Jersey & Guernsey Law Review – February 2013

MISCELLANY

Admitting prejudicial evidence

1 A recent judgment of the Jersey Court of Appeal (Sir John Nutting, JA) in *U v Att Gen*[1] throws helpful light on an important distinction in relation to the admissibility of evidence prejudicial to an accused person that is sometimes lost in the mists of similar fact evidence. The starting point is still to be found in the celebrated *dictum* of Lord Herschell in *Makin v Att Gen (New South Wales)*[2]—

> "The mere fact that evidence adduced tends to show 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 on 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."

2 The test for the admissibility of similar fact evidence is a two-stage test. First, is it relevant? This is a hard-edged question as to whether or not the evidence has any probative value. Secondly, should it be excluded as being unfair? There is a discretion to be exercised to determine whether the evidence should in all the circumstances of the particular case be admitted. All this is well established. The evidence is generally admissible if it is relevant to an issue before the court, *e.g.* because it tends to prove one of the elements of the alleged offence, or rebuts a defence which would otherwise be open to the accused. As Nutting, JA put it—

> "The question of coincidence lies at the heart of the analysis. Evidence is likely to be admissible if an attempt to explain it away by coincidence would be an affront to common sense, or would be against all probabilities, or would only be accepted as an explanation by an ultra cautious jury: *DPP v P*."[3]

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[1] [2012] JCA 085.
[2] [1894] AC 57, at 65.
[3] (1991) 2 AC 447.

3 In *U v Att Gen*, the 34-year-old appellant had been convicted of "making" (*ie* viewing), indecent photographs of children contrary to art 2(1)(a) of the Protection of Children (Jersey) Law 1994. Indecent photographs of young boys were found on the hard drive of his computer ("the 2010 photos"). The appellant denied making them. The prosecution obtained the leave of the trial judge to adduce similar fact evidence in three respects—(1) evidence of a transaction on his credit card in 2003 subscribing to a website "Erectxboys.com"; (2) a list of other similar website addresses on the hard drive of another computer belonging to the appellant seized by the police and examined in 2005; and (3) the memory card on the hard drive of the computer containing the 2010 photos on which was a film of the appellant having sex with KH, a 14 year old boy.

4 The trial judge found that (1) and (2) were relevant to issues before the Jurats and should be admitted. The Court of Appeal upheld that exercise of discretion. The interest in the judgment lies primarily in the court's treatment of (3).

5 The appellant's defence had raised the issue of whether it was in fact KH who had made the 2010 photos. He had access to the computer, and made use of it from time to time. It was KH who had complained to the police of the abusive relationship that he had suffered at the hands of the appellant and who had drawn the attention of the police to the film. The prosecution had submitted that the evidence of the film was admissible on two bases—first, that it was relevant similar fact evidence, in that it was evidence of the appellant's interest in making and retaining indecent images of boys; and secondly, that it was admissible to enable the Jurats the better to understand the background to the making of the 2010 photos.

6 The trial judge had decided that the film was relevant similar fact evidence for the reason given by the prosecution. The Court of Appeal agreed, and found that the judge's exercise of discretion could not be faulted.

7 Nutting, JA held that the evidence was also admissible as being part of the background history. He cited a passage from an unreported judgment of Purchas, J in *R v Pettman*[4]—

> "Where it is necessary to place before the jury evidence of part of a continual background or history relevant to the offence charged in the indictment, and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involves including evidence

[4] CA, 2 May 1985, unreported.

> establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence."

Nutting, JA added—

> "But in truth all that is required is that such evidence passes the threshold test for relevance; and although background or historical evidence may include evidence of similar fact, it is important to distinguish evidence of background from similar fact evidence because of the higher test of admissibility invariably accorded to the latter. Professor Birch pointed out the distinction in (1995) Crim LR 651:—
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> > 'Similar fact evidence is employed as evidence which tends strongly to prove a particular fact (identity, intent, causal connection or whatever) which could be proved by other means but which the prosecution has chosen to establish by reference to other misconduct of the accused. As such, the evidence may need to be possessed of a high degree of probative value in order to buy its ticket to admissibility, for it involves "dragging up" material which is by definition prejudicial and which might have been left out. Thus it has been said that such evidence should be admitted in circumstances where it would be an "affront to common sense" to exclude it (*per* Lord Cross in *DPP v Boardman* (1974) 3 All ER 887 at 908, (1975) AC 421 at 456). Background evidence, on the other hand, has a far less dramatic but no less important claim to be received. It is admitted in order to put the jury in the general picture about the characters involved in the action and the run up to the alleged offence. It may or may not involve prior offences; if it does so this is because the account would be, as Purchas, LJ says in *R v Pettman* (2 May 1985, unreported), "incomplete or incoherent" without them. It is not so much that it would be an affront to common sense to exclude the evidence, rather that it would be helpful to have it and difficult for the jury to do their job if events are viewed in total isolation from their history.'"[5]

8 Applying the test of relevance to the relationship between KH and the appellant, the Court of Appeal held that, in deciding whether there was a possibility that KH had made the 2010 photos—

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[5] At para 41.

> "it would have been unrealistic to have deprived the Jurats of the details of the relationship between KH and the appellant, including the existence of the film and KH's allegations to police shortly before the appellant's arrest."[6]

The evidence was accordingly also admissible as being a necessary part of the background.

9 Although the case was apparently not drawn to the court's attention, *U v Att Gen* is consistent with a previous decision of the Court of Appeal in *Glover v Att Gen*[7] where the case summary records—

> "As a general rule, the Crown was obliged to call all relevant evidence to support its case, including background evidence of any kind (*e.g.* evidence establishing the commission of a further criminal offence with which the accused was not charged) if the absence of such evidence would result in a deficient or distorted picture being presented to the court (*R v Pettman*, English CA, 2 May 1985, unreported, applied)."

Provided that, without the background evidence in question, a "deficient or distorted picture" would be presented, or an "incomplete or incoherent" account would be given to the jury, such evidence is admissible irrespective of the rules governing the admissibility of similar fact evidence. *U v Att Gen* is a helpful reminder of this evidential rule.

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[6] At para 46

[7] 2008 JLR *N* [30], CA (Sumption, Nutting and Pleming JJA), 22 July 2008.