NEW SOUTH WALES COURT OF CRIMINAL APPEAL

CITATION:
Regina v PWD [2010] NSWCCA 209

FILE NUMBER(S):
2009/131881

HEARING DATE(S):
15 June 2010

JUDGMENT DATE:
17 September 2010

PARTIES:
Regina (Appellant)
PWD (Respondent)

JUDGMENT OF:
Beazley JA Buddin J Barr AJ

LOWER COURT JURISDICTION:
District Court

LOWER COURT FILE NUMBER(S):
2009/131881

LOWER COURT JUDICIAL OFFICER:
Flannery DCJ

LOWER COURT DATE OF DECISION:
7 May 2010

COUNSEL:
D M L Woodburne SC (Appellant)
R F Sutherland SC; S Bouveng (Respondent)

SOLICITORS:
Solicitor for Public Prosecutions (Appellant)
Watson McNamara Watt (Respondent)

CATCHWORDS:
CRIMINAL LAW – appeal – Criminal Appeal Act 1912, s 5F (3A) – appeal against decision on admissibility of evidence – requirement that decision eliminated or substantially weakened the prosecution's case
CRIMINAL LAW – appeal – interlocutory orders – Evidence Act 1995, s 97 – the tendency rule

CRIMINAL LAW – appeal – interlocutory orders – tendency evidence – requirement that evidence of tendency have significant probative value
CRIMINAL LAW – appeal – interlocutory orders – tendency evidence – factually similar cases – inappropriateness of equating tendency evidence with coincidence evidence
CRIMINAL LAW – appeal – interlocutory orders – tendency evidence – whether "sufficient similarity" or "striking similarity" required in establishing tendency
CRIMINAL LAW – appeal – interlocutory orders – tendency evidence – whether a pattern of behaviour, modus operandi or system or pattern with common threads is required in establishing tendency
CRIMINAL LAW – appeal – interlocutory orders – tendency evidence – evidence of tendency of principal of college to have sexual interest in young male students and to engage in sexual activities with young male students
CRIMINAL LAW – appeal – interlocutory orders – tendency evidence – multiple allegations – evidence of each allegation "different" – whether separate counts on indictment be heard together

LEGISLATION CITED:
Criminal Appeal Act 1912
Evidence Act 1995

CATEGORY:
Principal judgment

CASES CITED:
Cittadini [2008] NSWCCA 256; (2008) 189 A Crim R 492
DPP v P [1991] 2 AC 447
Ibrahim v Pham [2007] NSWCA 215
HML v The Queen; SB v The Queen; OAE v The Queen [2008] HCA 16; (2008) 235 CLR 303
Hoch v R [1988] HCA 50; (1988) 165 CLR 292
Pfennig v R [1995] HCA 7; (1995) 182 CLR 461
Phillips v R [2006] HCA 4; (2006) 225 CLR 303
PNJ v DPP [2010] VSCA 88
R v Blick [2000] NSWCCA 61; (2000) 111 A Crim R 326
R v Ellis [2003] NSWCCA 319; (2003) 58 NSWLR 700
R v Fletcher [2005] NSWCCA 338; 156 A Crim R 308
R v Ford [2009] NSWCCA 306
R v Harker [2004] NSWCCA 427
R v Li [2003] NSWCCA 407
R v Lockyer (1996) 89 A Crim R 457
R v Milton [2004] NSWCCA 195
R v MMK [2003] NSWCCA 364
R v Papamitrou [2004] VSCA 12; (2004) 7 VR 375
R v RN [2005] NSWCCA 413
R v Shamouil [2006] NSWCCA 112; 66 NSWLR 228
Townsend v Townsend [2001] NSWCA 136
Zaknic Pty Ltd v Svelte Corporation Pty Ltd (1995) 61 FCR 171

TEXTS CITED:

DECISION:
1. Vacate the rulings made by Flannery DCJ on 7 May 2010;
2. The evidence of tendency that the prosecution intends to produce pursuant to the Evidence Act 1995, s 97(1) contained in the notice dated 19 April 2010 is admissible;
3. Order that counts 1-10 on the indictment be tried together.

JUDGMENT:

IN THE COURT OF CRIMINAL APPEAL

CCA 2009/131881

BEAZLEY JA
BUDDIN J
BARR AJ

17 September 2010

Regina v PWD

Judgment

1 **BEAZLEY JA**: This is an appeal by the Director of Public Prosecutions under the *Criminal Appeal Act* 1912, ss 5F(2) and 5F(3A) in respect of rulings by Flannery DCJ in the District Court on 7 May 2010.

2 The respondent is charged with 10 counts of sexual misconduct between 1977-1992 against four boys, who were students at St Stanislaus' College, Bathurst. The respondent was the President (principal) of the College. The respondent has pleaded not guilty.

3 The matter was listed for trial on 27 April 2010 before Flannery DCJ in the District Court at Sydney. The prosecution filed a tendency notice seeking to adduce the evidence of the four complainants, and a further two witnesses, describing sexual conduct by the respondent as tendency evidence admissible in the cases in respect of each of the complainants. The Crown contended that the evidence of the six boys disclosed a tendency to have a sexual interest in young male students and to engage in sexual activities with them. The Crown also relied upon the evidence of a third witness, however, on the appeal, disavowed reliance on that witness.

4 The sexual conduct described by each of the boys was different. It ranged from the respondent rubbing against the thighs of one complainant while playing the piano (IB), to touching whilst both the

respondent and that complainant were lying on a bed, but fully clothed, to mutual fellatio with another complainant (BW).

5 On the day the matter was listed for trial, the respondent filed a notice of motion seeking orders that the counts on the indictment relating to each of the four complainants be severed from those that related to other complainants and that the tendency evidence be excluded. The basis of the application for separate trials brought on behalf of the respondent was that each of the individual complaints, together with the proposed evidence from the three (now two) additional witnesses, was so fundamentally different in the acts alleged, the circumstances in which the offences were said to have been committed, and the nature of the individual relationship at the time of the alleged offences, that any probative force that the acts, viewed either individually or collectively, might have had in proof of other acts charged was seriously diminished.

