appellant as damages payable by the second respondents (Triay & Triay) the amount of legal costs he incurred in connection with the rectification of the conveyance to him of the flat, and the nominal sum of £5 for aggravation.

40 **BLAIR-KERR** and **BRETT, JJ.A.** concurred.

Appeal allowed in part.

[1980–87 Gib LR 261]

YOME v. VALARINO

SUPREME COURT (Davis, C.J.): December 20th, 1984

Public Health—dangerous or dilapidated buildings—order to repair or demolish—order under Public Health Ordinance (cap. 131), s.39 need not specify work to be done but give owner choice to repair or demolish—to be given choice even though preferred choice already indicated to court

The respondent, the Senior Public Health Inspector, applied to the Magistrates' Court for an order under the Public Health Ordinance (*cap*. 131), s.39 requiring the appellant to repair or demolish a dangerous part of his property.

The respondent complained that the dormer window of the appellant's property was potentially dangerous for tenants living there. He applied to the Magistrates' Court for an order requiring that the appellant carry out building work to repair the window and remove the danger or demolish it altogether. At the hearing, the appellant conceded that the window was in a dangerous condition and elected to demolish it. The magistrate, however, in spite of the appellant's choice, made an order phrased in such a way that the appellant was required either to repair the window or to demolish it.

On appeal, the appellant submitted that (a) the magistrate had been wrong to phrase the order so that the option to repair remained; (b) the phrasing meant that if he failed to demolish the window, it would be open to the Government to repair it and recover the cost, placing him in the very position he had wished to avoid; and (c) if, in spite of his choice, an order could still be made for either repair or demolition, then the words "if he so elects" in s.39(1)(i)(a) were superfluous.

The respondent submitted that (a) the order was not defective as it was not necessary for the court to specify exactly how the work should be

done; (b) the appellant had not been prejudiced by the phrasing of the order and benefited from being given the opportunity to change his mind and repair the window; (c) s.39(1)(i)(a) would be phrased differently if, on election by the owner to demolish a dangerous structure, the court was limited to making an order for demolition; and (d) in the event of the owner failing to comply with the order, it should be open to the Government under s.39(2) to carry out whatever works it thought fit.

Held, dismissing the appeal:

The magistrate had been correct to phrase the order so that the choice to repair or demolish continued to lie with the appellant, since it was not necessary for an order made under the Public Health Ordinance (*cap.* 131), s.39 to specify the work to be done. The appellant had been in no way prejudiced by the framing of the order in the alternative and would benefit from its flexibility in the event that he changed his mind (para. 23; paras 26–27).

Cases cited:

(1) *Bewlay & Co. Ltd.* v. *London County Council*, [1953] 1 W.L.R. 1110; [1953] 2 All E.R. 821, considered.

(2) *McVittie* v. *Borough of Bolton*, [1945] 1 All E.R. 379, considered.

(3) *R.* v. *Recorder of Bolton*, *ex p. McVittie*, [1939] 2 K.B. 98; [1939] 2 All E.R. 334; on appeal, [1940] 1 K.B. 290; [1939] 4 All E.R. 236, considered.

Legislation construed:

Public Health Ordinance (Laws of Gibraltar, *cap*. 131), s.39: The relevant terms of this section are set out at para. 2.

A.V. Stagnetto for the appellant;
D. Azopardi for the respondent.

1 **DAVIS, C.J.:** This is an appeal by way of case stated against the decision of the Stipendiary Magistrate given on March 7th, 1984, in relation to an application by the respondent on behalf of the Government for an order under s.39(1)(i)(a) of the Public Health Ordinance (*cap.* 131), relating to the repair or demolition of dangerous buildings and structures.

2 Section 39 (which corresponds to s.58 of the English Public Health Act 1936) insofar as relevant provides as follows:

> "(1) If it appears to the Government that any building or structure, or part of a building or structure—
>
> (a) is in such a condition . . . as to be dangerous to persons in the building or any adjoining building, or on the premises on which the building or structure stands or any adjoining premises; or

(b) is by reason of its ruinous or dilapidated condition seriously detrimental to the amenities of the neighbourhood,

the Government may apply to the magistrates' court, and the court may—

(i) in the first mentioned case—

(a) where danger arises from the condition of the building or structure, make an order requiring the owner thereof to execute such work as may be necessary to obviate the danger or, if he so elects, to demolish the building or structure, or any dangerous part thereof, and remove any rubbish resulting from the demolition;

. . .

