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Evidence of Uncharged Criminal Acts

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EVIDENCE OF UNCHARGED CRIMINAL ACTS

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Evidence of uncharged acts usually has its genesis in an improper relationship of long standing. The admissibility of such evidence is scarcely supported by old authority or by logic. But times have changed, and every jurisdiction now admits the evidence. I examine the bases for admission. Assuming proper admission, what is the standard of proof? Can the evidence of uncharged acts support the evidence of the charged acts and, if so, how? There may be more events than can be realistically fitted on one indictment. Is there any difference when there is more than one complainant? What direction must a trial judge give? Is there an efficient method of appeal? I will try to distil some general propositions but it means looking at a lot of cases. I will examine how uncharged acts can affect sentence. Finally I will deal with the defence introduction of an accused's own uncharged criminal acts.

INTRODUCTION

For many years now courts have allowed evidence of criminal misbehaviour by an accused on occasions other than those charged. The characterisation of this evidence as 'uncharged acts' seems to have been first used in Australia in *Vonarx* in 1995.[1] I can find no record of the phrase being used here earlier, although it was extensively used in the USA. Thus the tag is not an Australian invention. Yet it seems to have made a stunning entrée into our legal vocabulary. "Uncharged acts" can now be regarded as part of the received judicial lexicon given the imprimatur bestowed on it by the High Court.[2] The term was first used in the setting of sexual offences where a complainant gave evidence of wrongdoing by an accused before or after the charged offence. More recently the term has been applied to permit evidence of other criminal acts in drug cases in a way that I will describe.

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[1] *R v Vonarx* [1999] 3 VR 618 (CA). The Court of Appeal handed down its decision on 15 November 1995.

[2] *Gipp v The Queen* (1998) 194 CLR 106 per Callinan J at 168; *KRM v The Queen* (2001) 206 CLR 221 per McHugh J at [24] and per Hayne J [134].

Notwithstanding the catchy designation, uncharged acts amount to evidence of the criminal propensity of an accused. The evidence is usually very prejudicial.[3] What makes uncharged acts quite special is that the evidence of the other wrongdoing has been allowed to be given by the one person who also gives evidence of the charged acts. The subject is not an easy one [4] for courts seem to have abandoned the old idea of general rules in favour of individualised discretionary solutions.[5]

HISTORY

It is not possible to discern why courts should allow such evidence to be given without looking at some curial history. But in all of these older cases evidence of other wrongdoing was given by an independent witness. For many decades now, evidence of relationship has been admitted when it is believed by judges to be relevant. An obvious example is where there has been a violent episode between spouses. Evidence of ill feeling between them had the potential to be relevant. In *Wilson* [6] a woman died from gunshot wounds. Her husband said the she was driving a tractor and carting a trailer of hay. He had put a shotgun on top of the hay. Their dog jumped on the load, discharged the gun and it was all a terrible accident. All manner of evidence was led to rebut that defence. One piece of prosecution evidence that found favour with the High Court was the hostility between the parties. That evidence was given by a person who heard the exchanges. Motive evidence was given by a woman with whom the accused was having an affair that the accused promised he would soon be free.

But relationship is not always a touchstone of admissibility. As Gleeson CJ said:

> "...it is not particularly helpful to begin with an assumption that, in a case of homicide involving a man and a woman, evidence of their relationship is admissible." [7]

And as Heydon JA said: "There is a blessed vagueness in the term 'relationship evidence'."[8]
For example, the parties may have had antipathy which had been resolved as it was in *Tsingopoulos*.[9]

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[3] *R v Beserick* (1993) 30 NSWLR 510; 66 A Crim R 419 at 515-516; 523 (CCA); *R v Vonarx* [1999] 3 VR 618 (CA) at 622 [14]; *R v FJB* [1999] 2 VR 428; 105 A Crim R 567 at 421; 573 [26] (CA).
[4] Smith v Holdenson, "Comparative Evidence: Admission of Evidence of Relationship in Sexual Offence Prosecutions – Part I (1999) 73 ALJ 432-445; – Part II (1999) 73 ALJ 494-502.
[5] Gleeson CJ, "Individualised Justice – The Holy Grail (1995) 69 ALJ 421-433. The article was based on the Martin Kreiwaldt Memorial address given by Gleeson CJ on 28 July 1994 at Darwin.
[6] *Wilson v The Queen* (1970) 123 CLR 334.
[7] *R v Frawley* (1993) 69 A Crim R 208 (NSW CCA) per Gleeson CJ at 220.
[8] *R v Clark* (2001) 123 A Crim R 506 (NSW CCA) per Heydon JA at 562 [99].

Evidence of wrongdoing with others has been held to be proper to prove the identity of the perpetrator of an obvious crime. A body is found, death having been brought about by obvious violence. Who is the killer? Someone who had been gratuitously violent to others just before, as happened in *O'Leary*,[10] and where the sufferers of that earlier violence all gave evidence. Mr Straffen strangled a young girl without any sexual motive and was detained because of his mental infirmities. That evidence was admitted when another girl was found killed in exactly the same circumstances when he had made a brief escape from his detention.[11] It was much the same with Mr Dupas, charged over killing a woman in the same way as he had previously been convicted.[12] That can be characterised as similar fact evidence. Propensity must be linked with opportunity as in *Pfennig*.[13] Again, in that case, a later detention of a young boy was admitted in evidence. There are other examples of independent evidence to show who committed the crime.

Evidence is received in a sexual case which shows that the accused has a passion for the complainant. The prime early case is *Ball*.[14] There a man and his sister were found in bed together and both were charged with incest. Other evidence was given that she had earlier given birth to a child and that the accused appeared on the birth certificate as the father. So there were those pieces of independent evidence.

