

REASONS OF THE COURT

(Given by Lang J)

[1] Mr Sahib is to stand trial in the District Court on charges of indecent assault, sexual violation by unlawful sexual connection and sexual violation by rape. On 18 December 2012, Judge E M Thomas made an order under s 344A of the Crimes Act 1961 declaring admissible propensity evidence that the Crown proposes to lead at Mr Sahib's trial.¹ Mr Sahib appeals to this Court against that ruling.

Leave to appeal out of time

[2] Mr Sahib filed his application for leave to appeal against the pre-trial ruling out of time. The respondent does not oppose leave to appeal out of time being granted. It is granted accordingly.

The alleged offending

[3] All of the charges that Mr Sahib faces arose out of an incident that occurred in the early hours of 21 July 2011. At that time the complainant was walking along a residential street in Hamilton after having dispensed with the services of a taxi driver whom she had engaged to take her home from a friend's house.

[4] Shortly after the complainant got out of the taxi, a white utility vehicle drove past her and then turned around and came back. There is no dispute that Mr Sahib was the driver of that vehicle. He stopped his vehicle beside the complainant, and asked her if she would like a ride home. She agreed and got into the vehicle. She noticed that Mr Sahib was wearing a yellow high visibility working vest.

[5] Shortly after the complainant got into Mr Sahib's vehicle, he reached over and touched her breasts. She immediately told Mr Sahib to stop touching her, and asked where he was taking her. She could see by this stage that the route he had chosen was not in the direction of her home. Mr Sahib stopped touching the complainant, but refused to say where he was taking her.

¹ *R v Sahib* DC Hamilton CRI-2011-019-5616, 18 December 2012.

[6] Mr Sahib drove the complainant out of the city, and eventually parked his vehicle in the driveway of a rural property. The complainant says that Mr Sahib then began undressing himself, and also began undressing her. She says she told him to stop doing that, and also told him she did not want to have sex with him. Mr Sahib ignored these remarks, and at some stage he made her suck his penis. He went on to have sexual intercourse with the complainant in the passenger seat of the vehicle. When he had finished, Mr Sahib drove the complainant back into town and dropped her off near a supermarket and service station. The complainant immediately contacted the police and told them what had happened.

[7] Mr Sahib was arrested after the complainant was able to provide them with some of the details from the registration plate of his vehicle.

The propensity evidence

[8] The Crown proposes to lead evidence from another young woman (“Ms A”) who was allegedly involved in a similar incident with Mr Sahib three weeks prior to the incident involving the complainant. Ms A will say that in the early hours of 1 July 2011 she was walking along a residential street in Hamilton very close to the area where Mr Sahib picked up the complainant three weeks later. A vehicle stopped, and she saw that the driver was an Indian male wearing a high visibility vest. This person asked if she wanted a ride home, and she accepted.

[9] After Ms A got into the car, the driver asked where she was going and who she was going to stay with. He also asked her whether she wanted a drink, and whether she needed cash. The second complainant declined both these offers. As the vehicle approached the street where Ms A lived, the driver asked if she wanted “a good time”. When she said she did not, the driver said he had cash and would pay her. Ms A declined this offer, and said that she wanted to get out of the vehicle. By this stage the vehicle was moving slowly along the street where Ms A lived. Ms A says that the following exchange then occurred:

He then said: “Come on, just let me suck your tittie.” I said: “No, I can get out here.”

He was driving really slowly, just under 20 km/h. I then said that I wanted to get out, and he said no, we'll just drive around the block. I said no, and I pushed the gear shift to park. He yelled at me and said that I can't do that.

[10] At this point Ms A jumped out of the vehicle, and began running towards her house. The man in the vehicle followed her, so she ran into another address and hid behind a parked vehicle. She believes the man in the vehicle eventually concluded that she must have gone inside her address, because he turned his vehicle around and drove away quickly.

[11] Ms A describes this person as being a male Fijian Indian with short black hair. She believes he was 35–45 years old, and of short stature and chubby build. On 1 August 2012 the police showed Ms A a photograph montage, and she identified Mr Sahib as being the driver of the vehicle. She has not, however, laid a complaint about his conduct.

