

REASONS OF THE COURT

(Given by Gilbert J)

Introduction

[1] The appellant, S, faces 29 charges of sexual offending against two of his nieces and two of his cousins. We will refer to them as complainants A, B, C and D. The alleged offending occurred between 1972 and 1983 when S was aged between 17 and 28 and the complainants were variously aged between four and 15.¹ S's case is that these events did not occur.

[2] The charges are:

Complainant A – period of alleged offending 1972

- (a) Three charges of indecency with a girl under 12.

Complainant B – period of alleged offending 1980 to 1983

- (a) Ten charges of indecency with a girl aged 12 to 16.

Complainant C – period of alleged offending 1972 to 1978

- (b) Four representative charges of indecency with a girl under 12.
- (c) One charge of rape.
- (d) Four representative charges of indecency with a girl aged 12 to 16.

¹ Judge Zohrab, in the decision determining the various pre-trial applications, addressed the difficulty arising with some of the offending being committed when the appellant was between 13 and 17, and being ordinarily dealt with in the Youth Court. The legislation in force also circumscribed the offending for which a child under 14 could be criminally liable. After reviewing the issues before him, Judge Zohrab concluded the charges ought to be amended so as the start date for all was the day the appellant turned 17: see *R v [S]* [2015] NZDC 357 at [73]. Therefore, although there was alleged offending prior to 1972, it is only the offending occurring after May 1972 that is the subject of the charges.

Complainant D – period of alleged offending 1972 to 1978

- (e) Three representative charges of indecency with a girl under 12.
- (f) One representative charge of attempted indecency with a girl under 12.
- (g) Three further representative charges of indecency with a girl under 12.

[3] Judge Zohrab declined an application for severance and ruled that the complainants' evidence is cross-admissible as propensity evidence.² The Judge further ruled that the evidence of complainants A and C concerning earlier sexual offending, from 1968 to 1972 when S was aged between 13 and 16, is also admissible as propensity evidence. There is no challenge to these rulings but S seeks leave to appeal against a further ruling by the Judge that the evidence of a fifth girl, to whom we will refer as E, is also admissible as propensity evidence. E is another of S's cousins. Her evidence is that from 1966 to 1968, when she was aged between nine and 11 and S was aged between 11 and 13, S raped her twice.

[4] The Judge summarised his reasons for concluding that E's evidence ought to be admitted as propensity evidence in the following way:

[166] ... I consider the acts alleged by [E] to be sufficiently unusual, and sufficiently similar to the allegations made by the other four complainants, to have probative value, notwithstanding that the defendant may have lacked understanding that they were wrong or unlawful. In my view its probative value is particularly significant in the context of alleged sexual assaults on five complainants spanning a period when the defendant was aged from 11 to 28. [E's] allegations allege [pre-adolescence] offending on the part of the defendant, and the others allege offending during his adolescence and through until adulthood. These matters in combination are highly probative.

[167] Accordingly, the Crown will be permitted to lead [E's] evidence, subject to the appropriate warning pursuant to s 122 Evidence Act 2006. Furthermore, whilst I am acutely aware of the extreme delay in the making of the complaint, and which will need to be addressed by way of direction, I am content to conclude that the prejudicial effect is not outweighed by the probative value.³

² *R v [S]*, above n 1, at [120]–[131] and [132]–[169].

³ This is obviously a slip. The Judge clearly meant the reverse, namely that the prejudicial effect is outweighed by the probative value.

[5] S appeals against this ruling on the ground that evidence of his behaviour when he was a child, aged 11 to 13, has limited probative value in relation to his actions when he was aged between 17 and 28. He contends that the limited probative value of this evidence is overwhelmed by the unfairly prejudicial effect it is likely to have.

