

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

**IN THE DISTRICT COURT
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKĀURAU**

**CRI-2019-090-577
[2020] NZDC 692**

THE QUEEN

v

KALOLO TUPUOLA

Hearing: 17 January 2020
Appearances: Ms Dean for the Crown
Mr P Le'au'anae for the Defendant
Judgment: 17 January 2020

**DECISION OF JUDGE D J SHARP
[On Admissibility of Propensity Evidence]**

Introduction

[1] The Crown apply to lead evidence of the defendant's previous convictions for threatening to kill the complainant. This conviction relates to an event on the 7th August 2009.

[2] A summary of facts relating to this conviction has been provided by the Crown. This refers to an incident where the defendant drove to the complainant's address to pick up his two sons. There was an argument concerning custody of the defendant's children. The defendant became angry and shouted at the victim *"I'm going to come back and I'm going to shoot you. I'm going to kill you and I'm going to take the kids and never bring them back. You will never see the kids again"*.

[3] The current allegations are that from 2009 to 2018 the defendant on a regular basis inflicted violence upon [the complainant] and their [children].

[4] The alleged offending against [the complainant] include the use of a hammer, a knife, a steel pipe and a claw hammer. The Crown also alleges that the defendant punched [the complainant] in the face, kicked her on the ground and poked her in the eyes.

[5] Offending is also alleged against the children. This includes using a broom, punching to the face, using a steel pipe, using a vacuum cleaner and stomping on the head and stomach of one of their children.

[6] The Crown further alleges that on two occasions the defendant threatened to kill [the complainant].

(a) In October 2018 it is alleged that the defendant picked up a knife, presented it to [the complainant] and said, *“Look see, if you run away again I can use this to kill or cut your throat”*; and

(b) On 28 December 2019, while [the complainant] was on the phone approaching her in a threatening manner and saying, *“You better look after your fuckin Mum in Australia or I will kill you”*.

The Law

[7] Section 40 of the Evidence Act establishes the rules for propensity evidence.

[8] The Court has admitted evidence of misconduct against a relationship partner that would not have met the orthodox similar fact evidence rules.

Definitions

[9] The admission of the “relationship propensity” evidence does not normally depend on ideas of coincidence.

[10] In *Perkins v R*¹ the Court of Appeal said of relationship propensity:

[20] Although it will fall within the definition of propensity evidence the relevance of evidence for other misconduct by the defendant to the victim will not normally depend on ideas of coincidence. Its relevance as bearing on the background or the nature of the relationships between those involved will usually be sufficiently obvious as not to require particular explanation. The rationale for its admission rests on establishing hostility on the part of the defendant to the victim and the violence of its expression. It is not always necessary to direct the jury in relation to such evidence. The risk of unfair prejudice associated with such evidence is likely to be less than with orthodox similar fact evidence and is usually addressed simply by the Judge warning the jury in general terms against being influenced by prejudice or emotion.

[11] The Court of Appeal went on to explain that the evidence is allowed in, not because of the similarity between what is alleged by way of background and the actual offending:

“but rather because otherwise the complainant’s evidence as to the alleged offending which is the subject of the charges will be necessary incomplete and perhaps not comprehensible from the point of view of the jury”².

[12] The Court of Appeal in *R v MacDonald* said of relationship evidence³.

“The relationship evidence in terms of its narrative significance was obvious. So obvious that the point went without saying. In that context we do not think it matters that the Judge did not explain this to the jury. He certainly did make it clear to the jury that they had to focus on a period covered by the charge”.

[13] In *R v Coe* Gordon J drew on the Court of Appeals decision in *Campbell-Joyce v R*⁴:

In *Campbell-Joyce*, that defendant had already behaved aggressively to the complainant and been violent or threatened violence towards her and was determined to be “highly relevant” to the question of whether the defendant committed the offences as charged. Even if the similarity was broad rather than specific, and even if the behaviour was not at all unusual.

The relevant propensity arises from what the evidence says about the “nature of the relationship between the parties...”⁵

[14] The Court held that the credibility of the complainant will be “*very much in issue*” and, in that context, it was significant that the relationship evidence provided

¹ *Perkins v R* [2011] NZCA 665 at [20] and *R v Coe* [2018] NZHC 502 at [27].

² *Perkins v R* at [27].

³ *R v MacDonald* CA 166/04, 8 April 2005 at [14].

⁴ *Campbell-Joyce v R* [2016] NZCA 192.

