PARTIES:	THE QUEEN v W B
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	9622509
DELIVERED:	18 August 1998
HEARING DATES:	22 July – 18 August 1998
JUDGMENT OF:	Kearney J

CATCHWORDS:

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE

Criminal Law – charges of sexual offences against different complainants - application for separate trials and to discharge the jury following ruling on 'similar fact' evidence – whether evidence on other charges admissible to negative alleged concoction of charges – whether prejudicial effect of other evidence outweighed probative value – whether prejudice to defence could be obviated by directions to the jury.

Criminal Code 1983 (NT), ss 309(1) and 341(1)
Gipp v The Queen (1998) 155 CLR 15, considered.
R v Sims [1946] 1KB 531, referred to.
De Jesus v The Queen (1987) 61 ALJR 1, considered.
Phillips v The Queen (unreported, Court of Criminal Appeal (WA), 8 October 1996), distinguished.
R v Ginger (unreported, Court of Appeal (Qld), 29 April 1997), referred to.
Sullivan v The Queen (1984) 152 CLR 328, referred to.
Hoch v The Queen (1988) 105 CLR 292, considered.

REPRESENTATION:

Counsel:

The Crown:	J.W.M. Adams
Defendant:	J.C.A. Tippett

Solicitors:

The Crown:	Office of the Director of Public Prosecutions
Defendant:	David Dalrymple & Associates

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. SCC 9622509

BETWEEN:

THE QUEEN
Plaintiff

AND:

W B
Defendant

CORAM: KEARNEY J

RULING

(Delivered Tuesday 18 August 1998)

The application

Yesterday, the evidence in the trial having been completed, I ruled on the question of the application of the rule as to ‘similar fact’ evidence in this trial. I ruled that the evidence in counts 1, 2, 3, 24, 25 and 27 fell into that category; and accordingly, the evidence adduced on any one of those 6 counts could be relied on in relation to the remaining 5. As to the remaining 23 counts, only the evidence adduced on a particular count could be considered, in relation to that count.

Following this ruling, Mr Tippett applied for an order for the separate trials of the other counts joined in the indictment, and for an order for the discharge of the jury in this trial. The application for separate trials was a renewal of 2 applications made before this trial commenced, to Mildren J in August 1997, and to me in July 1998. These applications had been unsuccessful, on the basis that at those times it was considered that the evidence on each count could be relied on in each of the other 28 counts.

Mr Tippett noted that the current trial now was not a 'similar fact' case. He submitted that for the trial to continue on the basis that 'similar fact' evidence was admitted only in 6 of the 29 counts, meant that the fair trial of the accused would be severely prejudiced in that, despite any direction I might give to the jury to the contrary, it would probably be influenced by the evidence adduced in other counts, when deciding whether or not the accused was guilty on each of the 29 counts.

The Crown submissions

Mr Adams had 2 independent submissions in relation to Mr Tippett's application for separate trials, and for the discharge of the jury.

(1) He submitted first that the evidence adduced on each of the remaining 23 counts – the individual evidence of each of the complainants – was admissible on each of the 29 counts, as evidence which went to negative the alleged concoction of those charges by each of the complainants concerned. He submitted that the fact the allegations were made, and the

detailed nature of the complainants' evidence in relation to their allegations, went to rebut the defence contention that they had concocted those allegations, that being the contention on which the defence had fought the case. He relied on *Gipp v The Queen* (1998) 155 CLR 15 at 19, where Gaudron J referred to the admissibility of 'similar fact' evidence, citing *Hoch v The Queen* (1988) 105 CLR 292 at 295-6 when noting that –

> "… it has a special probative value because, for example, it is highly improbable that persons would concoct the same story …"

In that case Gaudron J had also observed at 19-20 that the "general evidence of sexual abuse" there adduced was *not* 'similar fact' evidence, and hence was not admissible "unless there was some subsidiary issue in the trial to which it was relevant"; Mr Adams submitted that this was the position here as regards the evidence in the 23 counts. His submission was that the non-similar fact evidence in question here was relevant to concoction, a "subsidiary issue" in the trial, one in respect of which "the trial judge must instruct the jury as to the limited use that they may make of that evidence"; see *Gipp v The Queen* (supra) per Gaudron J at 19. Provided concoction had been made an issue in the trial only "by the way in which the defence case is conducted", in his submission the evidence in question was relevant and admissible; cf. Gaudron J in *Gipp v The Queen* (supra) at 20.