(ii) in the second mentioned case, make an order requiring the owner of the building or structure to execute such works or repair or restoration or, if he so elects, to take such steps by demolishing the building or structure or any part thereof and removing any rubbish resulting from the demolition, as may be necessary for remedying the cause of complaint.

(2) If the person on whom an order is made under subsection (1) for the execution of works, or the demolition of a building or structure or of any part of a building or structure, and the removal of any rubbish resulting from the demolition, fails to comply with the order within the time therein specified, the Government may execute the order in such manner as they think fit and may recover the expenses reasonably incurred by them in so doing from the person in default, and without prejudice to the right of the Government to exercise those powers, he is guilty of an offence and is liable on summary conviction to a fine of £50."

3 The application by way of complaint made by the respondent to the Magistrates' Court on November 14th, 1983, under s.39, was as follows:

"The complaint of Maurice Valarino, Senior Public Health Inspector, in the service and acting on behalf of the Government of Gibraltar, states that it appears to him that part of a certain building, namely, the dormer window on the east side of the roof over premises situated at 27 Governors Street, of which Mr. Albert Yome of 3 Irish Place is the agent, is in such a condition as to be dangerous to persons in the said building.

And Maurice Valarino now applies to the Magistrates' Court for an order that Albert Yome shall be required to execute such works as may be necessary to obviate the danger or, if Mr. Yome shall so elect, to demolish the dangerous part of the building and remove any

> rubbish resulting from the demolition; pursuant to s.39 of the Public Health Ordinance (*cap.* 131)."

4 In para. 4 of the case stated, under the heading "The Findings," the learned Stipendiary Magistrate states:

> "The appellant conceded that the premises were in a dangerous condition.
>
> The appellant had elected to demolish the part of the building in question as the cost of repairing did not justify the expenditure.
>
> The premises were let by the appellant to his tenants."

There was no dispute as to these findings.

5 The case stated by the learned magistrate does not say whether he made any order as a result of his determination of the respondent's complaint, but in para. 7 of the case stated, the learned magistrate said:

> "I ruled that notwithstanding the election already made by the appellant to demolish, the order could properly follow the usual form, *i.e.* that the appellant do execute such works as may be necessary to obviate the danger or if he so elects to demolish the dangerous part of the said building and remove any rubbish resulting from the demolition."

6 Mr. Stagnetto, for the appellant, submits that in view of the appellant's election to demolish the dormer window referred to in the respondent's complaint, the only order that the Magistrates' Court could make was an order requiring the appellant to demolish the window and remove any resulting rubbish. He submitted that an order in the alternative, as proposed by the learned magistrate in his ruling, which followed the wording of the respondent's complaint and required the appellant to execute such work as might be necessary to obviate the danger or, if the appellant so elected, to demolish the dangerous part of the building, was defective. Therefore, he submits, this court should find that the learned magistrate's determination was incorrect in law.

7 Mr. Stagnetto submitted that if it were open to the Magistrates' Court, notwithstanding the appellant's election to demolish the dormer window in view of the excessive cost of repair, to frame its order in the way it had, requiring the appellant to repair or demolish, it would be open to the government under s.39(2), in the event of his failure to comply with the order, to repair the defective window and to recover the cost of such repair from the appellant. This would in effect place the appellant in the very position he had expected, in making his election to demolish, to avoid.

8 Mr. Azopardi, who appeared for the respondent, submitted that the magistrate came to a correct determination in law, as set out in para. 7 of

the case stated, and that an order in the alternative form following the wording of the respondent's complaint was in no way defective. In answer to Mr. Stagnetto's argument, Mr. Azopardi submitted that s.39(1)(i)(a) would have been framed differently had it been the legislature's intention that on election by the owner to demolish a dangerous structure, the magistrates' court could only make an order for demolition. Where no election was made, it was clearly incumbent on the court, Mr. Azopardi argued, to make an order in the alternative following the wording of sub-para. (a) of s.39(1)(i). He submitted that where, as in this case, the owner had elected to demolish, it was perfectly proper for the court to make an order in the same alternative form.

9 Mr. Azopardi referred me to *Oke's Magisterial Formulist*, 19th ed., para. 30, at 868 (1979) in which the appropriate form of complaint for an application under s.58 of the Public Health Act 1936 is set out. The model form applies for an order requiring the owner to repair or demolish, as in the application in the present case. It is also stated (*op. cit.*, para. 30A, at 868) that the order to be made on such application "may be based upon the above complaint, specifying the period within which the work ordered to be executed shall be completed."

