STATE

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v.

MARK LAWRENCE MUTCH

[HIGH COURT, 1999 (Pathik J) 26 October]

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Criminal Jurisdiction

Crime: Evidence and proof- similar fact evidence- when admissible.

The accused was charged with a number of offences involving indecency with
C children. The prosecution sought leave to adduce the evidence of other children who would testify that the accused had also indecently dealt with them. The High Court explained the law governing the admissability of simiar fact evidence and granted the prosecution's application.

Cases cited:

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Director of Public Prosecutions v Boardman [1975] AC 421,
Harris v D.P.P. [1952] A.C. 694
Makin v Attorney-General for New South Wales [1894] AC 57
R. v. Doughty [1965] 1 All E.R. 560; [1965] 1 W.L. R. 331
R v P [1991] 3 All E.R. 337 H.L
E *Rex v. Sims* [1946] 1 K.B. 531

Ruling on admissibility of evidence in the High Court.

Ms. Rachel Olutimayin with *D. Goundar* for the State
M.Raza for the Accused

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Pathik J:

The accused Mark Lawrence Mutch stands charged on eight counts as follows: First Count, rape; Second Count, indecent assault. The complainant on these counts is Martha Kayaga Fifita; Third Count, indecent assault - the complainant
G being Akosita Maria Makitalena; Fourth Count, indecent assault with complainant Tagimaca Viro; Fifth Count, Rape with complainant Mariana Nai Seru; Sixth Count and Seventh Count indecent assault with complainant Maria Salote Seru; and Eighth Count - indecent assault with complainant Elenoa Adicakau.

The complainants in each of the above Counts have given evidence. Four other

witnesses have also testified.

The Prosecution now applies to court to adduce similar fact evidence and wishes to call as witnesses Ana Salauga, Frances Michale, Sereana Satish, Theresa Challottee and Yvonne Zian. Their statements are contained in the deposition. The prosecution has stated in its written submission the lines and passages in these statements on which it intends to rely in this application.

Prosecution submission

Ms. Rachel Olutimayin for the prosecution submitted that similar fact evidence is admissible in law. She stated that the probative force of the evidence of these proposed witnesses (girls) in support of the charges against the accused are sufficiently great to make it just to admit their evidence notwithstanding that it is prejudicial to the accused intending to show that he was guilty of other crimes. She referred the Court to one of the leading cases on the subject, namely, R v P [1991] 3 W.L.R. 161, H.L.

Further, the prosecution desires to produce evidence to show the unlikelihood of coincidence, that is that the allegations are not coincidence. She said that this evidence will be admissible under the similar fact rule if explanation of it on the basis of coincidence would be an "affront to common sense; or would be against all probabilities". If this is the case, then the evidence has the necessary probative force.

The prosecution submitted that the similar fact evidence will be relevant to the issue of whether the accused's conduct was accidental on the basis that a person may have one accident but is unlikely to have two or more accidents of a similar nature. The unlikelihood of coincidence is a rationale justifying reception of the evidence.

Ms. Rachel referred the Court to Harris v D.P.P. [1952] A.C. 694 where Lord Wilberforce stated that the basic principle must be that the admission of similar fact evidence is exceptional and requires a strong degree of probative force. He said that "this probative force is derived, if at all, from the circumstance that the facts testified to by the several witnesses, bear to each other such a striking similarity that they must when judged by experience and common sense, either all be true, or have arisen from a cause common to the witness or from pure coincidence".

Ms. Rachel further submitted that the similar fact evidence which the prosecution intends to adduce from the witnesses involves indecent assaults of similar type to those alleged against the accused, the evidence goes further to show some other

clear "signatures" (e.g. taking girls in the computer room, taking photographs of them, telling them to take their shower) which depicts the pattern of the accused's offending and then it is admissible, as its probative value outweighs its prejudicial value.

She finally submitted that the main issue would be credibility of the complainants, therefore similar fact evidence will assist the assessors to arrive at the truth and that the similar fact evidence ought to be admitted in the interests of justice.

Defence submission

Mr. Raza for the defence submitted that similar fact evidence to be admissible means that that would be corroborative evidence of the complainants. That is the only purpose for which similar fact evidence is admissible. He said that Makin v Attorney-General for New South Wales [1894] AC 57(P.C.) is still the guideline on the subject of similar fact evidence. He says that similar fact evidence refers to the commission of the crime and by having that admissible it says in fact that there is corroborative evidence of the charge. That is the basis upon which similar fact evidence can be admissible.

Mr. Raza submits that before similar fact evidence is allowed to be admitted one cannot ignore the facts that have come before the Court and the evidence of the six complainants in the eight Counts. He submits that this is an attempt on the part of the prosecution to improve the prosecution case where there have been gaping holes in the evidence of the complainants in all the counts.

