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

IN THE DISTRICT COURT
AT ROTORUA

CRI-2017-063-001471
[2018] NZDC 3461

THE QUEEN

v

CODY JAMES FANE

Hearing: 23 February 2018

Appearances: M Jenkins for the Crown
A Sykes for the Defendant

Judgment: 23 February 2018

RULING OF JUDGE G C HOLLISTER-JONES
[As to propensity]

Introduction

[1] On 22 April 2017, the defendant was charged with unlawful possession of a sawn-off .22 calibre rifle and recklessly discharged it.

[2] The charges arise from an incident at a Saturday morning market in a local park. The defendant is alleged to be one of three Mangu Kaha Black Power members present, each of whom was wearing a patch. This group was approached by two rival Mongrel Mob members and there was a resulting altercation between the two groups. The two Mongrel Mob members then retreated to their vehicle with the defendant and his two associates allegedly in pursuit. Whilst one of the Mongrel Mob members was reaching into the front passenger's seat of the car, the defendant is alleged to have raised a sawn-off .22 rifle and fired it directly at the Mongrel Mob member. The shot missed him but was found lodged in the driver's seat headrest.

[3] The defendant denies that he was one of the three Mangu Kaha Black Power members present at the park or at the car and, in particular, denies he possessed or fired the rifle as alleged.

[4] On 26 January 2018, Judge Cooper determined that a photograph of the defendant outside a food stall at the market shortly before the shooting was admissible. The photograph shows the defendant wearing a black vest with the Mangu Kaha gang patch on the back. The photograph shows he was with a second gang member. That photograph, if correct, establishes presence, but it does not prove that the defendant either possessed or fired the .22 sawn-off rifle. Ms Sykes has informed me that the defence position is that even if the photograph is admissible, it does not get the Crown as far as they seek. In particular, there is no accurate time of the taking of the photograph. She informs me that defence have appealed Judge Cooper's decision to the Court of Appeal, but accepts that, for the purposes of this application, that the Court has to accept Judge Cooper's ruling.

[5] I discussed with Ms Sykes what the defence to the case was and she clarified that the defendant was not at the park at the time and furthermore, that one of the other co-defendants possessed the rifle and shot at the Mongrel Mob member. She says that the defence position is that the shooter has pleaded guilty at an early opportunity to lesser charges in order to avoid focus on his liability in respect of this matter.

The propensity application

[6] The Crown applies to admit the defendant's convictions for possession of a sawn-off shotgun on [date deleted] 2011, and on the same day causing grievous bodily harm with intent by firing at a person he was in a dispute with. The defendant was convicted on 24 July 2012 and sentenced to 10 years' imprisonment in respect of that offending with a minimum non-parole period of five years. I am advised that he was on release conditions for that offending at the time of this alleged offending.

[7] The brief facts of the earlier offending are that the victim, who I am informed was his [relationship details deleted], had the care of the defendant's daughter. On the day of the offending, the defendant was staying with the victim and they got into an

argument over something the victim wanted to do with the defendant's daughter. The argument moved from inside to outside and whilst the two men were outside, it escalated into a fight. The victim then re-entered the house, the defendant followed, went into his bedroom, got a sawn-off shotgun and fired into a wall. At the same time, the victim entered the bedroom and the defendant shot him on the left side of the face causing severe facial injuries. The defendant then fled the address.

[8] The Crown submit that these two convictions establish a tendency on behalf of the defendant to overreact and in doing so, to resort to firearms when involved in verbal or physical altercations. The Crown says that is what the defendant said at the local park on 22 April 2017.

[9] The defence oppose the application on the basis that the prior convictions have modest probative value due to the differences in the facts and their distance in time from the current offending. In particular, Ms Sykes emphasises that the earlier offending was in a family context and the latter offending is in a gang context. The defence also submit the prejudicial impact exceeds the modest probative value and the jury will be overwhelmed with the prejudice of the earlier convictions.

