

**IN THE DISTRICT COURT  
AT HAMILTON**

**CRI-2016-019-007411  
[2018] NZDC 4620**

**THE QUEEN**

v

**[FINLAY LYONS]**

Date: 12 March 2018

Appearances: R Mann for the Crown  
R Barnsdale for the Defendant

Judgment: 12 March 2018

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**ORAL JUDGMENT OF JUDGE K B F SAUNDERS**

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[1] The Crown seeks to call at the trial of [Finlay Lyons] evidence of two convictions for sexual offending against a child under 12. The offending is sexual conduct with a child under 12, Ms [Wihone] laid as a representative charge and sexual violation by unlawful sexual connection. Today, Mr [Lyons] pleaded guilty to those charges, charges 3 and 4 in the Crown charge list of 12 March 2018.

[2] The offending occurred over a three-year period from [dates deleted] when the complainant was between 10 and 12 years old.

[3] Mr [Lyons] is to face trial tomorrow on charges 9 and 10 in the same Crown charge list. Allegations of sexual conduct with a young person under 16 in respect of a second complainant, Ms [Fuller]. The incidents are two specific occasions in [year deleted].

[4] The Crown seeks to lead the fact of the convictions in respect of the complainant Ms [Wihone] and also hopes to have an agreed statement of facts. As to the offending the Crown submits that it is repetitive offending over that three-year period that involves the defendant getting into bed next to Ms [Wihone], touching her vagina and digitally penetrating her at an address between 10 to 20 occasions. As to the particulars in respect of the charge of the sexual conduct with a child under 12 that is the indecent acts, the offending includes touching the vagina but not digitally penetrating Ms [Wihone], kissing her and touching her body. The Crown cannot be specific whether the offending occurred under or over Ms [Wihone]'s clothing. The evidence is somewhat unclear but in the evidential interview Ms [Wihone] said that she would wake up with the defendant's hands inside her pants. It goes no higher than that.

[5] The allegations in the matter for trial tomorrow are specific allegations of indecently touching the defendant's current partner's daughter, so for want of a better word his stepdaughter, Ms [Fuller]. The defendant remains in a relationship with her mother. The two separate incidents involve firstly for charge 9 the complainant was asleep in the lounge and the defendant touched her breasts area and her bottom over the top of her clothing. She pushed him off. The second occasion (charge 10) occurred when she was sleeping [location details deleted]. The defendant came into the [place where the complainant was sleeping], he had been drinking. He tried to touch her vagina over her clothes but got no further than her stomach. He was on top of her. She pushed him off.

[6] The Crown submits that there are similarities between the offending. The issue in dispute at trial will be did it happen so that the credibility and reliability of Ms [Fuller] to use Ms Mann's words are "front and centre". The evidence of the proven offending against Ms [Wihone] is highly probative.

[7] Sexual offending by an older male against a young girl in the context of some form of relationship makes the offending unusual and Ms Mann reminds me that the difference in seriousness is not of itself determinative. There is clear authority that is so, the sexual violation charge is capable of being propensity evidence in allegations of doing an indecent act.

[8] There was opportunity for the offending to have proceeded to that extent in any event and Ms Mann submits that Ms [Fuller] clearly resisted the defendant so that he was unable to further the offending or at least she made it more difficult for him to do that, whereas Ms [Wihone] stayed still. There is a connection in terms of the timeframe and of course until Mr [Lyons]'s plea this morning there was to be a trial in respect of both complainants so the jury would have heard the evidence in any event.

[9] Mr Barnsdale on the other hand points to the different circumstances and says that the timeframe is not strong because the offending in respect of Ms [Fuller] was at the very end of the period of offending involving Ms [Wihone]. The acts are different. As to the number of people making the allegations he accepts there are two but he says there is a real issue here in terms of whether there has been collusion or some form of suggestibility between the complainants. The Crown accepts that the two complainants know each other and indeed that Ms [Fuller] told Ms [Wihone] at the time of the incident in the [place where she was sleeping] what had happened to her.

