

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

**IN THE DISTRICT COURT
AT MANUKAU**

**CRI-2017-092-008234
CRI-2018-092-007625
[2018] NZDC 2445**

NEW ZEALAND POLICE
Prosecutor

v

[LEON KIRIKIRI]
Defendant

Hearing: 13 February 2018
Appearances: Mr Piho for the Police
Ms Croucher for the Defendant
Judgment: 7 March 2018

RESERVED DECISION OF JUDGE S MOALA

[1] Mr [Kirikiri] faces a charge of male assaults female. This is an application by the Police to lead relationship propensity evidence at Mr [Kirikiri]'s judge alone trial. The propensity evidence includes a history of abuse and controlling behaviour as well as his conviction for offensive use of a telephone against the complainant 9 days after the alleged assault.

[2] The application is opposed by Mr [Kirikiri].

[3] The issues for determination are:

(a) what are the issues at trial?

- (b) does the evidence show that Mr [Kirikiri] has a tendency to behave in a certain way, which is relevant to the issues at trial?
- (c) does the probative value of the propensity evidence outweigh the risk that it may have an unfairly prejudicial effect?

[4] I received the file on the morning of the pre-trial hearing. I reviewed the submissions and heard oral submissions from both Mr Piho and Ms Croucher. I reserved my decision for two reasons. First, I wanted more time to read the file properly. Secondly, Ms Croucher understood that the police were only seeking to rely on the conviction and not the other background relationship material in the complainant's statement. I gave her the opportunity to take further instructions and file further submissions. I received her submissions.

Background

[5] Mr [Kirikiri] and the complainant [name deleted] had been in a relationship for about five years. They live in separate addresses and do not have children together.

[6] [The complainant] says that on [date deleted] July 2017, between 8pm and 9pm she arrived at her home address having been at the [location deleted] with Mr [Kirikiri]. They left in their separate vehicles. They left on good terms.

[7] She says that Mr [Kirikiri] is the kind of person who has a random thought, thinks about it, and starts believing it. She says he will then call her to accuse her of whatever he has randomly thought up.

[8] When she got home she went to her bedroom to get ready for bed. She received a phone call from Mr [Kirikiri]. He began accusing her of something random. She cannot remember what it was but she hung up because she did not want to listen to it. She says that she had a feeling this would happen because it always does. Mr [Kirikiri] then began calling her over and over. She ignored all his calls. She says that whenever she ignores his calls or text messages, he would show up at her home address to argue about it. If he is not happy with something, he will not leave her alone until he gets his way. She said that this time she continued to ignore Mr [Kirikiri]'s calls and

because she knew he would show up if she did not answer, she had to leave her address so he would not show up and start arguing with her.

[9] As she was preparing to leave her house she opened the door and noticed Mr [Kirikiri] already on the other side. She says that her building has swipe card security access so he must have followed another car into the property or figured out a way of getting passed the security gate. When she opened the door, she told Mr [Kirikiri] to get out of her way. He yelled back at her “no, no, no you’re not going anywhere!”. He did not look like himself. He was so angry. Mr [Kirikiri] was standing in front of her at this point. Both were facing each other. He then forcefully pushed her into the wall. He did this with two open hands against her chest. She says that he handled her like a man. She did not receive any injuries because of this push. Mr [Kirikiri] started yelling at her “hop in my car”, and she did because she was scared.

[10] When they got into the car he began screaming at her. He screamed accusations at her for around 15 to 20 minutes. She kept her mouth shut the whole time. She says that if she does not say a word he will eventually calm down. He did.

[11] In the past, she says that Mr [Kirikiri] has shown up at her previous home address at [location deleted] and told her that the purpose of him coming to her address was that he wanted to kill her. He told her he changed his mind when he saw her. She says that this is another example of his random thoughts and how he takes them seriously.

Proposed evidence in relation to conviction

[12] On [date deleted], at around 9.30am [the complainant] rang Mr [Kirikiri] to let him know she was going to see a friend for coffee in [location deleted] she was also going to [event deleted]. She says that he yelled at her “you know I don’t like that mother fucker!” She responded by reiterating her plans to him. Eventually he said okay, and she ended the call.