10 Mr. Azopardi also referred me in 1 *Lumley's Public Health*, 11th ed., at 182 (1937) to the notes to s.58 of the Public Health Act 1936. Note (h) relating to s.58(1)(i)(a) (which corresponds to our s.39(1)(i)(a)) reads: "Apparently the order of the court must be in such a form as to give the owner of the building or structure the option either of executing work or of demolishing the building or structure . . ." Similarly, I observe on page 183, note (j) to s.58(1)(ii) (corresponding to our s.39(1)(ii)) reads: "Apparently the order of the court must be in such form as to give to the owner of the building or structure the option here mentioned."

11 Mr. Azopardi then referred me to 26 *Halsbury's Statutes*, 3rd ed., at 245, in the notes to s.58 of the Public Health Act 1936, where, under the heading "Contents of order" it is stated, citing *R.* v. *Recorder of Bolton, ex p. McVittie* (3): "An order need not specify how the works are to be done, whether by demolition, rebuilding or otherwise."

12 That was a case where the justices made an order under s.58(1)(b) and (ii) of the Public Health Act 1936, in respect of a derelict cinema in Bolton. The headnote to that case in *The All England Law Reports* reads as follows ([1939] 4 All E.R. at 236–237):

> " . . . [A]n order made under the Public Health Act, 1936, s.58, since it must give the owner the alternatives of repairing or demolishing the building, need not specify the particular repairs necessary for remedying the cause of complaint.
>
> Decision of Divisional Court ([1939] 2 All E.R. 334 affirmed)."

13 And the editorial note after the headnote reads as follows (*ibid.*, at 237):

> "Where orders for work to be done are made by a local authority, it is usually necessary for the requirements of the local authority to be stated with some particularity, but in the present case it is held that the matter is one for an order in general terms. In fact, the Act itself allows the owner to elect how he will deal with the ruinous or dilapidated building so that it may no longer be a detriment to the amenities of the neighbourhood."

14 Goddard, L.J. ([1940] 1 K.B. at 297), referring to s.58(1)(b) and (ii) (which correspond to s.39(1)(b) and (ii)), said:

> " . . . [T]he section deals only with a building which offends against the amenities of the neighbourhood because of its ruinous or dilapidated condition. Then the section says the justices may order a man to repair, to restore or to pull down, and he can choose for himself what he will do . . . He can repair it or restore it or pull it down—he can please himself. I do not think there is any warrant at all for saying that the justices must dictate to the owner and specify exactly what repairs are to be done; they have simply to say: 'You have a ruinous or dilapidated building; repair it or pull it down, whichever you please.'"

15 In the same vein in the Divisional Court, as reported in *R.* v. *Recorder of Bolton, ex p. McVittie* (3), Macnaghten, J., whose judgment Goddard, L.J. in the Court of Appeal said he adopted as his own, said ([1939] 2 K.B. at 104):

> "The remedy which Parliament has at last provided is that the Court may make an order requiring the owner to execute works of repair or restoration or, if he so elects, to take such steps by demolishing the structure and removing any rubbish resulting from the demolition as may be necessary for remedying the cause of complaint. The choice of demolition or restoration lies with the owner. The Court has no right to dictate which course he should adopt."

16 While it is true, as Mr. Stagnetto has pointed out, that this case related to a different set of circumstances from those in the present case and to a different paragraph of s.58(1) of the Public Health Act 1936 (we are concerned with the interpretation of s.58(1)(i)(a) (our s.39(1)(i)(a)) not s.58(1)(ii)), the wording of paras. (i)(a) and (ii) is in identical form, and in view of the principles enunciated by Macnaghten, J. and Goddard, L.J. apply as much to para. (i)(a) of the section as they do to para. (ii).

17 The fact that an election to demolish the dangerous window had been made by the appellant in the present case, whereas no election had been made by McVittie in *R.* v. *Recorder of Bolton*, *ex p. McVittie* (3), was

immaterial, Mr. Azopardi submitted. It was still perfectly proper for the Magistrates' Court in the present case, he said, in making an order under s.39(1)(i)(a) of the Public Health Ordinance, notwithstanding the owner's election to demolish the dangerous window, to make an order in the alternative form following the wording of the complaint and of sub-para. (a) of s.39(1)(a)(i).

