

**IN THE DISTRICT COURT
AT HAMILTON**

**CRI-2016-075-000428
[2017] NZDC 18987**

THE QUEEN

v

ISAAC WAYNE KUKA

Hearing: 18 August 2017
Appearances: Ms Clark for the Crown
Mr Bean for the Defendant
Judgment: 25 August 2017 at Noon

**RESERVED JUDGMENT OF JUDGE A S MENZIES
[Crown application to adduce propensity application]**

[1] The defendant faces four charges set out in the Crown charge list dated 7 October 2016:

- (a) Wounding with intent to cause grievous bodily harm;
- (b) Wounding with intent to injure;
- (c) Threatening to cause grievous bodily harm;
- (d) Possession of cannabis.

[2] The defendant is on remand to a trial date on 4 December 2017.

[3] The Crown seeks an order authorising the admission of propensity evidence at the trial which application is opposed by the defendant.

[4] The proposed propensity evidence takes the form of a certificate of conviction for a threatening behaviour charge together with what will be a modified summary of facts taken from the summary of facts itself which backgrounded the threatening behaviour charge but extended to other matters as well. The Crown indicated that from that summary which was provided for the argument of the application, the portion on page 4 under the heading CRN 14070004509 – threats to kill, would be incorporated together with a brief background to explain the context of the threatening to kill charge reflecting the altercation described between the defendant and a member of his family.

[5] That intended propensity evidence (“the earlier evidence”) involves circumstances on 3 September 2014. The defendant went to the address of his ex-partner’s uncle. After a verbal exchange at the door there was a physical altercation. The defendant entered the property and both parties ended up in the kitchen. The summary relating to the threat to kill charge then records:

The defendant has armed himself with a large stainless kitchen knife, (approximately 32cms) from the kitchen counter.

The defendant has stood over the victim and pointed the knife at him.

The defendant has threatened to kill victim B saying the words “I’ll cut your fucking head off”.

The defendant has demanded that victim B look at him before he has thrown the knife back down on the kitchen counter and walked out of the address.

[6] The charges the defendant now faces (the current charges) refer to events alleged to have occurred on 15 July 2016 outside the [premises] on Albert Street Whitianga. In support of its application the Crown has provided a summary of facts which can be summarised as follows:

(a) The defendant was staying at the [premises] and saw a number of persons approaching.

- (b) He went back into his unit and took up a kitchen knife. Armed with his knife and a pair of scissors he went back out onto the street, confronted and then stabbed [the complainant].
- (c) [The complainant] described the knife as a “skinny filleting type knife”.
- (d) A witness describes hearing a male say “fucking you think you cunts are hard” before seeing the male running into the driveway of the motel and then returning with something in his hand shaped like a knife.
- (e) The same witness describes the same male being challenged to a fight by another man in boxer shorts as the police turned up.
- (f) A different witness describes a male marching in front of the motel swinging his right hand and holding something long and sharp.
- (g) That witness said the male was making threats by saying “I will stab you in the eye, I will stab you in the neck”. That witness pointed out the same male to the police when they arrived and that male was arrested.
- (h) The person confronting the other man in boxer shorts was the defendant who was found to be in possession of a pair of scissors.
- (i) The only person arrested by the officer that attended the scene was the defendant who had a large gash on his hand.

[7] Section 43 of the Evidence Act 2006 addresses the issue of propensity evidence intended to be offered by the prosecution against a defendant:

Propensity evidence offered by prosecution about defendants

- (1) The prosecution may offer propensity evidence about a defendant in a criminal proceeding only if the evidence has a probative value in relation to an issue in dispute in the proceeding which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant.

- (2) When assessing the probative value of propensity evidence, the Judge must take into account the nature of the issue in dispute.
- (3) When assessing the probative value of propensity evidence, the Judge may consider, among other matters, the following:
 - (a) the frequency with which the acts, omissions, events, or circumstances that are the subject of the evidence have occurred:
 - (b) the connection in time between the acts, omissions, events, or circumstances that are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried:
 - (c) the extent of the similarity between the acts, omissions, events, or circumstances that are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried:
 - (d) the number of persons making allegations against the defendant that are the same as, or are similar to, the subject of the offence for which the defendant is being tried:
 - (e) whether the allegations described in paragraph (d) may be the result of collusion or suggestibility:
 - (f) the extent to which the acts, omissions, events, or circumstances that are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried are unusual.
- (4) When assessing the prejudicial effect of evidence on the defendant, the Judge must consider, among any other matters,—
 - (a) whether the evidence is likely to unfairly predispose the fact-finder against the defendant; and
 - (b) whether the fact-finder will tend to give disproportionate weight in reaching a verdict to evidence of other acts or omissions.

