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.

The accused submitted that (a) the similar fact evidence was inadmissible as (i) although there were some points of similarity between the evidence of Miss V and that of Mrs. H, there were no striking similarities; (ii) the incident involving Miss V was not proximate in time; (iii) only one previous similar incident had occurred and therefore no pattern of behaviour could be established; and (iv) the prejudicial value of Miss V's evidence outweighed its probative value; and (b) the tape recordings were inadmissible as (i) neither their history nor their authenticity could be clearly established; (ii) the content of the tapes was hearsay; (iii) their prejudicial effect outweighed their probative value; and (iv) the written transcripts had a very grave prejudicial value.

Held, allowing the tape recordings and their transcripts to be admitted in evidence:

While the similar fact evidence was technically admissible as it was proximate, disclosed striking similarities between the two alleged incidents involving the defendant and established what could loosely be called a system, it could not be adduced in this case as, on balance, its prejudicial value outweighed its probative value. The tape recordings and their transcripts, however, were admissible as the court was satisfied that they were, on the balance of probabilities, both original and authentic. They had been kept in a secure cabinet, apart from when they had been handled either by named police or technical experts, and their authenticity had been tested at New Scotland Yard. Further, their probative value far outweighed any possible prejudicial effect they might have. Once these facts had been established, it was clear that the transcripts of the recordings were also admissible in evidence (para. 12; paras. 25–26).

Cases cited:

(1) *D.P.P.* v. *Boardman*, [1975] A.C. 421; [1974] 3 W.L.R. 673; [1974] 3 All E.R. 887; (1974), 60 Cr. App. R. 165, considered.
(2) *D.P.P.* v. *Kilbourne*, [1973] A.C. 729; [1973] 2 W.L.R. 254; [1973] 1 All E.R. 440; (1973), 57 Cr. App. R. 381, considered.
(3) *Harris* v. *D.P.P.*, [1952] A.C. 694; [1952] 1 All E.R. 1044; [1952] 1 T.L.R. 1075, referred to.
(4) *Makin* v. *Att.-Gen. for New S. Wales*, [1894] A.C. 57; [1891–4] All E.R. Rep. 24; (1893), 69 L.T. 778; 10 T.L.R. 155; 17 Cox, C.C. 704, considered.
(5) *Mohamed* v. *R.*, [1949] A.C. 182; [1949] 1 All E.R. 365, considered.
(6) *R.* v. *Barrington*, [1981] 1 W.L.R. 419; [1981] 1 All E.R. 1132; (1981), 72 Cr. App. R. 280, considered.
(7) *R.* v. *Downes*, [1981] Crim. L.R. 174, considered.
(8) *R.* v. *Maqsud Ali*, [1966] 1 Q.B. 688; [1965] 3 W.L.R. 229; [1965] 2 All E.R. 464, considered.
(9) *R.* v. *Mills*, [1962] 1 W.L.R. 1152; [1962] 3 All E.R. 298, referred to.
(10) *R.* v. *Novac* (1977), 65 Cr. App. R. 107, referred to.

(11) *R.* v. *Robson*, [1972] 1 W.L.R. 651; [1972] 2 All E.R. 699; (1972), 56 Cr. App. R. 450, considered.
(12) *R.* v. *Sims*, [1946] K.B. 531; [1946] 1 All E.R. 699; (1946), 62 T.L.R. 431; 31 Cr. App. R. 158, considered.
(13) *R.* v. *Stevenson*, [1971] 1 W.L.R. 1; [1971] 1 All E.R. 678; (1971), 55 Cr. App. R. 171, referred to.
(14) *Thompson* v. *R.*, [1918] A.C. 221, referred to.

K.W. Harris, *Senior Crown Counsel*, for the Crown;
P. Montegriffo for the defendant.