Legal principles

[10] The application is governed by s 43 Evidence Act 2006 which provides:

> "**43 Propensity evidence offered by prosecution about defendants**
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> (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.
>
> (2) When assessing the probative value of propensity evidence, the Judge must take into account the nature of the issue in dispute.
>
> (3) When assessing the probative value of propensity evidence, the Judge may consider, among other matters, the following:
>
> (a) the frequency with which the acts, omissions, events, or circumstances which are the subject of the evidence have occurred:

(b) the connection in time between the acts, omissions, events, or circumstances which are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried:

(c) the extent of the similarity between the acts, omissions, events, or circumstances which are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried:

(d) the number of persons making allegations against the defendant that are the same as, or are similar to, the subject of the offence for which the defendant is being tried:

(e) whether the allegations described in paragraph (d) may be the result of collusion or suggestibility:

(f) the extent to which the acts, omissions, events, or circumstances which are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried are unusual.

(4) When assessing the prejudicial effect of evidence on the defendant, the Judge must consider, among any other matters,—

(a) whether the evidence is likely to unfairly predispose the fact-finder against the defendant; and

(b) whether the fact-finder will tend to give disproportionate weight in reaching a verdict to evidence of other acts or omissions."

[11] Probative value in the context of propensity reasoning involves concepts of linkage and coincidence. Linkage is the extent to which the conduct in issue shares characteristics or similarities with the proposed evidence. Coincidence reasoning is concerned with the improbability that the defendant would independently be accused of like conduct on separate occasions.

[12] When considering propensity evidence, the starting point is isolating the issue in dispute. That is mandated by s 43. In this case, the issue in dispute is whether the defendant possessed and used a sawn-off .22 rifle at the park. Simply put, the issue is

identity. There are no special rules regarding the admission of propensity evidence when the issue is identity; see *Rossiter v R*[1], *Winders v R*[2] and *Gourlay v R*.[3]

[13] I now turn to discuss the s 43(3) factors, bearing in mind that they are a useful structure to consider the probative value of the propensity evidence, but they are neither exclusive or mandatory (see *R v Martin*.)[4] First, frequency and connection in time. Frequency is twice and connection in time is six years apart. The defence emphasised that these two factors lessen the probative value of the evidence, but obtaining a firearm and shooting it at someone is not something that a person can do frequently, and for most of the six year time difference, the defendant was in custody and lacked the opportunity to offend in this way. Specifically, he was sentenced on 24 July 2012, received a five year minimum non-parole period, so that takes him past the date of this alleged offending which was 22 April 2017. So he must have been remanded in custody in respect of the prior offending such that he was released prior to the commission of this offending. In any event, he lacked the opportunity for five of the six years to offend in this way. Given what I have said is the relatively unusual nature of this conduct and its very high criminality and significance, the fact that there are only two instances and six years apart means that these two matters in my assessment are not determinative and are essentially neutral.

[14] The next matter is extent of similarity. This is the key issue on this application. The Crown submit that the following are the meaningful similarities:

(a) Prior to both shootings the defendant got into a verbal disagreement with the victim or complainant;

(b) On both occasions, the verbal disagreement then escalated to a physical confrontation;

(c) On both occasions the defendant then significantly escalated things out of all proportion to what was going on before by brandishing and then

[1] *Rossiter v R* [2015] NZCA 557.
[2] *Winders v R* [2016] NZCA 350.
[3] *Gourlay v R* [2017] NZCA 40.
[4] *R v Martin* [2013] NZCA 486 at [22].

discharging a firearm. Mr Jenkins emphasised that it is this factor that stands out and indicates a high degree of overreaction by the defendant and his highly unusual conduct;

(d) On both occasions the defendant then fled the scene immediately after the shots had been fired.

[15] The defence submit that these claimed similarities are limited to general conduct commonly involved with firearm usage during a dispute and there are significant differences, including:

(a) In the first incident, the shot was directed at the victim and caused serious injuries. In the second incident, no-one was harmed;

(b) The past offending involved a domestic dispute regarding guardianship of the respondent's child with the [victim]. The current matter involves gang related tensions and in oral argument, Ms Sykes put particular emphasis on this difference;

(c) In the second incident, the respondent is not said to have brandished the gun;

(d) The 2012 convictions relate to intentional grievous bodily harm. The current matter before the Court concerns the discharge of a firearm with reckless disregard.