[8] The term propensity is defined in s 40(1) as follows:

Propensity rule

- (1) In this section and sections 41 to 43, **propensity evidence**—
 - (a) means evidence that tends to show a person's propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events, or circumstances with which a person is alleged to have been involved; but
 - (b) does not include evidence of an act or omission that is—
 - (i) 1 of the elements of the offence for which the person is being tried; or
 - (ii) the cause of action in the proceeding in question.
- (2) A party may offer propensity evidence in a civil or criminal proceeding about any person.
- (3) However, propensity evidence about—
 - (a) a defendant in a criminal proceeding may be offered only in accordance with section 41 or 42 or 43, whichever section is applicable; and
 - (b) a complainant in a sexual case in relation to the complainant's sexual experience may be offered only in accordance with section 44.
- (4) Evidence that is solely or mainly relevant to veracity is governed by the veracity rules set out in section 37 and, accordingly, this section does not apply to evidence of that kind.

[9] Propensity evidence may be offered by the prosecution provided the evidence has a probative value in relation to an issue in dispute in the trial which outweighs the risk of an unfairly prejudicial effect on the defendant.

[10] The issues in dispute to which the proposed propensity evidence would be offered is described by the Crown as whether the defendant was the person making the threats, whether he was brandishing a knife at the time and whether he was the person responsible for stabbing [the complainant]. Specifically the Crown submits that the evidence of the previous conviction for threatening behaviour demonstrates that the defendant has a propensity, in the context of a violent confrontation, to seize a knife and to make threats of serious violence towards others, particularly with regard to the head, and to use the knife to reinforce the threat/s.

[11] The Crown argues the proposed propensity evidence would be probative of those issues by establishing the defendant's willingness to behave in a similar way to that presently alleged.

[12] In the context of issues under s 43(3) the Crown argues there is the one previous relevant event which occurred in 2014. That is proximate to the alleged offence in 2016 in terms of time. The key issue is that the Crown argues the behaviour is of a similar nature namely that in the context of a violent confrontation, the defendant seized a knife, made threats of serious violence towards others, particularly relating to the head, and used the knife to reinforce those threats. The Crown says the defendant was seen by a number of witnesses making this allegation. There is no connection between the events in 2014 and 2016 and therefore no suggestion of collusion or suggestibility. The Crown argues there is an unusual flavour to the defendant's behaviour which is distinctive.

[13] The Crown refers to *Mahomed v R*¹ and argues that the circumstances fall within "Scenario 1" referred at paragraphs [85] – [88]. Specifically reference is made to paragraph [87] in which the Court stated:

Although scenario 1 cases can, at least usually, be analysed in terms of coincidence, it will sometimes be better to explain the relevance of the propensity evidence as being material, in a specified way to the probability of the defendant being guilty.

[14] In the present case the Crown argues the propensity evidence supports the plausibility of the complaints against the defendant namely that he was a person holding a knife and that he was a person also making threats to stab people in the neck and in the eye. Therefore the Crown says when none of the Crown witnesses knew the defendant or anything about his prior history and have identified him in the street as the person responsible for threatening to cause grievous bodily harm and stabbing the complainant, the Crown seeks to rely upon the defendant's prior conviction for similar offending as providing considerable support to the identification of the defendant as the person responsible.

¹ *Mahomed v R* [2011] 3 NZLR 145

[15] The Crown acknowledges that the admission of propensity evidence would be prejudicial. However all propensity evidence is to a degree prejudicial to the defendant. In this context the Crown refers to *R v Tui*² at paragraph [19]:

In our view it is important not to confuse the strength which the prosecution legitimately obtains from the probative value of the propensity evidence with the concept of illegitimate prejudice. There is nothing illegitimate in a jury's assessment of the current charges being coloured by the proceeding acts. That is the very purpose of calling propensity evidence.

[16] The Crown argues that a properly directed jury would not give disproportionate weight to the evidence if admitted. Therefore the Crown says the propensity evidence of the previous convictions is of probative value sufficient to outweigh any prejudice to the defendant.

[17] In the context of matters raised by the defence, the Crown says that the background circumstances to the earlier and the later offending were clearly different and that is acknowledged. The Crown says however that no two sets of proposed propensity circumstances will ever be identical. The relevance is the manner in which the defendant behaved in each situation rather than the reason why the altercations in each case arose.

[18] The defendant opposed the application. In essence the defence argues that the proposed evidence does not go to a fact in issue and that illegitimate prejudice would result for the defendant which no judicial direction could cure.

[19] The defendant characterised the two sets of events differently to the approach of the Crown. The defendant emphasised that the earlier evidence in which the defendant grabbed the knife and threatened to cut the victim's head off was in response to the defendant believing the uncle involved was interfering with his relationship with his partner. The victim in that matter was not harmed.

[20] Referring to the statutory framework, the defence argues the evidence must first constitute propensity evidence which means evidence that tends to show a person's propensity to act in a particular way or to have a particular state of mind.

² *R v Tui* [2010] NZCA 243

Second the defence says the evidence must have a probative value “in relation to a fact in dispute”. Third the defence says the probative value must outweigh the risk that the evidence may have an unfairly prejudicial effect on the accused.

