ORDER PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS (INCLUDING THE RESULT) 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.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA648/2014
[2015] NZCA 27

BETWEEN	MATTHEW PHILLIP GRIGG Appellant
AND	THE QUEEN Respondent

Hearing:	11 February 2015
Court:	Wild, MacKenzie and Lang JJ
Counsel:	L A Caris and J P Miller for Appellant M A Corlett for Respondent
Judgment:	25 February 2015 at 4 pm

JUDGMENT OF THE COURT

A The application for leave to appeal is granted.

B The propensity evidence is to be admissible in Mr Grigg's trial only on charge one: the charge of possession of methamphetamine for supply.

C The appeal is otherwise dismissed.

D An order is made prohibiting publication of the judgment and any part of the proceedings (including the result) 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 Wild J)

Introduction

[1] Mr Grigg applies for leave to appeal against a pre-trial decision of Judge Morris given in the District Court at Wellington on 10 October 2014.[1] The Judge ruled evidence of Mr Grigg's conviction in 2005 for possession of methamphetamine for supply admissible as propensity evidence in Mr Grigg's trial, scheduled to commence on 2 March 2015.

[2] Mr Grigg faces four charges:

a) Charge One: possession of methamphetamine for supply;

b) Charge Two: offering to supply methamphetamine;

c) Charge Three: supplying methamphetamine; and

d) Charge Four: unlawful possession of a pistol.

Factual background

Current charges

[3] On 29 January 2014 the police stopped the appellant while he was driving. His car was searched pursuant to a search warrant. In a rear footwell the police found a black satchel containing 0.5 of a gram of methamphetamine in a snaplock bag, a loaded air pistol, a set of digital scales and several empty snaplock bags, one containing white crystal residue. Concealed in the fuse box area of the dashboard, in

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1 *R v Grigg* DC Wellington CRI-2014-085-931, 10 October 2014.

a sunglasses case, the police found two snaplock bags. One contained 1.2 grams of methamphetamine, the other four grams of dimethyl sulphone (a health supplement commonly used to cut down methamphetamine). Also in the sunglasses case there were further empty snaplock bags, some containing crystal residue, a methamphetamine pipe and pieces of drinking straw commonly used to divide methamphetamine into smaller quantities. This is the basis for charges one and four.

[4] After obtaining a search warrant, the police searched Mr Grigg's home. They found a packet of unused snaplock bags in the wardrobe.

[5] In the course of executing the search warrant on 29 January 2014, the police also seized a cellphone from Mr Grigg. They obtained text message data from this phone:

(a) text messages from the period 19–22 January 2014, which form the basis of charge three: supplying methamphetamine; and

(b) text messages from 23 January 2014, which provide the basis for charge two: offering to supply methamphetamine.

Propensity offending

[6] In August 2005 the police executed search warrants at Mr Grigg's home and business address simultaneously. Mr Grigg was at home. He was searched. In a snaplock bag in one of the socks Mr Grigg was wearing the police found several "point" bags, each containing methamphetamine. In the pocket of his jeans there was a further "point" bag also containing methamphetamine. There were further "point" bags in a CD holder atop the fridge. Mr Grigg had $2,490 in cash in his wallet.

[7] At Mr Grigg's business address the police found three pipes used for smoking methamphetamine, a butane torch, scales, handwritten "tick lists" and a number of used snaplock bags, some containing residue. These items were hidden in various places around the office.

[8] In total, 2.98 grams of methamphetamine were found in Mr Grigg's home and business premises. He was convicted and sentenced after pleading guilty to possession of methamphetamine for supply.[2]

Issues on appeal

[9] Ms Caris framed the four issues in this appeal as follows:

(a) whether there is jurisdiction to determine admissibility of propensity evidence beyond the scope of an application for the admission of propensity evidence;

(b) whether, in the circumstances, evidence of possession of methamphetamine for the purpose of supply was properly admitted in respect of the charges of offering to supply methamphetamine, and/or supplying methamphetamine;

(c) whether the Court of Appeal's decision in *Preston v R*[3] has a "watering down" effect on *Rei v R*;[4] and

(d) whether, in the present circumstances, Judge Morris erred in her application of *Rei v R* in her assessment of admissibility in respect of the charge of possession of methamphetamine for the purpose of supply.