6 On 7 May 2010, following the hearing of the motion, including taking of evidence on the voir dire, Flannery DCJ found that the tendency evidence lacked significant probative value because the acts described by each of the boys and the surrounding circumstances of each act were so different from each other that it did not make it "*more likely to a significant extent*" that the charged acts occurred. Accordingly, her Honour ruled that the evidence was not admissible. Her Honour directed that there be four separate trials.

The conduct alleged in support of the counts in the indictment

7 IB was a student at the College between 1974 and 1979 (schooling years 7-12). He was an outstanding music student and eventually Dux of the college. The respondent was his music teacher, who taught him piano and guitar. IB was close to the respondent. On one evening in 1976, the respondent invited IB to his private room, where he offered IB food and suggested that IB "*could get closer to him*".

8 When he was about 15 years old, IB had returned to the school with the respondent after attending a concert. Other students had been sent back to the school with another teacher. Before returning to the school, the respondent had taken IB to a café. When they arrived back at the College, the respondent sat talking with IB in the car and said to IB that he wanted to see "*more affection*" from him.

9 Evidence was given by CF that he was in the same class as IB for a period. He said he got on well with IB but they were not close friends. CF observed that the respondent gave special treatment to IB. He also observed that the respondent would stare at IB when he was in his swimmers. He described IB as being withdrawn and shy and a bit of a loner, notwithstanding that he was very successful. He said that IB had a key to the respondent's room and that, on several occasions, he saw the respondent and IB entering the room together and remaining there for prolonged periods.

10 The first count in the indictment alleges an indecent assault on IB when he was 14 years of age which occurred in the dormitory of the boarding school at night. The respondent is alleged to have come into the boarders' dormitory wearing a knee length bath robe and thin summer pyjamas and to have sat down on the bed with his backside so placed on IB's bed as to be adjacent to IB's genitals/loin area. IB was in pyjamas underneath the bedclothes. IB had just woken up and had an erection. The respondent is alleged to have sat down on top of the bedclothes and pressed his body against IB's genitals/loin area. IB attempted to move away from the respondent, but the respondent continued to sit with his body against IB's erect penis. One of the students is alleged to have called out that IB was "*rooting*" the respondent. The proximity of placement of the respondent's body whilst sitting on the bed in the vicinity of the groin area of IB is the alleged indecent assault.

11 The second count in the indictment alleged an indecent assault on IB when IB was 17 years of age and in Year 12. During the course of a piano lesson which involved playing a duet with the respondent, the respondent sat close to IB, so that his thigh was touching IB's thigh. The respondent moved his thigh back and forth against IB's thigh and said "*let's have some fun*". IB felt uncomfortable and moved away.

12 Counts 3, 4 and 5 related to the complainant, MK. MK's father had died when he was two years old. He had a twin sister and two older sisters. His mother's second marriage ended in divorce after a few years. MK was regularly on detention and consistently in trouble for non-compliance with school rules.

13 In 1983, when MK was in Year 8, he suffered a strangulated testicle whilst on a school cadet bivouac. He was admitted to Bathurst Hospital on 26 March 1983 and was discharged from the hospital on the afternoon of 28 March 1983. The allegation against the respondent is that he collected MK from Bathurst Hospital and took him back to MK's room at the college and arranged for a meal for him as he had missed normal dinner time. After MK had his meal, the respondent asked to look at his testicles to see where it hurt. The allegation in respect of count 3 was that the respondent pulled MK's pyjamas down and touched his testicles a few times. MK jumped in pain on each occasion.

14 The allegation in respect of count 4 relates to an occasion when MK attended the respondent's room at night in his pyjamas. The respondent asked MK to show him, on the respondent's own testicles, where it was that MK had felt the pain. The respondent made MK touch the respondent's penis and testicles and the respondent had an erection.

15 In 1983, the respondent told MK that he would have to come to the respondent's room to make rosary beads if he wanted to "*Get in the good books*". MK started attending the respondent's room three to four times a week, late at night, to make rosary beads. On those occasions, the respondent played soft music and MK would fall asleep. The respondent would wake him later and tell him to go back to his dormitory.

16 The allegation in respect of count 5 related to an occasion when MK had been sent to the respondent's room to make rosary beads after having been caned by another teacher. The respondent asked MK if his backside was hurting and asked to look at it. The respondent pulled MK's pyjamas down and told him to lean over. The respondent then rubbed some cream on MK's buttocks, penis and testicles. MK's penis became erect. After he had finished, MK lay on the floor on his side and made rosary beads.

17 There were other occasions when MK and two friends, AM and WM, were in the respondent's room making rosary beads. During these visits, there were occasions when the respondent would lean over MK to get something and would press up against him. MK would feel that the respondent's penis was erect.

18 MK was described by his mother as having been a normal loving teenage boy towards her and his sisters, but after attending St Stanislaus', had became angry and abusive. He ran away from school several times and finally refused to return in 1985. Thereafter, his behaviour deteriorated. He was thrown out of home and eventually engaged in criminal acts, resulting in convictions in three States. The respondent visited him in gaol on two occasions. The respondent visited him subsequent to his release from gaol and gave him a bike and $500.

19 Counts 6, 7 and 8 relate to complaints made by BW. Prior to attending St Stanislaus', BW had lived with his mother, who had separated from his father when he was only one year old. BW did not like boarding school, did not do well at school and was often on detention for acting out behaviour.

20 Each of counts 6, 7 and 8 relate to an occasion in 1983 when BW and another boy, BM, were caught by a member of staff who ascertained that both boys had been drinking alcohol. They were in Year 9 at the time. The boys were sent to the respondent. BW alleged that BM went into the respondent's room and was there for about half an hour. He said that when BM emerged from the respondent's room, he was "*as white as a ghost*".

