IN THE DISTRICT COURT
AT INVERCARGILL

CRI-2015-025-001959
[2016] NZDC 3530

NEW ZEALAND POLICE
Prosecutor

v

JUNIOR ORICA
Defendant

Date of Ruling: 3 March 2016

Appearances: Sergeant D Harvey for the Prosecutor
J Ross for the Defendant

Judgment: 3 March 2016

RULING OF JUDGE M J CALLAGHAN

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[1] Junior Orica faces two charges alleged to have occurred on 27 October 2015 at Invercargill. The first being that he being a male, assaulted a female, namely Madeline Wilkinson; and the second being that he breached a protection order in favour of Madeline Wilkinson by physically abusing the protected person.

[2] He is due to have a hearing in respect of a Judge alone trial on those charges, I am told it is next Tuesday, 8 March 2016. The Crown to seek to call propensity evidence which is opposed by the defendant.

[3] The current allegations are that on 27 October 2015 the defendant and the victim were at their common address in Invercargill; the complainant having arrived back at her place at about 8.30 pm with her father. She went inside the house and the

defendant went outside the house for about five minutes. When he came back inside he was, she describes as "aggro" at her and yelling at her because she was supposed to have been home by 6.00 pm. They were in the lounge of the house and he then grabbed her by the hair with both hands. She says that the left side of her head hurt the most so he must have grabbed that side the hardest (or the most). She was then pulled to the ground and dragged along the ground a wee bit. She also said that she had covered her face with her arms because, "he was trying to punch me in the face," that was why he started pulling her hair because she had tried to protect her face.

[4] The complainant said that after being pulled to the ground she remembers seeing her daughter and she also says that she does not know but at some stage she got hit in the mouth by the defendant because she was bleeding. The reason that the assault stopped was because someone came to the door. Immediately that happened she was left alone, she ran to the back of the house and jumped out of the window into the back yard, and went to the flat at the back of the house where they were residing.

[5] There was a protection order in place. I believe that was issued as a result of a conviction which was entered in October 2013.

[6] The proposed propensity evidence that is sought to be called relates to two convictions which occurred in 2013 and to another incident on or about 5 July 2015; all three previous incidents relate to the same complainant.

[7] The facts of the March 2013 incident, are that on the evening of 28 February 2013 the complainant and defendant had been out and they returned home at about 3.00 am on 1 March. At 4.30 am on 1 March the defendant began to shake the victim believing that they would be late for work and blaming her. The victim got out of her bed and was approached by the defendant who said it was her fault that they would be late and he began punching her about the head and face using a closed fist. The victim fell to the ground, curling up in a ball, holding her hands around her face as the defendant continued to punch her about the head. She ran from the address before returning a short time later to find the address empty.

The complainant locked the apartment door and phoned the police who found the defendant outside. The defendant pleaded guilty to that offence.

[8] The second incident occurred in Whanganui. A temporary protection order was issued on 24 September 2013 in favour of the complainant with the defendant being the respondent. At 10.00 am on Wednesday, 16 October, both the defendant and the complainant were at a residential address in Whanganui, the defendant left the address and went to a local library. He returned at about 11.00 pm to the house where the victim (or the complainant) was present and both children were asleep in bed. When he entered the address the defendant went to the kitchen where the victim was and asked if she had been speaking to another male. She replied that she had and the defendant punched her to the right side of her face with a closed fist and then punched her several more times to the area about her head. He verbally abused her. She subsequently curled up into a ball in a defensive position under the kitchen table and covered her face. The defendant continued to abuse her while striking her. The defendant stopped this act and the victim got out from under the table and sat on a nearby seat. Later a family member of the complainant/victim arrived at the address and the victim went to her bedroom where she remained for the evening.