[10] While issue (a) is a jurisdictional challenge to Judge Morris' decision, the other three issues challenge, on different grounds, the Judge's decision to rule the propensity evidence admissible. We will deal with each of the issues in turn.

First issue: did the Judge exceed her jurisdiction?

[11] The Crown had applied for a ruling that the propensity evidence was admissible on charge one. The Judge simply ruled the evidence admissible in

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2 *R v Grigg* HC Wellington CRI-2005-085-5625, 31 March 2006.
3 *Preston v R* [2012] NZCA 542.
4 *Rei v R* [2012] NZCA 398, (2012) 25 CRNZ 790.

Mr Grigg's trial.[5] That ruling made the propensity evidence admissible on all three methamphetamine charges.

[12] Mr Corlett advised us the Crown is content for the propensity evidence to be admitted only on charge one. He points out, correctly, that the jury, if it finds Mr Grigg guilty on charge one, can take that into account when reaching its verdicts on the other three charges.

[13] We need not, therefore, rule on Ms Caris' submission that the Judge erred in going beyond the scope of the Crown's application. But, if it assists in future cases, we express the view that the Judge did not exceed her jurisdiction. The Crown's application was under s 101 of the Criminal Procedure Act 2011. That section provides:

> …
>
> (5) The Court may make an order under this section on any terms and subject to any conditions that the Court thinks fit.
>
> …

So the Court's jurisdiction under s 101 is not circumscribed by the application with which it is dealing.

Second issue: is the propensity evidence admissible also on charges two and three?

[14] Mr Corlett's advice that the Crown only seeks to have the propensity evidence admitted on charge one dispenses with the need to answer this second issue. The trial Judge will need to direct that the propensity evidence is not relevant to charges two, three and four, but that a finding by the jury of guilt on charge one would be relevant when they come to consider their verdicts on charges two and three.

Third issue: does *Preston v R* have a "watering down" effect on *Rei v R*?

[15] We consider this issue is misconceived. First, in *R v Healy* this Court said:[6]

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5 *R v Grigg,* above n 1, at [49].
6 *R v Healy* [2007] NZCA 451, (2007) 23 CRNZ 923.

> [46] … In our view, the words of the statute are the most helpful starting point in the propensity analysis and, to the extent that the decisions referred to above might be read as suggesting the starting point is a comparison with the common law or some judicial gloss on those words based on earlier authorities, we disagree. As an illustration of the approach we prefer, reference can be made to this Court's decision on appeal in *Taea* where the Court did not find it necessary to refer back to the law in force before the advent of the Act: *R v Taea* [2007] NZCA 472 at [20]; and, see also *R v Goodman* HC WANG CRI 2006-034-440 12 June 2007 at [21]. To the extent that *Cooper*[7] may be thought to suggest a different approach, it should not be followed.

[16] The judgment in *Healy* was delivered on 18 December 2007. The Evidence Act (the Act) had come into force on 1 August that year. Prior to the Act, the case law on propensity evidence (then generally referred to as "similar fact evidence") had got into disarray. The many decisions of this Court were irreconcilable. What the Court was stressing in *Healy* was that applications to admit propensity evidence should be based firmly on the provisions in the Act. Judges should avoid resort to case law unless it is genuinely authoritative as to matters of principle. In particular Judges should avoid pointless attempts to reconcile one propensity ruling with another or others.[8]

[17] This Court's comments in *Healy* remain equally valid today. The provisions in the Act dealing with the admissibility of propensity evidence are comprehensive and admirably clear and concise.[9] If a court applies them to the case with which it is dealing, there should seldom be a need to refer to another case. From that we exclude the Supreme Court's authoritative guidance in *Mahomed v R*, in particular as to the rationale for the admission of propensity evidence and as to the directions a Judge should give a jury as to its use.[10] We also exclude cases in the areas referred to in *The Evidence Act 2006: Act & Analysis*.[11] The reason other cases are unlikely to assist is that the outcome in each case turns on the weight to be given to the matters set out in s 43(3) and (4) of the Act.

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7 See *R v Cooper* [2007] NZCA 481.
8 See *R v Healy,* above n 5, at [46] and [48]–[54].
9 See Evidence Act 2006, ss 40–43.
10 *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145.
11 Richard Mahoney and others *The Evidence Act 2006: Act & Analysis* (3rd ed, Thomson Reuters, Wellington, 2014) at [43.01(1)].