[12] Mr Sahib denies being the driver of the vehicle.

The issue at trial

[13] Mr Sahib accepts he had sexual intercourse with the complainant in his vehicle in the early hours of 21 July 2011. He will contend that the activity was consensual, and that he paid the complainant for permitting him to have sex with her. For that reason the sole issue at trial will be whether the complainant consented to having sexual intercourse with Mr Sahib.

[14] In order to find Mr Sahib guilty, the jury will need to be satisfied beyond reasonable doubt that the complainant is telling the truth when she says that Mr Sahib had sexual intercourse with her after she had made it clear that she did not want that to happen. If the jury accepts her evidence on this point, there appears to be little scope for an alternative defence based on reasonable belief that the complainant was consenting.

The Judge's decision

[15] The Judge noted that the Crown sought to lead the evidence because it demonstrated that Mr Sahib tends to act in a predatory and sexually inappropriate way towards women. He does so in circumstances where the women are strangers, and he has picked them up late at night in his vehicle. The Crown also relied on the evidence as showing that Mr Sahib refuses to desist from such conduct when rebuffed. The Crown submitted that this is directly relevant to the issue of whether the complainant consented to having sexual intercourse with Mr Sahib, and whether he believed on reasonable grounds that she was consenting.

[16] The Judge also recorded that counsel for Mr Sahib accepted that the evidence was relevant to these issues. His primary submission was that any probative value the evidence might have was greatly outweighed by the unfairly prejudicial effect that the evidence would inevitably have on Mr Sahib.

[17] The Judge concluded that the evidence was highly probative of Mr Sahib's state of mind and his tendency to act in the manner alleged by the Crown. It was therefore directly relevant to the issues the jury will be required to determine. He also considered that the probative value of the evidence outweighed any risk of unfair prejudice, and that careful directions would ensure that the jury understands the proper purpose of the evidence and the use they can make of it.

Grounds of appeal

[18] Counsel for Mr Sahib advanced much the same argument on appeal as he advanced in the District Court. He emphasised that Ms A's evidence differs markedly from the evidence to be given by the complainant because the driver of the vehicle did not engage in sexual activity with Ms A. In addition, Mr Sahib has never been charged as a result of any involvement he may have had with Ms A.

[19] Counsel for Mr Sahib also challenged the Judge's conclusion regarding the probative value of the propensity evidence, and submitted that the Judge had failed to appreciate the extent to which the propensity evidence was likely to create unfair prejudice for Mr Sahib.

Decision

[20] We can dispose of the first argument briefly. The principles governing the admissibility of propensity evidence are contained in s 43 of the Evidence Act 2006. The ultimate test is whether the evidence has a probative value in relation to an issue in dispute that outweighs the risk that it may have an unfairly prejudicial effect on the defendant.² In assessing the probative value of the evidence the court may take into account, to the extent they are relevant, the factors set out in s 43(3). Whether or not charges have been laid in respect of proposed propensity evidence is not a factor to be taken into account under s 43, and is irrelevant to the court's decision.

[21] The fact that sexual activity did not occur in the case of Ms A is also irrelevant. The real issue is whether the evidence she can give is sufficiently probative of an issue in dispute as to outweigh the risk that it may have an unfairly prejudicial effect on Mr Sahib.

The probative value of the propensity evidence

[22] As noted above, the only issue in dispute at the trial will be whether the complainant consented to having sexual intercourse with Mr Sahib. Ms A's evidence will therefore need to have probative value in relation to that issue.

[23] The leading authority in relation to propensity evidence is the judgment of the Supreme Court in *Mahomed v R*.³ In a passage often cited in this context, Tipping J 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.

² Evidence Act 2006, s 43(1).

³ *Mahomed v R* [2011] NZSC 53, [2011] 3 NZLR 145.

[24] Not all the factors listed in s 43(3) are relevant in the present case. Those of most significance are the close connection in time between the events described by the complainant and Ms A; the similarity in circumstances between those events; and the absence of any suggestion of collusion between them. The events they describe may also fairly be described as unusual.

