

**IN THE DISTRICT COURT
AT HAMILTON**

**CRI-2017-019-002810
[2018] NZDC 3897**

THE QUEEN

v

TENGORE NORMAN TURNER

Hearing: 1 March 2018
Appearances: Ms Guthrie for the Crown
Mr Weir for the Defendant
Judgment: 2 March 2018 at 4.00pm

**RESERVED JUDGMENT OF JUDGE A S MENZIES
[Crown application to adduce propensity evidence]**

[1] The defendant Tengore Norman Turner faces one charge of aggravated robbery to which a plea of not guilty has been entered. The defendant is presently remanded on bail to 1 March 2018 as a reserve trial date.

[2] The Crown seeks an order authorising the admission of propensity evidence at the trial. That application is opposed by the defendant.

[3] The proposed propensity evidence takes the form of a Certificate of Conviction and the accompanying summary of facts relating to a previous conviction for aggravated robbery for which the offence date was [date deleted] 2012 and the result date 22 October 2014.

[4] For the purposes of the application, the Crown has provided the summary of facts for the current prosecution together with the Certificate of Conviction and

summary of facts which constitute the proposed propensity evidence (the earlier offending).

Current charge

[5] The Crown case against the defendant alleges that at approximately 7.30pm on [date deleted] 2017, the complainant was walking around Hamilton lake. In the same area were the defendant and the co-defendant Cody Farrant.

[6] Both defendants were with a number of associates and as they walked in the direction of the victim, the defendants Turner and Farrant picked up two nearby plastic chairs. The victim continued walking ahead of the defendants who then discussed doing a stand-over of the victim for his property.

[7] The defendant Turner approached the victim from behind and struck the victim over the head with the plastic chair. The force of the swing caused the chair to break and caused a small laceration to the victim's ear.

[8] The defendant Farrant kicked the victim who fell to his knees. The defendant Turner reached into the victim's pocket and took an iPhone. Both defendants then ran away.

Propensity evidence

[9] The summary of facts relating to the offending in 2012 involved a victim who was a visitor from [overseas] who was backpacking around New Zealand.

[10] On [date deleted] 2012, the victim arrived in Hamilton. While walking along the Waikato river, the victim met the defendant and two other associates. The victim associated with the defendant and associates both that night and again [the following day]. The [third] day, the victim met the defendant and a number of other associates at the Hamilton Casino. The victim had with him a small backpack containing his passport and a number of other personal items.

[11] The victim and the defendant left the area of the Casino together with one other male. The three associated for a while in a courtyard near the river and then began walking along the path of the river walk. The defendant then pulled a wooden stake from the ground that was holding a small tree and began hitting cans and bottles on the ground with the stake. The defendant suddenly struck the victim with the stake over the back of the head which caused the victim to fall to the ground and drop his backpack.

[12] The victim rolled over and then ran from the defendant towards the river. The defendant and his associate followed demanding that the victim give them his wallet. The victim ran into the Waikato river to escape. The defendant and his associate threw large rocks at the victim while in the river. Eventually the defendant walked away, collected the victim's backpack that had been dropped earlier and left the scene with the backpack.

Propensity evidence

[13] Section 43 of the Evidence Act 2006 ("the Act") addresses the issue of propensity evidence intended to be offered by the prosecution against a defendant:

Propensity evidence offered by prosecution about defendants

- (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 that are the subject of the evidence have occurred:
 - (b) the connection in time between the acts, omissions, events, or circumstances that 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 that 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 that 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.

[14] The term propensity is defined in s 40(1) as follows:

Propensity rule

- (1) In this section and sections 41 to 43, **propensity evidence**—
 - (a) means evidence that tends to show a person’s propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events, or circumstances with which a person is alleged to have been involved; but
 - (b) does not include evidence of an act or omission that is—
 - (i) 1 of the elements of the offence for which the person is being tried; or
 - (ii) the cause of action in the proceeding in question.
- (2) A party may offer propensity evidence in a civil or criminal proceeding about any person.
- (3) However, propensity evidence about—
 - (a) a defendant in a criminal proceeding may be offered only in accordance with section 41 or 42 or 43, whichever section is applicable; and

- (b) a complainant in a sexual case in relation to the complainant's sexual experience may be offered only in accordance with section 44.
- (4) Evidence that is solely or mainly relevant to veracity is governed by the veracity rules set out in section 37 and, accordingly, this section does not apply to evidence of that kind.