18 Mr. Azopardi stressed the importance of the court's order being in the alternative—to repair or, if the owner so elects, to demolish—in that in the event of the owner failing to comply with the order it should be open to the Government under s.39(2) "to execute the order in such manner as they think fit," that is to say, either by repairing the dangerous window or by demolishing it.

19 Counsel on both sides have raised the question of the effect of s.39(2) of the Public Health Ordinance. It does not appear to me that I am concerned in this case with the practical effect of s.39(2) if in this case the appellant were to fail to comply with the order in the alternative form proposed by the learned magistrate in his ruling, that is to say, whether, in the event of the appellant's failure to demolish the dormer window as he has elected to do, the Government in the exercise of its powers under s.39(2) could repair the dangerous window despite the appellant's election to demolish in view of the excessive cost of repairing it. I observe, however, that there are what appear to me to be helpful remarks on this aspect in the judgment of Scott, L.J. ([1945] 1 All E.R. at 380) in *McVittie* v. *Borough of Bolton* (2). The question I have to decide is whether it is open to the learned magistrate to make an order in the alternative form proposed in his ruling notwithstanding the election to demolish the dormer window made by the appellant.

20 Mr. Stagnetto submitted that if the learned magistrate was right in holding that notwithstanding the appellant's election to demolish the dangerous window, the court's order should follow the wording of sub-para. (i)(a) and require the appellant to repair or, if he so elected, to demolish, it would seem that the words "if he so elects" in sub-para. (i)(a) would be superfluous. Mr. Stagnetto referred me to the case of *Bewlay & Co. Ltd.* v. *London County Council* (1). In that case a complaint was preferred under s.64 of the London Building Acts (Amendment) Act 1939, against Bewlay & Co. Ltd. that they had failed to comply with a dangerous structure notice requiring them to "take down, repair or otherwise secure" certain portions of premises belonging to them. The magistrate took the view that he was bound to make an order in the terms of the complaint. It was held that s.64 gave the magistrate a discretion to order Bewlay & Co. to take down the building, or to repair it, or otherwise to secure it and that the case should be remitted to him to deal with it on that basis.

21 Lord Goddard, C.J., after citing ss. 62 and 64(1) of the 1939 Act, said ([1953] 2 All E.R. at 822):

> "On receipt of the dangerous structure notice, the appellants, as the owners of these premises, at once shored them up to prevent any immediate danger. They were then summoned before the magistrate who made an order directing them to take down, repair, or otherwise secure the building. Their case was that they were willing to take down, but they were not willing to repair because to do repairs to this dilapidated old structure would cost far more than it was worth and to repair the house was an uneconomic proposition, the expenditure on which they could not justify.
>
> The difficulty arises because there are some statutory tenants in the house, and the district surveyor refuses to exercise the power he has under s.67, of certifying that it is necessary to remove them. The order that has been made on the appellants is to take down, repair, or otherwise secure. They are ordered to do one of three things. If they were ordered merely to take down the premises, they would be protected because the Rent Restrictions Acts have made provisions with regard to the tenants. But they were ordered to take down or repair, and it might hereafter be said against them: 'You ought to have exercised the option given you by the order in a way which would not work to the detriment of the tenants who are in possession of part of the house.' The magistrate has found that the premises are not such as economically would warrant the expenditure required to put them in a safe condition and a reasonable state of repair, and that in normal times the building would doubtless have been demolished as it is not worth repairing from an economical point of view, but he held that he was bound to make an order in the exact terms of the section, that is to say, to take down, repair, or otherwise secure. In my opinion, the magistrate was wrong in holding that he had no discretion. I think he had a discretion to say whether the appellants should take down, or whether they should repair, or whether they should otherwise secure. I am not saying that in a proper case the magistrate may not confirm the order in the words 'take down repair or otherwise secure,' but in the present case he held that he could only make an order in those terms, whereas it is quite clear as a matter of English that on the complaint he could order the owner to take down, or to repair, or otherwise to secure."

