

**IN THE DISTRICT COURT
AT ROTORUA**

**CRI-2015-063-001548
CRI-2015-063-003212
[2016] NZDC 9957**

THE QUEEN

v

RUTH ADELE WHEELER

Hearing: 27 May 2016
Appearances: A Hill for the Crown
I Tucker and A Burns for the Defendant
Judgment: 3 June 2016

**JUDGMENT OF JUDGE P W COOPER
[As to application to adduce propensity evidence]**

The application

[1] The defendant faces two trials on two separate charges of methamphetamine offending. This is an application to adduce as propensity evidence previous convictions of the defendant in relation to earlier methamphetamine offending.

The charges

CRI-2015-063-003212 – Possession of methamphetamine for the purpose of supply
([address 1 deleted])

[2] The alleged facts here are that on 21 May 2015, the police were at an address in [address 1 deleted], Rotorua regarding an unrelated matter. While at the address, a

police officer saw the defendant crouching down beside a shed appearing to hide something. He knew the defendant had previous convictions for drug dealing. He invoked s 20 Search and Surveillance Act 2012 and conducted a search without warrant.

[3] At the spot where the defendant was crouched down, under a broken brick the police officer found a small shoulder bag containing six small plastic bags, each containing 0.1 grams of methamphetamine and a bundle of \$2500 in cash.

[4] The admissibility of the evidence obtained in this search has been the subject of another ruling, in which the evidence was ruled admissible. In the course of that hearing, the defendant gave evidence that while the police were at the house, a cat, which was supposed to have remained inside, darted outside and she ran out the back door in an effort to get the cat. She said that because she was wearing high heels, she accidentally tripped over at the spot where she was seen by the police officer. She denied hiding or knowing anything about the methamphetamine and the contents of the bag.

[5] Therefore the issues in relation to this charge are likely to be whether the defendant was in possession of the bag of methamphetamine and cash which the police officer allegedly saw her hiding, and if she in possession, was her purpose to supply methamphetamine. This case has not yet been allocated a trial date.

CRI-2015-063-001548 – Supplying methamphetamine between 23 July 2015 and 13 August 2015 (representative charge)

[6] It is alleged that on 23 July 2015, the defendant began selling methamphetamine as a street level dealer on behalf of a Mangu Kaha Black Power member, Adam Kohunui. It is alleged that the defendant was one of four people selling methamphetamine at street level for Adam Kohunui. The defendant is alleged to have continued to do this until 12 August 2015.

[7] The evidence against her comes from analysis of text and voice communication between the defendant and Kohunui and others. It is alleged that she

was selling methamphetamine in small street level amounts between .1 of a gram and one gram. It is alleged that she was a busy street level dealer, often completing multiple drug deals on the same day. During the period encompassed by the charge, it is alleged that she obtained wholesale methamphetamine worth at least \$8700 from Kohunui and on-sold it to various buyers. The total amount involved is alleged to be at least 12 grams of methamphetamine.

[8] It is alleged that the attribution evidence in relation to the communications emanating from or going to the defendant includes the defendant as referring to herself as “Ruth”, “Deb”, or “Blondie” and other people texting her identifying her as “Deb” or “Ruth”. It is alleged that five of the communications in which the defendant is said to have been involved, have included reference to her home address and that in total, her name “Ruth” was referred to on six occasions and her nicknames “Deb” and “Blondie” on 26 occasions.

[9] The defendant was played a recording of some of the intercepted voice communication and denied that the person alleged to be her was in fact her.

[10] The issue in relation to this charge is likely to be whether the person supplying methamphetamine was the defendant, given her complete denial that she was the person involved in the communications which form the basis of the charge. This case has been set down for trial on 20 June 2016.

The proposed propensity evidence

[11] The Crown seek to adduce as propensity evidence the previous convictions of the defendant and the supporting summaries of fact in respect of the following offences:

Conviction December 2013	One charge of conspiring to supply methamphetamine
	Two charges of supplying methamphetamine

	One charge of possession of methamphetamine for supply
Conviction January 2015	One charge of possession of methamphetamine
Conviction May 2012	One charge of possession of methamphetamine

The December 2013 convictions

[12] These convictions relate to offending in April 2012. On 20 December 2013, the defendant was sentenced to three years, two months imprisonment in respect of these charges. She was released from prison on 13 April 2015.

[13] This offending relates to the defendant operating as a street level dealer in methamphetamine on behalf of a senior patched member of the Mongrel Mob gang with whom she was in a relationship. There is a lengthy summary of facts in respect of this offending, but in brief, the evidence implicating the defendant came from analysis of cellphone data. It was estimated that during the period 19 April to 13 June 2012 and 10 October 2012 to 16 October 2012, the defendant supplied or offered to supply or conspired to supply approximately 9 to 16.35 grams of methamphetamine to persons unknown. There were numerous communications between the defendant and her buyers or would-be buyers and her then partner, Vincent Hurunui. References to methamphetamine were in a coded form commonly seen in this type of offending. In a number of the texts either sent by the defendant or to the defendant, she referred to herself or was referred to by others as “Ruth” or “Blondie” or “R”. The quantities of methamphetamine supplied or offered were discussed in relation to this offending were at ‘street dealing’ level, involving amounts of between .1 of a gram and one gram.

