

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

NOTE: PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS, OF COMPLAINANT(S) PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

**IN THE DISTRICT COURT
AT PALMERSTON NORTH**

**CRI-2017-031-000526
[2017] NZDC 26663**

THE QUEEN

v

LYRIC HOFMANN
Defendant

Hearing: 13 October 2017

Appearances: Mr K van der Plas for the Crown
Mr P Foster for the Defendant

Judgment: 24 November 2017

**RESERVED JUDGMENT OF JUDGE L C ROWE
ON PRE-TRIAL APPLICATION FOR ADMISSIBILITY OF PROPENSITY
EVIDENCE**

[1] Lyric Hofmann is charged with indecent assaults and attempted sexual violation of a [age deleted] woman.

[2] Mr Hoffman has convictions for indecent assault and indecent acts in relation to other adult women.

[3] The Crown wishes to adduce evidence of the convictions and circumstances of the previous indecent acts and indecent assault at Mr Hoffman's trial to demonstrate

Mr Hoffman's propensity to act in a sexually aggressive or persistent way towards adult women or to have a sexually aggressive or persistent state of mind towards adult women.¹

[4] There is no question about the identity of the person alleged to have indecently assaulted the complainant. The issue is whether the assaults happened at all. More accurately, the issue is whether the complainant's account of what Mr Hofmann did is credible.

[5] The question then is whether the evidence of Mr Hofmann's previous sexual offences has a probative value in relation to this issue (whether the assaults happened at all) which outweighs the risk that the evidence may have an unfairly prejudicial effect on Mr Hofmann.²

Alleged facts

[6] The complainant is a [age deleted] woman who lived with her [child] at an address in Foxton.

[7] She knew Mr Hofmann by sight, as a fellow resident of Foxton, but not by name.

[8] It is alleged the complainant was at home with her [child] on 25 April this year when, at about 4.00 pm, Mr Hofmann arrived unannounced.

[9] Mr Hofmann came into the kitchen area of the home where he offered to sell cannabis to the complainant. She declined the offer.³

[10] The complainant stood up from the kitchen table thinking Mr Hofmann was leaving, but he grabbed her buttocks. The complainant turned away from Mr Hofmann and brushed his hand away before sitting down to continue her dinner.

¹ Evidence Act 2006, s 40(1)(a).

² S 43(1)

³ Mr Hofmann is also charged with offering to sell cannabis.

[11] Mr Hofmann then grabbed the victim's wrists and put her left hand down his pants, forcing her hand onto his penis. The complainant pulled her hand away.

[12] Mr Hofmann used his other hand to touch the complainant on her genitalia, over the top of her clothing. He attempted to kiss the complainant on the lips but she moved her head to the side to avoid him.

[13] The complainant repeatedly told Mr Hofmann "no" and that she had a boyfriend.

[14] Mr Hofmann then pulled his pants down to expose his penis and tried to push the complainant's head onto his penis.

[15] Mr Hofmann asked to spend five minutes in the bedroom with the complainant.

[16] The complainant managed to get up from her chair and away from Mr Hofmann but, as she did so, he grabbed her buttocks again.

[17] Mr Hofmann then left but, as he did so, told the complainant not to tell anyone about the incident.

[18] The complainant immediately ran to a [nearby relative] and reported what had happened.

Previous incidents

12 December 2012 – indecent act

[19] At about 4.00 am on Wednesday 12 December 2012, Mr Hofmann went to the [details deleted] store. Whilst the store was closed, [details deleted] staff were on the premises.

[20] Mr Hofmann opened the [details deleted] door, looked inside and saw the [age deleted] female victim standing in the [room]. Mr Hofmann then shut the door, exposed his penis and masturbated.

[21] The victim opened the [details deleted] door, looked outside and saw Mr Hofmann standing at the side of the door masturbating. She told him there were security cameras in the area.

[22] Mr Hofmann then walked towards the victim, continuing to masturbate as he did so. The victim went back inside and shut the door after her.

[23] Mr Hoffman ejaculated over the exterior of the external [details deleted] door and then left the area.

5 January 2013 – indecent act

[24] On Saturday 5 January 2013 at about 10.10 pm, Mr Hofmann was in [street name deleted], Foxton Beach. He urinated on a lamp post while looking directly across the road at the [age deleted] female victim who was standing at her kitchen window.

[25] After urinating, Mr Hofmann walked up the road but returned a short time later on the victim's side of the street. He stopped at a lamp post underneath a street light approximately 10 meters from the victim's kitchen window. He pulled his pants down to expose his penis and began masturbating while looking directly at the victim who was still standing in her kitchen window looking at him.

[26] Mr Hofmann ran away when the victim called out to her husband.

3 June 2013 – indecent act

[27] At about 11.00 am Monday 3 June 2013, Mr Hofmann was in a reserve area at Foxton Beach.

[28] The [age deleted] female victim was walking her dog in the reserve. As she went to walk past Mr Hofmann she thought he was urinating so she retreated for a few minutes to allow him to finish, then carried on walking past him.

[29] As she did so, the victim could see that Mr Hofmann was exposing himself, his penis was erect and he was masturbating. Mr Hofmann looked directly at her while he did this.

