

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF ANY COMPLAINANTS UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA249/2013
[2014] NZCA 120**

BETWEEN KM (CA249/2013)
Appellant

AND THE QUEEN
Respondent

Hearing: 26 March 2014

Court: Stevens, Keane, Andrews JJ

Counsel: C B Wilkinson-Smith for the Appellant
M D Downs for the Respondent

Judgment: 4 April 2014 at 3.00 pm

JUDGMENT OF THE COURT

The appeals against conviction and sentence are dismissed.

REASONS OF THE COURT

(Given by Andrews J)

Introduction

[1] Following a trial in the District Court at Manukau before Judge Wiltens and a jury, the appellant was convicted of one charge of sexual violation by unlawful sexual connection, two representative charges of doing an indecent act on a girl under the age of 12 years, and one charge of doing an indecent act on a girl aged between 12 and 16 years. He was subsequently sentenced to imprisonment for three years and eight months for each charge, served concurrently.¹

[2] The appellant has appealed against his conviction on the grounds that the trial Judge's summing up failed to adequately direct the jury on the use of propensity evidence, leading to a risk that the jury's verdicts were reached by improper use of propensity evidence. He submitted that the jury verdicts were unsafe and a miscarriage of justice had occurred. The appellant has appealed against his sentence on the grounds that the sentence imposed was manifestly excessive.

Background

[3] The appellant was in a de facto relationship with the mother of the two complainants. The charge of sexual violation by unlawful sexual connection related to one child, M. It was alleged that on an occasion between January 2001 and February 2002, when M was 11 or 12, the family, including the appellant, were out on a picnic. M's evidence was that the appellant tickled her, moving his hand into her underpants, and played with her genitalia. She said that the appellant then inserted two of his fingers into her vagina and pulled them out, repeating this three times.

[4] The jury found the appellant guilty on this charge. It was also alleged that the appellant had kissed M several times, while he was intoxicated. The jury found him guilty in relation to that allegation on a representative charge of doing an indecent act on M when she was under 12, and on a representative charge of doing the same when she was between 12-16. The appellant was found not guilty on one other charge of doing an indecent act to M.

¹ *R v [KM]* DC Manukau CRI 2011-092-013515, 9 April 2013 [Sentencing Notes].

[5] The appellant was also found guilty of offending against M's sister, E. The jury found him guilty on a charge of doing an indecent act on a girl under 12, relating to an occasion between June 2001 and June 2003, when he kissed E on the lips. The appellant was found not guilty on two other charges of doing an indecent act on E, pertaining to actions occurring on separate occasions.

[6] In sentencing the appellant, the Judge concluded that, bearing in mind the seriousness of the offences, imprisonment was the only option available.² For the offending against M, the Judge adopted a starting point of three years and six months' imprisonment, placing the offending on the cusp of bands 1 and 2 as set out in this Court's guideline judgment in *R v AM (CA27/2009)*.³ The Judge then added a cumulative sentence of two months' imprisonment in respect of the offending against E, resulting in an overall sentence of three years and eight months' imprisonment.⁴

Appeal against conviction

Applicable principles

[7] Pursuant to s 385(1)(c) of the Crimes Act 1961, an appeal must be allowed if the appellate court is of the opinion that on any ground, there was a miscarriage of justice. Section 385(1) further provides that the appellate court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no miscarriage has occurred.

[8] In *R v Matenga*, the Supreme Court considered when it was appropriate to allow an appeal based on a miscarriage of justice.⁵ The Supreme Court held that even where the appellate court has identified an error that was capable of affecting the result of the trial, the task of the appellate court is to consider whether that potentially adverse effect on the result may, in reality, have occurred.⁶ If the court considers, having reviewed all the admissible evidence that a guilty verdict was

² Sentencing Notes, above n 1, at [9].

³ At [16], citing *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [113].

⁴ Sentencing Notes, above n 1, at [17].

⁵ *Matenga v R* [2009] NZSC 18, [2009] 3 NZLR 145.

⁶ At [31], noting that a "substantial" miscarriage is one which in substance, that is, in reality, affected the result of the trial.

inevitable, in the sense of being the only possible verdict on the evidence whether or not the error had occurred, it should not allow the appeal.