Mr Adams also relied heavily on *R v Sims* [1946] 1 KB 531, in which the principles applicable when determining whether separate trials should be

ordered, were discussed; the relevant provisions are identical with Code s309(1). Mr Adams submitted that the power under Code s341(1) to order separate trials of multiple offences turned on the forming of an opinion that the accused would otherwise "be prejudiced or embarrassed in his defence"; I note that the power in s341(1) seems wider than that, extending to "any other reason". The principles set out in *R v Sims* (supra) have, however, been overtaken by some recent authorities in the High Court.

I do not consider that Mr Adams' first submission should be upheld. The evidence in question, said to be admissible for reasons other than propensity (in that it is admissible to rebut concoction) reveals a criminal propensity on the part of the accused; its prejudicial nature in my view outweighs its probative value on the issue for which it is sought to be admitted.

(2) Mr Adams' second submission was that the charges were properly joined under Code s309(1), and should not be severed under s341(1), because any prejudice which might otherwise result from the multiplicity of counts could be corrected by appropriate directions to the jury, on the need to treat each count quite separately.

Mr Adams relied on *De Jesus v The Queen* (1987) 61 ALJR 1. In that case the High Court held that the appeal should be allowed because, the evidence on the one count being inadmissible on the other, the 2 counts should

not have been joined in the one indictment. Mr Adams noted that the minority judges, Mason and Deane JJ, considered at 5 that the offences had been properly joined; and that Dawson J, a member of the majority, was "inclined" to the view that that was correct, saying (at 9) that

> "the provisions allowing joinder should not, because of the discretion [to order separate trials] be given an unduly restricted meaning."

Mr Adams submitted that although the offences charged had now been held not to involve 'similar facts', they were similar to some degree, and any prejudice could be corrected by appropriate directions to the jury.

Mr Adams furnished me this morning with *Phillips v The Queen* (unreported, Court of Criminal Appeal (WA), 8 October 1996) and *R v Ginger* (unreported, Court of Appeal (Q'land), 29 April 1997). I heard further submissions from both counsel on these cases, and on the question whether prejudice to the defence could be obviated by appropriate directions to the jury.

The defence submissions, in reply

Mr Tippett noted that when the defence made an application to Mildren J in August 1987 for separate trials, the Crown had then based its case for non-severance, on the fact that *all* the counts involved 'similar fact' evidence. His Honour considered, in his decision of 13 October 1997, that the indictment must be severed "unless the evidence of all of the complainants is admissible

as similar fact evidence"; he cited *Sullivan v The Queen* (1984) 152 CLR 328 and *De Jesus v The Queen* (supra) .

Mr Tippett submitted, correctly in my opinion, that Code s341(1) is concerned with prejudice or embarrassment to an *accused,* and not with any problems which may arise for the Crown, when the issue is whether separate trials of multiple counts in a single *indictment* should be ordered.

Mr Tippett also submitted that the offences charged did not form a "series" of offences, within the meaning of Code s309(1), because of the period of time which they covered; I do not think there is any merit in that submission.

Conclusion

It is clear, as Mr Tippett submitted, that as Dawson J put it in *De Jesus v The Queen* (supra) at 10 –

> "… as a general rule sexual offences form a special class of offences which should be tried separately except where the evidence upon one count is admissible upon another count."

See also Gibbs CJ at 3:

> "Sexual cases, however, are peculiarly likely to arouse prejudice, against which a direction to the jury is unlikely to guard."

Similarly, in *Hoch v The Queen* (supra), I note that it was held that charges involving 3 complainants should not have been heard together, because the

evidence admissible on each charge was not, on the facts of the case, admissible on the others.

I note that these general indications by the High Court of a usual approach to the trial of sexual cases does *not* mean that there are no sexual cases in which appropriate directions to the jury are likely to guard against prejudice, with fairness to the accused, even though the evidence on one count is not admissible upon another. *Phillips v The Queen* (supra) is an example. Each case must be considered on its own facts. The fact of this case are very different to these in *Phillips v The Queen* (supra).

Bearing in mind the approach and reasons of the High Court, in stressing the general desirability of the separate trials of sexual offences except where the evidence on each count is admissible upon the others, I do not consider that the present case is one where appropriate directions to the jury on each count are likely to provide a sufficient safeguard against prejudice to the accused, so as to ensure that he receives a fair trial. Accordingly, I consider that there should be separate trials of the counts in the Indictment; the details of such an order is a matter on which I will hear counsel further. Meanwhile, I consider that, regrettably, it is necessary in the ends of justice to discharge the jury in this trial without giving its verdict.

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