EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

IN THE DISTRICT COURT
AT GISBORNE

CRI-2015-016-001041
[2016] NZDC 7289

THE CROWN

v

MONTY HUDNALL

Hearing: 29 January 2016

Appearances: R Guthrie for the Crown
R Donnelly for the Defendant

Judgment: 2 May 2016

JUDGMENT OF JUDGE W P CATHCART

Introduction

[1] The defendant is to stand trial on three charges of sexual violation by unlawful sexual connection and two charges of indecent assault on a child. At the relevant time, the complainant can be described as the defendant's stepdaughter. She was seven years of age at the time of the alleged offending.

[2] In essence, the allegations are that the defendant sexually violated the stepdaughter by anal and digital penetration. One of the indecent assault charges alleges that act of kissing the complainant. These three charges are alleged to have occurred at the complainant's home between 25 and 27 December 2014. The second indecent assault charge alleges that the defendant knelt down between the child's

legs and pulled her pants down. It is said this incident was observed by the complainant's mother on or about 11 January 2015.

[3] The trial is scheduled to commence in the week of 30 May 2016.

[4] There are three applications for pre–trial orders pursuant to s 101 Criminal Procedure Act 2011. The categories of evidence under challenge are as follows:

(a) The Crown seeks to lead evidence that in the weeks leading up to the offending, the defendant accessed via a smart TV system at the home pornographic sites that relate to fantasy based inter–familial sexual activity on specific pornographic sites. The Crown does not seek to lead evidence of all of the pornographic sites accessed but only those specifically related to "inter–familial sexual activity". The Crown argues that this evidence is admissible as propensity evidence.

(b) The Crown wishes to lead in the complainant's evidence–in–chief a passage at page 18 of the transcript, lines 17 to 28, of her evidential interview. The defence object on the ground that it is a prior consistent statement and thus inadmissible pursuant to s 35 Evidence Act 2006 unless and until triggered by s 35(2).

(c) The Crown seeks to lead evidence from the complainant's mother, Ms Tara Ward. That evidence includes a passage recorded at page 8 at [3] of her statement. The defence object to that passage of evidence on the grounds that it is irrelevant and prejudicial.

Category (a): the propensity evidence issue

[5] It is the Crown's case that between 2 November 2014 and 10 December 2014 the defendant accessed various pornographic sites using Ms Ward's Smart TV system. Without setting forth the exact description of the pornographic sites, the specifics of which are delineated in the Crown's application, the sites can be

conveniently categorised as being related to the topic of inter–familial sexual activity.

[6] The Crown submits that the evidence of the defendant accessing these pornographic sites in the weeks leading up to the alleged offending demonstrates that the defendant had a tendency towards a particular state of mind, which it defined as follows:

> The defendant has a propensity to have a particular state of mind, that is, to be interested in inter–familial sexual activity particularly that between parents/step–parents and children.[1]

[7] If the evidence is ruled admissible, the Crown proposes to lead no more than the names of the various sites and the dates and times accessed either by way of agreed summary of facts or through the officer in charge of the case.

Current allegations

[8] According to the complainant's account, the incidents occurred in the lounge of the house. The defendant was sleeping in the lounge with two other children. According to the complainant's account, she awoke to find the defendant on the floor next to her, kissing her on the mouth. She alleges that the defendant then placed his penis in her anus.

[9] Notwithstanding the incredibly serious incident that had just occurred, the complainant says that she went back to sleep. She says that she awoke again to find the defendant had placed her on a nearby couch where he again anally violated her. During this sequence the complainant said that the defendant made her touch his penis. She then describes the defendant getting off the couch and wrapping himself under a rug which was lying on the lounge floor.