[13] At 2.59pm she received a call from Mr [Kirikiri] whilst she was having lunch with her friend. He began getting angry at her for going to [location deleted] saying

that he always wanted her to take him to [location deleted]. He called [the friend] a mother fucker and a bitch. She told him she only went to [location deleted] with [the friend] as she wanted to [event deleted]. He told her she was lying. She just sat there and listened to him yelling at her until he eventually hung up.

[14] She then received two more calls from him around 3.15pm where the same thing happened. He repeated himself and yelled at her. She listened and eventually he hung up.

[15] He rang back when she hopped into her car. [The friend] was in the front seat. Mr [Kirikiri] repeated himself again and told her to pass the phone onto [the friend] so he can tell her he hates her and swear at her. She refused and he hung up on her.

[16] While she was driving, she received another call from Mr [Kirikiri]. This time she had him on loud speaker so that her friend [name deleted] could hear. I told him he was on speaker and he told me “I don’t give a fuck!” and “didn’t we discuss this before?”. She responded by asking him what he meant. She did not want to entertain the call, or for [the friend] to feel awkward, so she hung up on him.

[17] She then received 14 missed calls from Mr [Kirikiri]. She arrived home around 4pm. She got changed and got into her car and drove to [location deleted]. She did this because she knew he would go to her house to look for her after she ignored his calls.

[18] When she arrived at the [location deleted], she called Mr [Kirikiri] at about 4.45pm to ask him why he was being so nasty? This resulted in him getting even angrier. He yelled at her “go home, pack your things and get the fuck out of the country!”. She told him this was scaring her and she hung up.

[19] [The complainant] called [the friend] while she was in the car from her work phone, so the next time Mr [Kirikiri] called on her personal phone, she had him on speaker so that [the friend] could hear him screaming at her. [The friend] told her she needed to go to the police station. [The complainant] drove and picked up [the friend] and the two of them went to the police to report the matter.

[20] Whilst she was in the interview room with the officer she received more than 40 missed calls and the following 15 messages from Mr [Kirikiri] to her personal phone:

“Pick up your phone mother fucker”.

“Fuck you”.

“Fuck you mother fucker”.

“You have fuckin’ destroyed all the good relationship that we had been having, mother fucker”.

“Fuck you mother fucker”.

“Pick up your phone fucker”.

“Fuck you mother fucker”.

“Fuck you answer your phone”.

“I want my fuckin’ money back fucker”.

“I want my fuckin’ money back fucker”.

“I want my fuckin’ money back mother fucker”.

“All the money I have spent on you for all the years, I want fuckin’ back”.

“Fuck you mother fucker”.

“You can fuckin’ ignore my calls, I don’t fuckin’ care. My fuckin’ money I will get it all of it from you fucker”.

“I’m not going to run around looking for you, fuck that shit, but my fuckin’ money you will fuckin’ give it”.

[21] She says she fears Mr [Kirikiri] and tired of the way he treats her. She is scared to go home because if he finds her she does not know what he will do to her. She knows that he will show up at her house and she is scared. She wants him to go on anger management course so he can try and help himself. She says that she has tried to leave him before, but a vicious cycle begins where he gets angry and tells me that it will not make it any easier for me. He will show up and just stay quiet to keep the peace. She says she is scared and she needs help.

Legal principles

[22] The test for admissibility of propensity evidence is set out in s43 of the Evidence Act 2006. When assessing the probative value of the propensity evidence I must consider the nature of the issue in dispute. I may consider the various factors in s43(3), however, relationship propensity evidence does not rely primarily on ideas of co-incidence so these factors will generally be of less significance. Section 42(4) sets out the test for assessing the prejudicial effect of the evidence. The Crown can only offer propensity evidence about a defendant if the probative value outweighs the risk that the evidence may have an unfairly prejudicial effect.

[23] The Supreme Court in *Mahomed v R*¹ distinguished relationship propensity evidence from ordinary propensity evidence and described its probative value as:

- “(a) The propensity evidence may be relevant for reasons associated with co-incidence, such as the implausibility of a young child receiving a number of injuries by accident.
- (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.”