[25] The credibility of the complainant will be a vital aspect of the Crown case. She alone can prove she did not consent to having sexual intercourse with Mr Sahib. No other Crown witness can give evidence about that central issue. In assessing whether the complainant is telling the truth, we consider the jury may be assisted by Ms A's evidence. The jury may consider it to be no coincidence that, a short time before the incident involving the complainant, another female was involved in a very similar incident with Mr Sahib. If accepted, Ms A's evidence may demonstrate that Mr Sahib has a tendency to persist in engaging in sexual activity with female strangers notwithstanding the fact that they do not consent. He does so after approaching them on the street late at night and offering them a ride home in his vehicle, thereby rendering them vulnerable to his advances. Ms A's evidence may therefore lend strength to the complainant's evidence that Mr Sahib persisted in engaging in sexual activity with her after she had told him she did not want that to happen.

[26] Like the Judge, we consider the propensity evidence to have considerable probative value in relation to the single issue in dispute.

Unfair prejudice

[27] The risk of unfair prejudice often arises when propensity evidence is adduced. In the present case the risk of such prejudice potentially arises in two ways. The first arises as a result of Mr Sahib's denial that he was the driver of the vehicle that picked up Ms A. If he maintains this stance his counsel will need to challenge Ms A directly regarding the issue of identity. This will mean that Mr Sahib is effectively forced to defend himself on two fronts.

[28] Secondly, there is a risk the jury will engage in illegitimate reasoning that leads directly to a finding of guilt. If the jury accept Ms A's evidence, there is a risk

that they may proceed directly from that finding to a conclusion that Mr Sahib must also be guilty of sexually violating the complainant. Such reasoning would obviously not be legitimate, because the second conclusion does not follow logically from the first. Even if the jury were to accept Ms A's evidence, they could not find Mr Sahib guilty based on that finding alone. The propensity evidence is but one strand of the Crown case. The jury could only legitimately find the charge proved if they were satisfied of Mr Sahib's guilt based upon all of the evidence, and in particular the evidence of the complainant.

[29] We do not consider the first area of risk to be particularly problematic. Propensity evidence will often be admitted notwithstanding the fact that it remains the subject of dispute. In such cases the defendant is entitled to challenge the evidence, and to seek to persuade the finder of fact that the evidence is either incorrect or irrelevant to the issues they need to determine.

[30] Sometimes the nature or extent of the dispute about the propensity evidence is such that it tells against the evidence being admitted. That may occur, for example, where the matters in dispute will needlessly prolong the trial,⁴ where there is a risk that the evidence will unfairly predispose the jury against the defendant⁵ or where the jury may give disproportionate weight to the evidence.⁶ In the present case, however, Ms A's evidence will not unduly prolong the trial. Her evidence should occupy no more than one to two hours at most. The discrete and limited scope of her evidence also means that careful jury directions can adequately guard against the risk that the evidence will unfairly predispose the jury against Mr Sahib, or that they will give disproportionate weight to Ms A's evidence.

[31] We take the same approach in relation to the second area of risk. The trial Judge will obviously need to direct the jury that they can only have regard to Ms A's evidence if they are sure she is telling the truth, and that her identification of Mr Sahib as the driver of the vehicle is reliable. The Judge will then need to give clear directions regarding the manner in which the jury may use Ms A's evidence. The Judge will also need to tell the jury that Ms A's evidence is but part of the total

⁴ Evidence Act 2006, s 8(1)(b).

⁵ Ibid, s 43(4)(a).

⁶ Ibid, s 43(4)(b).

body of evidence, and that they need to reach their verdicts having regard to all of the evidence. In particular, the Judge will need to warn the jury that, if they accept Ms A's evidence, they should not assume that Mr Sahib is guilty merely because he has acted in a similar way previously. If appropriate directions are given, we consider that they will guard adequately against the risk that the jury will proceed directly from accepting Ms A's evidence to a finding of guilt.

[32] Given our conclusion that the probative value of Ms A's evidence is high, we are satisfied that it outweighs the risk that her evidence may have an unfairly prejudicial effect on Mr Sahib.

Result

[33] An extension of time for filing the application for leave to appeal is granted.

[34] Leave to appeal is granted, but the appeal against the order under s 344A of the Crimes Act 1961 declaring propensity evidence admissible is dismissed.

Solicitors:
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