[10] As noted earlier, the evidence supporting the second indecent assault charge comes from the complainant's mother. Late in the evening on 11 January 2015, she observed the complainant lying on her back with the defendant knelt between her legs. She says that the complainant's pants were down to just above her knees and

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[1] Memorandum of Crown counsel in support of pre–trial orders dated 22 January 2015 at [5]

that the defendant had his hands on the top of her pants. She gained the distinct impression that the defendant was in the process of pulling the complainant's pants off.

[11] The Crown intends to call evidence from the complainant's aunty, Ms Rose Thomas, who will testify that during the relevant period she observed the defendant lying naked under a rug in the lounge when the complainant and the two other children were asleep in that room.

[12] The complainant's mother confronted the defendant about this observation. According to the mother's evidence, the defendant admitted to being naked in the lounge and masturbating while the children were in the room. The defendant subsequently admitted these allegations in his police DVD interview.

[13] In June 2015, the complainant's mother became aware that various pornographic sites had been accessed on her Smart TV in the lounge between 2 November and 10 December 2015. According to the Crown's theory, a number of these sites were accessed at a time when the defendant would have been at home and getting ready for work.

Relevant legal principles governing the admission of propensity evidence

[14] As is prescribed by statute, propensity evidence is evidence that tends to show a person's propensity to act in a certain way or to have a particular state of mind.[2] In determining the relevancy of the propensity evidence, the Court is required to consider the nature of the issues at the trial.[3] The overarching principle is that relevant propensity evidence is to be admitted only if it has a probative value in relation to an issue in dispute which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant.[4]

[15] It is common ground that the issue in dispute is whether the events, as described by the complainant and the mother, actually happened. That issue will

[2] Evidence Act 2006, s 40(1)(a)
[3] Evidence Act 2006, s 43(2)
[4] Evidence Act 2006, s 43(1)

correspondingly rest almost entirely on the jury's assessment of the credibility and reliability of the complainant and, to some degree, the complainant's mother.

[16] Both parties referred to a number of cases which deal with the vexing issue as to whether evidence relating to a defendant's possession of pornography or accessing it is admissible in cases involving allegations of sexual offences against children. On that topic, I have considered the Court of Appeal decisions in *R v Hurring*,[5] *D (CA 801/2013) v R*,[6] and *D (CA383/2012) v R.*[7] Also, I have considered the High Court decision in *R v F.*[8]

[17] The guiding principles for the admission of propensity evidence are set forth in the Supreme Court decision in *Mohamed v R.*[9] The rationale for the admission of orthodox propensity evidence rests on the concept of linkage of coincidence. The greater the linkage or coincidence provided by the propensity evidence, the greater the probative value that the evidence is likely to have.[10] The strength of that linkage is analysed through the rubric of the s 43(3) factors.

[18] As a matter of logic, the level of particularity in the propensity evidence reflects the strength of the link between that evidence and the factual matrix of the offences charged. Thus the relevant propensity pattern must have some specificity about it.[11]

Evaluation of propensity evidence

[19] In this case, the evidence clearly is being advanced to invoke ideas about coincidence or probability in connection with the defendant's state of mind. In essence, the Crown argues that the defendant's timely predilection towards fantasy pornography relating to inter–familial sexual conduct makes it more likely that the defendant carried out the acts against the complainant with the requisite state of mind.

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[5] [2008] NZCA 245
[6] [2014] NZCA 369
[7] [2013] NZCA 260
[8] [2013 NZHC 2028
[9] [2011] NZSC 52
[10] [2011] NZSC 52 at [3]
[11] [2011] NZSC 52 at [3]

[20] At the outset, it has to be said that the Crown's description of the alleged mental predilection is pitched at a general level. Defined in that way, it could be argued that the propensity evidence is broadly linked to an assessment of the mental elements alleged to constitute the index offending.

