

**IN THE DISTRICT COURT  
AT PAPA KURA**

**CRI-2016-092-004215**

**THE QUEEN**

v

**[NAZEEM ABBOD]**

Hearing: 7 March 2017

Appearances: Ms D George for the Defendant  
Mr P Winiata

Judgment: 9 March 2017

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**RESERVED DECISION OF JUDGE S MOALA**

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**Introduction**

[1] [Nazeem Abboud] faces the following charges after a domestic incident at his home address:

- a) breach of a protection order (x3);
- b) assault with intent to injure;
- c) male assaults female; and
- d) assault on a child.

[2] The Crown applies for an order that relationship propensity evidence be admissible at Mr [Abboud]'s trial.

[3] The application is opposed by the defendant.

[4] I reserved my decision after reviewing the written submissions and hearing from Counsel.

### **Background**

[5] The complainants are Mr [Abboud]'s wife [Aman Najjar] and their 5 year old daughter [Qudsiyah Abboud]. Ms [Najjar] also has a son [Raji] from a previous relationship. In 2013 a final protection order was granted protecting Ms [Najjar] and the two children from Mr [Abboud].

[6] On [date deleted] April 2013 Mr [Abboud] and Ms [Najjar] had an argument because the defendant ate grapes which were left for their daughter [Qudsiyah]. [Qudsiyah] cried and the defendant threatened to hit her. She ran to her room and the defendant followed her. Fearing for [Qudsiyah]'s safety, Ms [Najjar] intercepted Mr [Abboud] in the hallway.

[7] Mr [Abboud] is alleged to have placed his hand on Ms [Najjar]'s throat and squeezed her throat as she struggled to breathe. She says that he has done this before so she tried to stay still in the hope that he would stop. At the same time he used his right leg to kick Ms [Najjar] twice to her thigh. She pleaded with him not to hit [Qudsiyah] but he released his grip on her and went into [Qudsiyah]'s bedroom. He held [Qudsiyah] by the arm while slapping her to her face with an open hand. He then hit her again to the face with the back of his hand.

[8] Between [date deleted] April 2016 and [date deleted] May 2016 he sent messages to Ms [Najjar]'s son [Raji] asking for him to get Ms [Najjar] to call him about the court case. Ms [Najjar] blocked him from contacting [Raji]. On [date deleted] April 2016 he sent Ms [Najjar] an email and two further emails on [date deleted] April 2016. Ms [Najjar] did not respond. Mr [Abboud] continued to

communicate with the complainant. He sent another email on [date deleted] May 2016 and a further 3 emails on [date deleted] May 2016.

[9] When he was spoken to by the Police he denied the assaults but admitted that he contacted the complainant as he needed to speak to her.

[10] The Crown seeks to lead the following passages from Ms [Najjar]'s formal written statement as relationship propensity evidence:

“Due to the violence in the home from [Nazeem] I went into refuge in 2013 and on [date deleted] February 2013 I obtained a Temporary Protection order with [Nazeem] as the respondent and the order protected me and my two children. In July 2013 the Protection Order became final.

After being in refuge for a while, I finally moved out of refuge and [Nazeem] was very sorry and had said he had changed so we moved back in together and the violence continued straight away.

I tried to make things work because of the children but no matter what I did [Nazeem] was never happy. [Nazeem] would drink more and more but when he drinks he becomes very drunk and violent.

[Nazeem] would hurt me and the children but I felt that I could not phone the Police because [Nazeem] stated it was because of me he became upset and I believed it was all because of me. I felt it was my fault [Nazeem] would hurt me and the children.

The violence is increasing both in frequency and the nature of the violence is getting worse.

[Nazeem] will place his hands around my neck regularly and squeeze my neck to the point where I cannot breathe properly and if I move he will continue to squeeze tighter. I have learnt not to try and stop him because this way he will let go after a while.

The violence has consisted of verbal abuse putting me down and telling me I am not good enough. [Nazeem] also would hit me and he has started to place his hands around my neck and squeeze. Which one of the reasons I have come to the Police today.”

### **Legal principles**

[11] I agree with the summary of the relevant law provided by the Crown in its written submissions.

