***Roach v The Queen* [2011] HCA 12 (4 May 2011) – High Court of Australia (appeal from Queensland Court of Appeal)**

'Assault occasioning bodily harm' – 'Directions and warnings for/to jury' – 'Probative value' – 'Propensity evidence' – 'Relationship evidence'

Charge/s: Assault occasioning bodily harm.

Appeal Type: Appeal against conviction.

Facts: Mr Roach was convicted of assault occasioning bodily harm of his female partner. At trial, Howell DCJ admitted evidence of previous (uncharged) assaults that Mr Roach committed on the complainant during their relationship. The relevant Queensland provision—s 132B of the *Evidence Act 1977*—applies to proceedings for assault occasioning bodily harm and provides that '[r]elevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed is admissible in evidence in the proceeding'. However, s 130 of the *Evidence Act 1977* gives the judge power to exclude otherwise admissible evidence if it is deemed unfair to the accused to admit.

Issue/s: Whether the trial judge should have applied the test in *Pfennig v The Queen* [1995] HCA 7; (1995) 182 CLR 461 and whether 'viewed in the context of the prosecution case, there is a reasonable view of [the relationship evidence] which is consistent with innocence'. Only if there is no reasonable view, can the evidence be admissible because its probative value outweighs its prejudicial effect on the accused.

The appellant argued that in considering whether to admit evidence under s 132B, the trial judge ought not to admit that evidence if there was a reasonable view of that evidence consistent with innocence ('the rule in *Pfennig*'). The appellant argued that the rule in *Pfennig* recognises the prejudicial effect of evidence used to prove a propensity of the accused ("propensity evidence"), and applies at common law to propensity evidence as a measure of the probative force of that evidence. (see *Roach v The Queen* [2010] HCATrans288 (5 November 2010)).

Decision and Reasoning: The appeal was dismissed. French CJ, Hayne, Crennan and Kiefel JJ of the High Court held firstly that s 132B has a 'potentially wide operation'. Section 132B contemplates evidence of other acts of domestic violence throughout the relationship being admitted. The section could also be used to admit similar fact evidence to prove the accused's propensity to commit similar crimes. The Court found it could also be used to admit other types of evidence including evidence of a person's state of mind, evidence of the circumstances of the crime or to provide context to the history the relationship. It could also be used as evidence in a provocation or self-defence case, or where the offender is a victim of domestic violence. (See at [30]-[31]). The Court then held that the *Pfennig* test has no application to the common law residual discretion enshrined in s 130. As such, the test of admissibility under s 132B is whether the evidence is relevant, which is subject to the exercise of the discretion preserved in s 130.

The purpose of admitting the evidence here was not to show a propensity of the accused (re the rule in *Pfennig*); rather, the evidence:

'was tendered to explain the circumstance of the offence charged. It was tendered so that she could give a full account and so that her statement of the appellant's conduct on the day of the offence would not appear "out of the blue" to the jury and inexplicable on that account, which may readily occur where there is only one charge. It allowed the prosecution, and the complainant, to meet a question which would naturally arise in the minds of the jury' at [42].

The High Court noted the permissible ambit of 'relationship evidence', and the need for clear directions for juries about the use of such evidence and the purpose for which it is tendered:

[45] In the present case the evidence, if accepted, was capable of showing that the relationship between the appellant and the complainant was a violent one, punctuated as it was with acts of violence on the part of the appellant when affected by alcohol. Without this inference being drawn, the jury would most likely have misunderstood the complainant's account of the alleged offence and what was said by the appellant and the complainant in the course of it. To an extent Holmes JA acknowledged this in the conclusions to her reasons. Whilst her Honour identified the relevance of the evidence as showing the particular propensity of the appellant, she also concluded that it made the appellant's conduct in relation to the alleged offence intelligible and not out of the blue.

[47] The importance of directions in cases where evidence may show propensity should not be underestimated. It is necessary in such a case that a trial judge give a clear and comprehensible warning about the misuse of the evidence for that purpose and explain the purpose for which it is tendered. A trial judge should identify the inferences which may be open from it or the questions which may have occurred to the jury without the evidence. Those inferences and those questions should be identified by the prosecution at an early point in the trial. And it should be explained to the jury that the evidence is to allow the complainant to tell her, or his, story but that they will need to consider whether it is true.

[48] The directions in this case were sufficient. At the conclusion of the evidence the trial judge directed the jury of the need to exercise care and that it would be dangerous to convict on the complainant's evidence alone unless they were convinced of its accuracy. His Honour told the jury that the history of the

relationship between the complainant and the appellant had been led "for a very specific purpose" and that they must be "very, very careful in relation to the limited use that [they] may make of such evidence." He explained how evidence could be used as evidence of propensity and directed them that they were not to use the evidence in that way. His Honour informed the jury that the evidence was led so that the incident charged was not considered in isolation or in a vacuum but "to give [them] a true and proper context to properly understand what the complainant said happened on the 13th of April 2006."