[21] When this evidence of predilection passes through the s 43 rubric, the Crown says the link gets stronger. The Crown correctly points out that there is proximity in time between the time period of the alleged offending and the defendant's accessing the pornographic sites. Second, the Crown correctly notes that the propensity evidence demonstrates that the defendant has an unusual interest in searching for pornographic sites that relate to fantasy-based sexual connection between family members and a young child, particularly a stepdaughter. Third, the Crown contends that there is a degree of similarity between the description of the acts portrayed on these fantasy sites and the more serious acts alleged here. Both involve penetrative sex between family members, albeit that the former is fantasy only.

[22] The Crown relied on the Court of Appeal decision in *D (CA801/2013) v R*.[12] In that case, the appellant was convicted on four charges (three of which were representative) of sexual violation by rape; four representative counts of sexual violation by unlawful sexual connection; four representative charges of inducing a child to perform an indecent act; one charge of indecency by way of anal intercourse; and five charges of assault on a child, three of which were representative. The victims in that case were the defendant's stepson and stepdaughter.

[23] In *D (CA801/2013) v R*, the appellant, on various occasions, had used tape to tie his stepdaughter's hands or gag her. Also, the Crown's case was that the appellant showed both the stepson and stepdaughter child pornography on his computer; in particular images of adult males having vaginal and/or oral sex with young children.

[24] Evidence of the appellant's conviction on 20 charges of possession of objectionable publications was ruled admissible as propensity evidence prior to trial.

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[12] [2014] NZCA 369

The images referred to in the charges showed males engaged in sexual activity with infants and children. Most of the images showed infants or children who were restrained and gagged during the appalling criminal activity.[13]

[25] In *D (CA/801/2013) v R*,[14] the level of particularity that linked the propensity evidence to the index offending was much stronger. There was similarity in the ages of the children involved, the similarity of anal penetration of a young boy by a male, and the similarity in the aspects of the restraint and gagging of the children. The appellant's abnormal and unusual sexual interest in children was self-evidently sufficiently unusual. In combination, these factors rendered the propensity evidence of high probative value to the facts alleged in that case. That is not the case here.

[26] Here, the propensity material does have some probative value because the fantasy mindset can easily become a real mindset. But one does not necessarily lead to the other. The supposed likelihood that the defendant would sexually offend against the complainant in the way alleged because he developed an unusual interest in fictional pornography with familial titles is not a strong coincidence. I therefore do not accept the Crown's submission that the probative value of the propensity evidence is high.

[27] In contrast, the prejudicial effect of the evidence on the defendant is considerable. The admission of the evidence carries with it the real risk that the jury may view the defendant with disgust and thus be overwhelmed by it. Judicial directions to the jury against the improper use of the evidence would not be sufficient to guard against that risk. In the final analysis, however, I take the view that the propensity evidence does not have sufficient probative value to outweigh the risk that the evidence may have an unfairly prejudicial effect on the defendant. The evidence falls at that hurdle.

[28] The propensity evidence is ruled inadmissible.

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[13] [2014] NZCA 369 at [9]
[14] [2014] NZCA 369

Category (b): the s 35 Evidence Act issue

[29] The Crown seeks to lead in the complaint's evidence–in–chief statements that: she first spoke to her mother "about these things" and; that she felt "good" after she told her mother because she had been "keeping it in [for] so long". The disputed passage also includes the complainant's statement that she did not initially want to tell her mother because the defendant and her mother were in a relationship and she thought her mother "would feel sad".[15]

[30] The Crown's position is that this evidence does not constitute a prior consistent statement within the definition of s 35 Evidence Act. The Crown argues that the evidence does not constitute a spoken assertion by the complainant about what occurred, but simply about the fact of speaking to her mother. In the Crown's view, this evidence does not breach s 35. The Crown considers that it is relevant to the general narrative and timeline of the offending.

[31] In this case, the complainant did not report the alleged offending immediately. It is common ground that the complainant told her mother "about these things" approximately one month after the alleged offending.

