

**ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS,
OCCUPATION OR IDENTIFYING PARTICULARS OF APPELLANT
PURSUANT TO S 200 CRIMINAL PROCEDURE ACT 2011.**

**NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR
IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY
S 203 OF THE CRIMINAL PROCEDURE ACT 2011.**

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA379/2018
[2019] NZCA 255**

BETWEEN R (CA379/2018)
Appellant

AND THE QUEEN
Respondent

Hearing: 29 May 2019

Court: Collins, Peters and Mander JJ

Counsel: P K Hamlin for Appellant
JEL Carruthers for Respondent

Judgment: 26 June 2019 at 11.30 am

JUDGMENT OF THE COURT

- A The appeal against conviction is dismissed.**
- B Order prohibiting publication of name, address, occupation or identifying particulars of appellant pursuant to s 200 of the Criminal Procedure Act 2011.**
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REASONS OF THE COURT

(Given by Mander J)

[1] R was convicted by a jury of sexual offending against his daughter that occurred between 2006 and 2008, when she was six to eight years old.¹ In support of the daughter's evidence, the Crown relied on evidence of sexual offending against R's stepdaughter between 2002 and 2006, when she was aged between 11 to 15 years. Those allegations had previously been the subject of two trials. Both juries were unable to agree on verdicts and the charges were eventually stayed.

[2] R appeals his convictions on the grounds that the propensity evidence of the stepdaughter should not have been admitted, that the trial Judge failed to adequately direct the jury on the use to be made of that evidence, and that prejudicial comments made by the prosecutor resulted in his trial being unfair.

Background

[3] At the time of the offending, R was separated from his daughter's mother. However, the daughter would often spend time at his house, including staying overnight. On one such occasion, while watching television, R exposed his penis and forced it into his daughter's mouth. Later, he dressed her in what she described as a "rude suit" and positioned her so she was bent over with her head near his exposed penis. He took photographs. The daughter was first spoken to by police in 2009, at which time she did not disclose the full extent of R's offending. However, in January 2015, the daughter completed an evidential video interview. As a result, R was charged with sexual violation and committing an indecent act on a child.

[4] The stepdaughter's allegations were of R kissing her using his tongue on a number of occasions when she was aged 11 years, and of forcing his hand down the front of her pants and touching her vagina when she was approximately 12 years old. Her evidence was that when she was 13 there was an occasion when R came into her bedroom and put his hand down the back of her pants. The stepdaughter called out to her mother and R explained what had occurred as being an accident, about which

¹ *R v [R]* [2018] NZDC 11672.

he was very embarrassed. It was further alleged that, when the stepdaughter was 14 years old, R entered a caravan where she was sleeping and forced his fingers inside her vagina. On another occasion, he gave her alcohol to drink, put his arms around her and started to kiss her. The stepdaughter also gave evidence of R taking photographs of her and offering her \$300 to model for him if she wore a see-through top.

Admission of propensity evidence

[5] Judge Patel, who also presided at R's trial, ruled the stepdaughter's evidence admissible as propensity evidence.² The Judge considered the probative value of the stepdaughter's evidence outweighed any unfair prejudice to R from its admission.

[6] Mr Hamlin, counsel for R, argued that the Judge had erred in admitting the stepdaughter's evidence. He submitted there had been a failure to consider the material differences between the girls' allegations and that the Judge had not considered the risk of collusion and suggestibility when determining the evidence's probative value. Mr Hamlin further submitted the Judge failed to adequately consider the risk of unfair prejudice to R by admitting the stepdaughter's evidence.

[7] We consider the propensity evidence was properly admitted. The stepdaughter's evidence was plainly propensity evidence which had considerable probative force in respect of the issue in dispute at trial, namely whether the daughter was telling the truth about the alleged sexual acts. The stepdaughter's evidence was capable of demonstrating that R had a propensity to be sexually attracted to and to engage in sexual conduct with young girls.

[8] Mr Hamlin relied on the different ages of the girls and the "lack of particularity" or similarities in the alleged sexual misconduct. As this Court has consistently held, such differences have largely been held irrelevant when assessing the underlying propensity which this type of evidence discloses.³

² *R v [R]* [2018] NZDC 2379 at [61].

³ *M (CA85/2013) v R* [2013] NZCA 239 at [18]–[19]; *C v R* [2015] NZCA 262 at [10]–[12]; and *R v O (CA465/2017)* [2017] NZCA 472 at [9].

