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

NOTE: NO PUBLICATION OF A REPORT OF THIS PROCEEDING IS PERMITTED UNDER S 438 OF THE CHILDREN, YOUNG PERSONS, AND THEIR FAMILIES ACT 1989, EXCEPT WITH THE LEAVE OF THE COURT THAT HEARD THE PROCEEDINGS, AND WITH THE EXCEPTION OF PUBLICATIONS OF A BONA FIDE PROFESSIONAL OR TECHNICAL NATURE THAT DO NOT INCLUDE THE NAME(S) OR IDENTIFYING PARTICULARS OF ANY CHILD OR YOUNG PERSON, OR THE PARENTS OR GUARDIANS OR ANY PERSON HAVING THE CARE OF THE CHILD OR YOUNG PERSON, OR THE SCHOOL THAT THE CHILD OR YOUNG PERSON WAS OR IS ATTENDING.

IN THE YOUTH COURT
AT NORTH SHORE

CRI-2017-244-000048
[2017] NZYC 873

NEW ZEALAND POLICE
Prosecutor

v

[YH]
Young Person

Hearing	14 November 2017
Appearances:	J Choi for the Prosecutor S Gray for the Young Person
Judgment:	14 November 2017

ORAL JUDGMENT OF JUDGE S A THORBURN

---

[1] This is an application by the prosecutor in this matter of the police and [YH] to adduce in [YH]'s trial evidence of propensity. [YH] is charged with one charge of indecent assault between [two months in] 2016.

[2] The context briefly for opening remarks can be that he was at the time a student at a [high school], as indeed was the young female complainant. And after school she, being alone in a study or learning room, was approached by him who entered the room and closed the door behind him and then engaged with her, it being said that she told him she was studying and asked him to go away but he persisted. She tried to distance herself from him in the room and he followed her, standing in front of her and then physically touching her with his right hand over her skirt on top of her left thigh and appearing to be gazing at her in an unnerving way. She pushed his hand away but he placed it back on her thigh, stroking her thigh. She felt uncomfortable and he tried to kiss her. She shoved him away and he fell backwards onto the floor. She tried to leave but he grabbed her by the ankle, he still being on the floor, and pulled her so that she fell onto her stomach and then he tried to place his hand underneath her skirt and between her thighs. She screamed. A staff member came. And that is the proposed evidence in respect to the matter for which he is to face trial.

[3] The evidence the prosecutor seeks to adduce of propensity comes from another young woman, being too a student at the same school, and on the face of it six or so months later. And in the afternoon of school she was sitting at [location deleted] to be picked up by her mum [details deleted] and the defendant, known to this second young woman, pulled up driving a car and he came and sat next to her. He, she says, began talking about relationships that she might have had and, to truncate the narrative in her brief which it is proposed should be adduced, she at his invitation agreed to accompany him into the school building to a room that was isolated where no one would be able to see them, he having introduced to her in his approach in earlier discussion questions about sexual conduct such as blow and hand jobs and if she had slept with anybody and having sat close to her with their legs touching. But she says she agreed to go with him as she trusted him.

[4] He then led her to this room, according to her evidence as it would be adduced, and continued then with physical contact with his hand on her leg over her skirt, over

her bum and mid-back, et cetera. It was then she began to feel a little concerned and he kept bringing up the topic. She, I read, says the same topic. He hugged her and physically engaged as a result of that, sort of a cuddle or something of that nature. "He swivelled around so his head was laying on my chest for a few moments." She became concerned about her mum who she was previously waiting for at [location deleted], he begging her to stay a little longer, and physical contact continuing, grabbing her arm saying that he would let her go if she gave him a hug. "He put me in a position where my face was facing his crotch. I didn't want to hug him but he insisted and I finally gave him a hug," she says, "and he held me tight so that my head was sideways on his crotch." She left and her mum picked her up. So it is this narrative from the second young woman that the prosecutor wishes to adduce in his trial of the allegation pertaining to the first by way of embracing the principles of propensity governed by s 43.

[5] He denies both allegations as described by both of the young women. And so in the task that is required by the Court when assessing whether or not to admit evidence under the propensity principle is to clearly identify the issue in dispute. I am giving this decision in an extemporary way. I have helpful and clear submissions from both counsel together with cases supporting their submissions and I acknowledge that material. I will not in this deliverance quote at length significant and relevant dicta that have been drawn to my attention. But in respect to the point of identifying the issue, there is the clear injunction in *Freeman v R* [1] para (21):

> In deciding whether to admit propensity evidence, the Judge should identify as precisely as possible the issue in dispute in the case to which the propensity evidence is adduced. Sometimes this will be very general, for instance whether the complainant's account is credible or even just whether the defendant is guilty. Where the relevant issue is very broad there is often greater judicial reluctance to admit evidence of similar offending (particularly where there is only one such other incident) than where the issue in dispute can be defined more narrowly. The other side of the coin to this is that propensity evidence which reveals no more than a propensity to commit offences of the kind alleged, despite having some probative value, will often be inadmissible given the inevitable associated prejudice. This is particularly so where the characteristics of the offending in question are unremarkable.

