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**IN THE DISTRICT COURT
AT AUCKLAND**

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

**CRI-2018-004-010817
[2020] NZDC 306**

THE QUEEN

v

TODD WALTER SENIOR

Hearing: 12 December 2019
Appearances: Rachel Tasman-Jones for the Crown
Maria Pecotic for the Defendant
Decision 14 January 2020

DECISION OF JUDGE B A GIBSON

[1] The defendant is one of a number of persons charged as a result of a police investigation into the activities of members and associates of the West Auckland chapter of a gang known as the Head Hunters. The charges that have subsequently arisen are primarily those involving methamphetamine manufacture and supply. The police investigation was given the code name Operation Oceanuster.

[2] The defendant is charged with conspiring to manufacture methamphetamine, several charges of supplying methamphetamine, manufacturing methamphetamine,

conspiring to supply methamphetamine, and two charges of offering to supply methamphetamine.

[3] He has an extensive list of criminal convictions, significantly in the past for burglary, achieving some notoriety in legal jurisprudence as the subject of the well-known decision *Senior v Police*¹.

[4] However it is not the defendant's burglary convictions that the Crown seeks to admit as propensity evidence against him at his trial, but rather convictions in 2013 for manufacturing and supplying methamphetamine for which he received a sentence of five years four months' imprisonment. He has other drug-related convictions but the application is limited to those convictions suffered in 2013.

[5] The Crown case is based on intercepted communications between him, his associates including other defendants, and customers purchasing or discussing the possible purchase of methamphetamine.

[6] The Crown submit the evidence of the 2013 convictions, if admitted as propensity evidence will be highly probative of the nature of the substance, which Mr Senior discusses using the lingua franca commonly associated with drug dealing.

[7] The Crown submit the tendency the evidence will demonstrate is a propensity to supply methamphetamine, and while not a methamphetamine "cook", to be a person close to and who assists methamphetamine cooks.

[8] On the charge of conspiring to manufacture methamphetamine the defendant with another is alleged to have attempted to source hypophosphorous acid and iodine for a methamphetamine manufacture. On the manufacturing methamphetamine charge, in respect of whether he has been jointly charged with another defendant, the defendant was allegedly waiting on the manufacture of two ounces of methamphetamine so that he could supply it to another.

¹ (2000) 18 CRNZ 340 (HC).

[9] The Crown further submits that while undoubtedly prejudicial, the proposed evidence is not unfairly prejudicial and the probative value of the proposed evidence far outweighs any unfairly prejudicial effect in any event.

[10] For the defendant Ms Pecotic submits, and Ms Tasman-Jones for the Crown agrees, that the main issue at trial will be whether the matter being discussed in the intercepted communications is methamphetamine, and for the manufacturing charges whether the manufacture of the substance is being discussed.

[11] Ms Pecotic said this would be the subject of expert evidence and so admission of the previous convictions was not necessarily probative of the allegations. Further while admitting the defendant was a habitual criminal, most of his convictions are for burglary and, other than the 2013 convictions the Crown seeks to admit in evidence, there are no others for methamphetamine dealing or manufacture so no tendency is established. She pointed to the prejudicial effect of admitting the evidence and referred to *Freeman v R*² where Young P for the Court said:

[21] In deciding whether to admit propensity evidence, the Judge should identify as precisely as possible the issue in dispute in the case to which the propensity evidence is adduced. Sometimes this will be very general, for instance whether the complainant's account is credible or even just whether the defendant is guilty. Where the relevant issue is very broad there is often greater judicial reluctance to admit evidence of similar offending (particularly where there is only one such other incident) than where the issue in dispute can be defined more narrowly. The other side of the coin to this is that propensity evidence which reveals no more than a propensity to commit offences of the kind alleged, despite having some probative value, will often be inadmissible given the inevitable associated prejudice. This is particularly so where the characteristics of the offending in question are unremarkable.

[12] Ms Pecotic also submitted that allowing the convictions to be admitted as propensity evidence would distinguish Mr Senior from other defendants in the trial who do not have a criminal conviction or for whom propensity evidence in the form of previous convictions is not available, thereby making it more likely that her client will be convicted. She relied on *Grimshaw v R*³. However in that case the proposed propensity evidence, namely convictions for low level dealing some three years prior to the events which led to the charges on which Ms Grimshaw faced trial, meant the

² [2010] NZCA 230.

³ [2013] NZCA 22.

probative value of the evidence was weak and so there was a greater risk of a jury giving disproportionate weight to evidence of the earlier convictions. Further, the facts of that matter are not on all fours with the present factual scenario. Ms Grimshaw lived in a property in Papatoetoe and during a search of the house a number of items containing methamphetamine were found in a room occupied by Ms Grimshaw and her partner. There was evidence that other persons used the house and had access to the room but those persons do not appear to have been defendants either jointly charged or to be tried with Ms Grimshaw. The submission was the admission of the propensity evidence would distinguish her from those other persons.

[13] Irrespective of the probative value of the evidence of the convictions in the present matter, which I consider to be high, Ms Pecotic's submissions effectively mean, if accepted, that a defendant against whom propensity evidence would properly be admitted could defeat an application on the basis that the admission is unfair to him because other defendants do not have criminal convictions or those that can be admitted as propensity evidence so that the jury will be predisposed to convict him. I do not imagine it was ever intended that the absence of convictions admissible as propensity evidence on the part of other defendants would act as a shield for a defendant who would otherwise, because of the probative value of the evidence, have his convictions admitted. Any risk of unfair prejudice can be dealt with by appropriate directions.

[14] The evidence proposed to be led is plainly relevant evidence. The higher its probative value, the weaker is the argument for refusing admission on the basis that the evidence is unfairly prejudicial. The sentencing remarks of Her Honour Peters J for the offences on which the convictions are sought to be admitted show why the convictions are highly relevant. There were three counts of manufacturing methamphetamine, a representative count of supplying methamphetamine, and a representative count of offering to supply methamphetamine. Peters J noted that the defendant was not the organiser of the manufactures, and neither was he the cook, but she was satisfied that he assisted in each manufacture by providing iodine and also on other occasions delivering ice to the address where the methamphetamine was being manufactured so that the ice could be used in the process. There were also numerous pages of text message conversations between the defendants and others in which he

offered to supply, or did in fact supply small quantities of methamphetamine on many occasions. The convictions are therefore plainly germane to the present allegations and show the defendant's tendency to supply methamphetamine, and while not a methamphetamine cook, to be a person close to and to assist in the manufacturing process as well as supplying methamphetamine at a retail level and generally dealing in amounts of one ounce or less.

[15] Accordingly I am satisfied that the probative value of the evidence is high and sufficient similarity exists between the acts the subject of the two events to mean that the evidence ought to be admitted. I accept there will be a prejudicial effect, as Ms Pecotic submits, but I do not accept that, following appropriate directions from the trial Judge, the evidence is likely to unfairly predispose the jury against the defendant, or that the fact of the earlier convictions will lead it to give disproportionate weight to those in reaching a verdict.

[16] Accordingly the evidence is admissible.

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B A Gibson DCJ