WRONG ADMISSION OF UNCHARGED ACTS

Uncharged acts were wrongly admitted in early trials. A good example is *Trotter*.[15] Mr Trotter was charged with a count of indecent assault on a boy aged twelve years. The prosecution case was that the indecent assault occurred when the boy was lying on a bed watching television at Mr Trotter's house when he was touched in the genital area. In re-examination the boy referred to another incident of indecent assault when he was drying himself when getting out of the bath. The boy was the only witness of these events. The Victorian Court of Criminal Appeal held that the evidence of the bathroom assault was not inadmissible, but the prosecutor should have been required to elect on which assault the prosecution relied. This failure would result in the applicant's not being able to run an *autrefois acquit* defence in the event that he was tried again

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[9] *R v Tsingopoulos* [1964] VR 676 (CCA).
[10] *O'Leary v The King* (1946) 73 CLR 566.
[11] *R v Straffen* [1952] 2 QB 911 (CACrD).
[12] *R v Dupas* (2004) 148 A Crim R 185 (Vic, Kaye J).
[13] *Pfennig v The Queen* (1995) 182 CLR 461.
[14] *R v Ball* [1911] AC 47 (HL).
[15] *R v Trotter* (1982) 7 A Crim R 8 (Vic CCA).

on the bathroom incident. Further, it was impossible to know if the jury were unanimous.[16] The appeal was allowed.

Earlier still is *Peacock.*[17] Dr Peacock had been convicted of murder. The prosecution case was that the victim died after an illegal abortion. During the trial in Victoria before Madden CJ, evidence was led over objection that the accused regularly carried on the practice of abortions at his hospital. Some time later in the trial Madden CJ realised the evidence was wrongly admitted and withdrew it from the jury. In the High Court only Griffith CJ dealt with this point:

> "I express no opinion on the abstract question as to whether evidence of this kind may be admissible in some cases. There is no doubt that the evidence in this case was not admissible."[18]

The High Court unanimously set aside the conviction on another ground.

LATENT AMBIGUITY

Other cases support the proposition that there should be evidence of only one criminal act for each count. That proposition comes from the cases on latent ambiguity. In *Johnson v Miller* [19] the defendant had been charged with one count of sly grogging by selling from his hotel after hours. The evidence after amendment was of "certain persons" leaving the premises. The defence requested particulars: which man was the subject of the complaint. The request was refused. Thus there were many offences encompassed in that one charge. The charge was not duplicitous, but the evidence itself was capable of proving many offences. It was Dixon J who used the term latent ambiguity. His Honour said:

> "...the facts or the alleged facts disclosed a latent ambiguity in the complaint. The latent ambiguity might have been removed by making an amendment or by giving particulars selecting one instance or person to the exclusion of the others." [20]

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[16] *R v Trotter* at 18. In *R v Jones* (1974) 59 Cr App R 120 at 127-128 the Court of Appeal came to much the same conclusion where the evidence showed that an affray, the single charged offence, occurred in different streets at different times.
[17] *Peacock v The King* (1911) 13 CLR 619.
[18] *Peacock v The King* per Griffith CJ at 643.
[19] *Johnson v Miller* (1937) 59 CLR 467.
[20] *Johnson v Miller* per Dixon J at 468.

R v BALL

The first question to be posed is whether uncharged acts can prove that the charged offence truly happened. The answer is that the courts have found that it can, and the authority cited for that proposition is *Ball*, referred to above and which I will now have to expand. Mr Ball and his sister were charged with incest. The case against them was circumstantial, for the prosecution relied on their being found lodged in a room in 1910 with only one bed. At trial the prosecution was allowed to lead evidence that the parties had lived together in 1908. Miss Ball had then given birth to a daughter and had completed the birth register that Mr Ball was the father. He did not sign the document. Incest was not an offence at the time of the birth. The indictment alleged two acts of intercourse for a fortnight between dates and on the day the policed apprehended them. The Court of Criminal Appeal allowed the appeal.[21] They held that the prosecution had to prove an act of sexual intercourse on the relevant dates and the fact that intercourse resulting in a birth two years before did not go to prove the charged act.

> "...the mere prolongation of the relationship renders the offence on any given day even less likely".[22]

The Attorney General appealed to the House of Lords. The argument between Bench and Bar sums up the issues. Forrest Fulton, who had defended at trial and appeared in the Court of Appeal, argued that the birth of the child in 1908 was not relevant to the act alleged to have taken place in 1910. Did the pair have sex between the charged dates? He then fielded questions about passion..

> Fulton said, "there is no question here of motive or intent. The question is, was there a physical act or not?"[23]
>
> Lord Halsbury asked, "On an indictment for murder would it not be evidence that there was enmity?"
>
> Fulton replied, "It might be evidence to shew malice. There you have to prove the murder, and here you have not proved the carnal knowledge." He lost.

LOGIC

Ball's case has been used by courts to justify the admission of uncharged acts, wrongly in my view. In *Ball* there was some independent evidence of the earlier intercourse. It is a misunderstanding of the case to use it as authority when the evidence of the uncharged acts

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[21] *R v Ball* (1910) 5 Cr App R 238 (CA).
[22] *R v Ball* (1910 5 Cr App r 238 at 248 (CA).
[23] This exchange in the House of Lords is reported only in *R v Ball* (1910) 6 Cr App R 31 at 41-42 (HL). It does not appear in the authorised report of the case.

comes only from the complainant. Using the charges to determine the relevance of the uncharged acts involves a circularity to be avoided.[24] To use the words of Brennan J:

> "To seek to prove a fact in issue by a chain of reasoning which assumes the truth of that fact is, of course, a fallacy repugnant alike to logic and the practical processes of criminal courts."[25]

Just as offensive to logic is that the credibility of the complainant is enhanced by the complainant's own evidence of uncharged acts. Evidence by the complainant of uncharged acts:

> "...is admissible even though self serving...and whether or not the statement and acts are substantially contemporaneous with the time of the offence charged."[26]

It is easy to see that in the setting if uncharged acts, logic and law are uneasy bedfellows.

RECENT HISTORY

The starting point of the modern use of uncharged acts in sexual offences comes from two unreported New South Wales Court of Criminal Appeal decisions. They are *Chamilos* [27] and *Wickham* [28]. In *Chamilos* a Greek family was in fish and chip shops in different country towns. The four children worked in the shop with their parents. The eldest child, a daughter, left. Even though she made no recent complaint, she said that her father had been having regular sex with her. The indictment charged three offences, one in 1976, one in 1979 and one in 1983. The prosecutor confined his examination-in-chief to those three events with no reference to the history of the relationship between father and daughter. In cross-examination she said "it has always been happening with my father". O'Brien CJ of CrD gave the judgment with whom the others agreed. His Honour said:

> "...evidence is admissible from the child of the general sexual relationship between the adult and the child out of which the charge arises".[29]

His Honour then examined English authority in support. The appeal based on the admissibility of evidence of relationship was dismissed.

