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**IN THE YOUTH COURT  
AT MANUKAU**

**I TE KŌTI TAIOHI  
KI MANUKAU**

**CRI-2021-292-0145  
[2021] NZYC 502**

**NEW ZEALAND POLICE  
Prosecutor**

v

**[JL]  
Young Person**

Hearing: 9 November 2021  
Appearances: N Walker for the Police  
V Letele for the Young Person  
Judgment: 15 November 2021

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**RESERVE DECISION OF JUDGE A M WHAREPOURI**

**[Pre-trial ruling on propensity evidence]**

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## **Introduction**

[1] [JL] is charged with aggravated robbery under s 235(1)(b) of the Crimes Act. The prosecution wishes to lead orthodox propensity evidence at his upcoming trial of earlier offending dealt with by way of a s 282 discharge. The trial is scheduled for 7 December 2021. The application is opposed by defence.

## **Background**

[2] The prosecution alleges that on 12 January 2021, at 7.50pm, the complainant was using a public walkway between two addresses on Massey Road, Mangere. A group of males (one of whom was [JL]) entered the walkway from the opposite end. Several wore hoodies with their hoods up. As they approached each other [JL] demanded money from the complainant. Acting out of fear the complainant handed over his wallet.

[3] [JL] then signalled to the other males who closed in around the complainant preventing him from running away. One of these males then took the complainant's iPhone 8 out from his pocket. He then grabbed the complainant's left wrist, revealed a knife and put it up to the complainant's ribs while demanding the PIN for the phone. Fearing for his safety the complainant told the male his PIN and the group then made off. The complainant then reported what happened to him to police.

[4] The complainant made three statements. In his first statement made on the night the complaint gave police a description of three of the males, one of whom wore a black t-shirt. The complainant felt as he recognised this male as someone he had met before from around Papatoetoe. Then in his second statement made on 28 January the complainant identified [JL] by name who was the male who took his wallet and was wearing the black t-shirt. The complainant said that [JL] had gone to his school.

[5] Following his identification [JL] was spoken to by police. He denied being in the public walkway or knowing anything about the robbery.

## **The trial issue**

[6] The defence accepts that identification will not be in issue, but the defendant denies acting together with those who carried out the aggravated robbery. Thus, the crucial issue at trial will be whether the defendant was physically proximate to an extent that his deliberate presence operated to support or heighten the threat to the complainant, and he intended this.<sup>1</sup>

## **The propensity evidence**

[7] The defendant was charged with his role as a knowing participant in an aggravated robbery on 24 July 2020. The facts of this offending was that [JL] and four other males were loitering in Aotea Square, central city Auckland at about 11.30pm. At the same time an international student was walking through a park that adjoins Aotea Square. The student was then confronted by the group and challenged to a fight. One of the males then kicked the victim. When the victim struck back in self-defence, all five males punched him about the body. One of the males with [JL] presented a knife, while a second male used a beer bottle and struck the victim about the head repeatedly. At this point the victim chose to comply with the group's demands. He then had his phone, wallet, car keys, jacket and shoes taken from him before the group ran away. The victim's phone was later discarded by the group because they were unable to understand the Asian characters on the phone and did not have the PIN to unlock it.

[8] [JL] was identified by police to have been involved. When spoken to he made frank admissions of playing an active role in the incident by punching and pushing the victim. Following his arrest, he appeared in Youth Court and entered a "not denied" plea to the charge of aggravated robbery. After a family group conference was held, a plan was set in place and following [JL]'s completion of that plan, [JL] was dealt with a by a discharge pursuant to s 282 of the Oranga Tamariki Act.<sup>2</sup>

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<sup>1</sup> The involvement needs to be immediate in the sense that they share a common purpose in confronting the complainant with the threat of and, if circumstances require, actual use of violence to facilitate the taking of property.

<sup>2</sup> [JL] was discharged on 10 March 2021, two months after the alleged offending.

## **The submissions**

[9] Ms Walker for the prosecution submits that alleged offending is similar in nature, time, place and circumstances to the propensity evidence such that [JL]’s “not denied” plea is relevant and highly probative. It makes the allegations of [JL]’s deliberate and knowing involvement in the charged offending more likely to be true because it confirms that the defendant has a tendency to knowingly act in concert with others when carrying out an aggravated robbery.

[10] For the defence Ms Letele submits the proposed propensity evidence is not sufficiently similar, and in fact there are significant differences between the index offending and the present allegations. Ms Letele also submits that the proposed propensity evidence does not support the tendency pointed to by the prosecution and is unfairly prejudicial.

## **Legal principles**

[11] I start with considering the effect of a discharge under s 282. Section 282(2) states that a charge discharged under subsection (1) is “deemed never to have been filed”.

[12] As noted in *Police v HC*:<sup>3</sup>

“A s 282 discharge is significant because if it is granted it has the effect as though these charges had never been laid in the first place. In other words, there is no formal record kept of a s 282 discharge being granted. That has significant consequences for any young person. In particular, if a record is kept it may well restrict your ability to travel in the future. If a record is kept it may require you to disclose that to any employer or potential employer. Equally, a number of job applications these days require a person not only to disclose any convictions they may have, if I use that word again loosely, but it equally requires you to disclose whether any charges have ever been laid against you.”