Submissions

[9] For the appellant, Mr Wilkinson-Smith acknowledged that the prosecution had not expressly sought to rely on propensity evidence at trial. However, he submitted the Crown had implicitly done so by virtue of having referred to the two complainants together. For example, he referred to the prosecutor's opening address to the jury, where he talked about "two sisters" and "the girls". He submitted that the same approach was repeated in the Crown's closing, where the prosecutor read out extracts from each of the complainant's evidence, referring again to "the sisters", "the older sister", "the younger sister", and "the girls". He submitted that each time the prosecutor said "look at the girls" or "look at the sisters", and invited the jury to look at the evidence globally, the Crown case slipped implicitly into relying on propensity evidence. Thus, he claimed, a propensity evidence warning should have been given, in accordance with the Supreme Court's judgment in *Mahomed v R*.⁷

[10] Mr Wilkinson-Smith further submitted that the direction the Judge gave the jury to look at each charge (and the evidence for each charge) separately was "grossly inadequate" as a propensity evidence warning. He submitted the Judge should have directed the jury that they could not bolster the evidence on one charge by reference to the evidence on another charge.

[11] For the respondent, Mr Downs submitted that had the Crown prosecutor asked the Judge to give a ruling as to the admissibility of propensity evidence (which, he submitted would have been granted), then a direction as to propensity evidence would have been required. However, he submitted, the Crown case was not run on propensity evidence, the Judge was not asked to give a ruling as to the admissibility of propensity evidence, and the Judge was not obliged to give a direction.

⁷ *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [91].

[12] Secondly, Mr Downs submitted that there was nothing in either the Crown prosecutor's opening or closing addresses from which it could be inferred that the jury was being invited to apply propensity reasoning. However, he submitted, given the complainants were from one family, and the appellant from the same family, and that common events were being referred to in respect of the various charges, it would have been unrealistic to deal with the evidence in any way other than the way in which it was.

The Judge's directions

[13] The Judge directed the jury as follows:⁸

The next topic, we have seven charges in the indictment. They're all different, therefore we need seven separate verdicts from you at the end of your deliberations. What you need to do is to look at each charge by itself, having regard to the law that applies to that particular charge, and again the law will differ according to the charges, and then decide that charge by itself. Once you've done that on to the next one, and the next one can be totally different. Your verdicts do not need to be consistent. Your verdicts do not need to be all either guilty or not guilty, they can vary according to the evidence and according to the type of charge that it is. If you like what we've been doing this week is we've been hearing seven trials all squashed into one hearing. You need to now separate them out into the seven components and deal with each one individually, and at the end Mr Foreperson will be asked to return seven verdicts. So that's what you need to be aiming at in your deliberations.

[14] Having directed the jury on the general issues of assessment of the evidence, and the evidence for each of the charges, the Judge concluded, with respect to the charges concerning M:⁹

To convict on the first few charges involving [M] you have to believe her. Her allegations have to be true because if they are not true then you cannot convict, there is no other evidence for these things. She is the only one that says these things occurred.

[15] The Judge then turned to the charges involving E, and set out the evidence in relation to those charges.¹⁰ The Judge then set out the appellant's evidence, and that given on his behalf.¹¹

⁸ *R v [KM]* DC Manukau CRI-2011-092-13515, 24 January 2013 at [23].

⁹ At [80].

¹⁰ At [81]–[85].

¹¹ At [98]–[104].

[16] The Judge also gave the jury a three-page document headed “Legal Elements”, which set out, for each charge, the elements the jury had to be satisfied the Crown had proved beyond reasonable doubt.

Discussion

[17] In light of the facts that the complainants were sisters, the appellant was in a position akin to their step-father, and the offending against each complainant was alleged to have occurred at much the same time, it might have been expected that the Crown would seek a ruling that the jury could apply propensity reasoning; that is, that if they were satisfied that one or more charges were proved, they could use that to reason that the appellant had a tendency to act in a certain way, and consider that tendency as evidence in support of other charges.¹² However, that is not what occurred in this case. No propensity ruling was sought, and none of the Crown prosecutor, defence counsel, or the Judge made any reference to it.

[18] The Judge’s direction to the jury to consider each charge separately (set out at [13] above), was orthodox. The direction was reinforced by the manner in which the Judge went through each count separately, both orally and in the “Legal Elements” document.

Was the Judge nevertheless obliged to give the jury a propensity direction?

[19] We now consider whether, notwithstanding that the issue of propensity evidence was not raised by counsel nor any direction sought, the Judge was obliged to give a propensity direction. Mr Wilkinson-Smith was not able to refer us to any authority to the effect that, notwithstanding no issue as to propensity evidence being raised, the Judge was obliged to give a direction as to propensity evidence. Neither has our own research disclosed any such authority.

[20] In *Mahomed*, William Young J said:¹³

[91] A propensity evidence direction is required where the Crown is:

¹² Evidence Act 2006, s 43.

¹³ *Mahomed v R*, above n 7, (giving the judgment of the minority, but endorsed by the majority at [17]).

- (a) relying on propensity reasoning and in doing so is invoking ideas about coincidence or probability; and/or
- (b) the evidence involves aspersions on the character of the appellant in respects not directly associated with the alleged offending.