21 Count 6 relates to what occurred when BW then went into the respondent's room. The respondent hugged him and said, "*What would your mother think?*" The respondent then fondled BW's penis and testicles on the outside of his tracksuit pants. BW's penis became erect. The respondent then put his hand inside BW's tracksuit pants and underpants and began to masturbate him. When BW asked him what he was doing, the respondent said "*I'm just showing you that I love you*". The manual manipulation of BW's genitals constitutes count 6.

22 The allegation in respect of count 7 is that when the respondent stopped masturbating BW, he asked if he could suck BW's penis. When BW asked why, the respondent said that BM had allowed him to

suck his penis and BM was not going to be expelled. BW then allowed the respondent to suck his penis until he ejaculated.

23 The allegation in respect of count 8 is that the respondent then asked BW to touch the respondent's penis. He then asked him to suck his penis. The respondent undid his belt, unzipped his trousers and pulled his underpants down far enough to expose his penis. BW then sucked the respondent's penis for about 30 seconds and told the respondent he did not want to do it anymore. The respondent told him that he had done enough. The respondent then told BW he forgave him for drinking the alcohol and told him that what had happened was to remain their secret and he was not to tell anyone. The respondent said that if BW told anyone, he would immediately expel him. He told him not to speak to BM about what had happened.

24 The allegations in respect of counts 9 and 10 relate to the complainant ND. ND attended the school as a boarder between March 1992, when he was 12 years old, and the latter part of 1994. He had had disciplinary problems at his former school. One night during the first term in 1992, he was sitting on the stairwell that led from the main foyer to the chapel. He was crying because he was homesick. The respondent sat down beside him and put his arm around ND's shoulder. ND told the respondent that he was homesick and the respondent invited him up to his room.

25 The allegation in respect of count 9 relates to what then occurred in the respondent's room. The respondent sat down on his bed and motioned ND to sit beside him. He asked him what was wrong and ND said he was homesick. The respondent rubbed his hand back and forth on ND's knee for about five minutes. The respondent then lay down on his bed and pulled ND by the shoulders down on to the bed. The respondent lay "*spooning*" ND. ND's head was on the respondent's left arm and the respondent cuddled him for about 15 to 20 minutes, during which time he continually stroked ND's right thigh just below the hip area. Before he left, the respondent squeezed ND's shoulder in "*a massaging fashion*", opened the door and said goodnight. As ND was leaving the respondent's room, the respondent told him that if ND ever wanted to talk, he was available.

26 On a subsequent occasion in the same year, ND had again been sitting in the stairwell feeling homesick. The respondent walked past and continued up the stairs and then invited ND up to his room. On this occasion, they lay on the bed and "*spooned*". The allegation in respect of count 10 is that the respondent reached down and massaged ND's penis area with an open hand on the outside of his tracksuit pants for about 15 minutes. ND's penis was erect during this period. The respondent held ND's shoulder in "*a massaging fashion*" before he left the room.

27 ND did not have much to do with the respondent after this. However, on an occasion when ND was in Year 7 (1992), he went to the respondent's room, uninvited, one night after evening prayers, because he was again feeling homesick. The respondent answered the door but told ND not to disturb him and to go back to the dormitory.

28 The respondent left St Stanislaus' at the end of 1992. During 1993, ND received a card from the respondent which said, "*All the best for the future from your friend Brother Peter*". There was a $10 note inside. ND did not know why the respondent sent him the money, as he had had nothing to do with the respondent for quite some time. He spent the money on lollies and disposed of the card after a while.

Other evidence

29 The Crown proposes to adduce evidence from two other witnesses: TD and RT, both of whom were students at St Stanislaus', in support of tendency. At trial, the Crown had proposed to adduce evidence from a third tendency witness, AM, however, as earlier indicated, that evidence was not relied upon on appeal to this Court. None of the allegations of these witnesses is the subject of a charge.

30 TD was a Vietnamese refugee. He was homesick and rarely saw his family. He did not fit in with the general population of students. He was invited to the respondent's room on a regular basis. The respondent gave him a key to his bedroom, took him for drives in his car and took him to Bathurst on one occasion. TD also assisted the respondent in editing the College's annual magazine.

31 On the respondent's request, TD would massage the respondent's back whilst in his bedroom. On one occasion in late 1985, there was an incident when TD and the respondent were in the respondent's bedroom in the early hours of the morning, when the respondent touched TD's penis on the outside of his pyjamas. The respondent remarked that TD's penis was "*floppy*". TD gave evidence on the voir dire that the touching was accidental. The respondent would give TD hugs while they were alone together in the respondent's bedroom at night.

32 TD gave evidence on the voir dire that he considered the hugs he received from the respondent were of a fatherly nature, the touching was accidental and there was nothing inappropriate in the respondent's conduct.

33 RT was another former boarder at the school. He had been expelled from his previous school and the respondent paid him special attention. The respondent invited RT to his room on many occasions between 1984 and 1987, where they would have discussions and play music. On occasions, the respondent placed his hand on RT's knee and thigh area. On other occasions, he would place his arm on RT's shoulder. During 1986 and 1987 RT visited the respondent's room on a more regular basis. The respondent would offer him alcohol and they would have discussions over a range of matters. The respondent would touch him on the inside of the leg, on the knee and shoulder as they sat and drank. The respondent told RT he was "*one of his special boys*".

Tendency relied upon by the Crown

34 The Crown seeks to prove that the respondent has a tendency to have a sexual interest in young male students, to engage in sexual activities with young male students, and use his position of authority to obtain access to young male students so that he could engage in sexual activity with them.

35 The Crown does not rely on a case of striking similarities, but rather on a pattern of behaviour, modus operandi, system or pattern and common threads (the pattern) in the respondent's conduct. The pattern for which the Crown contends is:

(a) the respondent resided at the college at the time that all the alleged offences were committed;

(b) the respondent was the music master and then principal, both of which were positions of authority at the time of the alleged offences;

(c) the complainants and the two other witnesses were students at the school at the time of the alleged offences;

(d) the complainants and TD were boarders at the school at the time of the alleged offences;

(e) the complainants came from families who were devout Catholics;

(f) the complainants and other witnesses were young male students;

(g) the respondent developed a special relationship with all of the complainants (except BW) and with TD;

(h) other than for counts 1 and 2 in respect of IB, the offences were committed in the respondent's private quarters. However, the incident between IB and the respondent referred to at [7] above, occurred in the respondent's private room.