[10] As to the issue of unfair prejudice it is Mr Barnsdale's submission that the conviction for sexual violation would be illegitimately prejudicial to Mr [Lyons] although he does not resile from the position so too is the indecent act. It will make it very hard for the jury to fairly determine the issues without having a predisposition to find Mr [Lyons] guilty he says and there is a real risk they will give disproportionate weight to the convictions. The issues are limited and it is Mr Barnsdale's submission that no judicial direction can ameliorate the risk of prejudice to the defendant. He also ends by making what he describes as a public policy submission relating to the fairness to Mr [Lyons] that he pleads guilty on the day of trial thereby saving the complainant from having to give evidence but that is now allowed to be used against him.

[11] As Ms Mann rightly points out s 49 of the Evidence Act 2006 is relevant. The fact that the defendant has been convicted is conclusive proof and of course s 43 requires a number of factors to be considered for admission.

[12] The test concerning whether propensity evidence offered by the prosecution is admissible is that contained in s 43 of the Evidence Act. The Crown may offer propensity evidence only if that evidence has a probative value in relation to an issue in dispute in the proceeding which outweighs the risk the evidence may have an unfairly prejudicial effect on the defendant. It is a balancing exercise and when balancing if the probative value of the evidence outweighs the prejudicial risk there are three steps the Court takes. Firstly, the Court must take into account the nature of the issue in dispute. Here the defendant denies offending against Ms [Fuller] so the issue in dispute is whether the indecent acts happened as she alleges or not as the defendant claims.

[13] Secondly, when assessing the probative value of the evidence matters that may be taken into account are those matters that have been referred to by counsel including the frequency of any acts, the connection in time, similarity of the acts, the number of allegations, any suggestion of collusion and to what extent the acts may be considered unusual.

[14] Finally, I must look at the prejudicial effects of the evidence and whether it is likely to unfairly predispose the jury against the defendant as the fact finders and whether it will have the fact finders, (the jury) give disproportionate weight in reaching a verdict to the evidence of those facts leading to the convictions.

[15] This is not a case where for example in terms of a charge of sexual violation the issue is consent or the issue is penetration. The defendant does not face a charge of sexual violation by unlawful sexual connection in respect of Ms [Fuller]. That of course is not determinative, but its probative value is limited.

[16] The Crown says that both convictions are relevant because it shows the type of person that Mr [Lyons] is, someone who will offend against young children in the context of having some form of relationship, be it either as a grandparent or as a stepfather. The sexual violation charge is clearly more serious and as I have said is not mirrored in offending involving the complainant Ms [Fuller] and it needs to be assessed in context to the issue here. It is not that there was sexual connection but that

it was consensual or there is an issue as to penetration. It is simply that it did not occur.

[17] I am satisfied the conviction for sexual conduct with a child under 12 is relevant. It is the same type of conduct and it is clearly unusual conduct, an interest by an offender in children is unusual and is something that clearly needs to be taken into account. Both complainants were of similar ages although Ms [Fuller] was a little older than Ms [Wihone] and I have already referred to the context of both complainants being in loose terms a family member.

[18] Clearly that analysis also applies to the sexual violation charge absent of course the fact that it is not similar to the allegations that Ms [Fuller] makes against Mr [Lyons].

[19] Propensity evidence is always prejudicial to a defendant. That is the way of it and it flows as a matter of course. In and of itself that is insufficient for the evidence not to be admitted. The issue is whether the admission of the convictions for both the sexual conduct and the sexual violation charges would be unfairly prejudicial. Would admission be likely to unfairly predispose the jury against the defendant, to distract them from a careful assessment of Ms [Fuller]'s allegations? I have real concern about the charge of sexual violation even accepting as I do that the difference in seriousness does not of itself determine its admissibility.

[20] I have come to the conclusion that it is of limited probative value in this case. It is distinctly different and in a situation where the defence is that it did not happen I am not satisfied it would not provide any great assistance to the jury in determining whether Mr [Lyons] has offended against Ms [Fuller] as she alleges he has done. It is of limited probative value, it is of little weight and I am satisfied that there is a risk that the evidence will have an unfair prejudicial effect on the defendant so the Crown cannot lead at his trial evidence of his conviction for sexual violation.

[21] As to the indecent act I find it is however cogent and has evidential force in respect of the Crown's contentions as to the offending against Ms [Fuller]. It is I find of real probative value as it is germane to the issue at hand whether similar indecent

offending occurred or not. Its strong probative value outweighs the unfair risk of prejudice to Mr [Lyons] that can be ameliorated by judicial direction so the Crown can lead at trial the defendant's conviction for sexual conduct with a child under 12.

K B F Saunders  
District Court Judge