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[24] *R v Josifoski* [1997] 2 VR 68 (CA) per Smith AJA at 83-84.
[25] *Perry v The Queen* (1982) 150 CLR 580 at 612. His Honour repeated similar sentiments in *Sutton v The Queen* (1984) 152 CLR 528 at 552. Approved: *Thompson v The Queen* (1989 169 CLR 1 per Mason CJ and Dawson J at 17. Applied: *R v Tektonopoulos* [1999] 2 VR 412; 106 A Crim R 111 (CA) at [36]. In logic, this is an example of *petitio principii*, otherwise begging the question.
[26] *R v Beserick* (1993) 30 NSWLR 510; 66 A Crim R 419 (CCA) per Hunt CJ at CL at 521; 428.
[27] *R v Chamilos*, New South Wales Court of Criminal Appeal (24 October 1985).
[28] *R v Wickham*, New South Wales Court of Criminal Appeal (17 December 1991).
[29] *R v Chamilos* at 15-16.

In *Wickam* a father was convicted in separate trials of two counts of carnal knowledge of his daughter and four counts of homosexual intercourse with his son. The girl gave evidence of a history of improper contact. Gleeson CJ with whom the others agreed said:

> "discussion of the issue in the abstract can be misleading...As in the present case, such evidence will often be relevant. and tend to make more credible the evidence of the complainant...First, the evidence may establish a sexual relationship which makes the complainant's allegations more likely to be true."[30]

His Honour then dealt with the evidence being an aid to understanding the charges. He referred to the admissibility of the evidence set forth in *Chamilos*.[31]

ADMISSIBILITY

Wickham has dominated more recent cases on admissibility.[32] In *Beserick*, Hunt CJ at CL used what Gleeson CJ had said in *Wickham*:

> "The true bases of admission...were analysed in some detail most recently by this court in *Wickham*...The evidence is admissible first, in order to establish a sexual relationship which makes the complainant's allegation more likely to be true. The 'guilty passion' of the adult for the child which conduct shows may make more credible the complainant's evidence that the sexual activity took place on the particular occasion which is the subject of the charge. In other words, it makes it more likely that the offence charged was in fact committed."[33]

In *PLK* the Victorian Court of Appeal said that the purpose of admitting prior misconduct in sexual cases was **not** to bolster the complainant's evidence though that was its effect once it was admitted.[34] The court cited *Wickham* and *Beserick* as the authorities for the effect on credibility. The bolster rule is well known even if not always called by that name.[35]

The quality of the uncharged evidence seems to affect its admissibility. In *BFB* the evidence was prejudicial and should have been excluded because:

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[30] *R v Wickham* at pp 6-7.
[31] *R v Wickham* at p 8.
[32] But perhaps by one of those twists of fate Gleeson CJ who gave the leading judgment in *Wickham* before his appointment to the High Court was not on the courts which decided *Gipp v The Queen* (1998) 194 CLR 106 or *KRM v The Queen* (2001) 206 CLR 221. *Gipp* caused lower courts a great deal of consternation because no ratio could be discerned. *KRM* settled things a little.
[33] *R v Beserick* (1993) 30 NSWLR 510 at 515; 66 A Crim R 419 at 422.
[34] *R v PLK* [1999] 3 VR 567 (CA) per Buchanan JA at 578 [46].
[35] McHugh J referred to the "bolster rule" in *Palmer v The Queen* (1998) 193 CLR 1 at 21 [49].

"...it was given in such general terms that it was impossible for the defence to cross-examine meaningfully..."[36]

The evidence is not always prejudicial. In cross-examination of the victim wife in *PDF*, the witness said that the accused's conduct had never been as bad as it was on the charged acts. On appeal Winneke P described this uncharged act evidence as inconsequential.[37]

The discretion for a judge to reject the evidence seems to remain.[38]

RISK OF MANUFACTURE

In *Hoch* [39] the High Court said that the evidence of two witnesses should have been excluded because of the risk of their having collaborated. The test is whether there was a possibility of concoction between the witnesses.[40] But where only one witness gives evidence of both uncharged and charged acts, it may be impossible to tell whether the whole account is a manufacture, an invention. The *Hoch* argument has been run on appeal in a single complainant case without success. It doesn't apply to a single complainant, say the courts.[41] It is a separate issue where the complainant has made false allegations before and suffers from psychiatric problems.[42]

RELATIONSHIP

The cases say that evidence of uncharged acts can be admitted to show relationship. But the cases have contributed to some confusion. Part of the problem was *Gipp* [43] in which the different judgments seemed at odds, not only between themselves but internally as well. What a problem. No wonder Heydon JA said about relationship, "the authorities...bristle with problems".[44] Gradually the High Court seemed to be saying in *KRM* [45] that the more things change the more they remain the same.[46]

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[36] *R v BFB* (2003) 87 SASR 278 at 282 [26] (CCA).
[37] *R v PDF* (2001) 124 A Crim R 418 at 428 [20] (CA).
[38] *R v Beserick* (1993) 30 NSWLR 510; 66 A Crim R 419 at 516; 423 (CCA); *R v Kemp* [1997] 1 Qd R 383 at 398 (CA); *R v Vonarx* [1999] 3 VR 618 at 622-623 [14] (CA); *R v Pearce* [1999] 3 VR 287 (CA); *R v BFB* (2003) 87 SASR 278 at 282 [26] (CCA). See also Flatman and Bagaric, "Non-Similar Fact Propensity Evidence: Admissibility, Dangers and Jury Directions" (2001) 75 ALJ 190-205.
[39] *Hoch v The Queen* (1988) 165 CLR 292 at 297.
[40] *Hickey v The Queen* (2002) 136 A Crim R 150 (WA CCA) per Templeman J at 156 [41].
[41] *R v Vonarx* [1999] 3 VR 618 at 623 [17] (CA).
[42] For example *R v Pearce* [1999] 3 VR 287 (CA).
[43] *Gipp v The Queen* (1998) 194 CLR 106.
[44] *R v Dann* [2000] NSWCCA 185 (10 May 2000) at [34].
[45] *KRM v The Queen* (2001) 206 CLR 221.

