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IN THE DISTRICT COURT
AT AUCKLAND

CRI-2018-019-000286
[2018] NZDC 11599

THE QUEEN

v

[RAYMOND POSEY]

Hearing: 1 June 2018

Appearances: H Jones for the Crown
J Munro for the Defendant

Judgment: 15 June 2018

JUDGMENT OF JUDGE W P CATHCART
[REASONS]

Summary of ruling

[1] The Crown alleges Mr [Posey] sexually abused his niece and much earlier his adopted sister who is the mother of the niece. He faces multiple charges ranging from indecency on a child to sexual violation by unlawful sexual connection.

[2] Charge 6 alleges Mr [Posey] indecently assaulted his adopted sister. Part of the Crown's case on that charge includes vital contextual evidence about a group sex encounter. Mr [Posey], then 18 years of age, had sexual relations with his then girlfriend, Ms [Martha Blair] whilst the adopted sister, then [under 15] years of age,

had sexual relations with her then boyfriend, Mr [Greg Newman]. All this occurred on the same bed. During this group-sex encounter, the Crown alleges Mr [Posey] reached over and touched his adopted sister's genitalia. The gravamen of charge 6 rests in the inseparable context of this group-sex encounter. Evidence about the adopted sister's involvement in that encounter is testimony about her "sexual experience" under s 44(1) Evidence Act 2016.

[3] Because it is caught by that limb of s 44, the Crown seeks permission to lead the body of evidence to prove the encounter and the alleged touching during it. Mr [Posey]'s counsel sensibly took a neutral position on the application. I am satisfied the Crown's application under s 44(1) should be granted. My reasons follow.

[4] Also, Mr [Posey] applied to sever the sexual abuse charges relating to the niece from the set of charges relating to the adopted sister. The Crown's case is that the evidence of both complainants is cross-admissible as propensity evidence. Mr [Posey] argues otherwise. Having heard argument, I was eventually satisfied the evidence of both complaints is cross-admissible as propensity evidence compelling a joint trial. My reasons follow.

Section 44 (1) evidence directly relevant to key fact in issue on charge 6

[5] The alleged offending against the adopted sister as represented by charge 6 occurred [in the late 1980s]. The key Crown witness is Ms [Blair]. She observed Mr [Posey] indecently touch the adopted sister during the group-sex encounter. In her statement, she states the adopted sister did not see who touched her nor register opposition. Ms [Blair] will say that the adopted sister appeared to believe the touching was a continuation of her encounter with Mr [Newman]. She will say Mr [Posey] reached over and touched his adopted sister several times and tried to insert his fingers into her vagina. Ms [Blair] will say at one point the adopted sister pushed the toucher away and said "no".

[6] Also, during the group encounter there was a stage when both young girls were blindfolded. During that phase, Mr [Newman] had sexual relations with the adopted sister and Mr [Posey] with Ms [Blair]. In her account, the adopted sister states Mr [Posey] later implied to her that he had had sexual intercourse with her. Ms [Blair]

will testify that at some point during this blindfold-phase she believes Mr [Posey] and Mr [Newman] switched places. She will say the touch felt like it was a different person.

[7] The Crown accepts that Ms [Blair] could not see what Mr [Posey] was doing during that blindfold-phase and that the adopted sister's account rests on a mere inference from a later conversation she had with Mr [Posey]. Thus, no charge has been laid with respect to the blindfold-phase.

[8] The Crown seeks to lead the entire body of evidence relating to the group encounter to set the contextual narrative for the alleged touching encompassed by charge 6. Mr [Posey] denies touching his adopted sister. In his police interview, he recalls his adopted sister and Ms [Blair] being naked on the same bed at Mr [Newman]'s flat but no more.

[9] The body of evidence relating to the group-sex encounter is plainly directly relevant to the key fact in issue under charge 6, to wit – did Mr [Posey] indecently touch his adopted sister during the encounter? Without this body of evidence there would be no contextual narrative as to how the alleged touching came about. In short, the adopted sister's "sexual experience" (s 44(1)) in that encounter is the very setting in which the allegation rests.

