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

IN THE COURT OF APPEAL OF NEW ZEALAND

CA792/2013
[2014] NZCA 31

BETWEEN	L (CA792/2013) Appellant
AND	THE QUEEN Respondent

Hearing:	17 February 2014
Court:	Ellen France, MacKenzie and Mallon JJ
Counsel:	J C S Sandston for Appellant A Markham for Respondent
Judgment:	24 February 2014 at 10.30 am

JUDGMENT OF THE COURT

A Leave to appeal is granted.

B The appeal is dismissed.

C Order prohibiting publication of the reasons for judgment in news media or on the internet or other publicly available database until final disposition of trial. Publication in law report or law digest permitted.

REASONS OF THE COURT

(Given by Ellen France J)

Introduction

[1] The appellant faces trial in the District Court on 14 counts of sexual and violent offending against his two adopted daughters. He applies for leave to appeal from a pre-trial ruling given by Judge Zohrab in which the Judge declined to order severance.[1]

Background

[2] In 1994, the complainants, O and A, were adopted by the appellant and his wife from an orphanage in an overseas country.[2] O was about 16 months old and A was aged six. In 2000, when she was 11 years old, A was placed in foster care with a new family. The appellant and the rest of the family moved to another town and it appears A had little or no subsequent contact with them.

[3] The alleged offending came to light after O made a complaint in late 2010 when she was 17. At that point, O was still living with her parents. Early the following year, A was interviewed as part of the police investigation into O's complaint. She, too, made a complaint.[3]

A's account

[4] A, who is now 25 years of age, says that when she was about 10 or 11 (between late 1998 and late 2000), the appellant applied burn cream to her. (A suffered badly from burns as a result of a fire when she was an infant.) She says in her interview that the appellant made her lie naked on a bed in a guest room in the family home on her stomach while he massaged her. A alleges that the appellant put his finger "up her

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1 *R v [L]* DC Nelson CRI-2013-042-896, 15 November 2013. The application for leave to appeal and the proposed appeal were heard together.

2 In this part of the judgment we largely adopt the description in submissions for the Crown of the factual background. O and A are not related to each other biologically.

3 Her foster parents said she had disclosed the abuse in 2005 but the decision was made that it was not in her best interests to make a formal complaint at that time.

bum" and then up her vagina. The appellant used the guest room as his room. This incident gives rise to two charges of sexual violation by unlawful sexual connection.

[5] On another occasion, A says the appellant told her to come and lie down on the bed with him in the guest room. He lay behind her and put his penis between her legs. This incident gives rise to a charge of indecent assault on a girl under 12.

[6] These incidents are all said to have occurred whilst the appellant's wife was at work.

[7] A also recounts various assaults including being squeezed around the throat and being beaten with a wooden spoon. These incidents give rise to three assault charges.

O's account

[8] O, who is now 20 years of age, has an IQ just above the threshold for intellectual disability. She describes four occasions in mid-2010 when the appellant touched her breasts and vagina. She was about 17 years old at the time. She says this occurred twice in each of two separate school holidays whilst her mother was at work.

[9] O says that on each occasion she was in the guest room. She alleges that the appellant told her to take her clothes off and then had her lie naked on the bed before touching her. She was unsure exactly whether the touching was inside or outside the vagina but it felt like it was "underneath". These incidents give rise to eight counts of indecent assault.

The defence

[10] The appellant declined to make a statement to police. The likely defence at trial is that the events did not happen.

The pre-trial decision

[11] Judge Zohrab concluded that the evidence of A and O was admissible as propensity evidence as between each other. The Judge also noted there were other common witnesses. Given these two factors, the conclusion was the charges should be heard together. In reaching this conclusion, Judge Zohrab identified what he described as some obvious similarities:[4]

> (a) The relationship of the [appellant] to the complainants, namely an adoptive father/daughter relationship.
>
> (b) The place of the alleged offending, namely a room in the family home used by the [appellant].
>
> (c) Use of an opportunity afforded by the [appellant's] wife going to work.
>
> (d) The aspect of the [appellant] having the girls lie naked on his bed.