[9] At about 8.00 am on the next day (17 October) the complainant got out of bed to get one of her children ready for school. Having organised the child she went back to the bedroom where the defendant was on the bed and a discussion began which turned to a verbal altercation between the two of them. It became heated, and the defendant started to verbally abuse the complainant. The defendant then left the bedroom upon the arrival of a male associate. The complainant remained in the bedroom but was upset and crying. The defendant then returned to the bedroom and asked why the complainant was upset. The complainant told him to leave the address which caused him to become angry. He then punched her to the side of her head with a closed fist and has left the room. The complainant phoned the police on her cellphone but the defendant re-entered and removed the phone from her. She then gathered some clothing preparing to leave the address and then went into the bathroom for a shower. The defendant entered the bathroom and another argument started. The complainant exited the bathroom and went into her bedroom where she dressed another child for school. After this the complainant then left the address, ran

down Harper Street where she had located a member of the public and used their phone to contact the police. The defendant pleaded guilty to the charges of breaching the protection order and male assaults female.

[10] The third incident was an incident which occurred on or about 5 July 2015. It occurred in Invercargill. The 2013 protection order was still in place. There had been an argument ongoing over a period of about a week where the defendant had been telling the complainant "to move out." There had been arguments over that. On the morning of 5 July the complainant was lying on the bed in the lounge. The defendant was also in the lounge on a couch, the children were present. The argument started and the defendant told the complainant to move out. She was happy to move out but she wanted to take some of her possessions. She told him that he could hold onto the majority of the property and she would just take her cellphone, but he would not let her take the cellphone or any other possessions. Suddenly he stood up and walked over to the bed. She says that she knew by the look on his face and by the tone of his voice that he was going to hit her "because that was what it was like the last time," so she curled up into a ball, covered her head to stop him from punching her in the face. She was lying on her stomach with her face covered, facing into the bed. The defendant then began punching her in the back of the head; she estimates about 10 times. He was also hitting the back of her hands because they were over the back of her head. She advised the defendant she was going to call the police, to which he responded, "I'll give you something to call the cops about," he then grabbed her by the hair and pulled her back off the bed. She was then face down on the floor. At that stage there was a knock at the door; the defendant walked off to answer the door. She got up and left the property and went with her father to the police station.

[11] The defendant was charged in respect of those matters but did not result in a conviction as the charges were dismissed because the complainant did not come to Court. The statement that she made to the police, dated 5 July 2015, was a formal statement. At the bottom of the statement she put, "I confirm the truth and accuracy of this statement. I make this statement with the knowledge that it is to be used in Court proceedings. I am aware that it is an offence to make a statement that is

known by me to be false or intended by me to mislead." She signed that statement on 5 July 2015.

[12] The issue at this trial will be one of credibility. The defendant, through his counsel, has indicated that the issue at the trial is that the allegations which he is facing did not occur, that there was a physical contact between the two parties but it was de minimis in that the defendant was restraining the complainant by holding her arms by her side.

[13] The signalling of that issue would indicate that the defendant will more likely than not be forced to give evidence at the trial which is to be conducted because he will in effect be attacking the credibility of the complainant. In the ordinary course of the trial it would be expected that he would have to give evidence to show the fact finder that there was a different scenario to that alleged by the complainant of events that occurred on 27 October 2015.

[14] The prosecution position in respect of the adducing of the propensity evidence is that they say that it shows the defendant has previously acted in a strikingly similar way to that which is the basis of the current male assaults female and breach of protection order charges. In reliance of s 43(3) the prosecution submit that there are a number of relevant factors which can be used to assess the probative value of the propensity evidence.

[15] Firstly, the frequency. The first two incidents to which there were pleas of guilty, were within a seven-month timeframe and that although there was a two-year gap until the defendant was charged in relation to the offending on 5 July, the only reason that those charges were dismissed was because the complainant failed to give evidence in Court. But the frequency arises also because the current set of offending occurred on 27 October which is only about three months after the 5 July incident. The prosecution say that the connection in time between the acts is relevant; that the four acts are relatively close in time. The first incident occurring in March 2013 and the last occurring in October 2015; a total timeframe of two years and six months.