[18] Secondly, *Rei* and *Preston* are both judgments delivered by divisional courts. Neither is more authoritative than the other. Both are but applications of the propensity evidence provisions in the Act. Counsel appearing for the Crown in *Preston* felt obliged to draw the Court's attention to *Rei*.[12] Delivering the Court's decision in *Preston*, Ronald Young J analysed *Rei*, noting the majority of the Court in *Rei* held the previous convictions comprising the propensity evidence revealed "nothing more than offending of the kind alleged".[13] This was the principal reason for which the Court found the probative value of the evidence was modest.

[19] What the *Preston* Court said about *Rei* perhaps overlooks the second reason why the *Rei* Court considered the propensity evidence to be of low probative value. This was the problematic nature of the coincidence reasoning the Crown would invite the jury to undertake. The Court in *Rei* explained:

> [50] The second reason we think the propensity evidence is of low probative value is that the coincidence reasoning the Crown would invite the jury to undertake is problematic. The previous convictions indicate that it would *not* be such a strange coincidence for the appellant to be occupying premises in which materials for methamphetamine manufacture were placed without his knowledge. If the appellant had no prior association with drug offending, it would in fact be much more difficult to explain how the drugs came into his premises. The appellant's prior involvement in the drug world supports his case that someone else placed the drugs in his premises. In particular, his 2002 offending was for participation in a large scale operation where several other offenders were involved, indicating that the appellant is likely to have a number of associates or acquaintances who share the same propensity he does and could be responsible for placing the items in the garage. So, although the evidence might be probative of the appellant's tendency to offend in the way alleged, it is also probative of his defence, meaning its overall probative value is low.

[20] When the police searched Mr Rei's address in September 2010 they found methamphetamine, paraphernalia for manufacturing and using methamphetamine, cannabis, a pistol and stun gun and other incriminating items.[14] Mr Rei's defence was that he was away during the days before and after the police search. The property was a "halfway house", used by other people who could have left the incriminating items there.[15]

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12 *Preston v R,* above n 3, at [40].
13 At [48], citing *Rei v R*, above n 4, at [45].
14 *Rei v R,* above n 4, at [4].
15 At [12].

[21] On our reading of the judgment in *Preston*, only Mr Preston featured in the 2004 propensity offending and May and August 2011 current offending, except that Mr Preston's partner was also charged in relation to the August 2011 offending.[16]

[22] All of this serves to demonstrate how fact and circumstance-specific each propensity evidence ruling needs to be. It also explains why the Court in *Preston* distinguished *Rei*.[17] The *Preston* Court was also satisfied "that the extent of similarity between the events of May and August in 2011 and in 2004 is significant".[18]

[23] Because we consider this issue is misconceived, we decline to answer it. Quite apart from that, an answer is not required in order to deal with the present application.

Fourth issue: did the Judge err in admitting the propensity evidence on charge one?

[24] In addressing this last issue Ms Caris placed heavy reliance on *Rei*, submitting the two reasons why the majority had excluded the propensity evidence in *Rei* were equally applicable here.[19] As to the first reason, she submitted evidence of Mr Grigg's 2005 offending "reveals nothing more than a mere tendency to commit offending of the type alleged, namely to possess methamphetamine for the purpose of supply". Then, having cited the passage from [50] in *Rei* which we have set out in [19] above, she argued the generic nature of Mr Grigg's 2005 offending has insufficient probative value on the issue in dispute to outweigh the risk of unfair prejudice.

[25] Mr Grigg's defence to charge one emerges from this statement he made to the police:

> It's not my meth, I'll tell you that much now. My car's been in storage the last 12 days at someone's house, the doors are unlocked. People have free access to my vehicle.

[26] So the issue on charge one will be: was the methamphetamine the police found in Mr Grigg's car his?

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16 See *Preston v R,* above n 3, at [7]–[10] and [23]–[32].
17 At [49].
18 At [49].
19 *Rei v R,* above n 4, at [45] and [50].

[27] Judge Morris accepted the defence case – "that the car had been amongst other associates" – would weaken the Crown's case which would rely on coincidence and linkage. She explained:

> [37] Here the Crown can say what bad luck that a man who has been dealing in methamphetamine in his past had his car chosen to put methamphetamine into that has been packaged for sale. It is far more consistent and statistically likely, the Crown says, that it was him again. Far less likely that a past methamphetamine dealer just happens to have had the misfortune of someone choosing his car to put the methamphetamine for sale into.