(i) The complainants and TD were young students of a similar class in that they did not easily adapt to boarding school, they did not fit in with the general body of students, they did not see their families regularly, they were homesick and came from devout Catholic families that regarded the Catholic Church in high esteem.

36 Her Honour catalogued the respondent's activities that the Crown alleged demonstrated the tendency for which it alleged as involving the following:

(a) to have young male students in his private room with him;

(b) to have young male students in his private room with him at night;

(c) to have young male students alone with him in his private room at night;

(d) to have young male students in a private room;

(e) to touch young male students' genitals;

(f) to touch young male students' genitals when they were alone with him in his private room at night and under his authority;

(g) to masturbate young male students when they were alone with him in his private room and under his authority;

(h) to fellate young male students when they were alone with him in his private room at night and under his authority;

(i) to have young male students fellate him when they were alone with him in his private room at night and under his authority;

(j) to take young male students for drives in his car;

(k) to provide young male students with food treats;

(l) to have a young male student massage his back;

(m) to ask young male students to show affection towards him;

(n) to share rooms with young male students during holiday camps;

(o) to press his body against young male students' genitals;

(p) to give alcohol to young male students; and

(q) to give money to young male students.

37 The issue that the Crown submitted the tendency evidence will bear upon is: first, whether the respondent conducted himself as alleged in respect of each count on the indictment; and secondly, if he did conduct himself as alleged in respect of counts 1-5, whether or not that conduct was innocent.

Reasons of the trial judge

38 The trial judge ruled that she did not propose to admit any of the tendency evidence and directed that there be four separate trials. Her Honour did not reject the tendency evidence on the basis that it was irrelevant: see *R v MMK* [2003] NSWCCA 364. As her Honour noted, such tendency evidence was relevant to whether the respondent had engaged in the charged acts. Rather, her Honour rejected the evidence on the basis that it did not have significant probative value: the *Evidence Act* 1995, s 97(1)(b); or alternatively, its probative value was substantially outweighed by its prejudicial effect: *Evidence Act*, s 101(2).

39 The trial judge accepted that:

> "… if [the respondent] has a tendency of the type identified by the Crown in its tendency notice, that is relevant to whether [the respondent] engaged in the acts the subject of the counts on the indictment."

40 Her Honour, at 18, noted that the Crown did not rely upon a striking pattern of similarity between the incidents. Rather, the Crown's case on tendency was that the acts and conduct of the respondent disclosed a pattern of behaviour, a modus operandi, a system or pattern, with common threads. Her Honour then identified the features of the pattern upon which the Crown relied (see [36] above).

41 Her Honour referred to the decision of the Victorian Court of Appeal in *PNJ v DPP* [2010] VSCA 88. Her Honour, at 22, observed that in this case, as in *PNJ*, the Crown relied on features of the alleged offending which reflected circumstances outside the respondent's control, and, as in *PNJ*, a number of the asserted similarities simply reflected the setting in which the alleged offending occurred: each of the complainants was a boarder at the school where the respondent lived and worked; the limited age range of those eligible for senior school accounted for the similarity in ages; the location of the alleged offending reflected a boarding school setting. Her Honour considered the fact that each of the complainants generally only saw their family during school holidays, that they were homesick and came from devout families, fell into the same category.

42 Her Honour then dealt with the remaining features relied upon by the Crown in this case to demonstrate tendency: namely, that the offences, other than in respect of counts 1 and 2, occurred in the respondent's private quarters; that the respondent developed a special relationship with all of the complainants (except BW) and with two of the tendency witnesses; and that the complainants and TD were young students of a similar class, in that they did not easily adapt to boarding school and did not fit in with the general body of students.

43 Her Honour considered that these features would perhaps be capable of disclosing a pattern, or modus operandi or common threads, if the relationship arose in the same way in each instance. However, her Honour did not accept that that was so. Rather, her Honour considered that the circumstances in which

each offence was alleged to have been committed, the relationship between the accused and each complainant at the time of the alleged offence and the acts themselves, were quite different.

44 Her Honour demonstrated her point, at 22-23, by referring to the different circumstances alleged in respect of each count and adopted the comments of Campbell JA in *R v Ford* [2009] NSWCCA 306, at [53], that:

> "… the generality with which a tendency is stated may be such that it provides a handicap to that evidence having *'significant probative value'*."

45 Her Honour concluded, at 23, that the tendency evidence did not make it more likely to a significant extent that the accused pressed his body against IB's genital area whilst he was sitting on IB's bed, or that he rubbed his thigh against IB's leg during the playing of a duet. Her Honour made similar findings in respect of each of the other counts.

46 Her Honour held further, at 24, that if she was wrong in concluding the jury would not ascribe significant probative value to this evidence, she did not consider that the probative value substantially outweighed the prejudicial effect it may have on the respondent.

47 Her Honour next observed that the Crown also relied on the tendency evidence to rebut any suggestion of innocent association in relation to IB or MK. Her Honour observed that in relation to IB, the only evidence truly capable of rebutting such a suggestion was the evidence of BW as to what he alleged occurred on 16 October 1983, and the evidence of ND, at least in respect of what ND contended took place on the second occasion he visited the respondent's room. In this regard, her Honour stated, at 25:

> "As in respect of what they alleged occurred, there can be little doubt that the accused was motivated by a sexual desire. If the accused were to suggest that he touched [IB] but his state of mind was innocent, whilst I accept that the evidence of [BW] and [ND] does make it more likely that he was motivated by a sexual desire to touch [IB], I do not consider that their evidence makes it more likely to a significant extent."