[12] The Judge recorded that on the material before him there was no suggestion of collusion and that, "measured by the standards of ordinary members of society, an adult man having a sexual interest in his adopted children is indeed unusual behaviour".[5] Judge Zohrab said it followed that:[6]

> notwithstanding the gap in time and the differences in the nature of the alleged sexual acts, having considered all of the factors in s 43(3) [of the Evidence Act 2006], ... the circumstances of the two sets of alleged offending are such as to strongly favour the admissibility of propensity evidence in this case.

The appeal

[13] The appellant submits that when properly analysed in terms of the factors set out in ss 43(3) and 43(4) of the Evidence Act, the probative value of the evidence is limited and is outweighed by its unfairly prejudicial effects. Accordingly, the appellant says the Judge was wrong not to order separate trials, one relating to the counts concerning A and the other for the counts with respect to O.

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4 At [39].
5 At [40].
6 At [41]. Judge Zohrab also dealt with, and rejected, an application by the Crown for the admission of propensity evidence relating to allegations concerning his infant daughter from his first marriage in the 1980s.

[14] In developing this submission, Mr Sandston for the appellant says the degree of similarity is not sufficiently strong to warrant cross-admissibility. Essentially, he submits, there is nothing more than would commonly be the case where the alleged offending involves siblings. Mr Sandston emphasises also the following factors: the alleged incidents are not frequent (s 43(3)(a)); there is a 10 year gap in time between the alleged offending (s 43(3)(b)); one of the complainants does not allege penetration (s 43(3)(c)); there are two complainants (s 43(3)(d)); and the complainants were at different ages at the relevant times, with one considerably older (s 43(3)(f)).

[15] The respondent supports the approach taken by Judge Zohrab.

Our analysis

[16] There is no dispute as to the relevant principles applicable to severance. In *R v W*, this Court stated:[7]

> The general principle is that counts arising from incidents unrelated in time or circumstance are not to be tried together unless evidence as to one is relevant to another, to an extent that its probative value outweighs its prejudicial effect. That may be so in a variety of circumstances, of which similarity of the facts is one.
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> …
>
> We do not go so far as to accept the proposition advanced for the Crown that whenever members of a family make allegations of abuse against the same individual within the family, all charges should always be heard together. Nevertheless, where as here the allegations are interwoven or interconnected the desirability of presenting the case on a realistic rather than an artificial basis will usually point against severance.

[17] In this case, the primary focus is on the admissibility of the evidence of the complainants as propensity evidence. On that aspect, we agree with the submissions for the Crown that although there is a 10 year gap in time between the two alleged sets of offending, on the material before us there are compelling circumstantial similarities.

[18] Both incidents involve allegations of sexual offending on young persons in the familial context. We accept that O was considerably older but her account is still indicative of a sexual interest by an older man in his own children. Further, whilst the

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7 *R v W* [1995] 1 NZLR 548 (CA) at 555.

touching was different in its extent, both complainants refer to being made to lie on the bed in a situation where the appellant, on the complainants' accounts, has taken advantage of his wife's absence. Absent any suggestion of collusion, the coincidence that the second complainant says similar things happened to her takes on a greater weight.

[19] We agree with Judge Zohrab's assessment that any prejudice is of the legitimate type contemplated by the admission of propensity evidence and any risk of improper reasoning can be dealt with by way of direction in the usual way. It is also important to remember that the matter comes before us as a severance issue and not a propensity determination. The strong likelihood that there will be some cross-admissibility is sufficient to dispose of the appeal.[8] It is not necessary or appropriate at this point to go further. The extent of cross-admissibility will be a trial issue once the evidence has been heard.

[20] Finally, although not expressly relied on by the Judge, there is also merit in the point made in Ms Markham's submissions that the fact of O's allegations being raised in 2010 provides the explanation for the significant delay in A making a formal complaint.[9] The evidence is therefore of potential direct (non-propensity) relevance. This factor also supports the decision to decline severance.

Result

[21] For these reasons, we agree that the interests of justice do not require severance. Leave to appeal is granted but the appeal is dismissed. For fair trial reasons we make an order prohibiting publication of the reasons for judgment in news media or on the internet or other publicly available database until final disposition of trial. Publication in law report or law digest permitted.

Solicitors:
Stallard Law Ltd, Nelson for Appellant
Crown Law Office, Wellington for Respondent

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8 See also *Banks v R* [2011] NZCA 469 at [12].
9 See also *R v W*, above n 7, at 555.