[9] The offending itself may not have been particularly distinctive and there are differences in the complainants' ages. However, both girls were relatively young children at the time of the offending, or in the case of the stepdaughter at least at the time the sexual conduct commenced. Both were in the care of R, either as the child's father or fulfilling the role of a "father figure". There was an overlap in the timing of the alleged conduct in the mid 2000s, and the photography aspect is a notable similarity. Moreover, engaging in sexual activity with children of that age is inherently unusual behaviour, especially for a man in a paternal relationship with the complainants.

[10] The trial issue was whether the offending had occurred against the daughter. The orthodox reasoning of the unlikelihood and coincidence of two young complainants disclosing R's sexual interest in them and acting in such an overt sexual way towards them while in his care meant their evidence in combination had significant probative force.

[11] R relied on the risk of collusion and suggestibility by reference to the evolving way the daughter's disclosure was finally made, and evidence regarding an unrelated incident. That incident involved a knife and the stepdaughter's mother. The daughter purported to be present notwithstanding the evidence of other witnesses who did not recall her being present at the time. We do not consider either feature materially affects the admissibility of the propensity evidence. A delay in the making of a complaint by a child, particularly in respect of an offender with whom she has a family relationship, is not uncommon. To the extent that the incident involving the knife may have been a potential indicator of the two girls discussing matters between themselves, that was a topic able to be fully explored at trial.

[12] We do not consider the fact there had been two hung juries in respect of the stepdaughter's allegations gave rise to unfair prejudice to R. A trial court must consider whether it is unfair to require a defendant to respond again to evidence which has not resulted in a conviction on an earlier occasion.⁴ However, that consideration must be assessed against the knowledge that a previous acquittal, or in this case

⁴ *Fenemor v R* [2011] NZSC 127, [2012] 1 NZLR 298 at [9].

previous juries not being able to agree, occurred when the propensity witness's allegation was assessed in isolation without the benefit of the additional evidence of another complainant testifying of being offended against by the same person, in a similar situation.⁵

[13] Mr Hamlin submitted that inadequate consideration had been given to the impact on the trial as a result of the considerable time and focus that would have to be paid to the stepdaughter's evidence. This was said to include the evidence R would have to traverse about the dysfunctional relationship between the stepdaughter, her mother, and himself during the period of the alleged offending, which would necessarily unfairly raise prejudicial evidence of which the incident with the knife was an example.

[14] We do not consider the additional evidence that was required to be traversed as a result of the admission of the propensity evidence derailed or unnecessarily prolonged the trial. The original Crown case which constituted two witnesses (the complainant and her mother) giving oral evidence was extended to include two further witnesses (the stepdaughter and her mother). While we accept other issues were then required to be canvassed in an effort to meet the propensity evidence, the preparation of that aspect of the case does not appear to have been onerous. No difficulties were identified regarding being able to prepare a response to the propensity evidence as a result of the time that had elapsed since the previous trials or from when the offending was alleged to have taken place.

[15] We consider Judge Patel was correct to find that the probative value of the propensity evidence outweighed the risk of any unfair prejudice to R. The primary prejudice that arose from the admission of the stepdaughter's evidence derived from its probative value in determining the essential issue of whether the daughter's evidence was true and whether she had been offended against by R. We consider the evidence of the stepdaughter constituted orthodox propensity evidence which was rightly admitted at the trial.

⁵ At [21]–[23]; and *T v R (CA117/2015)* [2015] NZCA 572 at [25]–[26].

Jury directions about the propensity evidence

[16] Judge Patel provided directions to the jury regarding the propensity evidence both before the stepdaughter gave her evidence and as part of his summing up. Having reviewed Mr Hamlin's critique of the trial Judge's directions, we do not consider any error arises that is sufficient to give rise to a miscarriage of justice.

[17] Mr Hamlin submitted that the trial Judge failed to adequately direct the jury on the proper use to which the propensity evidence could be put and that he failed to alert the jury to the risk of collusion. He further submitted that the Judge failed to adequately caution the jury about impermissible reasoning and unfair prejudice against R. In particular, it was submitted that there had been a failure to warn the jury against convicting R based on the "failure" of the two previous juries to convict R in respect of the stepdaughter's allegations.

[18] We accept the trial Judge did not expressly articulate how the probative value of the stepdaughter's evidence arose from the unlikelihood or improbability of two girls in R's care complaining of sexual misconduct. However, we do not consider that resulted in a misdirection or non-direction regarding the legitimate use to which that evidence could be put by the jury. The Crown's thesis of the unlikelihood of two girls fabricating such allegations would have been obvious to the jury. Any failure to expressly refer to the value of the evidence in those terms likely detracted from the Crown's case rather than R's defence.

