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

I TE KŌTI-Ā-ROHE
KI TE PAPAIOEA

CRI-2018-054-000278
[2018] NZDC 23032

THE QUEEN

v

[ELLIOT WIGGANS]

Hearing: 19 October 2018

Appearances: J J Harvey for the Crown
P L Murray for the Defendant

Judgment: 3 December 2018

RESERVED DECISION OF JUDGE S B EDWARDS
[On application for pre-trial orders]

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[1] The defendant faces the following charges:

(a) Two charges of sexual violation by unlawful sexual connection (with alternative charges filed of indecent assault on a child under 12) for alleged offending against [complainant 1] in [location deleted] on [dates deleted], when [complainant 1] was aged 11; and

(b) One charge of doing an indecent act on a child under 12, for alleged offending against [complainant 2] in [location deleted] on [date deleted], when [complainant 2] was six years old.

[2] There are several overlapping pre-trial applications before the Court:

(a) A Crown application pursuant to s 138(2) of the Criminal Procedure Act 2011 for leave to join the charges involving both complainants, opposed by the defendant; and/or a defence application pursuant to s 138(4) of the Act for an order that the charges involving [complainant 1] be heard separately from the charge involving [complainant 2].

(b) Crown applications (all opposed by the defendant) pursuant to s 101 of the Criminal Procedure Act for orders ruling:

(i) The evidence of [complainant 1] and [complainant 2] cross-admissible on a propensity basis; and

(ii) The statement of [witness 1] admissible as propensity evidence in relation to both complainants. [Witness 1]'s evidence is of an alleged event in [location deleted] in [date deleted] when [witness 1] was around four years of age. (The defendant does not face any charge arising from this alleged incident.)

(iii) The statement of [witness 2] admissible as propensity evidence in relation to both complainants. [Witness 2]'s evidence is of an alleged event in [location deleted] in around [date deleted] when she was five or six years old. (The defendant does not face any charge arising from this alleged incident either.)

Alleged offending

[COMPLAINANT 1]

[3] Mr [Wiggans] is an [nationality deleted] national who was holidaying in New Zealand in [date deleted]. He and his partner were staying with a [relative] of his partner's in [location deleted]. The [relative] is [complainant 1]'s father.

[4] [Complainant 1] alleges that the defendant touched her genitalia on two separate occasions within a 24-hour period. The first time, [complainant 1] and a young friend were using the spa pool at the house. The defendant got into the spa pool with them and pulled [complainant 1] towards him from around her waist so she ended up sitting on his knee with her back towards him.

[5] The defendant "cupped" her breasts in his hands from behind and squeezed them, then placed one hand on each of her knees and moved his hands up her thighs towards her waist. When he reached the top of her legs he put one finger from each hand underneath her swimsuit onto the outer lips of her vagina. The defendant then removed his fingers from inside [complainant 1]'s swimsuit and rubbed her vagina from outside the swimsuit, pushing between the lips of her vagina.

[6] The following morning [complainant 1] was sent to the defendant's bedroom to wake him up. He invited her onto the bed for a massage. [Complainant 1] lay on the bed on her stomach and the defendant sat on the back of her legs. He began massaging her shoulders before moving down to her buttocks. While massaging her bottom, he pushed his thumb against her vagina over the top of her clothing but penetrating her labia.

[COMPLAINANT 2]

[7] [Complainant 2] also lives in [country deleted] (but not in the same State as the defendant). In [date deleted], [complainant 2] and her [sibling] were staying with their [close relative] in [location deleted] while their parents were holidaying overseas. [Complainant 2] was then 6 years old. On [date deleted], [complainant 2]'s [close relative] took her to an extended family gathering at her [relative's] home in [location

deleted]. The defendant and his partner were there, as they were staying with [family details deleted] in [location deleted] at the time. [Family details deleted].

[8] The Crown alleges that while the defendant and [complainant 2] were playing games alone in the backyard, he reached into his shorts and exposed his penis to [complainant 2] over the top of his shorts waistband. He then pulled his shorts back over his penis and put a finger to his lips and made a "shushing" sound. [Complainant 2] went back inside the house and announced to the adults that "[the defendant] showed me his penis".