48 In her Honour's view, the reason the evidence lacked significant probative value was because the acts described by the three boys were so different: *"I say this because the nature of the conduct alleged by [IB] is so different to the conduct alleged by both [ND] and [BW]*". It will be recalled that the difference was that IB referred to the applicant sitting on the bed next to him with his body pressed against IB's genitals/loin area, and in another incident, rubbing thighs with IB while playing a duet on the piano, whereas ND described the respondent massaging his penis and BW referred to reciprocal fellatio.

49 Her Honour again held that in any event, if she was wrong in this regard, whatever significant probative value there was in such evidence, it did not substantially outweigh the prejudicial effect it may have on the respondent. Her Honour said there was:

> "… more than a real risk that the jury would focus on their allegations of serious criminal conduct and would be unable to properly consider the basis upon which the evidence would be admitted."

Alleged errors by the trial judge

50 The Crown submitted that her Honour erred in making the lack of similarity between the sexual acts or the surrounding circumstances the determining factor in assessing the probative value of the evidence. The Crown submitted that her Honour's focus on the lack of modus operandi, system or pattern with common thread as the basis for exclusion, was an erroneous basis upon which to assess the probative force of the evidence. The Crown did not rely upon system or pattern for the purposes of establishing tendency. The Crown also pointed out that identity, where system or pattern is often of importance, was not in issue in this case. The Crown submitted that her Honour's focus upon system or pattern was due to her reliance upon the decision in *PNJ v DPP*. However, that was a case about coincidence evidence, not tendency evidence.

51 The Crown also complains that apart from the case of IB, her Honour dealt with the evidence in a global way and failed to consider that the cases of the various complainants may involve different issues which would affect the probative force of the evidence.

52 The question of innocent association is an issue in respect of each complainant. The Crown tendered two statements from boys who had been at the school at the relevant times that said the respondent had not made any sexual advances to them and the defence tendered a bundle of statements to the same effect. That evidence indicated that the respondent had been involved with many boys over the years, had been alone with them in his room and given them lifts in his car, all with no suggestion of any untoward conduct.

53 The Crown complains that in dealing with that issue in IB's case, her Honour erred in taking into account only the evidence of two of the complainants, ND and BW, and not the fourth complainant, MK, who described incidents where the respondent rubbed his penis and testicles and made him touch the respondent's penis and testicles, nor the evidence of TD and RT, who also described sexual conduct by the respondent. It was not clear, on the Crown's submission, why her Honour did not refer to MK's evidence on the issue of whether the conduct in relation to IB had sexual connotations. Nor was it clear why her Honour selected the evidence of ND and BW alone in reaching her conclusion that she did not consider it more likely, to a significant extent, that the respondent was motivated by a sexual desire.

The respondent's submissions

54 The respondent contended that the differences in the sexual activity alleged in relation to the complainants and the other witnesses and the absence of relevant similarity in the circumstances in

which the conduct was said to have occurred were such that there were no unifying features of the case to warrant a finding that the evidence relied upon as tendency evidence had significant probative value. The respondent provided a table (marked MFI 5 on the hearing of the notice of motion) to illustrate the lack of any identifying unity.

55 During the course of the hearing of the s 5F appeal, the question arose whether the evidence of IB and ND was admissible as tendency evidence on the counts in which they are the respective complainants and similarly with the evidence of BW and MK. The thinking behind that question was whether, rather than there being four separate trials in the matter, as ordered by the trial judge, there should be two trials, in which the charges in respect of IB and ND proceeded together, and the charges in relation to BW and MK be heard together. It will be recalled that the charges relating to IB and ND involved touching on the outside of the complainants' clothing, whereas the charges relating to BW and MK involved touching of the genitals and/or fellatio.

Tendency evidence: the statutory provisions

56 The admission of tendency evidence is governed by the *Evidence Act*, ss 97 and 101. Those sections provide, relevantly:

> "**97 The tendency rule**
>
> (1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless:
>
> …
>
> (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value."
>
> "**101 Further restrictions on tendency evidence and coincidence evidence adduced by prosecution**
>
> …
>
> (2) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant."

The Dictionary to the *Evidence Act* provides:

> "***probative value*** of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue."

Tendency evidence: the case law

57 It is convenient to commence a consideration of the case law by noting the remarks of Spigelman CJ in *R v Shamouil* [2006] NSWCCA 112; 66 NSWLR 228 (Simpson and Adams JJ agreeing) in respect of the definition of "*probative value*":

> "[61] In my opinion, the critical word in this regard is the word *could* in the definition of probative value as set out above, namely, 'the extent to which the evidence could rationally affect the assessment …'. The focus on *capability* draws attention to what it is *open* for the tribunal of fact to conclude. It does not direct attention to what a tribunal of fact is *likely* to conclude. Evidence has 'probative value', as defined, if it is capable of supporting a verdict of guilty.
>
> [62] This conclusion is reinforced by the test that evidence must 'rationally affect' the assessment. As Gaudron J emphasised in [*Adam v R* [2001] HCA 57; 207 CLR 96], a 'test' of 'rationality' also directs attention to capability rather than weight."

58 Pursuant to s 97, tendency evidence, even if relevant, is inadmissible unless, relevantly, para (b) is satisfied, namely, that the court thinks that the evidence, either by itself or having regard to other evidence to be adduced, has significant probative value. In a criminal case, even if the court is so satisfied, the evidence must be rejected unless s 101(2) is satisfied, that its probative value substantially outweighs its prejudicial effect on the defendant.

59 In *Cittadini* [2008] NSWCCA 256; (2008) 189 A Crim R 492 Simpson J (with whom McClellan CJ at CL agreed) said, at [22]-[23] 495:

> "Proof of a tendency to act in a particular way of itself goes nowhere. Evidence that a person had a particular tendency is adduced in order to render more probable the proposition that, on a particular occasion relevant to the proceedings, that person acted in a particular way (or had a particular state of mind); that is, to provide the foundation for an inference to that effect.
>
> Put another way, tendency evidence is tendered to prove (by inference), that, because, on a particular occasion, a person acted in a particular way (or had a particular state of mind), that person, on an occasion relevant to the proceeding, acted in a particular way (or had a particular state of mind)."

