

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN
[SQUARE BRACKETS].

**IN THE DISTRICT COURT
AT WELLINGTON**

**CRI 2017-054-442
[2018] NZDC 3506**

THE QUEEN

V

[MOLLIE O’SULLIVAN]

Hearing: 23 February 2018

Appearances: L Hann for the Crown
S Pohiva for the Defendant

Judgment: 2 March 2018

**RESERVED JUDGMENT OF JUDGE I G MILL
ON PRE-TRIAL APPLICATION PROPENSITY EVIDENCE**

[1] Ms [O’Sullivan] is charged with posting a digital communication namely a Facebook post on [date deleted] 2016 with the intention that it cause harm to [Ellie Scott] being a posting that would cause harm to an ordinary reasonable person in Ms [Scott]’s position and did cause harm to Ms [Scott].

The application

[2] The Crown seek to have evidence admitted of Facebook messages sent by Ms [O’Sullivan] to Ms [Scott] around February 2016. The Crown submit this evidence is relevant as it has a tendency to prove something of consequence to the determination of the proceedings namely the defendant’s intent to cause harm to

Ms [Scott]. The Crown submits its probative value is not outweighed by the risk that the evidence will be unfairly prejudicial to the proceedings.¹

[3] Insofar as the evidence may be propensity evidence the Crown submits it is admissible pursuant to the terms of s 43 of the Act in that its probative value in relation to the issue in dispute outweighs the risk that it may have an unfairly prejudicial effect on the defendant.

[4] The defence submit the evidence lacks the specificity envisaged in the Supreme Court decision of *Mahomed v R*² and is therefore inadmissible.

[5] The defence submit a public post is quite different from a private message like those earlier in 2016. It is further submitted the earlier messages are “cherry picked” as they are not all the messages between the parties at the time and so the context is unknown.

[6] It is further submitted that comments in a private forum do not indicate a propensity for Ms [O’Sullivan] to harm the complainant in a public forum.

[7] If the evidence is otherwise admissible the defence submit that it is unfairly prejudicial and should be excluded.

The proposed propensity evidence

[8] The proposed evidence will come from [the Constable] who actioned a complaint received from Ms [Scott] in early February 2016 in relation to alleged derogatory messages sent via Facebook from Ms [O’Sullivan]. Whilst Police records are incomplete the constable did make a verbatim record of the messages complained of as follows:

“I have told [names deleted]”; “Your poor fucking daughter for having a mother who does that. You deserve everything you get and I am making it my mission to open the eyes of the world so they see what you are really like. You are an embarrassment to your family. Your [sibling] couldn’t believe why you would do that, you deserve what you get, and if I have [details deleted] and I

¹ See ss 7 and 8 Evidence Act 2006.

² [2011] NZSC 52.

die I hope you feel with every inch of your dark soul what a liar and cheat you are. Good luck with your fake relationship based on lies.”

“Oh and [names deleted] slowly but surely I will work my way around the people we have in common and that you know what you really are.”

“wake up you [details deleted] bitch. You are an embarrassment to [name deleted] lol. Get fucked for fucking with my life!”

“I have connections in [location deleted] and in the [deleted] and I WILL tell the families there what his fake arse woman is doing.”

[9] His evidence was he was asked to warn Ms [O’Sullivan] and he spoke to her on 11 February 2016. The constable’s evidence in relation to the conversation will be:

I asked [O’Sullivan] to explain her side of the story. She alleged that [Scott] had replied to her with equally derogatory messages but that she was not bothered by it. [O’Sullivan] explained that she had spent [details deleted] looking after [Scott] and then found out [deleted] prior that [Scott] had lied about [details deleted]. [O’Sullivan] told me she had stayed silent about it and said nothing to [Scott] or anyone else, although she was angry about it. She had since heard that [Scott] had been telling people that [O’Sullivan] had been accusing her of telling people so just ‘let loose’ on her by telling others that [Scott] is a fake, and by sending her those messages on Facebook. [O’Sullivan] acknowledged to me that she had sent those messages to [Scott].

[10] His evidence will be that Ms [O’Sullivan] was warned that her behaviour could make her liable for arrest and charge under the Harmful Digital Communications Act and that Ms [O’Sullivan] “accepted the warning and told me that she would stop”.

The Facebook post the subject of this charge

[11] The subject of the present charge is a Facebook post received on [date deleted] 2016, this time posted to a public Facebook site known as [page details deleted] by Ms [O’Sullivan]. The post had a picture of Ms [Scott] with the following caption:

[details deleted]

The issues in the trial

[12] The issues in dispute will be whether the Crown can prove:

- (a) That the communication would cause harm to an ordinary and reasonable person in the position of the complainant.

