

IN THE HIGH COURT OF FIJI
AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 072 OF 2008

BETWEEN:

THE STATE

Complainant

AND:

RAYMOND RAJENDRA SINGH

Accused

Counsel: Mr. A. Rayawa & Ms. J. Shah for the State
Mr. H.A. Shah for the Accused

Date of Hearing & Ruling: Monday 26th January 2009

RULING (2)

[1] This is an application by the State to adduce similar fact evidence. On 26 January 2009 I refused the application. I now give reasons.

[2] The nature of similar fact evidence is previous assaults on the deceased by the Accused using a knife. The assaults were witnessed by the deceased's son, George Borret. In the proceedings before the Court, the prosecution case is that the Accused used a knife to inflict serious injury to the deceased which caused her death. The prosecution submits that the previous assaults on the deceased by the Accused are relevant to the issue of identity of the offender.

- The prosecution submits that the previous assaults on the deceased by the Accused show that the Accused is the person who inflicted the fatal injury on the deceased that caused her death and no one else.
- [3] The defence objects to this evidence. The defence submits that there is no nexus between the previous assaults and the offence of murder that the Accused is charged with, and that the prejudicial effect of such evidence outweighs any probative value it may have.
- [4] The phrase "similar fact evidence" has no explicit meaning. A range of evidence falls under the category of similar fact evidence. They are classed as identity, tendency, character, dispositional and relationship evidence. Despite its different nature, similar fact evidence shows a propensity, that is, a particular kind of behaviour or a particular state of mind. Because the notion of propensity is ingrained in all the categories of similar fact evidence, its admissibility is approached with caution.
- [5] In ***Queen v Holtz*** [2002] NZCA 323 (18 December 2002) 1, the New Court of Appeal at p.7 said:

One of the problems with evidence of past conduct, whether labelled evidence of bad character, propensity evidence or similar fact evidence, is the tendency to look for principles of admissibility applicable to all such evidence in all circumstances. At a very general level there is the broad principle that to be admissible the evidence must be such that its probative value outweighs illegitimate prejudice to the accused in having adduced evidence of past conduct that might be given undue weight or used improperly in reasoning towards guilt of the crime charged. It is in the application of that general principle in the circumstances of particular cases that difficulties arise. Often this is because the approach adopted in one set of circumstances is

taken as the rule to be applied in a quite different case. Because of the wide variation in circumstances in which the issue calls for consideration, the preferable approach in a particular case is that which determines and weighs probative value and potential prejudice in the circumstances. It is necessary to consider the nature of the evidence, what it is sought to prove, what other evidence there is and its relationship and whether the evidence relates to prior proved offending or to concurrent charges, all against the underlying dangers inherent in propensity or bad character evidence.

- [6] When similar fact evidence is relied on by the prosecution to prove the identity of the offender, the Court in **Holtz** at p. 8 of the judgment said:

We are not persuaded that it is necessary to have different rules governing the admission and use of evidence of past conduct where identity is the issue. We do accept, however, that where the evidence is to be given with a view to establishing identity, care is necessary in assessing probative value. There is a real danger of being seduced by invalid reasoning. Evidence of a past incident which might have been that of the accused may have no probative value (or even relevance) in establishing that it was the accused who was responsible for the crime charged. That he or she have been responsible for both incidents, without more, cannot amount to proof beyond reasonable doubt. There must be something that points to both incidents having been the responsibility of the same person and that the accused was responsible for one of them before the evidence is probative. That something may be provided in many ways. Striking similarity in the two incidents may be one of them. Other evidence linking the incidents and the accused may be available. Instead of one, there may be a series of previous incidents, each separately having little distinctiveness but when taken together compel the exclusion of coincidence.

- [7] The most influential decision regarding the evolution of the similar fact evidence rule is that of the Privy Council in **Makin v AG (NSW)** [1894] AC 57. In **Makin**, the prosecution was allowed to adduce evidence of other bodies of

infants found on premises occupied by the defendants at various times, to rebut claims made by them that the child they allegedly murdered had died of natural causes and that their only crime was in disposing of the body improperly. In holding that the evidence of other infants found buried in the premises occupied by the defendant at various times was properly admitted, Lord Herschell at p.65 said:

It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.