60 In *Regina v Harker* [2004] NSWCCA 427 at [57], Howie J (with whom Santow JA and Bell J agreed) said:

> "… tendency evidence is placed before the jury as evidence tending to prove the guilt of the accused. The jury are asked to reason that, because the accused acted in a particular way on some other occasion or occasions, he or she must have acted in the same way on another occasion."

61 In *Regina v Li* [2003] NSWCCA 407 Dunford J (Spigelman CJ agreeing) said, at [11]:

> "Section 97 is not directed only at evidence showing a tendency to commit a particular crime but showing a tendency 'to act in a particular way'. In this case it was directed to showing that the appellant had a tendency to use violence to the complainant and to seek to control her in stressful marriage situations, and was relevant to whether he did by his actions on the night in

> question effectively 'detain' her; but it was not necessary for this purpose to show that he had detained her on any other occasion."

62 In *R v Fletcher* [2005] NSWCCA 338; 156 A Crim R 308 Simpson J, with whom McClellan CJ at CL agreed, stated, at [67]:

> "In my opinion, the present appellant's argument focused too narrowly upon a tendency to have sexual intercourse in a particular fashion. The DPP's explanation, provided to the appellant's legal advisors, shows that the 'tendency' which it sought to establish was wider, and more detailed. The DPP sought to establish a pattern of behaviour, or even a *modus operandi*, in the appellant's behaviour. This included the use of his position as parish priest in meeting Catholic families and involving himself in their lives, developing a special relationship with the families, the children of the families, and in particular with a child the focus of his attention; and the introduction of the child to sexually explicit material and, eventually, inappropriate sexual behaviour."

63 The probative force of tendency evidence needs to be assessed by reference to the issues in the case: *Pfennig v R* [1995] HCA 7; (1995) 182 CLR 461; *Phillips v R* [2006] HCA 4; (2006) 225 CLR 303 at [54]; *DPP v P* [1991] 2 AC 447. In *Pfennig*, in a passage adopted in *Phillips*, Mason CJ, Deane and Dawson JJ stated, at [64]:

> "… the evidence of propensity needs to have a specific connection with the commission of the offence charged, a connection which may arise from the evidence giving significant cogency to the prosecution case or some aspect or aspects of it."

64 In *Ford* Campbell JA (Howie and Rothman JJ agreeing) at [38], identified as an error in the trial judge's reasoning the judge's apparent view that tendency evidence must itself show a tendency to commit acts that are closely similar to those constituting the particular crime with which the accused is charged. In that case, the accused was charged with sexual intercourse without consent against an 18 year old woman who was a guest in the accused's home. The evidence of two other women he had indecently assaulted while they were guests in his home was held to have significant probative value. The respondent in that case argued that there was nothing unusual about the allegations by the women of sexual interference after a social event involving the consumption of a considerable amount of alcohol. That argument was rejected (*Ford* at [126]). The lack of striking pattern or similarity between the charged incident and the other two incidents was held not to be determinative. Campbell JA observed, at [38]:

> "The second flaw is the judge's apparent view that the tendency evidence must itself show a tendency to commit acts that are **closely similar** to those that constitute the crime with which a particular accused is charged. **That is not so**. All that a tendency need be, to fall within the chapeau to section 97(1), is 'a tendency to act in a particular way'." (emphasis added).

65 Later, at [125], his Honour stated:

> "In my view there is no need for there to be a 'striking pattern of similarity between the incidents'. All that is necessary is that the disputed evidence should make more likely, to a

> significant extent, the facts that make up the elements of the offence charged. In my view, it meets that test."

Significant probative value

66 If evidence is properly assessed as tendency evidence, the next step in the determination of whether evidence is admissible as tendency evidence under s 97(1) is the evaluation of whether the evidence has significant probative value. This involves more than mere statutory relevance: see *Zaknic Pty Ltd v Svelte Corporation Pty Ltd* (1995) 61 FCR 171 at 175-6 per Lehane J; *R v Lockyer* (1996) 89 A Crim R 457 at 459 per Hunt CJ at CL; *Ford* at [50]. In *Lockyer*, Hunt CJ at CL stated that:

> "In its context … *'significant'* probative value must mean something more than mere relevance but something less than a *'substantial'* degree of relevance."

His Honour accepted that the sense in which "*significant*" is used in s 97 is "*important*" or "*of consequence*".

67 In *Townsend v Townsend* [2001] NSWCA 136 Giles JA, at [78], observed that the evidence in that case was of such generality that "*little meaningful tendency*" was established. In *Ibrahim v Pham* [2007] NSWCA 215, Campbell JA observed that the tendencies alleged were of a very general kind. In this regard, his Honour considered that the generality of the tendencies alleged provided "*a handicap to their having 'significant probative value'*". The observations in those two cases were not statements of admissibility, but rather, the generality of the tendency was a factor, which in those cases tended against the evidence having significant probative value.

68 In *Townsend* the plaintiff brought proceedings against her husband for assault, alleging her husband had picked her up and thrown her on the floor during the course of an argument. The husband sought to adduce evidence from his first wife that he had a tendency to act in a particular way, that is, by not being violent towards his wife despite arguments with her. The trial judge held that the evidence had significant probative value. On appeal, Giles JA considered that the evidence should have been rejected as not having significant probative value. His Honour, at [78], analysed the evidence in the following terms:

> "… the circumstances of the respondent's conduct towards Mrs Townsend were very different from the circumstances in which the incident between the appellant and the respondent took place; certainly the evidence was of such generality that little meaningful tendency was established. The not very volatile arguments during the first marriage, of unknown frequency and subject matter, in all probability bore little relationship to the intensity and bitterness of the relationship between the appellant and the respondent in November 1995. The respondent had been unfaithful to the appellant, and the appellant was on her own account at the time of the incident shouting and swearing at the respondent and telling him that she wanted him to leave."