[21] The defence also refers to the decision in *Mahomed v R* and the particular emphasis in that decision that propensity evidence refers to “a tendency to act in a particular way or to have a particular state of mind”. The defence argues that illegitimate prejudice will be found if the propensity evidence has the potential to manifest adversely in the jury’s deliberation on the guilt or otherwise of the accused. As the Court noted in *Rei v R*³ propensity evidence which reveals no more than a propensity to commit offences of a certain type, despite having some probative value will often be inadmissible given the inevitable prejudice associated with that evidence. That is particularly the case where the characteristics of the offending in question are unremarkable.

[22] The defendant argues that the issue at trial is whether the defendant performed “the actus reus” of the offences in that he actually made a threat to wound a person and did wound the person.

[23] The defendant says that the two year gap is significant, there having been no other violence offending in the interim. The defendant then points to a number of differences between the events which the defence argues can be relevant in such assessments with reference to *Vuleitch v R*⁴.

[24] Accordingly the defence highlights the differences as comprising:

- (a) The defendant says that the later charges involve a fight with unknown associates in which the defendant was essentially defending himself. In comparison the earlier offending involved a heated argument in a kitchen about the victim interfering with the relationship of the defendant and his partner. The victim was not harmed.

³ *Rei v R* [2012] NZCA 398

⁴ *Vuleitch v R* [2010] NZCA 102 @ [38]

- (b) That offending was therefore a defendant arguing with a family member with no harm done as opposed to a fight with a large number of people in which the victim was injured.

[25] The defendant submits that the only similarity is the way in which the knife was used. However it needs to be established at trial that it was the defendant that was holding the knife or made the threat. Essentially the defendant argues that the similarities in the case are unremarkable in that it is a common method of threatening to cause grievous bodily harm to use a knife as a weapon. That lessens the probative value of the evidence.

[26] The defence therefore submits that the defence evidence would be of very limited probative value which would be far outweighed by unfair prejudicial effect which could not be remedied by judicial direction.

Discussion

[27] The first issue in this assessment is whether the propensity evidence is relevant to issues in dispute. The defence says it is not and argues it could only be relevant to the manner in which the knife was being held. I disagree. The Crown argues that the propensity evidence is relevant to issues at trial including whether the defendant was the person making the threats, whether he was brandishing a knife at the time and whether he was the person responsible for stabbing [the complainant]. Those are clearly issues at trial and I agree the propensity evidence is relevant to those issues. I therefore accept the propensity evidence is relevant to issues at trial.

[28] I agree there are differences arising in the two different factual scenarios. However the emphasis is on similarities. Does the evidence refer to “a tendency to act in a particular way or to have a particular state of mind” as discussed in *Mahomed*. Put another way the propensity evidence “must represent some sort of relevant signature” as the Court of Appeal noted in *Rossiter v R*⁵.

⁵ *Rossiter v R* [2015] NZCA 557 at [10]

[29] The key issue in this context is the extent of the similarities identified in the Crown submissions at paragraphs [16] and [18.3]:

The type of behaviour that is alleged of a similar nature, namely, that in the context of a violent confrontation, the defendant seized a knife, made threats of serious violence towards others, particular regards the head, and used the knife to reinforce those threats.

[30] In the earlier events, the defendant threatened to kill the victim using the words “I’ll cut your fucking head off” while standing over the victim and pointing the knife at him.

[31] In the current charges, the Crown says the defendant armed himself with a knife and threatened to stab people in the eye and in the neck. Again this was in the context of a violent confrontation. I do not accept that the similarities can be downplayed as being characterised as a typical example of threatening to kill. There are unusual characteristics of which the three common ingredients are:

- (a) A physical altercation;
- (b) Threats to maim seriously by use of a knife to the head area;
- (c) The presence of the knife to reinforce the threats.

[32] That behaviour illustrates a tendency to act in a particular way and has elements of a relevant signature.

[33] I am satisfied the proposed propensity evidence is relevant to issues in dispute and probative of those issues. Indeed I would regard the probative value as being comparatively high.

[34] The remaining issue to assess is the potential for unfairly prejudicial effect if the propensity evidence were to be admitted. The key issue in this context is whether a jury might use the evidence for “an improper purpose or in support of an impermissible process of reasoning”.⁶

⁶ *Mahomed v R* [2011] 3 NZLR

[35] The overall assessment required is as to whether or not the probative value outweighs the prejudicial effect to the defendant. Part of that inquiry recognises that direction would be necessary to a jury as to the manner in which the propensity evidence would be applied.

[36] My assessment is that the probative value of the proposed propensity evidence is moderate to high. The probative value would outweigh any potential prejudice to the defendant which I consider can be managed in a proper way with an appropriate direction to the jury.

Determination

[37] The Crown's application is therefore granted. The Crown is authorised accordingly to adduce the conviction for the 2014 offending and the relevant modified summary of facts.

A S Menzies
District Court Judge