The 15 January 2013 conviction for possession of methamphetamine on 12 March 2012 ([address 2 deleted])

[14] The summary of facts in respect of this offending says that the police executed a search warrant of the defendant's address and under the defendant's bed found a cosmetic bag containing a small set of electronic scales, 42 small empty zip lock bags and a silver screw top canister containing six small zip lock bags containing a total of .75 grams of methamphetamine. On the bedside table, the police located items for smoking methamphetamine and a set of electronic scales. In the laundry, the police found other items for smoking methamphetamine and 402 empty small zip lock bags and a small set of electronic scales. In a vehicle parked at the address, the police found \$1400 in cash in a glovebox.

[15] In spite of some of the circumstances of this offending indicating possession of methamphetamine for the purpose of supply, the defendant was charged with, and pleaded guilty to, possession of methamphetamine simpliciter. She was sentenced to come up for sentence if called upon, which would appear to indicate that both the police and the Court approached this offending on the basis that there was no commerciality involved, and that the cash found was not related to drug dealing.

28 May 2012 – Possession of methamphetamine on 10 January 2012 ([address 3 deleted])

[16] On 11 January 2012 at a [address 3 deleted], Rotorua address, the police found the defendant in possession of a handbag which contained 0.1 of a gram of methamphetamine. On that charge (the defendant's first conviction for drug offending), she was convicted and fined \$250 and ordered to pay Court costs.

Section 43 Evidence Act 2006

[17] 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 which are the subject of the evidence have occurred:
 - (b) the connection in time between the acts, omissions, events, or circumstances which 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 which 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 which 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.”

The issues in dispute

[18] In respect of the offending alleged in May 2015 (possession of methamphetamine for supply), the issues are whether the defendant was in possession of the bag containing the methamphetamine and cash, and if so, was the drug in her possession for the purpose of supply.

[19] In respect of the representative charge of supplying methamphetamine in July/August 2015, the issue is likely to be whether the defendant was the person communicating with the wholesale supplier of the methamphetamine (Kohunui) and the buyers or would-be buyers of methamphetamine.

[20] In considering the s 43(3) factors, the Supreme Court in *Mahomed v R* [2011] NZSC 52 at [3] said:

“[3] The rationale for the admission of propensity evidence rests largely, as William Young J says, 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.”

[21] The assessment of the s 43(3) factors is an evaluative exercise not a “tick box” exercise. Some factors may be highly relevant, others may not be relevant at all; *R v Martin* [2013] NZCA 486 at [22] and *R v Healy* [2007] NZCA 451 at [62]. As the Court of Appeal has observed in a number of cases, the assessment of the admissibility of propensity evidence is very fact specific.

[22] What is alleged in both sets of charges faced by the defendant is a commercial involvement in relation to methamphetamine – either the possession of methamphetamine for supply or actual supply of methamphetamine. In my view, the two convictions for possession for methamphetamine simpliciter (2012) are of little relevance to the issues in the present sets of offending. The offence committed at [address 3 deleted] is possession of a small amount of methamphetamine for

personal use. The possession of methamphetamine and the surrounding circumstances in relation to the [address 2 deleted] offence has some greater relevance because of the way in which the methamphetamine was packaged and the presence of cash in the vehicle. However, the nature of the charge laid by the police and the sentence imposed by the Court both indicate that this was not regarded as commercial activity in relation to methamphetamine and that the cash found was not from methamphetamine dealing. At best, these convictions show the defendant is familiar with methamphetamine and has possessed it in the past for personal use, but goes no further than that. In that sense, the situation is similar to that in *Grimshaw v R* [2013] NZCA 22 in that this offending does not show a specific propensity for the defendant to have methamphetamine in her possession other than for personal use. The probative value of the two convictions for possession of methamphetamine simpliciter is therefore relatively limited.

[23] The position is different, however, in relation to the set of charges in relation to possession of methamphetamine for the purposes of supply, supplying methamphetamine, and conspiring to supply methamphetamine in 2013. In my view, those previous convictions are highly relevant to the issues in relation to both sets of charges now before the Court.

Analysis of the probative value of the previous convictions in 2013 to the charge of supplying methamphetamine in 2015 (representative charge)

[24] The previous convictions in 2013 relate to numerous individual transactions involving the supply or offer to supply of methamphetamine at a street level of commerciality. The amounts involved were between .1 of a gram and one gram. The alleged offending in 2015 also involves numerous individual transactions at a street level of commerciality involving supply or offer to supply methamphetamine in amounts between .1 of a gram and one gram.

[25] The 2013 previous convictions involve the defendant being the retail seller for a wholesale supplier who was a senior gang member. The alleged 2015 offending also involves the defendant allegedly acting as a retail seller for a wholesale supplier who was a senior gang member (albeit a different gang).