[16] I consider that the similarities that give the evidence probative value are:

(a) On both occasions the defendant had a sawn-off firearm. Whilst one was a sawn-off shotgun and the second a .22 calibre rifle, is that the sawn-off aspect, which is a distinct characteristic;

(b) In both occasions, following an altercation, the defendant escalated the conflict by producing a sawn-off firearm;

(c) On both occasions, the defendant then fired it at the disputee.

[17] The essential differences are that the first incident was in a domestic context and the second incident is in a gang context, and the consequences for the disputee were significantly different. First, there was serious injury and the second, no injury.

[18] Taking the second difference first. The consequence for the victim in this sort of offending is often a matter of luck. In the first, the shotgun was obviously fired directly at the victim's face. In the second, the rifle is alleged to have been fired at the Mongrel Mob member getting into the car but it missed him and lodged in the headrest. An inference will be able to be drawn that the rifle was aimed at the Mongrel Mob member. Whilst there is a difference in consequence, there is a valid argument that there was a similar intention on both occasions. The fact that in respect of second, the charge has been framed as "a reckless act" not "an intentional act" is not material when considering the probative value of the evidence.

[19] Then there is the first and what is submitted to be the most significant difference, the different context of the two matters. The critical question is, does this reduce the probative values such that there is no longer sufficient linkage? Whilst I accept the different context has some significance, I consider it does not diminish the essential similarities, those being that when the defendant is in a dispute, whether it be family or gang based, he produces and uses a firearm aiming it at a person he is angry with and endangering their life. This is not regular conduct with a firearm. There is a continuum, there is a variability of conduct in the criminal arena with firearms; varying from intentionally taking a firearm to an event to extract retribution, to getting a firearm and using it in response to provocation from the other side with firearms, to using it in this sort of context to lesser and more accidental forms which might still be the subject of a recklessness charge. I conclude that the identified similarities favour the motion of propensity evidence.

[20] The number of persons is not a relevant factor in this context.

[21] Collusion or suggestibility is not a relevant factor in this context.

[22] Extent to which the acts for which the defendant is being tried are unusual. Possessing a sawn-off firearm is unusual. Firing it at close range at an individual is also unusual. This favours the admission of the evidence and is linked to similarities. It adds to the linkage.

[23] I accept the prejudicial impact of the earlier offending is considerable, particularly because of the consequences for the victim in that offending. There is therefore a risk that the jury might give proportionate weight to it and engage in impermissible reasoning. I discussed with Crown counsel and also with Ms Sykes about ways of managing that, and Mr Jenkins accepted that the summary of facts and any consequential s 9 agreement would contain no reference to the victim's injuries and any resulting s 9 would stop at the first victim being shot and would not include his subsequent fall to the floor. So that will remove the most upsetting aspect of the earlier offending and the other way of managing the prejudice will be a strong and comprehensive direction from the trial Judge on how to use the propensity evidence and how not to use it. I observe that that was the approach of the Court of Appeal in *R v Winders* where four prior discharges of a firearm were being brought into evidence in a propensity context.

Conclusion

[24] The proposed propensity evidence provides probative linkage toward establishing that it was the defendant who possessed the rifle and shot it at the Mongrel Mob member. It also provides probative evidence in relation to coincidence with the defendant, as a result of the photograph, said to be present at the park shortly before the shooting took place and wearing a Mangu Kaha patch. Did he have nothing to do with the shooting? The prior offending considerably strengthens the likelihood that the defendant was involved in this event. Likewise, in relation to the defence that it was a co-offender who possessed and shot the firearm, the prior offending is relevant in relation to whether that is something that becomes a reasonable possibility.

[25] I conclude the evidence of the prior convictions and a summary of the prior offending except reference to the victim's injuries is admissible. Ruled accordingly.

G C Hollister-Jones
District Court Judge