[8] The principle in **Makin** was adopted by the House of Lords in **DPP v Boardman** [1975] AC 421 and **R v P** [1991] 3 All ER 337, and by the majority in the High Court of Australia in **Pfenning** [1995] 182 CLR 461 (Mason CJ, Deane and Dawson JJ).

[9] In **Senikarawa v State**, Criminal Appeal No. AAU005 of 2004S, the trial judge admitted evidence of uncharged acts by the accused against the complainant. On appeal, the Court of Appeal upheld the trial judge's ruling and said:

The question of admissibility of such evidence is tested by the broader principle of whether the probative value of the evidence outweighs the prejudice to the accused, **R v Boardman** [1975] AC 421, **Pfenning v R** [1994-95] 127 ALR 99.

The nature of the evidence here was relationship evidence. The evidence of the uncharged acts provided an insight into the relationship between the appellant and the complainant and also the mother. It had a probative value beyond its tendency to prove a relevant propensity. It demonstrated an ongoing sexual attraction towards the complainant.

[10] While recognizing the inherent danger posed by the similar fact evidence, the courts have recognized that situations will arrive in which the probative value of similar fact evidence will be so strong as to outweigh any prejudicial effect it may have on an accused's right to a fair trial. In such cases, similar fact evidence may be allowed.

[11] In ***Pfenning***, the High Court of Australia held that before the prosecution can adduce evidence of "similar facts", the trial judge must be satisfied that there is no rational view of such evidence which is consistent with no innocence.

[12] At p.483 of the judgment, the Court said:

Because *propensity evidence* is a special class of circumstantial evidence, its probative force is to be gauged in the light of its character as such. But because it has a prejudicial capacity of a high order, the trial judge must apply the same test as a jury must apply in dealing with circumstantial evidence and ask whether there is a rational view of the evidence that is consistent with the innocence of the accused: *Hoch* (1988) 165 CLR at 296. Here 'rational' must be taken to mean 'reasonable' ... and the trial judge must ask ... the question in the context of the prosecution case; that is to say, he or she must regard the evidence as a step in the proof of the case. Only if there is no such view can one safely conclude that the probative force of the evidence outweighs its prejudicial effect. And unless the tension between probative force and prejudicial effect is governed by such a principle, striking the balance will continue to resemble the exercise of a discretion rather than the application of a principle.

- [13] From these authorities, the principles for admissibility of similar fact evidence could be summarized as follows:

Is the evidence relevant to a fact in issue in the case?

What is the probative value of the evidence?

Is there a reasonable view of the evidence that is consistent with innocence?

Does the probative value of evidence outweigh its prejudicial effect?

- [14] In this case the prosecution has led evidence that on 10 May 2008 at around midnight witnesses heard screams coming from the house occupied by the Accused and the deceased who at the time were a married couple. Shortly after the screams had stopped, the Accused was seen leaving the house with his two children in a car registration number ES028. After the Accused had left his house, the deceased was seen lying in a pool of blood on the floor of the living room. The deceased had a deep wound to her neck and a kitchen knife and broken bottles were found near her body. There is evidence of bloody footprints of the Accused found at the scene of the alleged crime. There is DNA evidence of the deceased's blood found on the clothes of the Accused and the vehicle he drove on the night in question. There is also evidence of an admission by the Accused that "he killed his wife in frustration", the making of which is in dispute.

- [15] Since there is circumstantial and direct evidence of identification, the prosecution's offer of relevance for the previous assaults on the deceased by the Accused to prove the identity of the assailant subject of the charge is misconceived. At this stage there is no suggestion that the Accused was an innocent bystander at the scene of the alleged crime. However, if such

evidence is led in due course either through the remaining prosecution witnesses or as part of the defence case, then the prosecution may renew its application as rebuttal evidence.

[16] After taking all these circumstances into account, I am not satisfied that there is an issue of identity of the person who has inflicted the fatal injury to the deceased for which the previous assaults on the deceased by the Accused becomes relevant to show that he is the person who in fact had inflicted the fatal injury that caused the victim's death.

[17] For these reasons, the application is refused.

.....
Daniel Goundar
JUDGE

At Suva
Monday 26 January, 2009

Solicitors:

Office of the Director of Public Prosecutions, Suva for the State
Haroon Ali Shah Lawyers, Lautoka for the Accused