Joinder/severance

Procedural issue

[9] Section 138 of the Criminal Procedure Act sets out the process for the joint trial of charges:

> **138 Trial of different charges together**
>
> (1) The prosecutor may—
>
> (a) notify the court before which a proceeding is being conducted proposing that—
>
> (i) 2 or more charges be heard together; or
>
> (ii) the charges against 1 defendant be heard with charges against 1 or more other defendants:
>
> (b) amend a notification given under paragraph (a).
>
> (2) Despite subsection (1), if the prosecutor seeks to give or amend a notification involving a charge in respect of which the proceeding has been adjourned after the entry of a not guilty plea, the prosecutor must seek the leave of the court.
>
> (3) Charges must be heard together in accordance with any notification given under subsection (1)(a) or amended under subsection (1)(b) unless the court—
>
> (a) does not grant leave where the prosecutor seeks leave under subsection (2); or
>
> (b) makes an order under subsection (4).

> (4) If the court before which the proceeding is being conducted thinks it is in the interests of justice to do so, it may, on its own motion or on the application of a defendant, order that 1 or more charges against the defendant be heard separately.
>
> ….

[10] In summary, any proposal for the joint trial of charges is initiated by the prosecution notifying the court of the proposal. The leave of the court is required to make (or amend) such a notification once the proceeding has been adjourned following the entry of a not guilty plea. If the notification is made in time, or if leave is granted, the charges will be heard together unless the court determines under s 138(4) that the interests of justice require one or more of the charges be heard separately.

[11] The charge alleging indecent assault against [complainant 2] was filed on [date deleted] 2018 and the defendant made his first appearance in court on that date. When he next appeared on [date – 4 days later – deleted], the charges involving [complainant 1] had been filed and the defendant pleaded not guilty to all charges.

[12] It does not appear the police made the notification referred to in s 138(1) prior to the defendant entering not guilty pleas on [the later date]. The Crown assumed responsibility for the prosecution on 13 February and included the charges involving both [complainant 1] and [complainant 2] in their Crown prosecution notice. This means leave is required to make a notification.

[13] The absence of an express statutory right of appeal against a decision granting leave to the Crown to give or amend a notification of joinder under s 138(2) was considered by the Court of Appeal in the recent decision of *Johnson v R*.[1]

[14] The Court of Appeal agreed that it was clear s 138 was drafted on the basis that any real contest about the merits of whether charges should be heard together or separately should take place under s 138(4). It endorsed an approach to cases where the Crown's application for leave is opposed which involves the defendant formally opposing it, but at the same time advancing a severance application under s 138(4). This allows the Court to deal with the defence arguments for severance at the same

[1] *Johnson v R* [2018] NZCA 187.

time as dealing with the leave issue under s132(2) and preserves the defendant's right of appeal against a decision refusing severance.

[15] This is the approach the parties in this case have taken and which I agree should be followed.

Severance and cross-admissibility of propensity evidence

[16] The principles applicable to joinder and severance were summarised in *Churchis v R*:[2]

> [28] Counsel were agreed that the principles applicable under s 138(4) are materially the same as those under the former s 340 of the Crimes Act 1961. These are well settled and include the following:
>
> (a) Offending that is unrelated in time or circumstance should not be tried together, unless the evidence of one incident is relevant to another to an extent that its probative value outweighs its prejudicial effect. That relevance may arise in a variety of circumstances, such as where the facts are so similar or the allegations interconnected to a point that it would be artificial to present them separately.
>
> (b) Joinder may be granted if evidence relevant to one count is also relevant to one or more other counts.
>
> (c) The practicalities of the criminal process may be taken into account including the degree of connection between the charges; the impact of successive trials on the accused and witnesses; and the likely effect of publicity of the first and subsequent trials.
>
> (d) Prejudice to the accused is a factor to be taken into account. The fact that the accused may be obliged to give evidence is a relevant but not a decisive consideration.
>
> (e) The discretion is wide. In the end, what is required is a balancing between the legitimate interests of an accused and the public interest in the fair and efficient despatch of the Court's business.
>
> [Footnotes omitted]

[17] The main plank of the Crown's opposition to the charges involving [complainant 1] and [complainant 2] being tried separately is their contention that the complainants' evidence is cross-admissible on a propensity basis. The Crown submits

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[2] *Churchis v R* [2014] NZCA 281 at [28].

the allegations show a pattern of sexual offending against young girls within a particular family, in relatively similar circumstances.

[18] The definition of propensity evidence in s 40(1) of the Evidence Act 2006 refers to a tendency to act in a particular way or have a particular state of mind. The propensity must have some specificity about it because that specificity provides the probative link between the propensity evidence and the conduct or mental state involved in the alleged offending.[3] Where the issue is cross-admissibility, the question is what is the specific conduct or mental state said to be common to the alleged offending against each complainant?