[12] Relationship or background evidence must still be analysed under s43 of the Evidence Act 2006<sup>1</sup>. However, because the relevance of such evidence does not rely primarily on ideas about co-incidence, the factors set out in s43(3) will generally be of less significance in determining the probative value of the evidence.<sup>2</sup>

[13] The Supreme Court in *Mahomed v R*<sup>3</sup> made the following observations about relationship propensity evidence. :

“[56] There are many reasons why the prosecution might wish to lead evidence of misconduct by the defendant towards the victim. In some cases, the misconduct might be inextricably linked to the alleged offending. To take an obvious and uncontroversial example of the defendant having threatened to kill the victim immediately before inflicting the fatal injury, the threat to kill could be regarded (at least by a pedant) as misconduct which betrayed a tendency to think about the victim in a particular way. But the obvious admissibility of such evidence has never been doubted. Other misconduct by the defendant towards the victim, even though not so closely linked in time with the offence, might reveal hostility by the defendant to the victim and thus be evidence of motive. Sometimes, such evidence might have important explanatory value, for instance as enabling a victim to explain why he or she had acted in a particular way. So in cases of alleged intra-familial sexual

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<sup>1</sup> *Lyon v R* [2015] NZCA 318; *M v R* [2013] NZCA 239

<sup>2</sup> *Lyons v R above* and *Mahomed v R* [2011] 3 NZSC 52.

<sup>3</sup> *Mahomed v R above*.

abuse, a victim may be unable to give a coherent account of what happened and why without discussing the underlying family dynamics.

[57] Evidence of the kinds just discussed differ from orthodox similar fact evidence in a number of overlapping respects:

(a) With orthodox similar fact evidence, the only link between the evidence and the offending in issue is through the particular propensity which the Crown attributes to the defendant. In that respect, the other misconduct is extraneous to the alleged offending. In contradistinction, evidence of misconduct by the defendant towards the victim can usually be seen as having a more direct relevance to the issues which the jury must decide.

(b) The relevance of the evidence of misconduct by the defendant to the victim will normally not depend (at least primarily) on ideas about coincidence and will usually be sufficiently obvious as to not require particular explanation.

(c) A high level of similarity between the alleged offending and the other conduct is not fundamental to probative value. Thus where the allegation is that the defendant murdered the deceased with a firearm, evidence of a prior attempt by the defendant to murder the deceased with a knife is likely to be relevant.

(d) The risk of unfair prejudice to the defendant arising out of evidence of other misconduct to the victim is likely to be less than with orthodox similar fact evidence. This is because the misconduct is usually not extraneous to the alleged offending and thus the associated evidence will not portray the defendant as being generally of bad character. In criminal trials it is routine for evidence of direct relevance to the alleged offending to reflect badly on the defendant, perhaps in terms of the defendant being a gang member, a drug user, an associate of criminals or having anti-social attitudes. The risk of unfair prejudice associated with such evidence is usually addressed simply by the judge warning the jury in general terms against being influenced by prejudice or emotion.”

[14] At paragraph [90] the majority set out why relationship propensity evidence may be relevant:

“[90] The three scenarios just discussed do not address propensity evidence as it relates to interactions between the defendant and victim. In respect of this:

- a) The propensity evidence may be relevant for reasons associated with coincidence, such as the implausibility of a young child receiving a number of injuries by accident. In a broad sense, this situation is similar to Professor Spencer's scenario two.
- b) The propensity evidence may have important explanatory value, as bearing on the background or relationships between those involved in or affected by the alleged offending.
- c) As a subset of (b), the propensity evidence may be relevant to establishing hostility on the part of the defendant to the victim or a motive for the defendant to harm the victim.
- d) As a further subset of (b), events may be so interconnected with the offending that the jury will not be able to understand properly what happened without hearing evidence about those events.

Leaving aside the first of the situations just postulated, in these circumstances the Crown will not usually be much reliant on ideas about coincidence and probability and the wrongfulness of the defendant's conduct will usually be so closely connected to the core elements of the case against the defendant as to leave little scope for unfair prejudicial effect.”

[15] In *Perkins v R*<sup>4</sup> the Court of Appeal endorsed the comments in *Mahomed* and noted that the rationale for relationship propensity evidence was establishing hostility on the part of the defendant to the victim and the violence of its expression. The Court said in *Perkins* that the “general atmosphere of violence” in the home was relevant to the Crown case, particularly to show the unwilling acquiescence to sex on the part of the complainant.

[16] The Court of Appeal in *M (CA85/2013) v R* held that allegations of past violence were probative to give “the jury the advantage of the full picture of the harsh domestic regime in the household” and because the “climate of fear” was directly

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<sup>4</sup> *Perkins v R* [2011] NZCA 665.

relevant to the issue of consent. Another significant aspect of the domestic regime is that it helped explain why there was a delay in making a complaint about the alleged offending.

## **Discussion**

[17] The starting point for discussion is: what is the defence at trial? When Mr [Abboud] was spoken to by the Police he said that Ms [Najjar] followed him and got in his way as he was going to his 5 year old daughter's room to speak with her. He told the Police that he gave Ms [Najjar] a small push to move her out of the way, but denied assaulting her in the way she alleges. Essentially he denies assaulting her by strangling and kicking her.

[18] At the trial, the jury will need to decide whether the violence as described by Ms [Najjar], happened at all. Her credibility will obviously be at issue.