[10] Thus, by a large margin, I was satisfied under s 44(3), that this body of evidence is of such direct relevance to the key issue for determination under charge 6 it would be contrary to the interests of justice to exclude it.

[11] Whilst taking a neutral position, Mr Munro was concerned that if the s 44 material was admitted he should be given 'permission' to cross-examine on it. I pointed out to Mr Munro that s 44(4) stipulates that permission of the trial Judge is not required to rebut or contradict evidence given under s 44(1). Permission to cross-examine is simply not required. However, such cross-examination applies only to evidence that is truly rebuttal evidence and, any line of questioning would be subject to the relevancy test under s 7 and the exclusionary rule under s 8.[1] Thus, provided

[1] *R v G(CA515/07)* [2007] NZCA 546; *J(CA89/16) v R* [2016] NZCA 528 at [35].

cross-examination is truly rebuttal evidence and is considered relevant and not impermissible collateral evidence, the cross-examiner does not need the trial Judge's permission.

[12] On a side note, Mr Munro initially took the position that the s 44 application should be adjourned to a later date after the severance application was determined. I declined that request. The body of evidence caught by s 44(1) is also of direct relevance to the strength of the defence arguments on the severance application. A proper analysis thus required both applications be dealt with simultaneously.

[13] For all these reasons, I granted the Crown's application under s 44(1) to lead the body of evidence about the group-sex encounter.

Mr [Posey]'s application to sever the sexual abuse charges relating to the niece from those relating to the adopted sister declined

[14] Propensity evidence requires a comparative exercise to determine whether the relevant pattern alleged is marked by sufficient particularity. A proper comparison under the s 43-rubric must be made to determine whether the Crown's propensity argument is made out. Ignoring the above s 44(1) material renders the comparison between the underlying (assumed) core facts artificial.

[15] However, after closely analysing that comparison, I finally reached the view the Crown's argument that the evidence from both the niece and adopted sister was cross-admissible as propensity evidence under s 43, was correct. My reasons are set out below.

Nature of allegations:

- *The adopted sister's complaint*

[16] Mr Munro says the first-in-time complainant is Mr [Posey]'s adopted sister. The Crown says she is Mr [Posey]'s sister. Both parties accepted she lived in the family home and the relationship between the two was in the nature of a brother-sister relationship. The precise nature of the relationship will no doubt be established in trial

evidence. At the very least, an interfamilial relationship is accepted. And I have approached the propensity determination on the footing Mr Munro's characterisation is correct.

[17] At the time of the alleged offending, the adopted sister was [under 15] years of age and Mr [Posey] was between 18 to 19 years of age. The alleged offending against the adopted sister took place around [the late 1980s] and consists of:

(a) The act of Mr [Posey] taking a photograph of her genitals and touching her to get a better picture whilst he was at his workplace;[2] and

(b) The act of Mr [Posey] touching her genital area during a group sexual encounter where the complainant and defendant were both having sexual relations with their respective partners in the same bed,[3] as discussed earlier.

- *The niece's complaint*

[18] The alleged offending against the niece may be summarised thus:

(a) Mr [Posey] took his niece and his son home after a family function, gave her alcohol, sat with her on a couch and then touched her breasts under her top;[4]

(b) Then later the same night during a trip back to her home Mr [Posey] touched her thigh and groin area and then attempted to insert his finger into her vagina after he stopped his vehicle on the side of the road;[5]

(c) At a boat ramp area, Mr [Posey] put his hand on her leg, moved it up to her vagina, pressed on the top of her clothing, moved her clothing and

[2] Charge 5 (indecency with girl between 12 and 16).
[3] Charge 6 (indecency with girl between 12 and 16).
[4] Charge 1 (sexual conduct with a young person).
[5] Charge 2 (sexual violation by unlawful sexual connection).

then put his finger under her clothing and tried to insert it into her vagina;[6] and

(d) On another occasion, he touched her thigh and bottom area.[7]

Relevant legal principles

[19] The principles relating to joinder and severance outlined in [case name 1 deleted][8] govern. In real terms, however, this application rests on whether the evidence from both complainants is cross-admissible as propensity evidence. If so, a joint trial must follow.