- (b) That the communication caused serious emotional distress to her.
- (c) That it was Ms [O’Sullivan]’s intention to cause harm to the complainant.³

[13] It is the last of these issues, namely intent to cause harm, that the proposed evidence is aimed at.

Is the proposed evidence propensity evidence?

[14] I find that the messages around February 2016 is evidence that tends to show Ms [O’Sullivan] has a propensity to send derogatory messages to Ms [Scott] via social media (and so has the propensity to act in a particular way⁴) having an intention to cause emotional stress to Ms [Scott] (having a particular state of mind which she is alleged to have had in the later post) which is evidence of the acts which Ms [O’Sullivan] is alleged to have been involved in.

[15] Although the written submissions have addressed matters enumerated in s 43(3) I find this case is not one that relies on concepts of coincidence and probability but is a case where the proposed evidence not only has an important explanatory value in terms of the background relationship between the two people involved but has a direct relevance to whether the defendant had intent and whether the communication would cause harm to an ordinary and reasonable person in the position of the complainant and whether in fact caused harm to her.

[16] This is particularly so given the earlier messages said she had told others and it was her mission to open the eyes of the world to see what Ms [Scott] was really like. It also contained a threat to “work around” people they knew and disseminate the information in [location deleted] and in the [details deleted].

[17] In my view this evidence is similar to the evidence described in *Taniwha v R*⁵ at paras 62 and 63 where it was said:

³ See para 4 submissions on behalf of the defendant.

⁴ Section 40(1)(a) Evidence Act.

⁵ [2016] NZSC 123.

[62] ... Section 40(1) of the Evidence Act defines propensity evidence and s 43 sets out the test which must be met where the prosecution wishes to offer propensity evidence about a defendant. These provisions were discussed by this Court in *Mahomed v R*. All members of the Court agreed that the rationale for the admission of propensity evidence rests principally on the concepts of coincidence and probability.

[63] In the much cited minority judgment of McGrath and William Young JJ, William Young J noted that propensity evidence relating to interactions between a defendant and a victim may have an important explanatory value in terms of the background or relationship between those involved. This includes situations where the events are so interconnected with the alleged offending that the jury will not be able to understand properly what happened without hearing evidence about them. In this type of case:

... the Crown will not usually be much reliant on ideas about coincidence and probability and the wrongfulness of the defendant's conduct will usually be so closely connected to the core elements of the case against the defendant as to leave little escape for unfair prejudicial effect.

[18] It also accords with the view of the Court of Appeal in *R v Martin*⁶ at paras 22 and 23 as follows:

[22] ... Although it will usually be appropriate to consider the s 43(3) criteria, that is only so to the extent they are relevant. The criteria are neither exclusive nor mandatory. It is not surprising that the Judge's application of the s 43(3) criteria resulted in her concluding that the Trumper evidence had little probative value. However, in our view the criteria were of limited application because they are primarily directed to a different type of propensity evidence, namely evidence that on other occasions the defendant has behaved in a way similar to that involved in the offence for which he or she is being tried. As explained in *Mahomed v R*, the admissibility of that type of propensity evidence generally turns on ideas of coincidence and probabilities. Hence the need to consider matters such as the degree of similarity and the number of previous incidents. As also explained in *Mahomed*, the only link between that type of propensity evidence and the offending in issue is through the propensity the Crown attributes to the defendant. The other misconduct is thus in that respect extraneous to the alleged offending.

[23] In contrast, the propensity evidence in this case is directly relevant. Its probative force does not depend on ideas about similarities and coincidence. Rather, on the Crown's theory of the case, the evidence has important explanatory value. It tends to establish Mr Martin's hostility towards the victim and a motive for him to harm her, making the alleged assault on Leilani more explicable than would otherwise be the case.

⁶ [2013] NZCA 486.

[19] Without the evidence of the earlier messages the jury will be deprived of evidence which is so connected to the alleged offending when its relevance and probative value is obvious.

[20] Whilst there is a prejudicial effect on the defendant it is not illegitimately and unfairly so. The fact the messages were private and the later post in a public forum does not alter my view given the context and content of the earlier messages.

[21] Any criticism of the quality of the proposed evidence can be challenged in the cross examination of [the Constable] and indeed Ms [Scott]. Her evidence in chief is proposed to be limited on the subject.

[22] In these circumstances I find the evidence of the earlier messages admissible and for my part I do not see that a propensity direction would be required but simply a direction involving sympathy and prejudice pinpointing this evidence.

Decision

[23] I therefore find the proposed propensity evidence of the messages admissible in the form it is intended to be submitted in.

[24] As to [the Constable]'s conversation with Ms [O'Sullivan], in the absence of any evidence of a warning given to her at the time and in the absence of any s 9 admission that may not be led in evidence in chief beyond that he spoke to her and no charge was laid.

I G Mill
District Court Judge