The learned Counsel then goes through the evidence of each of the complainants on each Count and points out to Court the weaknesses in the prosecution evidence particularly the inconsistent statements in the evidence of each of the complainants. He said that the complainants have been discredited in cross-examination. In Count six and seven the complainant in these Counts Maria Salote Seru was declared hostile by the prosecution.

On the law on the subject of admissibility of similar fact evidence he referred the Court to Blackstone's *Criminal Practice*, 1997 at F 12.4 p.1988 et seq.

Consideration of the application

The circumstances which have given rise to this application to admit similar fact evidence has been briefly outlined hereabove together with the legal submissions of both counsel.

I have carefully considered these submissions bearing in mind the nature of the eight Counts against the accused, the whole of the evidence that has been adduced

through the said complainants and the law bearing on the subject of admissibility of similar fact evidence.

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The law

The general rule as to similar fact evidence has been very clearly stated in *Halsbury's Laws* Vol 11 4th Ed para 375 thus:

> "375. Similar facts: general rule. The prosecution may not adduce evidence tending to show that the defendant has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the defendant is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. The mere fact that the evidence adduced tends to show the commission of other offences, however, does not render it inadmissible if it is relevant to an issue before the jury; and it may be so relevant if it bears upon the question whether the acts in question were designed or accidental, or to rebut a defence which would otherwise be open to the defendant.
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> In exceptional cases evidence that the defendant has been guilty of other offences is admissible if it shows that those offences share with the offence which is the subject of the charge common features of such an unusual nature and striking similarity that it would be an affront to common sense to assert that the similarity is explicable on the basis of coincidence. In such a case the trial judge has a discretion to admit the evidence if he is satisfied (1) that its probative value in relation to an issue before the jury outweighs its prejudicial effect and (2) that there is no possibility of collaboration between the witnesses."

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Blackstone (supra) states the basic test as follows:

> "It has rightly been said that the principle upon which evidence of similar facts is admissible is easy to state but difficult to apply: see, e.g. Makin v Attorney-General for New South Wales [1894] AC 57, per Lord Herschell LC at p.65; Director of Public Prosecutions v Boardman [1975] AC 421, per Lord Hailsham at p.446.
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> The statement of principle is easy, because it rests simply upon the notion of degrees of relevance. Evidence is

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> inadmissible it it does no more than to suggest that the accused is the sort of person who might commit the offence charged, but admissible if it goes further and becomes part of the proof that he did commit it."

In the application of the general rule it is in the court's discretion to exclude it as in circumstances stated by *Halsbury* (supra) at para 376 thus:

> "If it is sought to adduce similar fact evidence it must be shown that there is some specific connection both in regard to time and the nature of the events between the events sought to be adduced and those constituting the offence charged and the evidence must be probative in some real degree of that offence. Even where such evidence is strictly admissible the trial judge has a discretion to exclude it if its prejudicial effect is out of proportion to its probative value."

On the discretion of judge to exclude I refer to Harris v D.P.P. (supra) [quoting from 14(2) Digest (Reissue) para 4198] where it states:

> "It is a rule of judicial practice, flowing from the duty of the judge when trying a charge of crime to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly against accused, and to consider whether the evidence of similar facts which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed to make it desirable in the interests of justice that it should be admitted. If it can, in the circumstances of the case, have only trifling weight, the judge would be right to exclude it."

It is pertinent to note what was held in R v P [1991] 3 All E.R. 337 (H.L) which states the circumstances in which similar fact evidence is admissible. There it was held:

> "Evidence of an offence against one victim could be admitted at the trial of an allegation that the accused person had committed a crime against another victim if the essential feature of the evidence which was to be admitted was that its probative force in support of the allegations was sufficiently great to make it just to admit the evidence, notwithstanding that it was prejudicial to the accused intending to show that he was guilty of another crime. Although such probative force could be derived from striking similarities in the evidence

about the manner in which the crime had been committed, there was no justification in restricting the circumstances in which there was sufficient probative force to overcome prejudice of evidence relating to another crime to cases where there was some striking similarity between the crimes since what had to be assessed was both the probative force of the evidence in question and whether the evidence of one victim was sufficiently related, either by striking similarities or in time and circumstances, to the evidence of another victim provided strong enough support for the evidence of the second victim to make it just to admit it, notwithstanding the prejudicial effect of admitting the evidence."

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Application of law to the facts of this case

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The complainants have already given evidence and they have been cross-examined at great length. What weight is to be given to their evidence has to be weighed in the light of the rest of the evidence to be adduced by the prosecution including the proposed similar fact evidence if allowed.

At this stage the prosecution seeks a ruling from the Court whether it ought to be allowed to adduce similar fact evidence from the five prospective witnesses referred to hereabove based on portions of their statements to Police.

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Mr. Raza strongly objects to the admissibility of such evidence because, inter alia, in effect he submits that the complainants have performed dismally in the witness box while testifying in this Court. He asks how would the proposed evidence assist the prosecution.