[24] In *Perkins v R*² the Court allowed evidence of previous violent incidents between the defendant and the complainant, his partner. The Court said that it was important to show “a general atmosphere of violence” by him. It went on to say that “it set the background of what the Crown claimed was the unwilling acquiescence to sex on the part of the complainant, who on past experience knew that if she declined she would be assaulted.”

[25] In *R v Potaka-Alexander*³, Wylie J said that prior physical violence by the defendant on the complainant was rightly admitted because it gave the jury the overall

¹ *Mahomed v R* [2011] NZSC 52.

² *Perkins v R* [2011] NZCA 665.

³ *R v Potaka-Alexander* [2012] NZHC 1958.

view it needed of the relationship. He also said that “judges allow such evidence because otherwise the complainant’s evidence as to the alleged offending would necessarily be incomplete and perhaps not comprehensible from the jury’s point of view.”

[26] In *M v R*⁴, The Court of Appeal, described such evidence as giving “the jury the advantage of the full picture of the harsh domestic regime in the household” and because the “climate of fear” that was “directly relevant to the issue of consent.”

[27] Finally, in the minority judgment of *Mahomed v R*⁵, the Court said that the unfair prejudice normally associated with propensity evidence is likely to be less in these cases and can be addressed by a direction from the judge.

What are the issues at trial?

[28] Mr [Kirikiri] says that the issue at trial is whether the violence occurred. He accepts that he was with the complainant that day. However, he says that they both spoke to each other in an abusive way. In addition, they were both possessive of each other especially around their use of text messages and phone calls. He says that they would both ignore each other. He is adamant though that he never pushed her in the way she described.

[29] [The complainant] says that the assault happened and that Mr [Kirikiri]’s behaviour is aggressive and controlling when he does not get what he wants. She says that he has a particular way of dealing with her when she ignores her calls. He rings repeatedly. He turns up. He gets very angry. He is abusive and she lives in an environment of fear.

[30] [The complainant]’s credibility and reliability will be critical to the jury’s consideration in the trial.

Does the evidence show that Mr [Kirikiri] has a tendency to behave in a particular way, which is relevant to the issues at trial?

⁴ *M v R* [2013] NZCA 239.

⁵ *Mahomed v R* [2011] 3 NZLR 145.

[31] Mr [Kirikiri] says that for evidence to constitute propensity evidence it must have a degree of specificity about it. Mr [Kirikiri] says that the level of generality does not fall within the definition of propensity to act in a particular way. Ms Croucher referred to the cases that the Crown relied on. She distinguished them because there is no long history of sustained abuse or violence by Mr [Kirikiri]. She says that his conviction is for offending that occurred 9 days after the alleged assault. She says that it would be unfair to use his abusive language to show that he has a propensity to also use physical violence against the complainant. Ms Croucher says that when you look at the factors under s43(3) there are no strong features warranting admission.

[32] I am satisfied that the proposed evidence is relationship propensity evidence and that it should be admitted at Mr [Kirikiri]'s trial. It is background relationship evidence which shows the true nature and context of their relationship. He is controlling and abusive. The main issues at trial will be: why he went around to her place and whether he pushed her. The proposed propensity evidence supports her version of what happened.

[33] There are also similarities between the proposed relationship evidence and the allegations. He would get wound up about something. He would call her. He would be abusive to her. She would hang up and try to ignore him. This would anger him. He would try to call her many times. If she continued to ignore him he would go to her house. She would anticipate this and leave the house to avoid him.

[34] I am satisfied that the allegations cannot be dealt with in a vacuum. The relationship propensity evidence is critical to the issues to be determined at trial.

Does the probative value of the propensity evidence outweigh the risk that it may have an unfairly prejudicial effect?

[35] Given that this is a judge alone matter, the prejudicial risk is not as problematic as it would be in a jury trial. I am satisfied that the probative value of the evidence outweighs the risk that it may have an unfairly prejudicial effect.

Result

[36] All the proposed relationship evidence is relevant and admissible at Mr [Kirikiri]'s trial.

S Moala
District Court Judge