Analysis

[6] The alleged offending is summarised in the table below:

| Date | Alleged offending | Complainant | Complainant's age | Defendant's age |
|-----------|---|-------------|-------------------|-----------------|
| 1966–1968 | Rape (x2) | E | 9–11 | 11–13 |
| 1968–1975 | Representative indecency with girl under 12 (x4): <ol style="list-style-type: none"> 1. Induced her to touch his penis with her hand. 2. Penetrated her genitalia with his fingers. 3. Thrusting his penis between her legs. 4. Kissing her. | C | 4–10 | 13–20 |
| 1970–1972 | Indecency with girl under 12 (x3): <ol style="list-style-type: none"> 1. Penetrating her genitalia with his fingers. 2. Kissing. 3. Connection between his mouth and her genitalia. | A | 7–9 | 15–17 |
| 1972–1975 | Representative indecency with girl under 12 (x3): <ol style="list-style-type: none"> 1. Kissing. 2. Touching her body with his hands. 3. Lying on top of her. | D | 4–6 | 17–20 |
| 1972–1975 | Representative attempted indecency with girl under 12: Induced her to touch his penis. | D | 4–6 | 17–20 |
| 1975–1976 | Rape | C | 11 | 20–21 |
| 1975–1978 | Representative indecency with girl 12–16 (x4): <ol style="list-style-type: none"> 1. Induced her to touch his penis with her hand. 2. Penetrated her genitalia with his fingers. 3. Thrusting his penis between her legs. 4. Kissing her. | C | 11–13 | 20–23 |

| Date | Alleged offending | Complainant | Complainant's age | Defendant's age |
|-------------|---|--------------------|--------------------------|------------------------|
| 1975-1978 | Representative indecency with girl under 12 (x3): 1. Kissing. 2. Touching her body with his hands. 3. Lying on top of her. | D | 7-9 | 20-22 |
| 1980-1983 | Indecency with girl 12-16 (x10): 1. Penetrated her genitalia with his fingers. 2. Connection between his mouth and her breasts. 3. Ejaculating over her face. 4. Touching her breasts with his hands. 5. Touching her bottom with his hand. 6. Kissing her face. 7. Penetrating her genitalia with his fingers. 8. Inducing her to touch his penis with her hand. 9. Connection between her mouth and his penis. 10. Ejaculating over her face. | B | 13-15 | 25-28 |

[7] This table shows that the alleged offending occurred frequently throughout the entire period from 1966 to 1983.⁴ The complainants were young female cousins or nieces of S. The alleged offending all occurred while the complainants were visiting S and his family at one of S's parents' two residences or at S's grandmother's residence. The alleged offending is serious and the pattern of behaviour is similar.⁵

[8] Mr McKenzie's submission that evidence of a person's acts as a child has little probative value in determining whether that person committed similar acts as an adult has little force in this case because acts similar to those alleged by E, when S was a child, are said by the other four complainants to have continued to occur frequently from that time through until he became an adult.⁶ There are no broken periods. Unless there has been collusion between them, it would be an extraordinary

⁴ See Evidence Act 2006, s 43(3)(a).

⁵ Section 43(3)(c).

⁶ Mr McKenzie accepts that in appropriate cases evidence of behaviour in childhood can qualify as propensity evidence, even in the absence of knowledge that the acts were wrong or unlawful, as this Court found in *K (CA26/2014) v R* [2014] NZCA 229 at [44].

coincidence if all five complainants made false allegations of similar sexual offending by S covering this extended period from 1966 to 1983.⁷

[9] Particularly given that S faces allegations of rape, we are not persuaded that E's evidence that she too was raped by S is unfairly prejudicial. It has high probative value in relation to the other alleged offending because of its close connection in time, place and circumstance. We consider that the risk of any unfair prejudice arising out of this evidence can be met by appropriate directions being given to the jury by the trial Judge.

[10] We are not persuaded that the Judge made any error in determining that E's evidence is admissible as propensity evidence. The appeal must therefore be dismissed.

Result

[11] The application for leave to appeal is granted.

[12] The appeal is dismissed.

[13] For fair trial reasons, 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.

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⁷ Judge Zohrab noted there was no evidence of collusion between the complainants and to the extent there was any suggestion of collusion, this could be the subject of cross-examination at trial: *R v [S]*, above n 1, at [134](d).