[26] In the 2012 offending, the defendant refers to herself or is referred to by others in text communication as “Ruth” or “Blondie”. In the communications relating to the alleged 2015 offending, the defendant refers to herself or is referred to by others as “Ruth” or by nicknames “Deb” or “Blondie”.

[27] Although there is a gap in the previous convictions which relate to offending in 2012 and the alleged offending in 2015 for much of the time the defendant was in custody. She was released from prison on 13 April 2015 and the alleged offending in relation to this charge is said to have commenced in July 2015.

[28] In considering the issue of whether the defendant in 2015 was the person selling methamphetamine on numerous occasions in lots between .1 of a gram and one gram and referring to herself or being referred to by others as “Ruth”, “Blondie” or “R”, it is highly probative that in 2012, the defendant calling herself or being referred to by others as “Ruth” or “Blondie” on numerous occasions was selling methamphetamine in street level dealing lots of between .1 of a gram and one gram in 2012.

Does the proposed propensity evidence of the previous convictions in 2013 have a probative value in relation to the issue in dispute which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant?

[29] Any propensity evidence must inevitably carry with it some prejudicial effect on a defendant. The question is whether the probative value outweighs the risk that the evidence may have an **unfairly** prejudicial effect on the defendant.

[30] In *Mahomed v R* at paragraph [7], the Court said:

“Obviously any evidence that is probative will be prejudicial to the accused but not normally unfairly so. Unfairness is generally found when and to the extent the evidence carries with it a risk that the jury will use it for an improper purpose or in support of an impermissible process of reasoning. In assessing the probative value/unfair prejudice balance, the court may need to take into account the extent to which it considers a ‘proper use’ direction in the trial judge's summing-up is likely to guard against the risk of improper use.”

[31] In terms of s 43(4), when assessing the prejudicial effect, a Judge must consider, among other matters:

- (a) Whether the evidence is likely to unfairly predispose the jury against the defendant; and
- (b) Whether the jury will tend to give disproportionate weight in reaching a verdict to the evidence of the earlier offending.

[32] I have considered those factors and take the view that a direction along the lines referred to by William Young J in *Mahomed v R* would sufficiently deal with those concerns. In addition, the appropriate way of putting the circumstances of the 2013 previous convictions before the jury would be by way of a summary of facts. The present summary of facts is very lengthy and it would be preferable if it was condensed to encapsulate in a more concise way the essential features of the offending.

The assessment of the probative effect of the 2013 previous convictions in relation to the alleged 2015 offending at [address 1 deleted]

[33] In order to prove this charge beyond reasonable doubt, the Crown must prove that Sergeant Watson was correct in his observation of the defendant hiding the bag. The defendant says she knows nothing about the bag and has advanced an explanation that she tripped over at the spot where the bag was hidden while chasing a cat. In considering the accuracy of the evidence of Sergeant Watson's observations and the explanation given by the defendant if given at trial, the fact that the defendant has previous convictions for methamphetamine dealing in 2013 is highly relevant.

[34] The methamphetamine offending in the 2013 convictions relates to street level dealing involving methamphetamine of .1 of a gram to one gram. The six point bags of methamphetamine each weighing .1 of a gram and the \$2500 in case found in the bag is consistent with someone possessing methamphetamine for sale at a street level of commerciality.

[35] Again, there is the feature that although the earlier offending was in 2012, in 2013 the defendant was sentenced to imprisonment and was released in April 2015. The alleged [address 1 deleted] offending occurred only approximately a month later in May 2015.

[36] The issue of whether the defendant had possession of the bag depends on the jury's assessment of the evidence of Sergeant Watson that he saw the defendant hiding something at the spot where the bag was found, together with the defendant's denial of any knowledge of the bag and her explanation (if offered at trial) that she simply tripped up at the spot where the bag was found while chasing a cat.

[37] Again, the probative value of the previous convictions for methamphetamine dealing derives its force from the coincidence that a person with those previous convictions was allegedly seen hiding the bag associated with methamphetamine for the purpose of supply.

[38] The probative value in relation to the issue is high and in my view outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant. In making that assessment, I have regard to the factors in s 43(4) as to whether the evidence is likely to unfairly predispose the jury against the defendant and whether the jury would give disproportionate weight in reaching a verdict to the evidence of the earlier convictions. As discussed earlier, redrafting the summary of facts in respect of the earlier offending to focus on the essential features of the offending in a concise way, together with an appropriate direction in terms of *Mahomed v R*, would overcome any risk that the jury would use the evidence in an impermissible way.

Conclusion

[39] I am satisfied that the evidence of the 2013 convictions is admissible as propensity evidence in respect of each of the two sets of charges before the Court.

[40] It also follows from the analysis above that if the defendant is found guilty of the charge of supplying methamphetamine in 2015 at her trial commencing on 20 June 2016, this too would be admissible as propensity evidence in respect of the

later trial on the charge of possession of methamphetamine for purposes of supply (the [address 1 deleted] charge).

[41] I am not satisfied that the evidence of the two previous convictions for possession of methamphetamine simpliciter qualify as propensity evidence, applying the s 43 analysis and rule that the evidence of those two convictions is inadmissible as propensity evidence.

P W Cooper
District Court Judge