual acts on him, as follows:

(a) requiring the complainant to masturbate him;

(b) masturbating the complainant; and

(c) requiring the complainant to perform oral sex on him.

22 The allegation that such acts were committed is, sadly, unremarkable. It is a commonplace in sexual offending of this kind, and cannot be said to distinguish the applicant's offending from that of any other such offender. The position might have been different if the evidence had disclosed surrounding circumstances which could be seen to be distinctive and which were common to the accounts given by the various complainants. But, as the table illustrates, there are no such circumstances. The same is true of those sexual acts which only complainants C and F allege. There is no distinctive feature which can be seen to

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25 (2004) 7 VR 375.

26 Ibid 391.

recur. There is no 'pattern'.

23 All that is left, accordingly, is what is said to be a distinctive progression - from masturbation to oral sex and, in the cases of C and F, to anal sex. Once again, we were not persuaded that there was anything about this sequence which would distinguish the present allegations against the applicant from like allegations against other sex offenders.

The possibility of concoction or contamination should be considered

24 A large part of the argument before the trial judge concerned the question whether, in assessing the probative value of the coincidence evidence, he should consider the possibility that the evidence had been concocted or 'contaminated' or 'innocently infected'. (For the sake of simplicity, we will use the word 'contamination' to cover all of these possibilities.) The submission for the applicant, before the trial judge and again in this Court, was that there was a real possibility of contamination. This was said to have arisen because, during the period when the complainants were at the Centre, it was 'widely rumoured among the boys that boys were being molested [and] the accused man was named in such rumours, with lots of kids saying to be careful of the accused man'. It was said to be relevant, moreover, that each of the complainants had first made complaint against the accused in response to publicity in the media about sexual abuse having occurred at the Centre during that period, and about compensation being available.

25 Before the judge, the prosecutor argued that this was not a matter which the Court should consider when deciding whether the evidence had significant probative value. It was submitted that the judge should 'assess the probative value of the complainants' evidence if accepted, that is, … take the prosecution case at its highest.'

26 After a review of the authorities, the trial judge concluded that he should consider 'the real possibility of contamination', in accordance with the recent decision of the New South Wales Court of Criminal Appeal in *AE v R*.[27] The court there said:

> If two or more persons make similar allegations about another in circumstances in which no possibility of joint concoction exists the allegations may possess significant

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27 [2008] NSWCCA 52.

> probative value for the reasons that are explained in *Hoch v The Queen* … . If the possibility of joint concoction cannot be excluded the evidence does not possess the same probative value since there exists another explanation for the circumstance that each complainant has made like allegations.[28]

27 The written submission for the Crown filed on the application for leave to appeal sought to maintain the position adopted before the trial judge. In the course of discussion with the Court, however, senior counsel for the Crown accepted that the issue of contamination was relevant to the determination of probative value under s 98 EA and that, if the material before the judge disclosed a reasonable possibility of contamination, then that should be taken into account.

28 With respect, this concession was properly made. It is, in our view, not only appropriate but necessary for a judge to consider whether, on the material before the Court, there can be seen to be such a possibility. Whether and to what extent such a possibility affects the probative value of the evidence relied on will be a matter for the judge to decide. If necessary, a voir dire can be conducted, in order to assess whether the claim of contamination is well-founded.

29 It has not, however, been necessary for us to investigate further the facts said to be relevant to contamination. As will be apparent from the earlier discussion, we reached our conclusion about inadmissibility without needing to consider possible contamination.

The judge's certificate

30 The ruling the subject of the application for leave to appeal was, in terms, a ruling concerning the admissibility of evidence. It was, accordingly, treated as an interlocutory decision to which s 295(3)(a) of the CPA was applicable. That meant, the parties accepted, that leave to appeal could not be sought from this Court unless the trial judge had certified –

> that the evidence, if ruled inadmissible, would eliminate or substantially weaken the prosecution case.