[30] The victim called out to him “no, you can’t do this” and then continued past him and ran along the reserve.

12 November 2015 – indecent assault

[31] On Thursday 12 November 2015 about 10.00 am, Mr Hofmann went into the [volunteer centre].

[32] The [age deleted] female victim was working alone at the Centre as a volunteer that morning. Mr Hofmann approached the victim and said he was looking for a toy to buy for his dog.

[33] The victim walked across the room to look through some items that were for sale to see if they would be suitable for Mr Hofmann to purchase for his dog. As she was looking through these items, Mr Hofmann walked up behind her and pressed himself against her back and buttocks.

[34] The victim returned to her desk followed closely by Mr Hofmann. She seated herself behind her desk and Mr Hofmann stood directly in front of the desk. He asked the victim if she had a partner and whether she lived alone. He said that a nice lady like her should have a partner.

[35] The victim told Mr Hofmann there was nothing suitable for him to buy for his dog and he left a short time later.

Propensity analysis

[36] There were four occasions between late 2012 and late 2015 when Mr Hofmann has behaved in an indecent way towards adult women. Mr Hofmann committed the three indecent acts in 2012/13 when he was 15 years old. These charges were proved in the Youth Court. Mr Hofmann committed the 2015 indecent assault when he was

18 years old. It was proved in the District Court following which Mr Hofmann was sentenced on 4 April 2017 (21 days prior to the present alleged offending).

[37] There are differences in the indecent acts performed in 2012/13 and the present alleged offending. In 2012/13 Mr Hofmann exposed his penis at the victims and masturbated as opposed to the present allegations of indecent physical contact.

[38] The 2015 indecent assault was more similar in that it involved Mr Hofmann making unwanted indecent physical contact with the victim. The difference between the 2015 offence and the present alleged offences is more a difference of scale and persistence.

[39] The common features between all offences and the present allegations however are that they comprise sexually motivated offences, opportunistically carried out against, or in relation to, adult women who are apparently alone, Mr Hofmann had no prior relationship or connection with the women, and there was a degree of persistence despite the victims' rejections of his activities or advances. This demonstrates a consistent intention on Mr Hofmann's part to sexually prevail or persist over, or in relation to, adult women regardless of their wishes.

[40] A difference in the seriousness of offending, or an escalation in offending, does not, of itself, deprive propensity evidence of its probative value, particularly when the relevant acts fall within the same spectrum or category of offending.⁴

[41] There are dissimilarities. These include the varying times of the day or night that Mr Hofmann has offended, the ages of the women involved, he has offended in a public place, outside and then inside victims' work places, and he has offended outside a victim's home and allegedly (in the present instance) inside a victim's home. These differences are of no consequence given the similarities in each case of opportunistic sexual offending against single adult women, with whom he has no relationship, in a persistent way against their wishes.

⁴ *R v Khan* [2010] NZCA 510 at [25]; *Hetherington v R* [2012] NZCA 88 at [20]; *Rossiter v R* at [12].

[42] There is no suggestion the present complainant knew Mr Hofmann other than as a passing acquaintance and there is no evidence she knew of Mr Hofmann's previous offences. There is no suggestion the complainant has any connection with the previous victims and there is no evidence of collusion or suggestibility.

[43] The probative value of the previous offences lies in the coincidence that the present adult female complainant would allege that Mr Hofmann had behaved towards her in a sexually persistent way when he found her alone (or at least the only adult present), independently of four other women who have experienced similar types of conduct, albeit at the more minor end of the spectrum. There is a logical and specific linkage and coincidence between Mr Hofmann's conduct and mental state on each occasion which carries the propensity evidence well beyond mere evidence of offences of a general kind.⁵

[44] The propensity evidence accordingly has very strong probative value on the trial issue of whether these events happened at all, and the associated question of whether the complainant has made these allegations up.

Prejudicial effect

[45] There is nothing unfair in having the complainant's allegations of persistent sexual conduct towards her measured against the coincidence that Mr Hofmann has opportunistically behaved in a sexually persistent way towards other lone adult women on four occasions in the preceding four and a half years. Indeed, it would be artificial to assess the complainant's credibility without this coincidental previous behaviour being known to the jury.

[46] The jury will of course be directed that proof of previous incidents does not, of itself, prove that the present incidents occurred and that the previous incidents need to be viewed strictly in terms of the extent to which they logically support the complainant's credibility. It goes without saying that a jury may consider the

⁵ By application of *R v Mahomed* [2011] NZSC 52 at [3]; and *Rei v R* [2012] NZCA 398 at [48 and [49].

propensity evidence adds considerably to the complainant's credibility but, as observed, that is not a matter of unfairness but rather a matter of probative strength.

[47] For these reasons, I do not consider the propensity evidence is likely to unfairly predispose the jury against Mr Hofmann and nor is the jury likely to give disproportionate weight to the propensity evidence when reaching their verdicts following appropriate directions.

Outcome

[48] It follows that the prosecution may offer the evidence of the four previous victims and the certificates confirming that the previous offences were proved or (in relation to the 2015 offence) Mr Hofmann was convicted.

[49] The Crown's application is granted accordingly.

L C Rowe
District Court Judge