[16] The prosecution also rely on the similarity between the acts. All four incidents relate to offending at a residential address where both parties were residing. They involve the same victim in each case with whom the defendant was in a domestic relationship. The parties had been arguing in all four incidents and on each occasion the defendant has punched or struck the victim about the head causing the victim to cover her head with her hands to protect herself. On the previous occasion of July 2015, the defendant has dragged the victim by the hair as is alleged in the current charge.

[17] In relation to the number of persons making the allegations, the prosecution say that all four incidents relate to the same victim. There can be no suggestion of collusion because it is the same victim.

[18] The defence position in relation to the frequency issue is that there is little probative value to be gained from the previous incidents and that limited probative value should be assigned to the frequency of the prior events.

[19] In respect to the connection in time, the defence refer me to the decision of *M v R* [2010] NZCA 219 at para 35 and say that the Court of Appeal said a two and a half year gap between incidents is a significant gap in time which tended to detract from the probative value of each offence as evidence of the commission of the other.

[20] As to similarity, the defence says that there is little probative value arises from the fact of the propensity evidence demonstrating that the defendant has committed previous offences of a general kind as alleged in the current charges and that the Court should also consider the dissimilarities which are apparent from the allegations and convictions which the defendant faces.

[21] As to the current allegation, the defence says that it is a yanking of the complainant's hair, a dragging to the ground, a pulling along the ground by her hair and at some point striking her in the mouth and says that it is not a sustained assault. The 1 March 2013 assault, the defence says, was a sustained assault; there was punching to the victim, to the head and face, the victim fell to the ground and curled herself into a ball, covering her hands and while on the ground the defendant

continued to punch about the head. They say that is a dissimilar incident to the current one because the current incident cannot be a sustained assault.

[22] As 17 October 2013, again the defence says that is a sustained assault and this offending cannot be categorised when compared to the October 2015 event as a sustained and prolonged assault because in October 2013 it took place over two distinct time periods.

[23] As to the July 2015 event, again defence say it is dissimilar. The allegation is more serious in July 2015 and it was far more sustained than the current allegation.

[24] As to the allegations being made by one complainant, the defence says that that has a relatively low probative value and also says in respect of the unusualness of the features that there is really nothing unusual in respect of any of the events within a sphere of domestic violence, punches to the head cannot be characterised as unusual. Dragging the victim by the hair could be considered unusual, but the only time that has occurred was in the unproven allegation of July 2015. The tendency to drag by the hair is an unproven factor. There are, the defence say, no unusual features present.

[25] Counsel therefore submits that little probative value is contained in the propensity evidence. He then submitted about the prejudicial effect of the propensity evidence; I will come back to that shortly.

[26] The issue of time being a period of two and a half years was of some import here. The police referred me to the decision of *R v Wallace* HC Auckland CRI-2010-092-2879, 11 October 2010. At para 26 of that decision Brewer J said:

> The probative value of propensity evidence increases if there is a connection in time between incidents. Again as a matter of common sense, a series of acts occurring within a relatively short period of time can show a strong propensity to act in a particular way and hence increase the probative value of the evidence. In this case there were five years between the incidents. As *White v R* demonstrates, that does not preclude the evidence being considered as propensity evidence. But it does not add materially to its probative value.

[27] The defence referred me to *M v R* and at para 35 the Court of Appeal said in relation to connection in time:

> The gap between the two alleged events is almost two and a half years. While the Judge might be right that there was a "proximate connection", we consider that the critical issue is whether this factor enhances or detracts from the probative value of the propensity evidence. Rather than enhancing probative value, the significant gap in time tends to detract from it.

That case related to sexual offending which related to a complaint not made initially until a later timeframe and was not acted upon until the matters were being argued before the Court in respect of joinder of counts as well as cross-admissibility of propensity evidence.