[32] The Crown relies on the following passage from the Supreme Court decision in *Rongonui v R*[16] where the majority said:

> Whereas evidence simply to the effect that a complainant has spoken to someone can be regarded as amounting only to evidence of conduct, rather than evidence of an assertion of some matter, and is admissible if the fact of her doing so is relevant to a matter in issue, the position changes when reference is made to the content of what is being said. The difference is between the fact of speaking and making a spoken assertion of some matter.

[33] For the defendant, Mr Donnelly argues that the Crown's reliance on the passage in *Rongonui* must be placed in context. I agree. In that passage, the Supreme Court accepted the general proposition that the act of a complainant speaking to someone can be regarded as amounting only to evidence of conduct rather than a spoken assertion of some matter. However, the observation was made in the context of the Court dealing with the notion about whether the victim's

[15] These passages are taken from page 18 of the complainant's evidential video line 17–28
[16] [2010] NZSC 92

evidence–in–chief that she told her friends "what had happened" went beyond the mere fact of her speaking to her friends. The Supreme Court considered that the statement was a spoken assertion by the victim that she had been sexually violated by Mr Rongonui. Although the victim did not specify the content of "what had happened" the context of the statement raised the obvious inference that she had. The majority in *Rongonui* rejected the use of such a device to thwart the s 35 principles.

[34] Here, the Crown proposes to lead evidence from the complainant that she told her mother "about these things". The inference the jury is bound to draw from the context of this statement is obvious— that is, the victim told her mother about the substantial allegations. The evidence thus amounts to a previous consistent statement and it is *prima facie* inadmissible.

[35] This is not a case where the required challenge under s 35(2) to the complainant's veracity or accuracy has been triggered prior to trial. A simple denial of the offending and a not guilty plea does not trigger the s 35(2) response unless that challenge is clearly made.

[36] As observed by the Court of Appeal in *H (CA671/11)* v *R*,[17] a not guilty plea, even if expanded to an explanation that involves the claim that the events did not happen, is not sufficient to allow the complainant to give evidence of a prior consistent statement as part of her evidence–in–chief.

[37] In sum, the Crown is not entitled to lead this evidence–in–chief unless, and until, the trigger under s 35(2) occurs.

Category (c): complainant's mother's evidence of reporting the matter to the police

[38] The Crown and the defence have agreed that portions of the statement by the complainant's mother will be redacted for trial. This application relates only to one portion of her statement. The evidence in dispute relates to the complainant's mother leaving the defendant's home on 14 February 2015 and deciding to report the matter

[17] [2012] NZCA 102 at [10] – [13]

to the police having just confronted the defendant about the allegations. The witness says that she left the defendant's house and "decided that it was time to call the police".

[39] The Crown points out that the delay in reporting by the complainant, and then by her mother, may be an issue raised at trial. The Crown argues that the disputed evidence is relevant because it provides contextual background about the timeframes and sequence of events. The Crown argues that the evidence is relevant to that issue and is not unfairly prejudicial in terms of s 8 Evidence Act.

[40] Mr Donnelly argues that the fact that the complainant's mother "decided" it was time to call the police carries an inherent assertion that she believed the complainant's allegations. Mr Donnelly does not suggest such evidence is always irrelevant and he acknowledged that it can be led as part of the narrative. He points out that the defence has not formally raised "delay" as a factor in the case.

[41] He contends that the jury's reliance on the mother's evidence that she "decided" it was time to go to the police carries with it inherent prejudice. He says that the evidence amounts to an assertion that the complainant's mother believed the defendant was lying when he rejected the allegations put to him.

[42] I accept the Crown's position on this matter. The evidence that the complainant's mother decided to go to the police after confronting the defendant provides an important narrative, especially in terms of timeframes. Any residual prejudice to the defendant can be addressed by a direction to the jury that they are not to draw any adverse inference by the mother's decision to go to the Police and to remind them that they are the judges of fact not the complainant's mother.

[43] The application to lead that evidence–in–chief is granted.

W P Cathcart
District Court Judge