[20] In determining the relevancy of this propensity evidence, I am required to consider the nature of the issues at the trial.[9] The overarching principle is that relevant propensity evidence is to be admitted only if it has a probative value in relation to an issue in dispute which outweighs the risk that the evidence may have an unfairly prejudicial effect on Mr [Posey].

[21] The rationale for the admission of orthodox propensity evidence rests on the concept of linkage and coincidence. The greater the linkage or coincidence provided by the propensity evidence the greater the probative value the evidence is likely to have.[10] The strength of that linkage is to be analysed through the rubric of the s 43(3) factors. As a matter of logic, the level of particularity in propensity evidence reflects the strength of the link between that evidence and the factual matrix of the offence as charged. Thus, the relevant propensity pattern must have some specificity about it.[11]

Nature of the issues in dispute

[22] The key issue in relation to each charge is whether the indecent acts took place. Mr [Posey] denies those acts. The relevancy of the claimed propensity evidence to the

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[6] Charge 3 (sexual violation by unlawful sexual connection).
[7] Charge 4 (sexual conduct with a young person).
[8] [case name 1] [2014] NZCA 281 at [28].
[9] Evidence Act 2006, s 43(2).
[10] *Mohamed v R* [2011] NZSC 52 at [3].
[11] *Mohamed v R* [2011] NZSC 52 at [3].

determination of those key issues thus is obvious. The real issue therefore is to determine whether there is sufficient propensity pattern to warrant cross-admissibility.

The connection in time between the acts, events or circumstances which are the subject of both sets of assumed core facts

[23] The gap in time between the respective sets of facts is significant. It is about 23 years. Of course, whilst the passage of time is relevant to the admissibility, it is not determinative. This is because the passage of time may not necessarily extinguish the alleged probative propensity.[12] This is especially so where – as here – an unusual propensity is alleged that of itself may not be amenable to a connection-in-time analysis.[13] The case law now is replete with examples of propensity evidence being admitted in cases where the gap in time is, other things being equal, substantial.[14]

[24] Take for example *F (CA7/18) v R.*[15] In that case, the Court of Appeal upheld the cross-admissibility of propensity evidence. It involved a comparison between alleged offending against a grand-daughter and historical offending against three nieces, now all adults. The Court considered the significant gap in time between the two sets of offending (23 years) was not fatal to cross-admissibility. The Court acknowledged the connection-in-time factor was weak but treated the time lapse as one factor in the overall assessment of the probative value.[16] I adopt the same approach here.

The frequency with which the acts which are the subject of the evidence have occurred and the number of alleged victims

[25] This factor is of some relevance here but only in the sense it adds to the cumulative effective of the propensity pattern. Both the adopted sister and the niece

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[12] *Robin v R* [2013] NZCA 105 at [26].
[13] *Snell-Scasbrook v R* [2015] NZCA 195.
[14] *Senior v R* [2016] NZCA 389 (offending spanning a period of 25 years but not continuous); *R v E* [2016] NZHC 144 (five complainants all relatives of the defendant); propensity evidence included indecent assault incidents between 1993 to 1995 cross-admissible as propensity evidence in relation to trial complainants alleging offending between 1989 and 2010; [case name 2] [2010] NZCA 510; *R v W* [1995] 1 NZLR 548.
[15] *F (CA7/18) v R* [2018] NZCA 100.
[16] *F (CA7/18) v R* [2018] NZCA 100 at [53].

allege multiple instances of touching but the latter more. A degree of regularity in the offending exists in the comparative pattern between both complaints.

The extent of the similarity between the acts, omissions, events or circumstances which are the subject of the evidence and those which constitute the alleged index offending

[26] Mr [Posey]'s case initially gains real traction on this factor.