[19] In his summing up, Judge Patel identified to the jury the propensity which the Crown contended could be derived from the stepdaughter's evidence, namely that R had a tendency to sexually offend against "young women" that were in his care and of how that was capable of assisting to prove the charges as they related to the daughter. The Judge referred to the Crown's submission that the stepdaughter's allegations were reliable and pointed to pieces of evidence that supported that being the case, including her complaint to a teacher in 2003, and another complaint to her mother near the end of 2006, when she wrote a letter which was produced in evidence.

[20] The Judge referred to the similarities upon which the Crown relied, in particular the connection in time, that the girls were young when these things happened

to them, and that the offending occurred at R's house at night when they were in his care. Reference was also made to both girls having referred to R asking them to model "explicit clothing". Judge Patel noted the Crown argument that those aspects of the evidence indicated a tendency on R's part which could be used to assist the jury in assessing the daughter's allegations.

[21] Judge Patel then proceeded to summarise the defence response to the propensity evidence; that the stepdaughter's evidence was not truthful, that it did not have the tendency contended for by the Crown, and did not help the jury in terms of proof of the charges. The Judge reminded the jury of the stepdaughter's personal problems, referencing her shoplifting and use of alcohol and cannabis, together with other aspects of her personal life and her relationships with family members which, it had been submitted, was the context against which the stepdaughter had made her complaints against R. Judge Patel reiterated the defence's stance that the stepdaughter's evidence constituted a false complaint. The Judge then directed the jury in the following terms:

It is for you to decide whether [the stepdaughter's] evidence is truthful and whether the tendency, the Crown submits, exists. If you are not satisfied the tendency exists you must leave the evidence entirely out of consideration. If you find that the tendency does exist you may use the evidence as part of the total evidence in the case when you are assessing the issues including the reliability and credibility and the truth of [the daughter], and ultimately whether the Crown has proved the defendant's guilt.

[22] We consider the trial Judge's directions, read as a whole, adequately explained to the jury the legitimate use to which the propensity evidence could be put in the circumstances of the case. We also reject the criticism that the Judge failed to refer to the possibility of collusion in the context of providing directions relating to the propensity evidence. Judge Patel, in summarising the defence response to the propensity evidence, referred to the stepdaughter's evidence as having "spawned" the daughter's false complaint and that each was falsely bolstering the other. Those directions followed an earlier specific direction regarding collusion between the girls when addressing the issue of the witnesses' credibility and reliability. The respective positions of both the Crown and R in regards to the question of collusion were addressed in some detail.

[23] We do not consider the jury would have failed to appreciate the importance of the issue of possible collusion when considering the propensity evidence. It was a theme which ran through the whole case, and was one which the trial Judge raised for a second time when addressing the issue of making inferences, albeit not in the same detail as he had previously canvassed that topic earlier in his summing up.

[24] Finally, there is the complaint that the Judge did not adequately provide directions regarding the risk of unfair prejudice arising from the propensity evidence. However, Judge Patel provided an orthodox direction to the jury warning them against falsely reasoning that, should they accept the stepdaughter's evidence that R had behaved in a certain way on a previous occasion, he must be guilty of the charges. The jury were directed that any tendency to offend in the past was not sufficient to prove R's guilt, and that it was only one item of evidence to be considered with all the rest of the evidence. Having provided that direction, the Judge then reminded the jury of not allowing feelings of prejudice to be aroused or of sympathy to be engendered from the stepdaughter's evidence.

[25] The second concern relating to unfair prejudice Mr Hamlin identified was the Judge's omission to direct the jury that they ought not convict R due to the "failure" of previous juries to convict him of the stepdaughter's allegations. What was to be said to the jury about the previous trials was the subject of discussion between counsel. R's trial counsel argued at a pre-trial hearing that if the jury were told of the previous two trials this may result in the jury convicting him to "make up" for the result of those earlier trials. In the event, the jury were directed that R had stood trial on two occasions in relation to the stepdaughter's allegations, that on both occasions the jury could not agree, and that, as is usually the case where two juries cannot reach agreement, a third trial had not taken place. There was no complaint at the time regarding the appropriateness of those directions.

[26] We accept that it would have been preferable for the trial Judge to have provided the direction which he indicated he would give to the jury about not being tempted to convict because of the outcome of the earlier trials. However, we do not consider that omission gives rise to a possible miscarriage of justice. In order to use the stepdaughter's evidence, the jury were required to be satisfied that her allegations

were truthful. R's position was that those allegations were false. That was the basis upon which the jury was asked to reject the propensity evidence. We are satisfied the trial Judge properly directed the jury that they needed to be satisfied of the truthfulness of the stepdaughter's evidence before it could be used to prove the present charges. When viewed against those explicit directions, we do not consider that a caution of the type sought would ultimately have been of any material effect.