1 **ALCANTARA, A.J.:** After arraignment, but before the case was opened by the prosecution, I dealt with and gave rulings on three issues regarding the admissibility of certain evidence, which the defence objected to. Following the decision of Shaw, J. in *R.* v. *Robson* (11), I have delayed giving reasons for the rulings until after receiving the verdict from the jury. The charge against the defendant in this case is one contrary to s.195(a) of the Criminal Offences Ordinance (*cap.* 37), the particulars of which read as follows:

> "Manuel Walsh, being a senior motor vehicle and driving examiner for the Licensing Department of the Government of Gibraltar, and a person under the Crown, between August 30th, 1984 and September 3rd, 1984, in Gibraltar, did corruptly attempt to obtain from Elaine Harding, for himself, a consideration, namely, that Elaine Harding should have sexual intercourse with him as an inducement or reward for doing an act in relation to his principal's affairs, namely, granting Elaine Harding a Class B driving licence."

2 The allegation against him is that after failing Elaine Harding twice in her attempts to obtain a driving licence, he suggested to her that if she had sexual intercourse with him, he would give her the licence. He also suggested a meeting place at the vehicles testing centre. The prosecution wanted to adduce similar factual evidence in the form of a witness, Miss Villarubia, who claimed that, about a year before the present incident, she went for a driving test with this same examiner and failed. The defendant suggested that, if she were willing to have sexual intercourse with him, he would grant her a licence to drive.

3 Starting with *Makin* v. *Att.-Gen. for New S. Wales* (4), counsel for the Crown has brought to my attention, and to that of counsel for the defence, the following authorities: *Thompson* v. *R.* (14); *Harris* v. *D.P.P.* (3); *D.P.P.* v. *Boardman* (1); *R.* v. *Sims* (12); *D.P.P.* v. *Kilbourne* (2); *R.* v. *Novac* (10); *R.* v. *Barrington* (6) and *R.* v. *Downes* (7).

4 This, counsel has done in a most commendable way, by even supplying photocopies of the actual reports both to the court and to defending counsel nearly a month before the actual hearing of the case. I hope this

practice continues, and that it is imitated in an appropriate case by defending counsel.

5 The guiding principle for the admissibility of similar facts evidence was stated by Lord Herschell, L.C. in *Makin* v. *Att.-Gen. for New S. Wales* as follows ([1894] A.C. at 65):

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew 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 upon 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."

6 Lord Goddard, C.J. in *R.* v. *Sims* (12) expressed himself in this way ([1946] K.B. at 537):

> "Evidence is not to be excluded merely because it tends to show the accused to be of a bad disposition, but only if it shows nothing more. There are many cases where evidence of specific acts or circumstances connecting the accused with specific features of the crime has been held admissible, even though it also tends to show him to be of bad disposition."

7 Lord Morris of Borth-y-Gest expresses himself in this manner in *D.P.P.* v. *Boardman* (1) ([1975] A.C. at 439): "[T]here are cases in which evidence of certain acts becomes admissible because of their striking similarity to other acts being investigated and because of their resulting probative force." Crown Counsel argued that there is a striking similarity between the evidence of Miss Villarubia and that of Mrs. Harding. The similarities are (a) both young ladies taking a driving test; (b) the defendant being the examiner involved; (c) both ladies told that they had failed; (d) both ladies visibly upset and displaying emotion; and (e) the defendant made an offer to ensure driving licence, notwithstanding their failure, in return for sexual favours. Counsel for the defence argued that the proposed similar fact evidence in this case was not admissible on three grounds.

8 Firstly, counsel for the defence has argued that, although there might be some points of similarity, there was no striking similarity, quoting the passage in Archbold, *Criminal Pleading, Evidence & Practice*, 41st ed., para. 13–4, at 883 (1982). I find as a fact that the evidence discloses a

striking similarity, showing that the *modus operandi* of the defendant was, to coin a phrase, a licence for a licence.