22 As can be seen, the facts of that case were very similar to the present case, but the procedure laid down by ss. 62 and 64 of the Act of 1939 is similar to that laid down in Part II of the Public Health Ordinance for the abatement of nuisances (see ss. 83 and 84 following ss. 93 and 94 of the Public Health Act 1936). It was argued in *R.* v. *Recorder of Bolton*, *ex p. McVittie* (3) that a court making an order under s.58 of the Public Health

Act 1936, should determine what works were necessary and so order, as was done under s.94 for the abatement of nuisances. It was held in that case, however, and affirmed on appeal, that this was not the case and that an order under s.58 need not specify the works to be done (see the judgment of Lord Hewart, C.J.).

23 Had the words "if he so elects" been omitted from sub-para. (i)(a) of s.39(1) of the Public Health Ordinance, then, it seems to me, it would have been open to the learned magistrate in the circumstances of the present case, to order that the appellant demolish the dangerous window, as it was held by Lord Goddard, C.J. in *Bewlay & Co. Ltd.* v. *London County Council* (1), to be open for the magistrate to order in that case. It is quite clear, however, from the decision in *R.* v. *Recorder of Bolton, ex p. McVittie* both in the Divisional Court and as affirmed on appeal that an order under s.58 of the Public Health Act 1936 (s.39 of the Public Health Ordinance) need not specify the works to be done.

24 At the end of his judgment in *R.* v. *Recorder of Bolton, ex p. McVittie* (3), Lord Hewart, C.J. said ([1939] 2 K.B. at 103):

> "It seems to me that no useful purpose is served by reading into a part of s.58 [of the Public Health Act 1936] quite different provisions enacted for quite a difference purpose, namely, provisions relating to the abatement of a nuisance. It is to be observed by way of supplement that there is an important sub-s. 2 to s.58 which, I think, throws light on the interpretation of sub-s. 1 . . ."

25 As I understand it, this passage ties up with an earlier passage in the judgment, where Lord Hewart, C.J. said (*ibid.*, at 101):

> "It seems to me that there is a real difference in kind between what is there [*i.e.* in s.58] being dealt with and the provisions to be found elsewhere in another part of the statute about the abatement of a nuisance. Here the statute is dealing with dangerous or dilapidated buildings and structures, and in my opinion it deliberately gives an alternative to the owner of such a building or structure and refrains deliberately from tying the hands of the authority upon whose motion the proceedings started."

26 It is perhaps open to the learned magistrate, in view of the appellant's stated election to demolish the dangerous window, to order that the appellant should simply demolish the window (though the judgments of Macnaghten, J. and Goddard, L.J. in *R.* v. *Recorder of Bolton*, *ex p. McVittie* (3) in the Divisional Court and on appeal would appear to indicate the contrary). As Mr. Azopardi has said, however, the appellant is in no way prejudiced by the order being framed in the alternative—to repair, or if the appellant so elects, to demolish—and it could well be that when the appellant came to do work necessary for demolition he might

change his mind and decide to repair instead of demolishing. It is quite clear, however, in my view, that an order made in the form set out in para. 7 of the case stated would be an entirely proper order to make in this case.

27 The answer to the question posed in this case stated whether the learned magistrate came to a correct determination in law is therefore, in my opinion, "Yes."

Appeal dismissed.

[1980–87 Gib LR 270]

R. v. WALSH

SUPREME COURT (Alcantara, A.J.): January 28th, 1985

Evidence—similar facts—admissibility—similar fact evidence inadmissible if prejudicial effect outweighs probative value, even if evidence is proximate, discloses striking similarities and establishes system

Evidence—documentary evidence—tape recordings—tape recordings and transcripts admissible if court satisfied, on balance of probabilities, original and authentic and probative value outweighs prejudicial effect

The accused was charged with corruptly attempting to obtain a consideration contrary to s.195(a) of the Criminal Offences Ordinance (*cap*. 37).

The accused was a driving examiner who refused to grant Mrs. H a driving licence on two separate occasions. On the second occasion, when she had not passed the examination, he told her that if she would have sex with him, he would grant her the licence and he suggested a meeting place where this liaison could take place. Mrs. H reported him and he was charged with the present offence.

At trial, counsel for the prosecution sought to adduce evidence *inter alia* in the form of similar fact evidence and tape recordings with transcripts. The witness who was to give similar fact evidence, Miss V, claimed that the accused had made the same proposition to her when she failed her driving test a year earlier. The tape recordings were obtained by Mrs. H when she met the accused as he had suggested and recorded their conversation on concealed tape recorders. The defence objected to the admission of this evidence.

The Crown submitted that all the evidence was admissible as its probative force outweighed its prejudicial effect.