The nasty case of *Loguancio* [47] involved continuing uncharged acts of violent assault and rape. The appeal was dismissed. The High Court refused special leave because McHugh J said the uncharged acts provided evidence of relationship between the accused and the complainant and of the context in which the offences were alleged to have occurred.[48]

Within the year in a now famous passage McHugh J said in *KRM*:

> "Until this Court decides to the contrary, courts in this country should treat evidence of uncharged sexual conduct as admissible to explain the nature of the relationship between the complainant and the accused just as they have done for the best part of a century"[49]

KRM settled things a little. The New South Wales Court of Criminal Appeal said in July 2002,

> "the only course this Court can take...in...a state of law which is perhaps best described as 'fluid' is to adopt the approach...that the law in *Beserick* and *AH* is still that which applies."[50]

There are some important observations made by the Victorian Court of Appeal. The first is that one incident does not make a relationship.[51] The second is a directive about admissibility. In *Pearce*, Tadgell JA said:

> "...no evidence of uncharged acts should be led before it is established at the trial that it should not be excluded as a matter of the judge's discretion and, if it to be admitted, its exact bearing on the charged acts, and on the evidence of them, is agreed or decided."[52]

TRUE CONTEXT

Evidence of uncharged acts is, according to *Beserick*,

> "admissible in order to place the evidence of the offence charged into a true and realistic context, in order to assist the jury to appreciate the full significance of what would otherwise appear to be an isolated act occurring without apparent reason."[53]

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[46] "Plus ça change, plus c'est la même chose", wrote Alphonse Karr.
[47] *R v Loguancio* (2001) 1 VR 235 (CA).
[48] *Loguancio v The Queen* M34/2000 (15 December 2000, unreported).
[49] *KRM v The Queen* (2001) 206 CLR 221 at 233 [31].
[50] *R v TAB* [2002] NSWCCA 274 (16 July 2002) at [33].
[51] *R v Young* [1998] 1 VR 402 (CA) at 416.
[52] *R v Pearce* [1999] VR 287 (CA) per Tadgell JA at 298.
[53] *R v Beserick* (1993) 30 NSWLR 510; 66 A Crim R 419 (CCA) per Hunt CJ at CL at 515; 422.

Put another way, the evidence makes plausible what would otherwise be implausible.[54] As McHugh J said in *KRM*:

> "...evidence of uncharged acts may explain why on the occasion or occasions charged, the complainant did not rebuff the accused or show no anger or resentment."[55]

Thus uncharged act evidence has been held properly admitted in cases of sexual offences to show the context in which they occurred.[56] This reason has also been used as a basis for admissibility in drug cases.[57]

Evidence of wrongdoing which occurred out of the jurisdiction cannot be charged. In the place where the charged acts are laid. If these out-of-jurisdiction acts tend to explain how the charged acts occurred, it is easy to understand their admissibility as uncharged acts. There are many cases where evidence was admitted of uncharged acts which occurred out of the jurisdiction.[58]

GUILTY PASSION

Most of the cases say that evidence of uncharged acts is admissible if it shows that the accused had a guilty passion for the complainant. It provides a motive.[59] They all cite *Ball*. One example is *Vonarx*.[60] There are many others.[61]

CREDIBILITY

The evidence of uncharged acts in sexual cases, once admitted, increases the credibility of the complainant. So much was said in *Wickham* and *Beserick*. But that proposition now seems to be entrenched. In New South Wales in *AH* [62] and in Victoria in *PLK* [63] appeal courts approved and followed those earlier cases.

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[54] *R v Hagarty* (2004) 145 A Crim R 138 at 143 [19] (NSW CCA).
[55] *KRM v The Queen* (2001) 206 CLR 221 per McHugh J at 230 [24].
[56] *R v Hagarty*; *R v R* (2003) 139 A Crim R 371 at 381 [44] (Qld CA); *R v Kostaras* (No 2) (2003) 86 SASR 541; 143 A Crim R 254 at [129].
[57] *R v Cornwell* (2003) 57 NSWLR 82; 141 A Crim R 164 at [38] (CCA).
[58] For example *R v Josifoski* [1997] 2 VR 68 (CA); *Dawson v The Queen* [2001] WASCA 2 (WA CCA)
[59] *KRM v The Queen* (2001) 206 CLR 221 per McHugh J at 230 [24].
[60] *R v Vonarx* [1999] 3 VR 618 at 622 [13] (CA).
[61] Such as *R v TJW, ex parte A-G* [1998] 2 Qd R 456 (CA); *Kailis v The Queen* (1999) 21 WAR 100; 107 A Crim R 195 at [84] (CCA); *R v AH* (1997) 42 NSWLR 702; 98 A Crim R 71 at 708; 77-78 (CCA).
[62] *R v AH* (1997) 42 NSWLR 702 at 708 (CCA).
[63] *R v PLK* [1999] 3 VR 567 CA).

In *PLK* the appeal submission was that the evidence of uncharged acts must come from another witness for an improved credibility of the complainant. Buchanan JA rejected that argument. His Honour said:

> "The decided cases put no such limitation upon the admissibility of past misconduct, and once the evidence is admitted, its probative qualities are the same whether the source of the evidence is the complainant or another."[64]

SUBSEQUENT UNCHARGED ACTS

In sexual cases uncharged acts are used by the prosecution to show relationship or guilty passion as we have seen. Uncharged acts subsequent to the charged acts can rarely be relevant. Two examples are sufficient. Johan Beserick was a petty officer who instructed naval cadets. One of those cadets said that shortly after they met, Mr Beserick fondled his penis. Judge Davidson QC over objection allowed the boy to give evidence that much the same thing continued many times a week for the next three or four years. The Court of Criminal struck down the conviction. Hunt CJ at CL, with whom the others agreed, said:

> "It could not usually be said that the evidence of *subsequent* sexual activity is relevant in order to place in its proper context the evidence of the earlier activity upon which the offence charged is based. I am not prepared to say that it could never be relevant for that purpose, but the cases in which it would be relevant for that purpose must surely be unusual ones."[65]

The second case was also in New South Wales. Nicholas Dann was convicted of two counts having homosexual intercourse with his seven year old stepson at Albury. The alleged offences arose out of a single incident between 1 January 1997 and 31 March 1997. Late in 1997 the family moved to Queensland. Over objection Judge Freeman allowed the complainant to give evidence of three other sexual acts in Queensland. The conviction was set aside. Heydon JA, with whom the others agreed, applied the principle from *Beserick*. His Honour added to that part of his judgment by saying that the Queensland evidence was vague making it difficult for the accused to respond except by a denial.[66]

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[64] *R v PLK* [1999] 3 VR 567 (CA) per Buchanan JA at 578-579 [48]. Charles JA concurred. The appeal was allowed for other reasons. Tadgell JA, who would have dismissed the appeal, dissented.
[65] *R v Beserick* (1993) 30 NSWLR 510 at 525; 66 A Crim R 419 at 432.
[66] *R v Dann* [2000] NSWCCA 185 (10/05/2000) at [37].