9 Secondly, counsel has argued that the incident regarding Miss Villarubia was not proximate enough in time, and should be disregarded. The criterion for admitting similar fact evidence is relevancy not proximity in time. In this case, I find in any case, that the incident of Villarubia was proximate enough. It is alleged to have taken place on June 27th, 1983, whereas the present offence is alleged to have taken place between August 30th, 1984 and September 3rd, 1984. If the previous incident were to be alleged to have taken place 10 or 20 years before, its relevancy would be doubtful.

10 Thirdly, counsel has argued that a single prior similar facts incident does not establish a pattern, and should be excluded. Counsel has drawn my attention to the quotation in *Archbold* (*op. cit.*, para. 13–4, at 884), in which Lord Cross is quoted as having said the following in *D.P.P.* v. *Boardman* (1) ([1975] A.C. at 460):

> "In *Kilbourne*, Lord Reid expressed the view . . . that in a case of this sort 'similar fact' evidence could only be admitted if it showed that the accused was pursuing what could be 'loosely called a system' and that two instances would not be enough to constitute a system. I naturally hesitate to differ from my noble and learned friend, but I am not myself prepared to draw a line of this sort. On the other hand, I think that when you have so few as two instances, you need to proceed with great caution."

11 There is little doubt in my mind that two instances can, in an appropriate case, constitute a system, and this makes similar facts evidence admissible provided great caution is exercised. I therefore find that the evidence of Miss Villarubia is relevant and admissible. Counsel for the defence has submitted that I should exclude that evidence on the ground that its prejudicial value outweighs its probative value, and referred me to *Archbold* (*op. cit.*, para. 15–75, at 965). Crown Counsel agreed that it is for me, as trial judge, to do this "balancing act." I need only quote a passage from one of the cases supplied by him. In *Harris* v. *D.P.P.* (3), Viscount Simon quoted ([1952] A.C. at 707), with approval, the classic statement of the rule of Lord du Parcq in *Mohamed* v. *R.* (5) ([1949] A.C. at 192):

> "[I]n all such cases the judge ought to consider whether the evidence 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 interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is

plain but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible."

12 The decision must then be left to the discretion and sense of fairness of the judge. I have decided to exercise my discretion and exclude the similar fact evidence in this case. In exercising my discretion, I have taken into account, among other factors, the second and third objections to admissibility by the defence and the fact that, according to Miss Villarubia, she told no one about the incident until she made her statement in this case.

13 The second ruling I gave was in relation to the evidence of Miss Pratts. At practice direction level, her evidence was sought to be introduced as similar fact evidence. At the preliminary issue level, Crown Counsel quite rightly did not seek to say that it was admissible as similar fact evidence, but that it would be corroborative of something which Mrs. Harding would say when she came to give evidence. This evidence was objected to by counsel for the defence. I agree with him. It is plainly inadmissible, and it is excluded. In fact, it is not relevant. I need say no more.

14 The third ruling related to the tapes and transcripts which the prosecution were seeking to put forward. Mrs. Harding had a meeting with the defendant on September 3rd, 1984 at the vehicles testing centre. She had been fitted with two tape recorders, so that her conversation with the defendant would be recorded. Counsel for the defence objected to the admissibility of the tapes on four grounds: (a) that the history of the tapes had not been clearly established; (b) that what was on the tapes was hearsay evidence; (c) that the prejudicial effect of the tapes outweighed their probative value, and should be excluded; and (d) that the written transcripts have a very grave prejudicial value, and should, in any case, be excluded.

15 Crown Counsel has also provided the court and defending counsel in advance with photocopies of the cases he was going to rely on. The cases are the following: *R.* v. *Robson* (11); *R.* v. *Stevenson* (13); *R.* v. *Masqud* (8) and *R.* v. *Mills* (9).

16 I think the starting point in this issue is *Archbold* (*op. cit.*, para. 4–289, at 350): "Tape recordings are admissible as evidence provided that they are shown to be both original and authentic." The next step is *R.* v. *Robson* (11) in which Shaw, J. said ([1972] 1 W.L.R. at 653) that "it was for the prosecution as the party seeking to put forward the recordings to prove them to be originals and that the standard of proof in this regard was the balance of probabilities."