[19] The Crown submits that the defendant's conduct on each occasion shows a willingness to engage in sexual activity with young girls. However, I agree with Mr Murray that the specific tendency common to [complainant 1]'s and [complainant 2]'s allegations cannot be put any higher than an unusual sexual interest in girls and, perhaps, a willingness to act on that interest, albeit in quite different ways.

The s 43 assessment of probative value/unfairly prejudicial effect

[20] The acts alleged by [complainant 1] and [complainant 2] are significantly different. With [complainant 2] there was no physical contact and no invitation or attempt to engage in physical contact. Up until the relatively recent decision of the Supreme Court in *Y(SC 40/2013) v R*, the defendant's alleged conduct against [complainant 2] would not have supported a conviction for doing an indecent act "with or on" a child.[4] Even now, the jury will need to be satisfied not only that the defendant's exposure of his penis was directed at [complainant 2] but also that she was to some extent under his control or influence, so that the defendant was able to compel her participation (active or passive).[5]

[21] The distinction that can be drawn between the alleged conduct with [complainant 1] and [complainant 2] is not based solely on severity. While the acts involved fall within the same broad category of offending, the absence of any physical

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[3] *Mahomed v R* [2011] NZSC 52 at [27].
[4] *Y(SC 40/2013) v R* [2014] NZSC 34, [2014] 1 NZLR 724; *Trower v R* [2011] NZCA 653.
[5] *Y(SC 40/2013) v R*, at [21] – [22].

contact with [complainant 2], or sexual activity between [complainant 2] and the defendant, makes it conduct of quite a different nature to that the defendant allegedly engaged in with [complainant 1].[6] There is no question it is unusual for an adult male to engage in sexual activity with young children. It is also unusual behaviour for an adult male to expose his penis to young children. However, while both are unusual tendencies, the specific conduct is different and, arguably, so is the mental state involved.

[22] The other similarities the Crown points to are that both [complainant 1] and [complainant 2] are relatives of Mr [Wiggans]'s partner and that the alleged offences were committed at family addresses when Mr [Wiggans] and his partner were visiting. However, I agree with Mr Murray, these features are not uncommon in cases involving offending of this kind within extended families.

[23] When the differences in the acts alleged by [complainant 1] and [complainant 2] are considered together with the difference in their age at the time of the alleged offending ([complainant 1] was 11 while [complainant 2] was 6 years old) and the gap of nearly eight years between the alleged offences, the lack of any strong linkages is apparent. I consider that the cross-probative value of each complainant's evidence, as tending to support the evidence of the other, is low.

[24] Applying the balancing test required under s 43(1), I am not satisfied that the cross-probative value of the evidence outweighs the risk of unfair prejudice to the defendant if the charges are heard together. In particular, [complainant 1]'s allegations are clearly more serious than [complainant 2]'s and there is a real risk that, despite directions from the trial Judge, the jury will place disproportionate weight on [complainant 1]'s evidence and engage in illegitimate reasoning in reaching their verdict on the charge against [complainant 2].

Other considerations relevant to severance/joinder

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[6] This distinguishes this case from *Hetherington v R* [2012] NZCA 88, where the index offending was rape and the propensity evidence indecent assaults, but all involving skin-on-skin contact with young girls' breasts or genitalia.

[25] The cross-admissibility of evidence on a propensity basis does not determine severance or joinder; what is required is a broader consideration of the extent to which the allegations are interconnected or interwoven.[7] These were separate alleged incidents, nearly eight years apart. [Complainant 1] and [complainant 2] are distant relatives and there is a significant age gap of around 12 years between them. It would not be artificial to present their allegations separately.

[26] In terms of the practicalities of the criminal process, the basis for the Crown's suggestion that the "dynamics of the wider family" may need to be explored at trial is not apparent. There are no civilian witnesses who would be required to give evidence twice if there are two trials. Any practical difficulties for the defendant, given he resides in [location deleted], could be resolved by running what will be two relatively short trials consecutively.

[27] I am satisfied that the interests of justice require these charges to be heard separately. The Crown's application for leave to join the charges involving [complainant 1] and [complainant 2] is declined and the defendant's application under s 138(4) for an order that the charges relating to [complainant 1] be heard separately from the charge relating to [complainant 2] is allowed.