[28] In respect of the time factor, I believe when the weighing up the balancing factor here that the time factor is relevant to my consideration. I believe that it is appropriate that I consider the time factor when I look at the particular facts of each of the incidents to show whether or not the evidence should be allowed by propensity.

[29] In the March 2013 incident the factors that I consider were relevant there to the current offending are, firstly, it was in a bedroom; it was the same victim; there was anger and abuse; there was punching to the head and face with a closed fist; the victim went to the ground; the victim curled up; she had her hands around her face to protect face; she was continued to be hit once she was on the ground; she ran to escape the assault.

[30] In October 2013 the offence occurred in the bedroom as well as the kitchen; again there was a discussion; there was anger and abuse; there were punches to the side of the head; the victim tried to leave the address; she went to the bathroom from the bedroom; when she got the opportunity she ran from the address; the punches were to the right side of the face and several punches to the head; again she was curled up in a ball covering her face but the striking continued.

[31] In July 2015, she was in bed; there is an argument; she is curled up in a ball; she has covered her head; there were punches to the back of her head multiple times; here she was grabbed by the hair and dragged off the bed; and when the opportunity

arrived she got up and left the address by the most appropriate means of escape and was taken to the police by her father.

[32] On 27 October 2015 (the current events), she is pulled by the hair; she covers her face to stop being hit but nonetheless is then dragged to the ground and pulled down onto the ground and dragged along the ground; she is hit in the face and the mouth; and again she runs to escape.

[33] Those factors, when I assess the frequency, the connection in time and the extent of similarity, accepting that there is a two and a half year gap, I find that the factors that are relevant across the four incidents are such that the evidence is strikingly similar and is propensity evidence of the defendant's reaction to an argument situation arising within the domestic relationship, the manner in which the victim reacts is something which is important and consistent across the offending, and also the fact that she tries to extricate herself from the particular scenes by the most appropriate and fastest method possible.

[34] The fact that it is only one complainant to me has little impact in this instance because the defendant has admitted the offences in 2013 by his pleas of guilty, and the factors which I have set out from the same victim are consistent upon those that have been admitted and the one that he was not found guilty of because of the failure of the complainant to give evidence, and the factors that are involved in the current charging.

[35] The next issue that I need to consider is whether or not the admission of the evidence would have a prejudicial effect upon the conduct of the hearing. It is mandatory for the Court to consider whether the evidence will unfairly predispose the fact finder against the accused and whether or not the fact finder will give disproportionate weight to the evidence in reaching the decision in the hearing. On that point, the defence submit that even though it is not a jury trial, a Judge alone is not insulated from being unfairly predisposed against a defendant and accordingly that there is a real risk of unfair prejudice to the defendant if the propensity evidence is admitted.

[36] The Judge that hears this matter will be very conscious of the fact that he or she must be vigilant about what weight, if any, she or he will attach to the propensity evidence and will no doubt remind him or herself about the weight and purpose that the use of propensity evidence can be put to. The propensity evidence, in my view, is highly probative in this case. It shows that the defendant acts in a way towards the complainant and the complainant reacts in a particular way to his attacks which would indicate that at the hearing, where the issue will be one of credibility (ie, who is to be believed) whether the Court can accept the evidence with respect to the credibility issue.

[37] Accordingly, I rule that the three incidents of propensity evidence (ie, March 2013, October 2013 and July 2015 evidence) sought to be admitted, are admissible and maybe lead at the trial of the defendant.

[38] I will leave it to the prosecution and counsel to discuss how the evidence is to be lead. If agreement cannot be reached how the evidence is to be lead, bearing in mind that the defendant has pleaded guilty to two sets of the propensity evidence, then the matter can be raised with the Judge on the day of the hearing. I would suggest that a s 9 agreement would be the appropriate method of having the matter put before the Court.

M J Callaghan
District Court Judge