69 In *Ibrahim*, the tendency relied upon was for the defendants and their employees to deal with members of the public for the purposes of arranging loans for investment of funds in projects of Karl Suleman,

knowing or suspecting that such loans were risky and could not be repaid, encouraged the borrowers to invest and failed to advise them of the risk and nature of the investments. It is not necessary to deal in detail with the case, other than to observe that the only similarity in the evidence of one of the tendency witnesses was of an allegation of a representation by the defendant "*that the investment was good*". The allegation was of a statement made on one occasion only. For that reason it was held that even if such evidence qualified as tendency evidence, it did not have significant probative value.

70 *R v Milton* [2004] NSWCCA 195 involved offences against two teenage boys. The accused had employed the boys and he inappropriately encouraged them to drink and to use drugs. Notwithstanding that there was a difference in the sexual activity in respect of each boy, Hidden J held, at [31], that the evidence established that the accused had attempted to foster a relationship with them conducive to sexual contact. His Honour concluded that as there was no suggestion that the complainants had put their heads together to fabricate their evidence, the combination of their evidence had considerable probative force in rebutting the appellant's assertion that his association with each of them was entirely innocent.

Probative value outweighed by prejudicial effect

71 It has been accepted that the test of prejudicial effect is whether it involves a risk of an unfair trial: see *R v RN* [2005] NSWCCA 413; *Ford* at [58]. In this regard, this Court has accepted the statement of McHugh J in *Pfennig* at [40] 528-9:

> "If there is a real risk that the admission of such evidence may prejudice the fair trial of the criminal charge before the court, the interests of justice require the trial judge to make a value judgment, not a mathematical calculation. The judge must compare the probative strength of the evidence with the degree of risk of an unfair trial if the evidence is admitted. Admitting the evidence will serve the interests of justice only if the judge concludes that the probative force of the evidence compared to the degree of risk of an unfair trial is such that fair minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial."

72 In *HML v The Queen; SB v The Queen; OAE v The Queen* [2008] HCA 16; (2008) 235 CLR 303, a case of relationship evidence, Gleeson CJ, at [12], commented in terms relevant to the question raised under s 101(2) that the reason for the exclusion of propensity evidence was not because it is irrelevant, but because of its prejudicial effect, that is, the danger of improper use of the evidence. As his Honour observed:

> "It is the risk that evidence of propensity will be taken by a jury to prove too much that the law seeks to guard against."

73 The Court has accepted that the balancing exercise under s 101(2) is of the same nature as must be carried out under s 137: *R v Blick* [2000] NSWCCA 61; (2000) 111 A Crim R 326; *R v Ellis* [2003] NSWCCA 319; (2003) 58 NSWLR 700. As Campbell JA explained in *Ford*, at [64]:

> "The proper carrying out of the balancing task requires the judge to identify the type or types of prejudicial effect it may give rise to, and why it is that the judge has reached the view that the probative value of the evidence substantially outweighs (or does not substantially outweigh, as the case may be) any such prejudicial effect: *R v Harker* at [47], [58]; *R v RN* [2005] NSWCCA 413."

Determination

74 Having regard to the question that was raised during the course of the hearing, there are two issues before the Court for determination:

(1) Did the trial judge err in rejecting the tendency evidence as not having a significant probative value: s 97(1)(b), or because its probative value outweighed its prejudicial effect: s 101(2).

(2) Should there be two trials in the matter, as raised in the course of argument.

75 Subject to the second issue, the Crown and the respondent both accept that the question whether there should be separate trials or not depends upon the determination of whether the proposed tendency evidence is admissible.

76 The respondent's alleged tendency and the manner in which he allegedly engaged in that tendency are set out above at [35] and [36]. Both of those paragraphs contain some degree of repetition, but no complaint was made about that in the appellant's argument in this Court. In summary however, the Crown case was that the respondent had a sexual interest in young boys and for the purposes of gratification of that interest, he preyed upon boys in his care in a variety of circumstances, but all of which it is alleged involved some vulnerability. In the case of IB, he did not fit in, notwithstanding that he was successful in the school; MK had been in hospital undergoing treatment for what could only have been a difficult and embarrassing condition for a young boy; BW was in trouble for drinking and was sent to the respondent for disciplinary reasons, but was shown sexual attention instead, under the guise of that being a demonstration of how the respondent loved him; and ND was extremely homesick. Likewise, TD and RT were shown sexual attention in circumstances where each exhibited vulnerability.

77 As I have indicated, her Honour focussed upon the decision in *PNJ v DPP* in determining whether the evidence upon which the Crown sought to rely was admissible tendency evidence. *PNJ* involved sexual assaults by officers working at a juvenile detention centre. It was held that the evidence of the various complainants who had been inmates of the centre was not cross-admissible, as it was lacking significant probative force because the conduct alleged by each of the boys was not sufficiently similar.

78 It is apparent from her Honour's judgment that she looked at the circumstances which persuaded the court in *PNJ v DPP* to reject the evidence sought to be relied upon in that case as coincidence evidence. Her Honour then compared the features of this case relied upon as tendency and rejected

them if they appeared to have the same characteristics as identified in *PNJ*. She then rejected any other feature of the tendency evidence on the basis of insufficient similarity. In doing so, her Honour failed to consider the tendency case upon which the Crown relied: that is, for the respondent to use his position of authority to a category of student who was vulnerable.

79 The authorities are clear that for evidence to be admissible under s 97 there does not have to be striking similarities, or even closely similar behaviour. By contrast, coincidence evidence is based upon similarities. Section 98 provides in terms that two or more events occurring is not admissible to prove that a person did a particular act, on the basis 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 is improbable that the events occurred coincidentally unless, the evidence has significant probative value.

80 In *PNJ*, the Victorian Court of Appeal acknowledged that under the express provision in s 98, similarity is an important factor from which probative force is derived under s 98: see *Hoch v R* [1988] HCA 50; (1988) 165 CLR 292. It should also be observed that even with coincidence evidence, a pattern of conduct or 'underlying unity' or modus operandi is not a condition of its admissibility. It depends on the issues raised: see *R v Papamitrou* [2004] VSCA 12; (2004) 7 VR 375.