[19] The next issue is to decide what the probative value is of relationship propensity or background evidence that the Crown proposes to lead.

[20] In my assessment, the evidence is highly probative of the two main issues in this trial, namely, whether the violence occurred at all and the credibility of the complainant.

[21] I agree that this evidence is the type of "relationship" or "background" evidence discussed in *Mahomed* and *Perkins*. This is propensity evidence of the defendant's behaviour towards the two complainants which contextualises the offending. It is also evidence that establishes hostility on the part of the defendant to the complainants and demonstrates the violence of its expression: *Perkins*. This evidence is of narrative significance and it would be artificial to view this particular incident as isolated offending.

[22] The defence says that there is no need to show a general atmosphere of violence as this is a single incident unlike *Perkins* which involved a number of charges over a longer period. I disagree. The reality is that Ms [Najjar] says there is an atmosphere

of violence in this home and I am of the view that the probative value of that evidence is not reduced by the fact that the charges relate to a single incident. It must also be kept in mind that there are three charges of breaching a protection order. What that will tell the jury is that there has been an atmosphere of violence in this home which was sufficiently serious to warrant a protection order being made final.

[23] The defence further argues that there is sufficient context given in Ms [Najjar]'s description of the alleged incident. I agree that she provides an explanation for the events of that day. However, it is inescapable that in a domestic relationship where there is a protection order, the context and the narrative for an incident of violence cannot be limited to the events of a single day. That does not make sense.

[24] The relationship propensity evidence will give the jury the advantage of the full picture of the harsh domestic regime in this household. Ms [Najjar] lived in fear of him and the jury needs to know this so that they can assess her actions on this given day and the credibility of her evidence.

[25] The relationship propensity evidence also explains and gives context to why she feared for her daughter's safety. Without that context the jury might perceive Ms [Najjar] as over-reacting to Mr [Abboud] dealing with a simple parenting and discipline issue where his daughter was crying over a few grapes. Given his history of violence towards the family, she was in genuine fear that he would hurt [Qudsiyah] and she was prepared to put herself at risk to stop him. That cannot be explained without the relationship propensity evidence.

[26] In this case, there is an allegation of strangling in the hallway and Ms [Najjar] describes it in her formal written statement at page 6:

“At this point [Nazeem] walked towards me and [Nazeem] grabbed me by the neck using his right hand he placed his fingers around one side of my neck and his thumb on the other side. The palm of [Nazeem]'s hand was against my throat and his fingers and thumb were just under each side of my jaw. [Nazeem] squeezed my neck very hard between his fingers and thumb which made it very

hard for me to breathe and I was very scared he would push more as this has happened before.

[Nazeem] squeezed my throat and pushed me back into the kitchen.

I just tried to stay still so hopefully [Nazeem] would stop squeezing my neck but at this point [Nazeem] lifted his right leg and kicked me twice in my thigh...”

[27] It would be artificial to have her describe the strangling and her response to it without reference to the fact that he has done it before. What happened was familiar territory for her and she knew how to reduce the risk because she has had to do it before.

[28] I am also of the view that the delay in complaining will be an issue at trial. Even if there is only a one week delay there will still be a question in the jury’s mind as to why she didn’t complain immediately. She has given an explanation as to why she did not complain about all of the violence by him. This evidence is important for the jury to be able to assess her credibility and the fact that she delayed making a complaint.

[29] In summary, the relationship propensity evidence is highly probative of a number of key issues in this trial.

[30] In assessing the prejudice to Mr [Abboud], I am mindful of the Court’s comments in *Mahomed* about the risk of unfairness being less than the orthodox similar fact evidence scenario.

[31] I start with the protection order. There are three charges of breaching the protection order. As discussed earlier the charges will alert the jury to the fact that there is already a background of violence in this relationship. It is my view that any prejudice by allowing the relationship propensity evidence must be assessed with that in mind.

[32] The defence argues that the proposed statement is too general and that the lack of specificity amplifies the risk of unfair prejudice. I disagree with this submission. The fact that the relationship propensity evidence is led in a general way reduces the prejudice to the defendant. The jury can then focus on the charges with that background and context in mind. If it is more specific and detailed, then the jury may focus on those incidents and get distracted by them or give inappropriate weight to the background evidence. It will of course be a matter for the defence whether to cross examine those details into the evidence or whether a broad brush denial is the best way to deal with the background evidence.

[33] Overall, in the context of this case, the risk of unfair prejudice is very low.

[34] I then come to balance the probative value of the relationship propensity evidence against the prejudice to the defendant and the proceedings. I am satisfied that the evidence has a high probative value to the issues in this trial which far outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant. The trial judge can deal with any prejudice by giving the jury the usual direction.

[35] I therefore grant the application. The relationship propensity evidence is admissible at Mr [Abboud]'s trial.

S Moala

District Court Judge