MULTIPLE COMPLAINANTS

In sexual offence cases there is often evidence of an accused's impropriety against more than one alleged victim. A prosecutor has to make the hard decision on whether to proceed with charges involving one or more. In *Beserick* there were separate trials for each complainant. The appeal encompassed both convictions.[67]

Even when there is an indictment alleging sexual offences against one complainant, sometimes another complainant gives evidence of uncharged acts because of how the trial is run. It happened in *BRS* [68] and in *TKWJ*.[69] In each there was only one complainant. In each the defence said it wanted to call evidence of good character. In each the prosecution properly led evidence of uncharged acts by the accused against another to rebut the good character evidence. The only difference was that in the latter case the defence did not call the character evidence.

The charges against *R H McL* involved a two complainants 'A' and 'B' and the charges about both were joined. Only 'A', gave evidence of a number of uncharged acts. Joinder was not a ground of appeal to the Court of Appeal [70] or to the High Court.[71] The Court of Appeal held the uncharged act admissible as showing guilty passion and explaining 'A's lack of complaint.[72] But the trial judge had misdirected the jury. She wrongly said that the evidence of uncharged acts of 'A' could be also be used on whether there was a sexual relationship between the accused and 'B'. In fact the uncharged acts bore on the relationship with 'A' alone.[73]

In *GAE* [74] the charges involved three complainants, 'M', 'S' and 'P', boys at the time. The severance argument failed because the Court of Appeal found the evidence cross-admissible. 'M' alone gave evidence of uncharged acts. That too was admissible said the court as showing:

> "...the existence of...sexual passion for M and thereby placed the charged sexual acts...with him in their proper context."[75]

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[67] *R v Beserick* (1993) 30 NSWLR 510; 66 A Crim R 419 (CCA).
[68] *BRS v The Queen* (1997) 191 CLR 275.
[69] *TKWJ* (2002) 212 CLR 124.
[70] *R v R H McL* [1999] 1 VR 746 (CA).
[71] *R H McL v The Queen* (2000) 203 CLR 452. The High Court appeal was only on sentence.
[72] *R v R H McL* [1999] 1 VR 746 at 767-769 [68]-[73] (CA).
[73] *R v R H McL* at 771-772 [79]-[80].
[74] *R v GAE* (2000) 1 VR 198; 109 A Crim R 419 (CA).
[75] *R v GAE* at 217; 436 [64].

DRUG CASES

Uncharged acts are not confined to sexual charges. They have been held properly admissible in drug charges as well. Some of the cases pick up the expressions used in the sexual cases. *Grakalic* is a good example. At trial there were three accused. One pleaded guilty and was sentenced on her preparedness to give prosecution evidence. She did give that evidence including that she had traded drugs with the accused for a good deal of time before the dates of the charges. She was clearly an accomplice. On appeal her evidence of the uncharged acts was held admissible. Murray J said the evidence:

> "was clearly admissible to support her credibility and make believable her knowledge of the applicant...It was evidence of a guilty relationship capable of rebutting (innocent) association."[76]

In *Mong* the prosecution led evidence of similar uncharged drug dealing six months before the first offence. The Court of Appeal held the evidence was admissible. Callaway JA said that it was relationship evidence.

> "It was no different in that respect from an allegation of a sexual offence between an adult and a child some months before the offence charged..."[77]

In *Long* the two accused were charged over an amphetamine cook up in South Australia. A prosecution witness gave uncorroborated evidence of there having been a cook up six weeks before the charged act. Held, the evidence was admissible. Doyle CJ used a string of decisions in sexual cases as justification.[78]

LEGISLATION

Three states have legislation which bears on the admissibility of propensity evidence. Victoria's *Crimes Act 1958* section 398A was passed in 1997 and has had a good deal of judicial interpretation. The next in time was Queensland *Evidence Act 1977* which has section 131A on similar facts and section 131B on the admissibility of evidence of domestic violence in charges of homicide and other violence. [79] The most recent legislation is Western Australia in 2004.[80] Neither the Qld nor WA legislation has yet been before the superior courts. None of

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[76] *Grakalic v The Queen* (2002) 27 WAR 19 (CCA) per Murray J at [23]. In fact defence counsel announced at trial that he would not be taking part in the trial other than for addresses. He did not ask a question of the accomplice.
[77] *R v Mong* (2002) 5 VR 565 per Callaway JA at 570-571 [18]. The other judges agreed with his Honour.
[78] *R v Long* (2002) 137 A Crim R 263 per Doyle CJ at 269-271 [34]-[41]. The other judges agreed.
[79] *Evidence Act 1977* s 132A.
[80] For offences under the *Criminal Code* chapters 28 to 30.

the legislation refers to uncharged acts in terms, but in Victoria it has been carefully examined.[81] The application of the *Uniform Evidence Acts* [82] was first dealt with in *AH*.[83]

STANDARD OF PROOF

The standard of proof is another difficulty. Courts seem to say that the standard of proof depends on the nature of the evidence. If the uncharged acts are part of the *res gestae* of the charged acts and inextricably part of them, they should be proved beyond reasonable doubt.[84] If the uncharged acts form an indispensable link in reasoning to guilt then they too would have to be proved beyond reasonable doubt.[85] Otherwise uncharged acts seem to be treated like any other piece of circumstantial evidence which do not have to be proved beyond reasonable doubt provided, as Wigmore said, it is strands in a cable.[86] But where the uncharged acts are links in the chain of proving the offence, to continue Wigmore's metaphor, they must be proved beyond reasonable doubt. But courts do not speak with one voice.