Evidence of [witness 1]

[28] [Witness 1] is [in her early 20s]. [Complainant 2] is her [relative]'s daughter. It was at [witness 1]'s parents' house that the alleged offending against [complainant 2] took place. (She was not present at the time.) [Witness 1] became aware of [complainant 2]'s allegation about 10 days later [details deleted].

[29] [Witness 1]'s evidence is about one occasion when the defendant and his partner were staying at her home in [date deleted] when she was around 4 years old. She alleges that she was asleep in her bedroom when she woke up to see the defendant standing in the doorway with his penis out of the top of his shorts. He was staring at her while "caressing and lifting" his penis.

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[7] *R v F* (CA139/2012) [2012] NZCA 371.

[30] For the same reasons the cross-probative value of [complainant 1]'s and [complainant 2]'s evidence is low, I consider the probative value of [witness 1]'s evidence in relation to [complainant 1]'s allegations is low and outweighed by the risk that its admission would have an unfairly prejudicial effect on the defendant.

[31] However, I consider [witness 1]'s evidence should be admissible at the defendant's trial on the charge involving [complainant 2], on the basis its probative value is medium and not outweighed by the risk of illegitimate prejudice.

[32] The propensity shown in [complainant 2] and [witness 1]'s allegations is both unusual and quite specific. It shows a tendency on the defendant's part to expose his penis to very young girls (relatives, rather than strangers), when they are alone.

[33] Mr Murray refers to differences between the two incidents; [witness 1] alleges the defendant was masturbating while [complainant 2]'s allegation appears to be limited to exposure of his penis; the defendant's actions in relation to [witness 1] were furtive and there was no engagement between them whereas the alleged offending against [complainant 2] was more brazen and involved engagement through eye contact and gestures. However, I do not consider these differences materially detract from the probative value of [witness 1]'s evidence.

[34] I acknowledge there is a significant gap in time of 17 years between the two alleged incidents. However, given the strong link of the specific and unusual nature of the tendency involved, I do not consider the passage of time diminishes the probative value of [witness 1]'s evidence to the level where that probative value is outweighed by the risk of illegitimate prejudice.

[35] The defendant's other concerns relate to the reliability and credibility of [witness 1]'s evidence, given her age at the time and the fact no complaint was made until 17 years later. The potential for collusion also arises, given the circumstances in which [witness 1] made her complaint. These are all issues for the jury to determine, as they will be directed that before they can use [witness 1]'s evidence of the incident in [date deleted] as propensity evidence they must be satisfied it happened.

[36] In circumstances where those issues can all be explored at trial and where the jury will be directed on if and how they can use [witness 1]'s evidence and the type of reasoning processes they must not employ, I am satisfied the probative value of her evidence outweighs the risk of it having an unfairly prejudicial effect on the defendant.

[37] I rule the evidence of [witness 1] admissible as propensity evidence at the defendant's trial on the charge of doing an indecent act on [complainant 2].

Evidence of [witness 2]

[38] [Witness 2] is [complainant 1]'s [close family member]. [Witness 2] (now [age deleted]) made a statement to the police in [date deleted] 2018, two months after the defendant was charged with the offending against her [close family member] and [complainant 2].[8] She recalls an incident when she was 5 or 6 years old, which would have been in [dates deleted]. The defendant and his partner were visiting her home. She remembers being put in the defendant's lap or sitting in his lap. She recalls it feeling different to when she sat in anybody else's lap. While [witness 2] says she did not know what an erection was at the time, she strongly believes now that the defendant had an erection at the time.

[39] While the Crown filed written submissions in support of admitting [witness 2]'s statement as propensity evidence in relation to both [complainant 1] and [complainant 2], after discussions at the hearing, Mr Harvey conceded that it did not meet the threshold for admissibility as it does not show a tendency on the defendant's part to have a sexual interest in young girls.

[40] Even if that low qualifying threshold is met, the probative value of [witness 2]'s evidence is minimal and easily outweighed by the risk it would unfairly pre-dispose the jury towards the defendant. I am also satisfied that on a s 8 analysis, the risk of [witness 2]'s evidence needlessly prolonging the trial(s) outweighs its minimal probative value.

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[8] [Complainant 1] made a complaint to the police in 2010 but it appears a decision was made not to prosecute the defendant at that time.

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Judge S B Edwards
District Court Judge

Date of authentication: 03/12/2018
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