

**IN THE DISTRICT COURT
AT MORRINSVILLE**

**CRI-2017-039-000666
[2018] NZDC 3152**

NEW ZEALAND POLICE
Prosecutor

v

MICHAEL ROBERT GIFFORD
Defendant(s)

Hearing: 19 February 2018
Appearances: Sergeant K Cummings for the Prosecutor
R Quin for the Defendant
Judgment: 19 February 2018

**ORAL JUDGMENT OF JUDGE M L S F BURNETT
[On Propensity Evidence]**

[1] Mr Gifford is facing one charge of theft of a box of 24 cans of beer valued at \$30, the property of Countdown Morrinsville. The charge arising out of events on 25 September 2017. He was bailed to appear today but has failed to appear. Mr Quin is here but has no instructions from Mr Gifford.

[2] I have issued a warrant for Mr Gifford's arrest for failing to answer Court bail.

[3] A pretrial application was to be determined today by way of propensity evidence in relation to a former conviction on a guilty plea arising out of events on 2 March 2017 on which occasion he went into the Countdown supermarket in Te Aroha, walked through the store to the alcohol section, uplifted a box containing

24 cans or bottles of beer to the value of \$38.99 and then walked back through the store and exited the store without attempting to pay.

[4] The summary of facts in relation to the current charge is identical. There is the time difference. The proposed propensity charge was at 9.20 pm. The current charge is at 7.42 pm. The location was a supermarket in Morrinsville compared to a supermarket in Te Aroha. The timespan is between 2 March 2017 and 25 September 2017. The items stolen and alleged to have been stolen are identical in terms of number and content. The manner in which the propensity act and the current alleged act were carried out were also identical, and shows Mr Gifford has a tendency to act in a certain way, namely to enter a supermarket or large store to target and uplift a large pack of alcohol (beer) and leave immediately with no attempt to pay. Given the similarities, plainly the conviction has probative value in relation to any likely issues in dispute: namely, actus reus and mens rea. Therefore the issue is whether or not the propensity evidence outweighs any illegitimate prejudice in respect of the mind of the decision maker.

[5] I am of the view that there would be no unfair predisposal by the fact finder against the defendant. I do not perceive this matter qualifies to be heard by a jury. A Judge is perfectly capable of regarding the propensity conviction as one piece of evidence to take into account, bearing in mind that the onus is on the prosecution to prove the elements of the charge beyond reasonable doubt. Similarly a jury in my view. A simple propensity evidence direction will be sufficient to avoid any illegitimate prejudice, along with the direction that because the defendant has committed a seemingly identical offence prior, that the decision maker is not permitted to go simply to reason ergo the defendant must have been guilty of this charge. As I say the elements of the charge must still be proven beyond reasonable doubt and the propensity conviction is one piece of evidence for the decision maker to take into account.

[6] I am satisfied that the conviction is propensity evidence and if the defendant fails to attend Court at the trial, the Judge ought to be able to proceed in the defendant's absence.

[7] Propensity application granted. Reasons given. If the defendant fails to appear at the next hearing, hearing to be able to proceed in defendant's absence.

M L S F Burnett
District Court Judge