In *R H McL* the judge was held properly to have directed the jury that the uncharged acts showing only guilty passion and context, had to be proved to the criminal standard.[87] In *Cook*, on appeal, the court held that:

> "It is generally sufficient that in this kind of case that the jury be told that, unless they find the evidence of extraneous conduct reliable and believe it to be true, they should disregard it."[88]

INDICTMENT

An indictment should not be overloaded. Nor should it contain counts that are trivial. All the cases say that.[89] In cases that involve sexual offences prosecutors have a difficult decision to

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[81] *R v TJB* [1998] 4 VR 621; sub nom *Bullen* (1998) 102 A Crim R 74 (CA) per Callaway JA at 631-632; 84-85; *R v Tektonopoulos* [1999] 2 VR 412; 106 A Crim R 111 at [17]-[24] (CA); *R v GAE* (2000) 1 VR 198; 109 A Crim R 419 at 216-217; 436-437 [61]-[67].

[82] *Evidence Act 1995* (Cth and NSW) and *Evidence Act 2001* (Tas)

[83] *R v AH* (1997) 42 NSWLR 702; 98 A Crim R 71 at 708-709; 78-79 (CCA); *R v Fordham* (1997) 98 A Crim R 359 at 369 (NSW CCA). See also Smith and Holdenson, "Comparative Evidence: Admission of Evidence of Relationship in Sexual Offence Prosecutions – Part II (1999) 73 ALJ 494-502.

[84] *R v FJB* [1999] 2 VR 425; 105 A Crim R 567 (CA) per Charles JA at 434; 577 [41].

[85] *R v Nieterink* (1999) 76 SASR 454 (CCA) per Doyle CJ at [83]. *R v MM* (2000) 112 A Crim R 519 at 540 [50] (NSW CCA). In *R v IK* (2004) 89 SASR 406; 147 A Crim R 237 (CCA) Doyle CJ said at [84] that cases where uncharged acts need to be proved beyond reasonable doubt are the exception.

[86] Referred to by Dawson J in *Shepherd v The Queen* (1990) 170 CLR 573 at 579.

[87] *R v R H McL* [1999] 1 VR 746 at 771 [77] (CA).

[88] *Cook v The Queen* (2000) 22 WAR 67 at [75] (CCA) approved *Buttsworth v The Queen* (2004) 29 WAR 1 at 11 [43]-[44] (CCA).

[89] David Ross QC, *Ross: Crime* (2nd ed Lawbook Co, 2004) at [9.1740].

make. Do they charge few offences and try to confine the evidence to those charges? As we have seen, that is what happened in *Chamiros*. The opposite occurred in *Taylor* where there were 76 charges of alleged sexual offences against children. Even though it became a plea of guilty, the very number of counts made the case a "ridiculous exercise".[90] The modern practice is quite different. The indictment is certainly not overloaded but evidence is often given of events which are not included in any count. A good example is *Bau*.[91] The complainant gave evidence of sexual offences occurring regularly for six years. The indictment contained only two counts being the first act and the last. The complainant gave evidence of everything in between. It seems that the uncharged act evidence was not objected to at trial for it was not a ground of appeal. Perhaps because the accused was acquitted on count 1.

OBJECTIONS AND PLEAS

Most defence advocates will object to prosecution evidence of uncharged acts. A judge will hear submissions and rule. When the evidence is ruled admissible, in Australia the trial will usually then proceed. If the accused is convicted there will often be an appeal. The admissibility of the evidence of the uncharged acts will often be the main ground. There is a different system which operates in England. There, the pre-trial arguments are run, as here. Where there is an adverse ruling, the accused will plead guilty, then appeal against his conviction for the wrong introduction of evidence. The English judges see nothing adverse in this procedure and do not hold the plea of guilty against the accused. They hear it as a normal appeal.[92] Of course the accused would not plead guilty at that early stage if there were a chance of acquittal or if the trial could be expected to throw up other grounds.

In Australia we seem to be greatly influenced by the proposition that a plea of guilty is an acknowledgment of all the matters which the prosecution has to prove. According to the High Court decision in *Maxwell*[93] a plea of guilty must be unequivocal otherwise the trial judge must reject it. In South Australia the courts are fiercely opposed to the English system. In *Day*,[94] Gray J said:

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[90] *R v Taylor* (1992) 58 A Crim R 337 at 341 (Vic CCA).
[91] *R v Bau* [2005] QCA 106 (Qld CA 15 April 2005).
[92] Examples are *R v Chalkley* [1998] QB 848; *R v Richardson* [1999] QB 444 and *R v Cort* [2004] QB 388.
[93] *Maxwell v The Queen* (1995) 184 CLR 501.
[94] *R v Day* (2002) 82 SASR 85 (CCA) per Gray J at [75]. Wicks J agreed. The court applied their earlier decision in *R v Frantzis* (1996) 66 SASR 558 (CCA) to the same effect.

"The procedures of the Court should not be used in this way. Other avenues are available, including the case stated or questions reserved procedure, or if found guilty following trial, through the appellate process."

New South Wales adopts a more flexible approach, simply asking whether there has been a miscarriage of justice.[95]

In Victoria the Court of Appeal has said that an appeal against conviction after a plea of guilty will succeed where there has been a miscarriage of justice. Recent cases show that a successful appeal is a rare thing.[96]

Where the strength of the prosecution case rests on uncharged acts the trials are usually quite long. If the admissibility of the uncharged act evidence were to be the only basis of an appeal, the flexible English (and NSW) approach has merit, not least for court efficiency.