[13] Ms Letele accepted from the outset that a s 282 discharge is capable of being the subject of a propensity application. This was likely a pragmatic decision given that the consequence of a s 282 discharge is as if the “charge” had never been laid, not

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<sup>3</sup> [2016] NZYC 218 per Judge Davis.

that the admitted facts (or at least “not denied”) which underpin the proposed propensity evidence had never occurred. And furthermore, because higher courts have now made clear that even a prior acquittal may be the subject of a propensity application.<sup>4</sup> Moreover, even proceedings which have been the subject of a stay may be adduced as propensity evidence in the case of another complainant.<sup>5</sup> Thus, while a fuller exposition of the legal arguments may have been beneficial one can well understand the defence concession. The issue for this court then becomes if the test of admission is met.

[14] Section 40 of the Evidence Act states propensity evidence is “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”.

[15] Section 43 provides:

**“43 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:

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<sup>4</sup> See for example *R v K* [2019] NZSC 46.

<sup>5</sup> *R v Armitage* [2017] NZCA 63.

- (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.

[16] While s 43(3) sets out the non-exhaustive considerations when assessing the probative value of the orthodox propensity evidence, the evidence might still be excluded however under s 43(4) if it is “likely to unfairly predispose the factfinder against the defendant” and “the factfinder will tend to give disproportionate weight to evidence of those other acts”.

[17] The Supreme Court in *R v Mohammed* stated:<sup>6</sup>

“The rationale for the admission of propensity evidence rests largely...on the concepts of linkage and coincidence. The greater the linkage or coincidence provided by the propensity evidence, the greater the probative value that evidence is likely to have. It is important to note, however, that the definition of propensity evidence refers to a tendency to act in a particular way or to have a particular state of mind. It is necessary, therefore, that the propensity have some specificity about it. That specificity, in order to be probative, must be able to be linked in some way with the conduct or mental state alleged to constitute the offence for which the person is being tried.”

## **Analysis**

[18] The propensity evidence must have sufficient particularity to be probative. After considering the proposed propensity evidence and the alleged offending, I consider that there is sufficient similarity between the two such that the propensity

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<sup>6</sup> (2011) 25 CRNZ 223 at para [3].

evidence has real probative force in assisting in determining the crucial issue where the index offending is concerned. My conclusion is based on the following. Firstly, the allegations here relate to an event that occurred only 6 months after the events in Aotea Square. Thus, they are closely connected in time. The fact the proposed propensity evidence emanates from a single event is of no real moment because a single act can be the basis for propensity.<sup>7</sup>

[19] Secondly, there are several similarities between the propensity offending and the present allegations. Both concern street robberies carried out by a group of males (same in number) where a knife was presented. Further, both involved the targeting of a lone individual out walking at night in a secluded or semi-secluded setting. And, the valuable property taken in both instances included wallets and a cell phone. While I accept there are some differences between the two episodes the Court of Appeal has previously said such differences are irrelevant when assessing the underlying propensity.<sup>8</sup> In addition, I agree with the Crown that the most significant difference pointed to by the defence namely the use of actual violence in the July 2020 offending by [JL] and his co-offenders (punching and assault with a bottle) can be explained by the victim's reaction in fighting back. By contrast the complainant in the alleged offending was compliant. Thus, I consider the propensity evidence and the alleged offending involve broadly similar conduct.

[20] Thirdly, while it is unfortunately common for young men to threaten or actually perpetrate violence towards others they encounter on the street, what is slightly unusual here is [JL] being in the company of others who are in the possession of a knife and present them to extract property from strangers.

[21] Lastly, any evidence that is probative will be prejudicial to the accused but not normally unfairly so. The relevance of the proposed evidence is obvious. If the trial Judge accepts the propensity evidence that [JL] knowingly acted in concert with others to carry out an aggravated robbery where a knife was presented, then such evidence is logically probative in deciding whether or not [JL] was acting in concert with others

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<sup>7</sup> See *R v Mata* [2009] NZCA 254 at [36]. However, the fewer actions relied upon can make it less likely that the relevant propensity can be proved.

<sup>8</sup> *M v R* [2013] NZCA 239 at paras [18]–[19]; *C v R* [2015] NZCA 262 at paras [10]–[12]; and *R v O* [2017] NZCA 472 at para [9].

in the way the complainant says he did in July 2020. Thus, this evidence is prejudicial but in a very proper and legitimate way. In addition, unfairness is generally found when and to the extent the evidence carries with it a risk that the decision maker will use it for an improper purpose or in support of an impermissible process of reasoning. In assessing the probative value/unfair prejudice balance I believe that a Judge sitting alone will guard against any improper reasoning meaning that risk of unfair prejudice is remote.<sup>9</sup>

## **Conclusion**

[22] I consider that the propensity evidence is relevant in that it points to a tendency on the part of [JL] to act in a particular way. That is to be deliberately and knowingly present in close proximity to others (acting with them) to commit an aggravated robbery. Any unfair prejudice will be able to be negated by the Judge reminding him or herself of the appropriate directions normally given to a jury on the use of this propensity evidence and prejudice more generally.

[23] The Crown's application to adduce the propensity evidence is granted.

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Judge M Wharepouri  
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe  
Date of authentication | Rā motuhēhēnga: 17/11/2021

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<sup>9</sup> For example, any risk of unfair prejudice can be dealt with by the trial Judge reminding him or herself against being influenced by prejudice or emotion.