As well, a propensity evidence direction should be given where, without it, there is a danger that the jury will not realise the relevance of the evidence in question or there is some particular risk of unfair prejudice associated with the evidence.

[92] On the other hand, and as the corollary of what we have just said, where the evidence in question, although still falling within the Act's "propensity evidence" definition, is not led primarily in reliance on coincidence or probability reasoning, a specific direction may well not be required.

[21] We are satisfied that the present case falls into the latter category. There was no explicit reliance by the prosecutor on propensity evidence. Nor was the jury invited to engage in propensity reasoning. The matters advanced by Mr Wilkinson-Smith as implicitly relying on propensity evidence do not create a risk of propensity reasoning in the present circumstances.

[22] In *Wi v R*, the Supreme Court, addressing summing up generally, said:¹⁴

Summings-up should be tailored to the particular case. Specimen directions are helpful when they are required. A very important part of a trial Judge's function is to give the jury as much help as possible by identifying the issues presented by the case and the evidence which is relevant to those issues. The summing-up should also, to the extent necessary, explain to the jury in what way evidence should and should not be used. Directions should not be mandatory unless, without them, there is a real risk that the jury will approach the matter in an inappropriate way or in a way which does not do the defendant's case justice.

[23] Both Mr Downs and Mr Wilkinson-Smith referred us to the judgment of this Court in *R v S(CA467/97)*.¹⁵ That judgment dealt with, in part, similar fact evidence, and has some relevance to the consideration of propensity evidence under the Evidence Act 2006. The Court said:¹⁶

Although charges relating to the sexual abuse of more than one family member by another family member would not automatically be heard together, where allegations are interwoven or interconnected the desirability of presenting the case on a realistic rather than an artificial basis will usually point against severance. ... This is such a case. E's evidence helped to convey a realistic picture of the family environment and of the way the

¹⁴ *Wi v R* [2009] NZSC 12, [2010] 2 NZLR 11 at [41].

¹⁵ *R v S(CA467/97)* [1998] 3 NZLR 392 (CA).

¹⁶ At 400.

appellant treated his step-daughters. It also rebuts his claim of lack of opportunity. Furthermore, E's evidence may have helped the jury to assess A's credibility, which was the essential issue in the case. In our view, the probative value of E's evidence therefore outweighed its prejudicial effect and the evidence was properly admissible.

The appellant also complained that the jury was given no direction relating to the fact that E's evidence was similar fact evidence for the charges involving A. The Judge outlined at length the need to consider the nine charges separately and he stressed that the jury must not bolster the evidence on one charge by reference to evidence on another, or conclude from the fact that there was more than one complaint that there must be some truth in the charges laid. The fact that he failed to tell the jury that in some ways they could in fact use evidence of one charge in considering another was in fact favourable to the defence. This ground must also fail.

[24] Mr Wilkinson-Smith submitted that this Court in *R v S* held that a jury must be directed that they cannot bolster evidence on one count by reference to evidence on other counts. We do not read *R v S* in that way. The Court simply recorded the Judge's direction, and observed that the Judge's failure to tell the jury that they could use evidence of one charge in considering another was in fact favourable to the defence.

[25] This case is similar. The Judge directed the jury to consider each count separately. It was not suggested to the jury, by the Judge or anyone else, that they could use evidence of one charge in considering another. There was no reliance by the Crown on coincidence or probability reasoning. As in *R v S* this was favourable to the defence. The references to "the sisters", and "the girls, were simply a realistic portrayal of the family environment. In particular, we are not satisfied that any unfairness arose as a result.

[26] Accordingly, we are not persuaded that there was an error in the Judge's summing up, that the verdicts were unsafe, or that a miscarriage of justice has occurred. As we have found no error of law, no question as to the application of the proviso to s 385(1) of the Crimes Act 1961 arises.

The appeal against sentence

[27] In his submissions, Mr Wilkinson-Smith made it clear that the appeal against sentence depended on the appellant's conviction for the lead offence of sexual

violation being overturned. He submitted that if it were overturned, then the risk arose of an excessive sentence on the indecent assault and indecent act charges.

[28] In the light of our conclusion that the appeal against conviction must fail, there is no need for us to deal with the appeal against sentence, and it must be dismissed. We observe, however, that the appellant's offending was appropriately placed at the cusp between bands 1 and 2 of *R v AM*,¹⁷ and the sentence imposed was well within the range available to the Judge.¹⁸

Result

[29] The appeals against conviction and sentence are dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

¹⁷ *R v AM (CA27/2009)*, above n 3, at [113].

¹⁸ Noted above at [6].