31 The judge did certify in those terms. This followed a submission from the prosecutor that, if this Court were to rule that the coincidence evidence was not cross-admissible, 'that

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28 Ibid [44] (Bell JA, Holme and Latham JJ).

would weaken our case and may well lead to severance …'. The prosecutor referred to the decision in *CGL*.[29] There, the substantive issue was the same – the cross-admissibility of coincidence evidence – but the ruling under appeal was a ruling that the relevant counts be tried together. Having formed a different view about cross-admissibility, we ruled that the individual counts must be tried separately.

32 In the present case, by the time the request for a certificate under s 295(3)(a) was made the trial judge had ruled – consistently with his conclusion on cross-admissibility – that the matter would proceed as a joint trial in relation to complainants C, F and P. Conversely, it was common ground on the application for leave to appeal that, if we should conclude that the evidence was not cross-admissible, the prosecution would not oppose a defence application for severance.

33 It follows, in our view, that where the question of cross-admissibility is bound up with the question of separate trials, the interlocutory decision should not be characterised as a decision concerning evidence. In substance, if not in form, the decision concerns the whole conduct of the trial. Thus, when an application for a certificate is made in respect of such a decision, the question to be addressed is that raised by s 295(3)(b), namely whether the interlocutory decision is

> of sufficient importance to the trial to justify it being determined on an interlocutory appeal.

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29 [2010] VSCA 26.

TABLE OF SIMILARITIES & DISSIMILARITIES

ITEM OF DETAIL RE ALLEGED OFFENDING	**P**	**C**	**F**
Age of complainant	16-17	15-16	16
Place – YTC	Y	Y	Y
Complainant detainee at YTC	Y	Y	Y
A in position of authority over complainant	Y	Y	Y
Accused initiates sexual conduct	Y	Y	Y
Date of offences	13/4/66-5/12/66	27/2/64-27/1/66	9/9/65-26/11/65
Period of time at YTC before incidents start	2-3 months	unclear	7 days
Location of incidents of sexual misconduct	A's bedroom	C's bedroom	C's bedroom
Masturbation of A by C	**Y**	**Y**	**Y**
-masturbation of C by A in same incident	N	Y	Y
-use of pornography as a precursor	Y	-	-
-use of alcohol as precursor	Y	-	-
- no of this type of incident	4-10 (unclear)	2+ (unclear)	2+
Masturbation of C by A	**Y**	**Y**	**Y**
-masturbation of A by C in same incident	N	Y	Y
-use of pornography as a precursor	Y	-	-
-use of alcohol as pre-cursor	Y	-	-
-no of this type of incident	4-10 (unclear)	2+ (unclear)	2+
Oral sex by C on A	**Y**	**Y**	**Y**
-use of pornography as a precursor	Y	-	-
-use of alcohol as pre-cursor	Y	once only	-
-use of masturbation of A's penis as precursor	unclear	-	Y
-use of mutual masturbation as precursor	unclear	Y	-
- use of some force	-	Y	Y
-privileges offered	Y	-	-
-ejaculation in C's mouth	Unknown	Y	Y
-oral sex by A on C also in same incident	-	-	Y
-period of time after 1st incident of masturbation	3rd or 4th occ	3 wks; 3rd occ	2 days
-no. of this type of incident (charged & uncharged)	20	unclear	3+
Oral sex by A on C	**-**	**Y**	**Y**
-use of pornography as a precursor	n/a	-	-
-use of alcohol as pre-cursor	n/a	-	-
-purpose said to be for teaching how to do properly	n/a	Y	-
-oral sex by C on A in same incident	n/a	-	Y
-period of time after 1st incident of masturbation	n/a	? but >3weeks	unclear
-no of this type of incident	n/a	1	3+
Anal penetration of C by A	-	**Y**	**Y**
-use of pornography as a precursor	n/a	-	-
-use of alcohol as pre-cursor	n/a	-	-
-use of lubricant	n/a	Y	-
-position (lying on side on bed/facing wall)	n/a	Y	-
-position (kneeling/hands & knees on bed/facing wall)	n/a	-	Y
-period of time after 1st incident of masturbation	n/a	3 mths	3-4 days
-period of time after 1st incident of oral sex	n/a	? but <3mths	1-2 days
-no of this type of incident	n/a	1	3+
Common assault of C by A	Y	-	-
-location of incident	solitary room	n/a	n/a