[15] Propensity evidence may be offered by the prosecution provided the evidence has a probative value in relation to an issue in dispute in the trial which outweighs the risk of an unfairly prejudicial effect on the defendant.

Crown case

[16] It is accepted by the defendant that a robbery occurred. The co-defendant Farrant has pleaded guilty and has been sentenced. At the conclusion of the argument relating to the propensity application, the Crown raised a recent application that had been filed for an order pursuant to s 49 of the Evidence Act admitting the conviction of the co-defendant Farrant for the aggravated robbery of the victim. That application was not opposed and an order has been made accordingly.

[17] In those circumstances the Crown says that the issue in dispute to which the propensity evidence is directed is either:

- (a) Whether the defendant committed the alleged offending; and/or
- (b) The credibility of the witnesses for the prosecution.

[18] The Crown argues the propensity evidence would be probative of those issues.

[19] The Crown analysed the criteria under s 43(3) of the Act as follows:

- (a) *Frequency and connection in time*

Although there is a four and a half year gap between the two offences, the Crown says the defendant was firstly on bail for a significant portion of that time and subsequently in prison. The Crown argues in real

terms that the defendant only had a nine month opportunity to reoffend after his release from prison.

(b) *Similarity between acts*

The Crown says the following similarities are apparent:

- (i) They are both aggravated robberies
- (ii) They both occurred outdoors in popular public places in Hamilton city, albeit that the defendant and his co-offenders were alone with the complainants at the time they were robbed. There were no other members of the public about to witness the robberies at the time.
- (iii) The robberies were both opportunistic street robberies. The defendant took an opportunity when no other members of the public were about to act as witnesses and used objects that he happened to find nearby as weapons.
- (iv) Weapons were used by the defendant in both robberies. In 2012 he used a stake that was supporting a tree, and in 2017 he is alleged to have used a plastic chair obtained from [details deleted] near Hamilton lake where the robbery was committed.
- (v) Neither robbery was carried out alone. They were both carried out when the defendant was with associates. In the 2012 occasion all associates that the defendant was with at the time participated in the attack on the victim, and in 2017 one associate participated while others looked on.
- (vi) There was still an element of premeditation in both. In 2012 the defendant lured the victim down to the bank of the Waikato River on a pretext and in 2017 the defendant and his co-accused

are alleged to have discussed robbing the complainant between them before the robbery.

- (vii) On both occasions the defendant attacked the complainants without any warning at all. They were completely unsuspecting.
- (viii) The defendant's attack targeted the head on both occasions. The defendant struck the victim in the head with the wooden stake in 2012 and struck the complainant in the head with the plastic chair in 2017. Those strikes to the head were the first things that the defendant did on both occasions. There were no demands or pushes or escalation of attack from something minor up to a full scale attack to the head with a weapon. The attacks to the head came completely out of the blue.

(c) *Number of persons making similar allegations, collusion or suggestibility*

There is no suggestion that the victim in the earlier offending and the complainant are known to each other or could have, or have, colluded.

[20] The Crown refers to the Court of Appeal decision in *R v Tui*¹:

... it is important not to confuse the strength which the prosecution legitimately obtains from the probative value of propensity evidence with the concept of illegitimate prejudice.

[21] The Crown argues that there is no unfair prejudice arising from the admission of the propensity evidence and any prejudice arising can be addressed by an appropriate warning to the jury in the normal terms.

[22] The Crown argues that the probative value of the propensity evidence is high and that it outweighs the risk that the evidence may have an unfairly prejudicial effect

¹ *R v Tui* [2010] NZCA 243 at [19].

on the defendant. Further the Crown says any prejudicial effect would not be illegitimate nor undue and would be tempered by judicial direction as to proper use.

Defence case

[23] Mr Weir for the defendant confirmed the position in terms of the defence as being a denial that the defendant was involved in the offending. It is acknowledged that offending occurred in relation to the victim and that the co-defendant has been convicted and sentenced.