[27] Being satisfied that adequate directions relating to the propensity evidence were provided by the trial Judge, this ground of the appeal is dismissed.

The prosecutor's inappropriate comments

[28] In the Crown prosecutor's closing address, she made the following submission:

I want to now speak briefly about another aspect of the defence case, the defendant's so-called lack of previous convictions. Of course, that's a pretty glib argument in this case. We know he has some history; charges of domestic assault in 2007 were proven but he escaped conviction, and two trials of sexual offending against his stepdaughter resulted in hung juries. Even if the defendant had a truly clean history, how does that help you? Logic dictates that every offender at some time or other receives his first conviction.

[29] The mentioned domestic assault is the knife incident to which we have earlier referred, about which trial counsel cross-examined the daughter, the stepdaughter and her mother. That incident gave rise to a charge of assault to which R pleaded guilty. He was discharged without conviction. Evidence of R's lack of previous convictions which the defence sought to adduce, presumably as good character evidence, was elicited through the officer-in-charge. Her evidence was read by agreement.

[30] Trial counsel had a tactical decision to make regarding the introduction of the "knife incident" after the propensity evidence was ruled admissible. The decision to elicit evidence about that incident was an attempt to highlight the daughter's false memory of events in an effort to argue that it was the product of collusion between herself and the stepdaughter. However, it also potentially painted R in a bad light. Mr Hamlin submitted that the Crown prosecutor's comments aggravated this prejudice.

[31] As we have previously held, we do not consider the perceived need to introduce this evidence materially affected the validity of the decision to admit the propensity evidence. However, we acknowledge that the Crown prosecutor's comments, which were made in response to R's claim of being of good character, were inappropriate and are to be deprecated. They should not have been made, but we do not consider their utterance resulted in any real risk of prejudice.

[32] Firstly, the trial Judge provided specific directions regarding R's lack of previous convictions. He did not expressly link those directions to the prosecutor's remarks but, clearly, they applied to them. The Judge stated:

[117] You have heard the read evidence of Detective Patton that the defendant pleaded guilty to a charge of assault, and that related to the incident in the kitchen with [the stepdaughter's mother]. He was discharged without conviction. In law that is the same as a not guilty verdict. Therefore you must treat the defendant as having no prior convictions.

[118] The defendant asked you to give that evidence weight in assessing the case against him, and indicating he is not the type of person likely to have committed these offences.

[119] Of itself however, the evidence may be of limited assistance to you as a matter of logic. Every offender must commit a first offence.

[120] However, you may treat the evidence as some evidence that he is a person of good character.

[121] Being of good character is not in itself a defence to the charges. A defendant may have committed an offence even though she, he or she was otherwise of good character.

[122] Now, in relation to the evidence about the defendant holding a knife to [the stepdaughter's mother] and his being charged with it. The relevance of that evidence is in relation to whether [the daughter] was at the incident or not. You must not reason that because the defendant was involved in that incident and charged that he must be guilty of the offences that you are considering.

[33] In providing this direction about character evidence, the Judge cautioned the jury about any prejudicial reasoning arising from the incident involving the knife. The jury were directed that they could take into account that R had no previous convictions and that he had legitimately obtained a discharge without conviction in relation to the knife incident, which the Judge directed the jury must treat as a finding of not guilty.

[34] Mr Hamlin submitted that the Judge failed to correct the remarks made by the prosecutor. However, R's counsel in his closing address very effectively took the prosecutor to task about the inappropriateness of her remarks. When taken together with the Judge's directions, which confirmed defence counsel's view regarding the correct position, we consider any potential prejudice arising from the prosecutor's comments was largely extinguished.

[35] We are reinforced in that view because it would have been plain to the jury that part of the Crown's case was that R had engaged in sexual conduct with his stepdaughter. It was asking the jury to rely upon her evidence to support the daughter's evidence to prove the charges. It followed that R's reliance on his "good character", based as it was on his lack of previous convictions, was not one that the Crown accepted. Because of this aspect of the trial contest, R's reliance on his good record was always potentially limited. The prejudice that may otherwise have flowed from the prosecutor's comments must be viewed in that light. Having made that observation, we repeat that we consider the prosecutor's remarks, both in terms of their content and tenor, were neither appropriate or balanced.

[36] For the reasons discussed, we do not consider this particular aspect of the trial has given rise to any miscarriage of justice.

Result

[37] The appeal against conviction is dismissed.

[38] To protect the identities of the complainants, we make an order prohibiting publication of the name, address, occupation or identifying particulars of the appellant pursuant to s 200 of the Criminal Procedure Act 2011.

Solicitors:
Crown Law Office, Wellington for Respondent