

**IN THE DISTRICT COURT
AT AUCKLAND**

**CRI-2017-044-002936
[2018] NZDC 7387**

THE QUEEN

v

[DORIAN KEMP]

Hearing: 17 April 2018

Appearances: Ms E Walker for the Crown
Mr D Reece for the Defence

Judgment: 19 April 2018

PRETRIAL DECISION OF JUDGE N R DAWSON

[1] This case is going to trial on 14 May 2018. The defendant faces three charges of assault with intent to injure and two charges of male assaults female, all alleged to have been committed against the same complainant, his wife. The Crown have made an application to lead at trial propensity evidence of earlier offending by the defendant against the complainant and also to lead relationship evidence.

[2] The defendant and complainant began their relationship in 2006. On [date deleted] 2007 the defendant pleaded guilty to a charge of common assault against the complainant at the Waitakere District Court. He was subsequently discharged without conviction upon completing a Man Alive course. The police no longer hold a summary of facts for this offence and neither do the Waitakere District Court. The first of the charges in this trial is alleged to have occurred on [date deleted] January 2014 and the last on [date deleted] April 2017.

[3] The complainant's formal written statement describes the 2007 assault coming from an argument over a disagreement between her and the defendant, resulting in the defendant sitting on top of her on the couch and strangling her.

[4] On all five charges in this trial, the complainant alleges that the actions alleged all commenced during arguments with the defendant. In charges 1-4 she alleges that he restrained her including by sitting on top of her. In charges 1, 4 and 5 she alleges that he also strangled her.

[5] The Crown submit that the prior offending by the defendant against the complainant in 2007 is properly able to be led in this trial in that it is evidence of repetitive violent offending against the same woman with whom he is in a relationship by restraining her, by sitting on her and also by strangling her.

[6] The defendant has submitted that for the 2007 offending, the complainant did not ring the police, it was the neighbours. The defendant also submits that as no summary of facts is available relating to the defendant's guilty plea in 2007, we have only the complainant's word about what happened, which is highly prejudicial to the defendant. The extent of the similarity cannot be ascertained because the summary of facts is not available and this propensity application should be declined.

[7] Section 43(1) Evidence Act 2006 (the Act) provides:

- (1) The prosecution may offer propensity evidence about a defendant in a criminal proceeding only if the evidence has a probative value in relation to an issue in dispute in the proceeding which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant.

[8] Section 43(3) lists a number of matters, among others, that may be considered in relation to a propensity evidence application. These are considered below:

- (a) Under s 43(3)(a) only the one prior act is alleged to have occurred which was in 2007. One prior event cannot be said to be frequent. However five further similar acts are now alleged between 2014 and 2017.

- (b) Under s 43(3)(b) there is a gap of approximately seven years from the assault he pleaded guilty to, to the first of the acts alleged in this trial. That gap needs to be considered in light of these five new charges which range over a three year, three month period which is suggestive, along with the 2007 offending, of an ongoing course of offending by the defendant.
- (c) Under s 43(3)(c) there is a distinct similarity between all the acts alleged by the complainant with the assault in 2007. The defendant's submission that we only have the complainant's word for what happened in 2007 can be met by saying the defendant is equally able to recall what actually did happen and instruct his counsel accordingly.
- (d) Under s 43(3)(d) it is the same complainant in the 2007 assault as in these new charges.
- (e) Collusion has no relevance as it is the same complainant.
- (f) Under section 43(3)(f) it can be argued that restraining a complainant and the incidence of strangling a complainant are regrettably not particularly unusual. However the repetition in all the allegations of the course of action by the defendant during an argument with the complainant to restrain her, hold her down, sit on top of her and then frequently strangle her, all for the purpose of controlling her actions and to prevent her from calling out does amount to unusual behaviour to the extent that it is probative to the issues at trial.

[9] The evidence of the earlier assault in 2007 is prejudicial to the defendant, but in all the circumstances it is not unfairly so. An appropriate direction by the trial judge to the jury will prevent any disproportionate weight being attached to the propensity evidence by the jury. The application to lead evidence of the defendant's guilty plea to a charge of assault against the complainant is admissible as propensity evidence.

[10] The Crown wish to lead evidence often referred to as relationship evidence. In her formal written statement, the complainant says:

After 2007 the abuse continued but not to that extreme. During arguments [Dorian] would push me around. I would often try and walk away because I knew we would never get to the bottom of it and I was sick of arguing. [Dorian] would follow me and continue the argument and that was usually when the pushing started. This was never reported to the police.

[11] The Crown submit that this evidence should be admissible not because of similarity between what has been alleged in this trial but because the complainant's evidence in this trial would be incomplete and possibly incomprehensible to the jury if it is not led. The Crown submit that the relevance of the relationship evidence is in terms of its narrative and contextual significance.

[12] For the defendant it is submitted that it relates only to "pushing" of the complainant by the defendant, none of which was reported to the police at the time. It has no relationship to the charges in this trial.

[13] In *Perkins v R* [2011] NZCA 665 at para 27, the Court of Appeal said this type of evidence can be led at trial in circumstances where "because otherwise the complainant's evidence as to the alleged offending which is the subject of charges will be necessarily incomplete and perhaps not comprehensible from the point of view of the jury".

[14] This relationship evidence the Crown wish to lead would not assist the jury to understand why the alleged violence against the complainant occurred in the context of the family dynamics. It just alleges some less serious violent offending by the defendant against the complainant. The complainant's evidence cannot be said to be necessarily incomplete or incomprehensible without it. Nor does it assist the jury to focus upon the issues in this trial. The application to lead relationship evidence is therefore declined.

N R Dawson
District Court Judge