[24] Mr Weir accepted that the propensity evidence is relevant to the key issue as to whether the defendant committed the offence and is therefore directed towards an issue at trial. That in my view is an obvious and appropriate concession to make.

[25] Mr Weir referred to the Court of Appeal decision in *Rei v R*². Mr Weir referred in particular to the comments in that decision about whether previous convictions establish that the previous convictions made it more likely that the defendant committed the offence charged. Mr Weir referred in particular to the comments in *Rei* from the decision in *Freeman v R*³:

... 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. That is particularly so where the characteristics of the offending in question are unremarkable.

[26] In addressing the s 43(3) factors, Mr Weir argues that the propensity evidence value would be very low given that there is only one previous incident. He says further that the actual gap in time is more than five years, which Mr Weir says is significant and thereby reduces the probative value of the propensity evidence. The time spent by the defendant as a sentenced prisoner is acknowledged but Mr Weir points to the further time on remand and the nine months post release.

[27] In the context of similarities, Mr Weir argues that the similarities are common to offending of this nature. He also argues that the earlier offending involved more

² *Rei v R* [2012] NZCA 398.

³ *Freeman v R* [2010] NZCA 230.

serious circumstances with elements of guile and deception arising from the cultivation and trust from a relationship between the victim and the defendants developed over a number of days.

[28] Essentially the defence to the application is that the earlier offending illustrates no more than typical offending for a charge of this nature. The concerns expressed in the *Freeman* decision therefore apply. Mr Weir submits that the jury would be unfairly predisposed against the defendant if the propensity evidence were admitted. The defence argues that the probative value of the propensity evidence is low, the prejudicial effect correspondingly high which could not be addressed by judicial direction. Therefore Mr Weir argues the application should be refused.

Decision

[29] It is now apparent that the material facts alleged by the Crown about the robbery occurring will not be in dispute at trial. The focus of the trial will be whether or not the defendant was involved in the robbery with the convicted co-defendant.

[30] Certainly there are some dissimilarities between the two sets of events. In the earlier offending, the defendant formed a relationship with the victim over a number of days and it was only at the end of a three day period during which the parties spent time associating with each other, that the defendant and one other associate decided to attack and rob the victim. There is nothing apparent from the summary of facts as to the motivation on the defendant's part to change quite suddenly from maintaining a friendly relationship with the victim to attacking the victim.

[31] That lead-in type of relationship is not apparent in the current charge. The defendant and associates simply happened upon the complainant, who was a complete stranger, who was attacked from behind. While I accept that degree of distinction between the two sets of circumstances, it is not one that in my view carries a great deal of weight.

[32] In any event, the focus is less on dissimilarities and more on similarities. In that context, the Crown advances the similarities referred to in paragraph [19] above.

Those are legitimate similarities and indeed I did not discern any particular challenge to the Crown's submissions in respect of those similarities from Mr Weir. When the similarities are looked at globally in each case they are striking. In each case for example, the defendant has taken the opportunity, in conjunction with associates, to embark on an unprovoked attack from behind on a victim on his own, using the nearest object at hand as a weapon to strike the victim on the head from behind and then rob the victim when disabled.

[33] While there are differences in behaviour between the two sets of circumstances, they are differences of degree not of type of conduct. The fact that the propensity evidence is a single past incident does not detract from its tendency to show unusual behaviour and illustrate probative force relating to the current charge.

[34] The propensity evidence has a probative value in relation to what is probably the key issue in the current charge – that is the identity of the defendant as the attacker. There is in my view sufficient specificity or relevant signature to link the defendant's past conduct with the current charge.

[35] I therefore conclude and determine that the propensity evidence is highly probative to an issue at trial, namely the identity of the defendant as one of the attackers.

[36] There would be no doubt that such evidence would be prejudicial to the defendant but I am satisfied that such prejudice would not outweigh the probative value and would be appropriately managed by directions to the jury.

[37] I therefore determine that the propensity evidence proposed to be led by the Crown is admissible and may be led. The Crown's application is granted accordingly.

A S Menzies
District Court Judge