[27] At first sight, there are obvious dissimilarities in the comparison between both sets of assumed core facts. The niece was [under 15] years of age at the time of the alleged offending. Mr [Posey] was a middle-aged man between 41 to 43 years. At the time of the alleged offending he was only 18 years of age with a four-year gap between him and his younger adopted sister.

[28] Also, the group-sex encounter involving the adopted sister is dissimilar when compared against the niece's complaints. The former can be characterised as sexual experimentation by a young man with young teenagers; the later as an unusual propensity of an adult male sexually attracted to prepubescent females. However, what appears at first blush to be a significant dissimilarity does not hold up after further scrutiny. This is because the propensity pattern alleged has core commonality.

[29] The Crown says Mr [Posey] has an unusual sexual interest with prepubescent girls who are in an interfamilial relationship with him. The Crown says the evidence demonstrates Mr [Posey] has a propensity to be attracted to young female relatives around the age of [under 15] years. He has that "particular" state of mind and acts on that attraction by indecently touching the girls in that "particular" way. I agree.

[30] Mr Munro also argued the nature of the charges differ in severity between both complaints. But, the precise form of the charge does not disqualify the underlying pattern from qualifying as propensity evidence. As observed in [case name 2 deleted], "the propensity rule is not confined to a similar way of achieving a particular goal."[17] Also, in [case name 3 deleted],[18] the Court warned about drawing a distinction based on severity when the relevant acts fall within the same spectrum or category of

[17] [Case name 2] [2010] NZCA 510 at [24].
[18] [Case name 3] [2012] NZCA 269 at [20].

offending. Drawing such a distinction is an artificial approach. Also, it is inconsistent with the statutory focus which is on the propensity to act in a certain way or to have a certain state of mind and the extent of the relevant similarities.

The unusual predilection

[31] A predilection to be sexually attracted to prepubescent girls with whom Mr [Posey] has an inter-familial relationship is unusual. That predilection in and of itself may constitute a sufficient degree of specificity to qualify as admissible propensity evidence.[19] This must be the case because paedophiliac attitudes and activities can be both persistent and exceptionally unusual. Even a single event of prior sexual offending against a child is sufficiently unusual to potentially demonstrate the predilection.[20]

[32] I acknowledge that material differences cannot be ignored in the s 43 assessment. This is because significant differences in the circumstances surrounding the acts sought to be relied upon as propensity evidence can weaken the probative value that can fairly be put on the similarities.[21] But the core commonality in the propensity pattern as defined above is sufficiently specific.

[33] The group sex encounter involving the adopted sister is clearly dissimilar to the niece's complaints. But when drilled down, Mr [Posey]'s alleged indecent touching of his [under 15]-year-old adopted sister during that encounter reveals a sufficiently distinct and common propensity pattern when compared to his alleged sexual offending against his [under 15]-year-old niece. The 23-year gap is not fatal because paedophiliac tendencies can be persistent and non-amenable to a connection-in-time analysis. When analysed closely a distinctive and unusual propensity pattern between both sets of (assumed) core facts is discernible.

Over-arching test under s 43

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[19] [Case name 4][2011] NZCA 627 at [11].
[20] [Case name 5] [2003] NZCA 149 at [13] – [14]; [case name 6][2012] NZCA 531; [case name 7] [2012] NZCA 100; [case name 8][2012] NZCA 88 at [20].
[21] *R v S* CA561/11 [2011] NZCA 612 at [47].

[34] When combined, the above factors point to the propensity evidence as cross-admissible. The underlying pattern is highly probative in determining whether the sexual acts occurred. That probative value outweighs the risk the evidence may have an unfairly prejudicial effect on Mr [Posey]'s case.

[35] A proper-use direction to the jury will adequately restrict jurors from engaging in any improper reasoning process. It will require careful directions and it must be assumed an obedient jury will not have the tendency to give disproportionate weight to the propensity evidence in the face of such directions.

Conclusion

[36] The evidence of each complaint is cross-admissible as propensity evidence. The interests of justice thus demand a joint trial. For all these reasons, Mr [Posey]'s severance application was declined.

W P Cathcart
District Court Judge