⁵ *Campbell-Joyce v R* [2016] NZCA 192 at [26], cited in *Coe* at [36].

relative contextual background.⁶ The Court also held that, in assessing relationship propensity evidence:

“The factors set out in 43(3) of the Evidence Act may be considered where they are relevant but those factors are neither a closed list nor a mandatory one. In the end, it is a simple matter of analysing legitimate probative value against unfair prejudicial effect”.⁷

[15] The issue in the trial in this case is likely to be whether the assaults as alleged occurred.

[16] As such the credibility of the complainant will be significant. It is effectively her evidence alone that is relied upon by the Crown. There are no allegations recorded in the evidence from the children who are the subject of charges and the trial involves the jury assessing the credibility of the complainant. They must assess the family relationship in its dynamics as part of the consideration of this issue.

Defence Submissions

[17] The defendant faces a large number of charges. There is no evidence or statements made from the children. It is submitted by the defence that the admission of relationship propensity evidence will have an unfairly prejudicial impact upon the defendant with regard to the charges that relate to the children.

[18] The time period of the charges allows the Crown to present a narrative which the Crown may say shows violence and control. The addition of the conviction will be unfairly prejudicial and may cause the jury to improperly reason that all of the allegations are correctly made. The defence also submit that there are other means by which the Crown can show the jury the reasons for the complainant’s behaviour. Other approaches would not provide unfairly prejudicial evidence. The ultimate defence submission is that the propensity evidence should not be accepted as its probative value does not outweigh the unfairly prejudicial effect that the evidence would have upon the defendant’s trial.

⁶ *Coe* at [42] – [43].

⁷ *Campbell-Joyce v R* [2016] NZCA 192 at [20], cited in *Coe* at [34].

Crown Submissions

[19] The propensity evidence is probative in an assessment of [the complainant]'s credibility. [The complainant] says that the violence began in 2009. The threatening to kill conviction arises from that period. It supports her evidence. The Crown submit the fact of previous hostility towards [the complainant] and the manner of its expression is highly probative as to whether or not he has committed violence as alleged.

[20] The Crown submits the previous conviction suggests the nature of the relationship dynamic was one of violence and control. It is also submitted that [the complainant]'s narrative would be incomplete without it.

[21] The Crown submits the evidence is probative in order to understand [the complainant]'s behaviour. She did not (permanently) leave the relationship until December 2018. The propensity evidence occurred in the context of a temporary separation. This the Crown submit establishes that Mr Tupuola made it clear on that occasion that if she did not comply with what he wanted there would be violent consequences. This was accompanied by a threat that [the complainant] would never see her children again. It is submitted by the Crown that this explains why she remained with him throughout the 9-year period.

[22] It is likely that [the complainant] will be cross examined on why she did not speak to the police at the end of 2018, in fact this was not the first time police had been involved. Mr Tupuola's conviction for threatening to kill in 2009 had little or no effect upon the alleged family violence which the Crown say was inflicted for the next 9 years. The Crown submit this is relevant to the jury's potential question of why [the complainant] did not go to the police.

[23] In addition, it is submitted that the charges of threatening to kill are supported by the 2009 incident. The threats as alleged were conditional and made in order that [the complainant] comply with the defendant's will.

[24] As regards the prejudicial effect of the evidence the Crown submit that it would not be unfair prejudice. The propensity evidence relates to one conviction arising from one incidence of threatening [the complainant]. This is significantly less serious than a totality the alleged offending the jury will hear of. Accordingly, the propensity evidence will not have the significance that sometimes may be the case.

[25] In addition, as regards prejudicial effect it has been noted in *R v Coe*⁸ the risk of unfair prejudice associated with relationship type evidence is likely to be less than with orthodox similar fact evidence and may be addressed by the Judge warning the jury in general terms about being influenced by prejudice or emotion.

Discussion

[26] There is a degree of prejudice which would accompany the admission of the defendant's previous conviction. The family dynamics that are present here are matters that a jury should be informed of in order to understand the nature of the allegations and the circumstances that prevailed.

[27] The relatively limited evidence of the previous conviction will have some prejudicial effect, but this needs to be measured against the bulk of the evidence in the trial. This involves many allegations of physical assaults some involving the use of weapons.

[28] The probative value of the material is in relation to:

- (a) Assessing the credibility of [the complainant];
- (b) Understanding the relationship context as it stood between the parties and
- (c) Understanding the behaviour of the complainant in the continuation of the relationship over a lengthy period.

⁸ *Supra* at [46] and [49].

These are all matters upon which the proposed propensity evidence has direct relevance and a probative aspect.

[29] The prejudicial effect that the admission of the previous conviction will have can be offset by judicial directions. On considering the propensity evidence proposed it cannot be said that the unfair prejudicial effect is outweighed by the probative value of the evidence.

[30] Accordingly, the Crown may lead the evidence proposed with regard to the 2009 incident.

D J Sharp
District Court Judge