DIRECTIONS TO THE JURY

A judge must give directions to the jury (or to himself if sitting alone) on the permissible and impermissible used of evidence of uncharged acts. King CJ spoke of it many years ago.[97] In *KRM* both McHugh J and Hayne J spoke of the limited use of the evidence and the need for a propensity warning.[98] The limited purpose and effect of uncharged acts should be explained.[99] Where the evidence is uncorroborated the jury should be taken to any inconsistencies and uncertainties and warned to scrutinise the evidence of the complainant with great care.[100] A *Longman* [101] warning should be given when there is delay in complaint about the uncharged acts.[102] Things to avoid are to invite the jury to reason that mere acceptance of the complainant's evidence of uncharged acts would afford more reason to accept evidence of the charged act.[103] Words to be avoided are "propensity"[104], "guilty passion".[105] The judge should

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[95] *R v Doyle* (2001) 123 A Crim R 151 (NSW CCA).
[96] *DPP (Cth) v Hussein* (2003) 8 VR 92; 143 A Crim R 138 at 95; 141 [9] (CA) and see the cases cited in the footnote to the paragraph.
[97] *R v Dolan* (1992) 58 SASR 501 (CCA) per King CJ at 503.
[98] *KRM v The Queen* (2001) 206 CLR 221 per McHugh J at 233 [31] and Hayne J at 264 [134].
[99] A good example is *R v D'Arcy* (2001) 122 A Crim R 268 at 280 [55] (Qld CCA).
[100] *Robinson v The Queen* (1999) 197 CLR 162 at 171 [26].
[101] *Longman v The Queen* (1989) 168 CLR 79.
[102] *R v RWB* (2003) 87 SASR 256 (CCA).
[103] *R v Grech* [1997] 2 VR 609; 88 A Crim R 489 (CA) per Callaway JA at 614; 494-495; *R v Pearce* [1999] 3 VR 287 at 297 [27] (CA); *Cook v The Queen* (2000) 22 WAR 67; 110 A Crim R 117 at [63]-[92].
[104] *R v Vonarx* [1999] 3 VR 618 at 624 [21] (CA); *R v IK* (2004) 89 SASR 406; 147 A Crim R 237 (CCA) per Doyle CJ at [80].

tell the jury not to act on the uncharged act evidence unless satisfied of its truth,[106] that the offences could only be proved by evidence which related to them and not to the extraneous conduct.[107] If they disbelieve the complainant on an uncharged act it may create a reasonable doubt on the charge.[108]

POSSIBLE DIRECTIONS

1. The prosecution must prove beyond reasonable that he is guilty of the offence which is charged.
2. You have heard the complainant give evidence about events other than those which are charged.
3. The purpose of that evidence, according to the prosecution, is (to put the evidence about the offence in context OR to show the relationship between the accused and the complainant OR to show that he accused had a sexual desire of feeling for the complainant).
4. Those items of evidence of uncharged acts are these (detail given of each act). The first act is capable of showing (concept, relationship or sexual desire). (Then go through each uncharged act and its evidential capacity).
5. Look at each uncharged act individually. Scrutinise each with great care. (Point to evidence of uncertainties and inconsistencies). Then decide whether you are satisfied or not satisfied that it occurred.
6. If you are not satisfied about any of these uncharged acts you must then decide whether the prosecution has failed to prove (context, relationship or sexual desire).
7. Even if you are satisfied of each uncharged act and that it shows (context, relationship or sexual desire) you can only use that evidence for the limited purpose I have explained.
8. You must not reason that if the accused committed the uncharged acts that he is the sort of person who would commit the offence with which he is charged.
9. If you are not satisfied of some or any of the uncharged acts, does that cause you to have reservations about accepting the complainant's evidence about the offence charged?
10. I repeat. The prosecution must prove its case beyond reasonable doubt. It can only do so on the evidence that bears on the commission of the offence which is charged.

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[105] *R v AH* (1997) 42 NSWLR 702 at 708; 98 A Crim R 71 at 78 (CCA).
[106] *R v Kostaras* (2002) 133 A Crim R 399 (SA CCA) per Doyle CJ at 407 [51].
[107] *R v Grech* [1997] 2 VR 609; 88 A Crim R 489 (CA) per Callaway JA at 614;494.
[108] *R v Markuleski* (2001) 52 NSWLR 82; 125 A Crim R 186 (CCA) at [190] and [263]; *R v S* (2002) 129 A Crim R 339 at 349 [29] (Qld CA); *R v LTP* [2004] NSWCCA 109 (1 July 2004). *Markuleski* was not followed in *R v Trainor* [2003] VSCA 200 (10 December 2003) (Vic CA).

SENTENCING

May uncharged acts be taken into account by a sentencer?

The answer lies in the High Court decision in *Weininger*.[109] The case came about in the following way. Mr W pleaded guilty in NSW District Court to importing cocaine and associated charges. On the plea before Judge Levine the defence argued for leniency because of no prior convictions, that it was a one off and occasioned by financial difficulties. There was material before the judge in uncontested prosecution facts that suggested a long-standing importation system in which Mr W played an important part. Her Honour sentenced on the basis that he could not be treated as a first offender with the leniency that status usually attracts. An appeal failed 2-1.[110] Thence to the High Court which dismissed the appeal. In its joint judgment the High Court endorsed its earlier judgment in *Olbrich* [111] in following *Storey* [112] that ordinarily on sentence aggravating facts must be proved by the prosecution beyond reasonable doubt but mitigating facts need to be proved by the defence only on the balance of probabilities.

But, said the High Court, there are subtleties.

> "As was recognised in *Olbrich*, some disputed issues cannot be resolved in a way that goes either to increase or decrease the sentence..."[113]
>
> and
>
> [N]ot every matter urged on the judge who is to pass sentence has to be, or can be, fitted into one or other category."[114]
>
> And importantly as a matter of logic and commonsense:
>
> "The judge may be unpersuaded of matters in mitigation or in aggravation. The absence of persuasion about a fact in mitigation is not the equivalent of persuasion of the opposite fact in aggravation."[115]

Weininger has been interpreted according to its terms. In *Mailes* Wood CJ at CL had to impose a limiting term on a mentally disturbed man for murder. Some uncharged matters were put before his Honour showing aggression and threats. His Honour said:

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[109] *Weininger v The Queen* (2003) 212 CLR 629.
[110] *R v Weininger* (2000) 159 FLR 238; 119 A Crim R 151 (NSW CCA). Simpson J dissented.
[111] *R v Olbrich* (1999) 199 CLR 270.
[112] *R v Storey* [1998] 1 VR 359 at 369 (CA).
[113] *Weininger v The Queen* at 636 [19].
[114] *Weininger v The Queen* at 638 [24].
[115] *Weininger v The Queen* at 638 [24].