[28] Nevertheless, the Judge reached the view that the previous conviction for possession for supply was "certainly relevant to whether Mr Grigg was the owner of these drugs that had been packaged for supply".[20]

[29] The Judge then acknowledged the prejudicial effect of the jury hearing evidence that Mr Grigg had been convicted of methamphetamine dealing in the past. She said this about prejudicial effect:

> [47] … He has said to the police that he did not know it was there but that if he did he would use it or he would have sold it. In those circumstances the prejudice as a result of another set of offending is, in my view, appreciably less. It is also less unfairly prejudicial to him where there are other circumstantial factors, other evidence tying him in with dealing such as the texts. And of course there will be jury directions.
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> …
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> [49] Accordingly, I find the probative value does outweigh any risk of potential for unfair prejudice.

[30] We see no error in that balancing exercise. The Judge did not work through the matters set out in s 43(3) of the Act, but Mr Corlett was conscious of this and addressed them in this Court. He accepted there was only one previous incident, nine years earlier.[21] He also accepted there was nothing specifically unusual about both the propensity offending and the current offending as, for example, Mr Grigg again concealing the methamphetamine in his socks.[22] Mr Corlett submitted possession of

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20 *R v Grigg,* above n 1, at [40].
21 See Evidence Act 2006, s 43(3)(a).
22 Section 43(3)(f).

methamphetamine for supply was unusual behaviour in the "general terms" spelt out in the judgment of the majority in *Mahomed*.[23]

[31] Mr Corlett's focus was on s 43(3)(c) – the extent of the similarity between the circumstances of Mr Grigg's 2005 offending and those of the current possession for supply charge, charge one. Mr Corlett identified these similarities between both sets of offending:

a) a small quantity of methamphetamine: 2.9 grams in 2005; 1.7 grams this time;

b) snaplock bags found on both occasions;

c) similarly, scales present both times;

d) and also a pipe on both occasions; and

e) the methamphetamine – or some of it – concealed on both occasions.

[32] We acknowledge the similarities in this case are not unusual, which may be seen to limit their probative effect.[24] But, on the other hand, the differences between the 2005 offending and that alleged here are not sufficiently striking to have an effect on the probative value.[25] This Court was faced with a similar situation to the present in *Ihaaka v R,* where the appellant was charged with possession of cannabis for supply.[26] The Crown sought to adduce propensity evidence that the appellant had pleaded guilty to the same charge some four years prior. It argued the circumstances in which the cannabis was found, along with scissors, tinfoil, and rolled "tinnies", supported the probative value of the propensity evidence.[27] The Court said:[28]

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23 *Mahomed v R,* above n 11, at [13].

24 Mahoney and others, above n 13, suggest at [43.07(16)] that s 43(3)(c) and (f) require a similar analysis, in that unusualness is only relevant to the extent the propensity evidence and the contemporary allegation display the same, or similar, unusual features.

25 Since this Court's decision in *Vuletich v R* [2010] NZCA 102, there has been a trend towards recognising openly the importance of differences, as well as similarities, in assessing the probative value of propensity evidence

26 *Ihaaka v R* [2013] NZCA 405.

27 At [9].

28 At [12].

> Whilst it may not be unusual in a general sense to find cannabis in rolled tinnies, we agree that the circumstances in which the cannabis was found on both occasions are capable of showing a tendency to actually acquire cannabis and make up tinnies for sale.

[33] We therefore accept Mr Corlett's submission that these similarities help to demonstrate the probative force of the propensity evidence for the purpose of showing Mr Grigg had a tendency to deal in small quantities of methamphetamine in order to support a personal habit, which in turn is relevant in deciding the issue on charge one: was the methamphetamine found in the car Mr Grigg's?

[34] Accordingly, we answer issue four 'No', the Judge did not err in ruling the propensity evidence admissible on charge one.

Result

[35] Save that the propensity evidence is to be admissible only on charge one, we uphold the Judge's ruling that the propensity evidence is admissible in Mr Grigg's trial.

[36] Mr Grigg's application for leave to appeal is granted. Save that admissibility of the propensity evidence is limited to charge one, the appeal is dismissed.

[37] To preserve Mr Grigg's right to a fair trial, we make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of trial. Publication in law report or law digest is permitted.

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