81 The inaptness in relying upon *PNJ* may be demonstrated by considering the first feature which was rejected in *PNJ* as demonstrating coincidence, namely, the place where the offences were alleged to have been committed. The reason the Victorian Court of Appeal considered that the institutional location where the offences occurred pointed against the evidence being coincidence evidence, was because the choice of location was outside the accused's control. By contrast in this case, the institutional setting facilitated the respondent's tendency in that it was a place where, under the guise of offering solace to boys who were vulnerable for the variety of reasons to which reference has been made, he was able to engage his sexual tendency.

82 It was also important in *PNJ* for there to be some distinctive feature about the way in which the accused allegedly took advantage of the setting or context, as the Court was concerned to see if there was some distinctive feature to distinguish the offender from any other offender. The Court could find no recurring distinctive feature, underlying unity, pattern or system, which may be necessary where identity is in issue: see *DPP v P*. That was not the case being advanced here. The tendency case proposed here is not so as to establish identity or pattern.

83 Further, the other factual comparisons which her Honour made with *PNJ* were not well based. A feature of the evidence sought to be relied upon as tendency evidence was an element of selection and encouragement of the boys to whom he directed his sexual attention: only boarders were involved, all of whom reported feelings of isolation, homesickness and not fitting in, although this exhibited itself variously as discussed in the outline of the evidence given above. A combination of the students'

vulnerability and the respondent's authority enabled the respondent to act on his tendency to be sexually attracted to young male students. None of these features were present in *PNJ*, where the boys were in detention.

84 Finally, a relevant factor in *PNJ* was the possibility of joint concoction or contamination of evidence amongst the various complainants and witnesses, which made pattern and modus operandi of significance. That is not the case here. The complaints were made many years after the students had left the school and there was no evidence of communications amongst them in the interim.

85 I am also of the opinion that her Honour erred when considering the question of innocent association. In the first place, in the case of IB, her Honour confined her consideration to the evidence of the complainants ND and BW. Secondly, her Honour failed to give any consideration to the question of innocent association in the case of ND on the occasion when the respondent lay next to ND and stroked his thigh (count 9).

86 Although I consider her Honour erred in the above respects, the question remains whether the evidence was admissible pursuant to s 97, as having significant probative value. The issues at trial in this case will essentially be twofold: first, whether the appellant engaged in the conduct alleged at all; and secondly, whether any conduct in which he did engage was innocent: this being particularly relevant in the case of IB and ND.

87 The evidence sought to be relied upon, if accepted by the jury, would demonstrate that the respondent was a person who was sexually attracted to young male students and acted upon that predilection in various ways and at different times, but in a setting where the students to whom he directed his sexual attentions were boarders, who were homesick, did not fit in with the normal pattern of school life in various ways, for example, by not developing friendships or by having discipline problems, and who were thus vulnerable.

88 In my opinion, the evidence of the four complainants and the other two tendency witnesses is capable of rationally affecting the assessment of the probability of the respondent having engaged in the conduct alleged and had a sexual interest in doing so. So much was found by the trial judge. That evidence has significant probative value in the determination of the question whether the individual allegations should be accepted. The likelihood that such conduct occurred in relation to the other complainants and tendency witnesses would make it more likely that the respondent acted in the way alleged in respect of each particular complainant. It is evidence which also has significant probative value in rebutting the suggestion that the respondent's relationship with each of the complainants was innocent.

89 I have also reached the conclusion that the evidence upon which the Crown seeks to rely is not excluded by s 101(2). Of its nature, tendency evidence will have a prejudicial effect. However, I am

of the opinion that her Honour erred in finding that whatever significant probative value there may be in the evidence, that did not substantially outweighed its prejudicial effect. Her Honour's reason for this conclusion was that there was more than a real risk that the jury would focus on the allegations of serious criminal conduct and be unable to properly consider the basis upon which the evidence would be admitted.

90 This reasoning fails to recognise the intelligence and focus with which juries go about their deliberations. In this regard, the Court is also entitled to take into account that juries are to be properly directed as to the use to which such evidence is to be put.

Other considerations

91 There are two final considerations that need to be disposed of. The first relates to the issue that was raised during the course of argument on the appeal, namely, whether upon a consideration of the tendency case sought to be advanced by the Crown the complaints involving IB and ND should be heard together, but separate from the complaints involving MK and BW, and that the indictments in respect of counts relating to MK and BW should be heard together.

92 My consideration of the evidence and of the submissions provided by counsel in respect of this suggestion has persuaded me that that is not an appropriate course. My conclusion in this regard has in effect been determined by my conclusion that the tendency evidence upon which the Crown seeks to rely is admissible in respect of each count on the indictment.

93 The second matter relates to the requirement of the *Criminal Appeal Act*, s 5F(3A) which provides:

> "(3A) The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any decision or ruling on the admissibility of evidence, but only if the decision or ruling eliminates or substantially weakens the prosecution's case."

94 In my opinion, there can be no doubt that the case in respect of each complainant will be substantially weakened if the evidence of each complainant is not cross-admissible as tendency evidence and the evidence of the other two witnesses is not admissible in respect of each complainant. If the evidence was not admitted, a jury in each trial would be required to assess the evidence of each complainant as if it was a sole and isolated incident, in circumstances where the individual complainant had only come forward many years after the alleged complaint. It follows that in my opinion, s 5F(3A) is satisfied.

95 Accordingly, I propose the following orders:

1. Vacate the rulings made by Flannery DCJ on 7 May 2010;

2. The evidence of tendency that the prosecution intends to produce pursuant to the *Evidence Act* 1995, s 97(1) contained in the notice dated 19 April 2010 is admissible;

3. Order that counts 1-10 on the indictment be tried together.

96 **BUDDIN J**: I agree with Beazley JA.

97 **BARR AJ**: I agree with Beazley JA.

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17 September 2010