> "I specifically do not regard them as matters which should aggravate the sentence in a way that might be seen to have included a component for uncharged offences... *Weininger*".[116]

Where there is a course of sexual conduct demonstrated by the uncharged acts the scope for extending leniency is reduced. In *Liddy (No 2)* the court followed proposition earlier put by Doyle CJ in *D*. Doyle CJ had said:

> "The only way in which the uncharged offences can be used is to rely on them to refuse to extend the leniency that might be extended if the offences for which the offender is convicted were isolated offences."[117]

Some courts claim to follow *Weininger* but the case may not be clear cut. In *Dunne* the accused had pleaded guilty to 31 sexual offences he committed over on his young male students when he was a teacher. The offence occurred over three years. The main victim's statement referred to many other uncharged acts. The sentencing judge had said that he was not treating the uncharged acts as aggravation but on whether to be lenient. The Victorian Court of Appeal said:

> "...the fact of the commission of numerous other offences during the same period was relevant and admissible: it enabled a more realistic assessment to be made of the nature, degree and true significance of the criminality involved in the 31 offences and the level of the appellant's personal responsibility. It showed too that they were not the offences of a person of otherwise good character, To have regard to this 'context' is not to sentence the appellant for the uncharged acts. These matters are explained in *Weininger v The Queen.*"[118]

In Queensland the Court of Appeal up to 1997 held that it was improper for a sentencing judge to withhold leniency on the basis of uncharged acts.[119] In *TL*[120] on a re-sentencing for sexual offences the same court made no reference to those earlier cases.

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[116] *R v Mailes* (2003) 142 A Crim R 353 at 362 [51] (NSW SC, Wood CJ at CL).
[117] *R v D* (1997) 69 SASR 413; 96 A Crim R 364 (CCA) per Doyle CJ at 419; 369. Followed, *R v Liddy* (No 2) (2002) 84 SASR 231; 135 A Crim R 468 at [69] (CCA).
[118] *R v Dunne* [2003] VSCA 150 (24 September 2003) (Vic CA) at [17].
[119] *R v W* [1998] 2 Qd R 531 at 537 (CA) applying the careful review of authorities in *R v D* [1996] 1 Qd R 363 (CA) whose conclusions were set out at 403-404.
[120] *R v TL* [2004] QCA 430 (12 November 2004).

In South Australia courts have held that the general approach to sentencing in multiple sexual offending against children is the same whether the offences are charged as representative counts referring to uncharged acts, or as a single offence of persistent sexual abuse of a child.[121]

If there be more than one charge a court must impose an appropriate sentence on each.[122] After that, a combination of cumulation and concurrency will give the proper total sentence.[123] Concurrent sentences are appropriate if the offending were parts of a single episode.[124] A sentencing court will take into account remorse, delay and rehabilitation in the meantime. These sentencing principles apply to all cases.

DEFENCE EVIDENCE

Occasionally a person charged with a crime will introduce evidence of his own uncharged criminal acts.[125] Of course it must be relevant to issues in the trial.[126] I assume for this part that the introduction of such evidence for the defence is tactically wise, for there is no judicial discretion to exclude such evidence on the ground of prejudice. Uncharged criminal acts of the accused will usually be led by the defence to explain some strong part of the prosecution case.[127] Here are some examples.

Mr Vaitos was charged with many offences, most of which were sexual. He was the "silver gun rapist". The prosecution evidence included property stolen from the victims which the accused had in his possession. To explain this evidence the accused said that he wasn't a sex offender; these goods came from burglaries.[128]

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[121] *R v P* (2003) 87 SASR 287; 144 A Crim R 51 at [54] (CCA) applying *R v D* (1997) 69 SASR 413; 96 A Crim R 364 (CCA).
[122] *DPP v Grabovac* [1998] 1 VR 664; 92 A Crim R 258 at 680; 275 (CA), applied *R v Coukoulis* (2003) 7 VR 45; 138 A Crim R 520 (CA). See also *R H McL* v The Queen (2000) 203 CLR 452 at 457 [16]-[18].
[123] *Dickens v The Queen* (2004) 147 A Crim R 343 (WA CCA) applying *Mill v The Queen* (1988) 166 CLR 59 at 63.
[124] Often referred to as the 'one transaction rule". The expression derives from non-sexual cases such as *R v Murrell* (1985) 4 FCR 168; 15 A Crim R 303 per Blackburn J at 180; 315 (FCA); *R v Lappas* (2003) 152 ACTR 7; 139 A Crim R 77 at 27; 98 [137] (FCA); *R v Faithfull* (2004) 142 A Crim R 554 at 558-559 [25]-[28] (WA CCA) but has been used in a sexual case: *Dickens v The Queen* (2004) 147 A Crim R 343 at 345 [12] (WA CCA).
[125] See generally David Ross QC, "Accused Introduces His Own Bad Character" (2003) 8 Deakin Law Review 291-303.
[126] *Smith v The Queen* (2001) 206 CLR 650 at 654 [7].
[127] I do not include in this part evidence which shows prior convictions. An example is *R v H* (1995) 83 A Crim R 42 (SA CCA) where the accused said he could not have commited the offence because he was in gaol at the time.
[128] *R v Vaitos* (1981) 4 A Crim R 238 at 285-286 (Vic CCA). Mr Vaitos was convicted and lost his appeal.

In *Phillips* the accused was charge with rape. His fingerprints were found near the window of the victim's house where the rapist had gained entry. Easily explained, he said. She asked me to get marijuana for her. I tried but was unsuccessful. I went to her house to tell her but she wasn't home. I even checked by looking through the window. Hence my fingerprints.[129]

Messrs Peters and Heffernan were charged with conspiracy to supply heroin. Those taped conversations were not about heroin, they said. They were about the disposal of stolen cigarettes and the supply of cannabis leaf. Their defence succeeded, but too well. They were then charged with the offences they alleged to explain the heroin charge.[130]

In *Anderson* the accused was charged over explosions in England, said to be done by the IRA. Forged documents in her possession included passport and driving licence. The forgeries, she said, nothing to do with explosions in England. They were part of a conspiracy to break men from the Maze prison in Ireland. The escapees were to use the documents to get through Scotland and thence to Copenhagen.[131]

[129] *Phillips v The Queen* (1985) 159 CLR 45.
[130] *R v Peters and Heffernan* (1995) 83 A Crim R 142 and later (1996) 88 A Crim R 585. Both were decisions by NSW CCA.
[131] *R v Anderson* [1988] QB 678.