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Be that as it may, as stated by the prosecution, that at this stage the 'strength of the prosecution case does not become an issue' and that the credibility of witnesses are to be decided by the assessors. The question is whether or not to admit evidence irrespective of the strength of prosecution case as at present.

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I have come to the conclusion, on the evidence before me, bearing in mind the nature of evidence proposed to be adduced particularly in the light of the nature of the charges in the eight counts, that the evidence of similar fact is admissible in this case and ought to be allowed to be adduced, for the evidence goes beyond showing a tendency on the part of the accused to commit crimes of the kind charged and is positively probative in regard to the offences charged. The following passage from the *Digest* (supra) para 4181 is pertinent in regard to Court's duty in such a case:

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> "There is no principle whereby "similar fact" evidence must be excluded if there is a serious question as to the correctness of the facts spoken to in the "similar fact" evidence. The question whether the evidence relating to the similar facts is accepted or not is one for the jury. If the judge is satisfied that such evidence, if accepted by the jury, goes beyond evidence of mere disposition, he should admit the evidence and leave it to the jury to make what they think of it.
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> It is suitable and proper that the judge should consider whether he ought to give the jury a warning that the evidence is admissible only if it goes beyond mere evidence of disposition and that, if they think it relates to disposition only, they should disregard it, but there is no principle requiring such a warning to be given in every case, - R v. Rance, R. v Herron (1975) 120 Sol. Jo. 28; 62 Cr. App. Rep. 118, C.A."

As far as offences against children are concerned evidence of similar acts of indecency is admissible. On this the *Digest* (supra) at para 4278 states:

> "Although it is clear that on a charge of indecent assault on young children evidence of similar acts of indecency is admissible to enable the jury to decide whether visits of the children to accused person were in pursuance of a guilty or innocent association yet where the evidence of indecency is tenuous to a degree and where, even if the conduct is held to be indecent, it is a different form of indecency, then the trial judge can only exercise his discretion by excluding that evidence for its prejudicial effect would be overwhelming. - R. v. Doughty, [1965] 1 All E.R. 560; [1965] 1 W.L. R. 331; 129 J.P. 172; 109 Sol. Jo. 172; 49 Cr. App. Rep. 110, C.C.A."

I have already stated that on Counts 6 and 7 the complainant has been declared hostile and I need not say any more on what weight is to be put on her evidence at this stage. Also as admitted by prosecution in its submission that similar fact evidence will not assist its case in relation to rape counts in Counts 1 and 5 but on Counts 2, 3, 4 & 8 similar fact evidence will go a long way to support the evidence of the complainants and that it will throw some light on its case in relation to indecent assault charges.

The evidence of the complainants and the proposed similar fact evidence intended to be adduced bear striking similarity to some of the Counts before the Court.

The following passage from the judgment of Lord Goddard CJ in Rex v. Sims [1946] 1 K.B. 531 at 540 (C.A.) is apt:

> "That is a special feature sufficient in itself to justify the admissibility of the evidence; but we think it should be put on a broader basis. Sodomy is a crime in a special category because, as Lord Sumner said, "persons who commit the offences now under consideration seek the habitual gratification of a particular perverted lust, which not only takes them out of the class of ordinary men gone wrong, but stamps them with the hall-mark of a specialized and extraordinary class as much as if they carried on their bodies some physical peculiarity." On this account, in regard to this crime we think that the repetition of the acts is itself a special feature connecting the accused with the crime and that evidence of this kind is admissible to show the nature of the act done by the accused. The probative force of all the acts together is much greater than one alone; for, whereas the jury might think one man might be telling an untruth, three or four are hardly likely to tell the same untruth unless they were conspiring together. If there is nothing to suggest a conspiracy their evidence would seem to be overwhelming. Whilst it would no doubt be in the interests of the prisoner that each case should be considered separately without the evidence on the others, we think that the interests of justice require that on each case the evidence on the others should be considered, and that, even apart from the defence raised by him, the evidence would be admissible."

Bearing in mind the nature of the charges and the evidence that has been so far adduced, I consider that I ought not to deny the prosecution the opportunity of adducing similar fact evidence. In this regard I have noted the following statements from the judgment of Lord Goddard in Sims (supra) at p.540 where it is stated:

> "The visits of the men to the prisoner's house were either for a guilty or an innocent purpose: that they all speak to the commission of the same class of acts upon them tends to show that in each case the visits were for the former and not the latter purpose. The same considerations would apply to a case where a man is charged with a series of indecent offences against children, whether boys or girls: that they all complain of the same sort of conduct shows that the interest the prisoner was taking in them was not of a paternal or friendly nature but for the purpose of satisfying lust."

For these reasons, on the facts of this case, and taking into consideration the principles of law relating to similar fact evidence, in the exercise of my discretion, I grant the application.

(Application granted.)