17 The learned judge continued (*ibid.*, at 653–654):

> "My own view is that in considering that limited question the judge is required to do no more than to satisfy himself that a *prima facie* case of originality has been made out by evidence which defines and describes the provenance and history of the recordings up to the moment of their production in court. If the evidence appears to remain intact after cross-examination it is not incumbent on him to hear and weigh other evidence which might contravert the *prima facie* case."

18 Evidence has been called by the prosecution on this matter. Chief Insp. Payas and Insp. Olivero gave evidence of how the two tapes were in their possession and custody from the time they were taken out of the recorders until they were handed in as exhibits to the magistrates' court on committal. Apart from the time in which a copy of one of them was made by Insp. Olivero, they were in a secured cabinet which has only one key, which is normally in the possession of Insp. Olivero. The tapes only left the cabinet when they were sent to New Scotland Yard for testing.

19 Here again, they were handed personally by Chief Insp. Payas to P.C. Danino, who took them to England, and handed them to Mr. Penna at Gatwick Airport. Mr. Penna and Mr. Mills are two experienced technical officers who carried out a number of tests on the tapes to satisfy themselves as to their originality. Whilst these two tapes were in England, they were either in the possession of Mr. Penna and Mr. Mills, or in a security store. From that security store, they were taken out and handed personally by Mr. Penna to P.C. Golt to bring to Gibraltar. P.C. Golt in turn personally handed the two tapes to Insp. Olivero in Gibraltar.

20 Although all the witnesses have been submitted to long and close cross-examination, the originality of the tapes has been proved to my satisfaction. Counsel has relied heavily on the word "intact" in the above quotation from *R.* v. *Robson* (11), arguing that because a couple of mistakes had been made by two witnesses in relation to some of the exhibits, but not in relation to the two original tapes, the evidence for the prosecution was unreliable and no longer intact.

21 I cannot agree with him. When Shaw, J. used the word "intact" in the sentence "if that evidence appears to remain intact after cross-examination it is not incumbent on him to hear and weigh other evidence," he, in my view, meant uncontroverted. The provenance and history of the two tapes has been satisfactorily proved and the evidence for the prosecution has not been controverted.

22 In some cases, a judge might have to rule *prima facie* on the question of authenticity. Such is not the case here. I am satisfied as to the originality of the tapes, and there is no evidence or even allegation that the

voice on the tapes is not that of the defendant. In fact, there is evidence by some of the prosecution witnesses that they recognize the defendant's voice on the tapes.

23 After having given my ruling, I became aware of a ruling on tapes by the learned Chief Justice in the "Operation Jam" case, which was heard in 1983. In that case, the learned Chief Justice refused to deal with the question of authenticity once he was satisfied on the question of originality. In that particular case there was an allegation that the tapes had been tampered with, but no evidence by the defence or otherwise of tampering. I agree with that decision, and it has been very helpful to set out my own reasons on this issue.

24 The last step is to consider the admissibility of the transcripts. They are clearly admissible. I need only quote a passage from Marshall, J. in *R.* v. *Maqsud Ali* (8) ([1966] 1 Q.B. at 702):

> "In the matter of the transcripts the court desires only to say this. Having a transcript of a tape recording is, on any view, a most obvious convenience, and a great aid to the jury, otherwise a recording would have to be played over and over again. Provided that a jury is guided by what they hear themselves and upon that they base their ultimate decision, we see no objection to a copy of a transcript, properly proved, being put before them."

25 I have already answered the first objection of the defence to the admissibility of the tape, by that their history has been clearly established by the prosecution. The second submission is as to hearsay evidence. I will not even attempt to deal with that argument as it has no foundation and, with all due respect, is misconceived.

26 Insofar as submissions 3 and 4 are concerned, all I need to say is that the probative value of both the tapes and written transcripts far outweighs their possible prejudicial effect, and a trial judge would be using his discretion wrongly if he were to exclude them.

Order accordingly.