[1] *Freeman v R* [2010] NZCA 230

[6] The prosecutor seeks to argue that the two scenario which I am looking at are characterised by traits of similarity, of frequency and connection in time, as is referred to in subs (3) of para (43), when assessing the probative value of the proposed propensity evidence.

[7] Subsection (1) is the threshold section and does refer to the probative value assessment being in relation to an issue in dispute and it introduces the assessment necessary by weighing the risk that to admit the evidence may have an unfair prejudicial effect on a defendant.

[8] Ms Gray for the defendant rightly observes that there cannot be a broader issue in dispute here in this case, for a blanket denial is the issue. Just to distil that point as I interpret it, one would have a different situation if an event was acknowledged or that there was some common ground in evidence around an alleged actus reus but that comparing one event to another, in which there being in both some level of engagement or acceptance of conduct, then the issue of similarity of acts and circumstances, connection in time and frequency might have more capacity to be relevant in consideration of propensity than if there is a blanket denial around both scenario.

[9] Looking at para (21) again of *Freeman* "for repetition", the issue in dispute analysis sometimes will be very general. For instance, whether the complainant's account is credible or even just whether the defendant is guilty and in this case the issue is referred to by the next sentence, "Where the relevant issue is very broad there is often greater judicial reluctance to admit." So this is a case where without there being any acknowledgement of conduct relevant at all to the alleged factual scenario, the Court has to proceed to assess given the breadth of the issue in dispute with great care.

[10] Subsection (2) gives guidance. When assessing the probative value of propensity evidence, the Judge must take into account the nature of the issue and, having done that, then go into subs (3).

[11] The prosecutor says there is a frequency issue here and that is because there is a period of six months between the two alleged events. I put little weight on that submission. It is really an assessment, that is frequency, which has to somehow or other be contextualised in the round and a six month period between the two alleged events is largely I think unable to be weighted in any significant way because it is really just an observation in a vacuum. Six months is a long time or a short time depending on the circumstances and again, by reference to *Freeman* para (19), it is important to recognise the admissibility of propensity evidence is to be assessed in a nuanced and a contextual way, focusing closely on what is truly in issue.

[12] The next matter is the connection in time between the acts and so this also is bound to produce, in my view, the same consequence. For my discretion it is of little weight in this case and for the same reasons.

[13] The extent of similarity between the acts and omissions, events or circumstances which are the subject of the evidence. Given that, it may, for the sake of the argument, be appropriate to wonder if indeed the defendant is engaged in conduct such as described by these girls. There is the issue then to be discerned as to whether there is some rather unique or unusual feature which rings a bell of alert by virtue of that, meaning coincidence is unlikely. And the prosecutor points out to me that there are issues of similarity that make the conduct comparable and that the similarities are features that are unusual thus binding in their connection against any argument of coincidence, that they are school mates, that they are of similar age, and both allegations are on the school campus ground in places where they are alone.

[14] Ms Gray raises really the same issues to show that there is nothing unusual given the context and I tend to agree. The allegations are of conduct between students at a school likely to know one another at some level. Being of similar age is not an unusual or unique feature that speaks of the avoidance of coincidence and thus of probative value. Of course they are going to be of similar age. And also the same

point in respect to the venue where the alleged offending is said to have taken place, the school. And given that this is an assessment which has to be made on the identification of the matter at issue being in the broadest way, I do not either think there is much weight that can be put upon the invitation to regard matters of similarity in the alleged acts as telling probatively.

[15] The issue, if I was to admit the evidence or consider such, of me weighing the effect of unfair prejudice to the defendant and thus excluding it is also not a problem. In this particular case, if the evidence of the second matter was admitted it would clearly provide a significant prejudice to the defendant, which I am concluding may have an unfair effect for him. Certainly, as the prosecutor has pointed out, if this was before a jury, that discretion or assessment of fairness or unfairness is a matter of graphic demarcation and perhaps not so earnestly relevant if, as will be the case in this matter, it is a Judge alone trial.

[16] But my conclusion is now I think fairly obvious. On the principles that I have pursued, the issue at stake being as broad as it is, I do not consider that there is any real significant probative value in the propensity sense of this particular matter justifying an order admitting the evidence of the second proposed witness. This is because, as I have said, within the nature of the offending alleged there is nothing unremarkable given the circumstances that make traits or a trait of it, as alleged, stand out. And whilst to admit propensity evidence as can be done even where a matter is now proven or is denied does not prove the primary allegation of course, it is however evidence that can be drawn upon to strengthen and enhance the fact-finder's confidence to accept the testimony of the complainant. And in this case I see the second narrative as in a way quite untoward with no unusual features that strike a chord of alert that there are some similarities that justify the admission of the evidence as probative of the primary complaint. And so I rule against this application and direct that the evidence of [the proposed witness] ought not to be admitted in the hearing.

S A Thorburn
Youth Court Judge

Judge S A Thorburn is now retired and no longer a Warranted District Court Judge. These notes are issued on the proviso that they have not been checked for accuracy or signed by Judge S A Thorburn.

Dated at Auckland this 28th day of November 2017

S J Fleming
Executive Judge
Auckland District Court