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ORDER: PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS (INCLUDING THE RESULT) IN NEWS MEDIA OR ON INTERNET OR OTHER PUBLICLY ACCESSIBLE DATABASE UNTIL FINAL DISPOSITION OF TRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA251/06

THE QUEEN

v

GAVON LLOYD LIDDELL

Hearing: 23 August 2006

Court: Robertson, Wild and Harrison JJ

Counsel: M E Goodwin for Appellant
M D Downs for Crown

Judgment: 29 August 2006 at 11am

JUDGMENT OF THE COURT

A The application for leave to appeal is granted, but the appeal is dismissed.

B Order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on Internet or other

REASONS OF THE COURT

(Given by Wild J)

Introduction

[1] This is an appeal against a judgment of Venning J ruling admissible in the appellant's forthcoming trial propensity (similar fact) evidence by two proposed female witnesses.

[2] The nub of the appeal is that Venning J failed to take account of differences in the proposed propensity evidence. He thus erred in concluding the evidence was sufficiently supportive of the prosecution case "to outweigh the prejudicial impact of that evidence, as he gave inadequate weight to the prejudice which would inevitably arise".

[3] The appellant faces two counts of indecently assaulting a girl (called MS) aged between the age of 12 and 16 years, and one count of raping another girl (AH). MS, now 51, was aged 13-15 when allegedly indecently assaulted by the appellant between 1968-1970. AH, now 48, was 13 when allegedly raped by the appellant between late 1971-early 1972.

[4] The indecent assaults on MS allegedly occurred when she was staying with the appellant during school holidays. One occurred in a swamp area at the back of the appellant's house, the other in bushes by the side of the road after the appellant had stopped his car while MS was accompanying him on a work trip. The appellant lying on top of MS and rubbing her private parts with his penis until he ejaculated without penetration, and wiping himself with a handkerchief, were common features of both assaults, as was the appellant telling MS to keep it a secret and (on the second occasion) threatening that she would get into trouble if she told anyone. The

appellant telling MS that she "was a special girl and … a woman now" was a feature of the first incident.

[5] The rape alleged by AH occurred in the appellant's house while she was staying with him during Christmas school holidays. The accused wiping himself with a handkerchief after ejaculating and telling AH not to tell anyone and threatening her if she did (although this time the threat was that she would go to jail) were, again, features.

[6] AH also described a subsequent occasion when the appellant drove into an undeveloped subdivision and asked her if she wanted to earn $20. She ran off while he was beginning to loosen his clothing.

[7] Venning J declined to sever the charges relating to MS and AH. There is no challenge to that.

The propensity material

[8] In 1997 the accused was found guilty on four counts of rape and three counts of indecent assault involving five different female complainants. The disputed evidence is from two of the complainants from that trial.

[9] SB will give evidence of an incident in 1980 when she was 12 and living with her mother in a motor camp. The appellant and his wife were also living there. She will say that, while out driving with the appellant, he turned into a new, vacant subdivision, took her into the middle of a field, lay on top of her on the ground and raped her. She will say that he told her not to tell anyone what happened – "its just our secret".

[10] KL will give evidence that the appellant indecently assaulted her while she was staying with him and her grandmother in 1993. While her grandmother was out at work the accused showed her a pornographic video and then put his hand into her shorts and touched her vagina. The appellant then sniffed his fingers before going into the bathroom, telling KL he needed to wash his hands because they smelt. Just

before going to wash his hands, the appellant told KL not to tell anybody because he could go to jail for it.

[11] A common feature of both proposed witnesses' evidence will be the appellant telling them that he had helped or taught his daughters and other outgoing girls to become sexually aware or how to be a woman and that good fathers should do that.

The appeal issues

[12] Mr Goodwin accepts Venning J correctly identified the common features and similarities of the offending alleged by the four women.

[13] Mr Goodwin also pointed to other similarities between the accounts of the four women which the Crown had referred to in argument before Venning J, but which the Judge did not mention in his ruling. One of these – the family connection between the appellant and all the women except SB (who was a daughter of a family friend) was in fact noted by the Judge. The others are comparatively insignificant.

[14] Mr Goodwin urged two differences in the alleged offending. The first was the dates of the offending against MS and AH between 1968 and early 1972; the offending against SB in 1980, and that against KL in 1993. The Judge did note that:

> While the offending against [SB] and [KL] occurred a number of years later than the incidents alleged by the complainants, significantly the offending occurred at a time when both [KL] and [SB] were aged around 13, the age at which MS and AH say they were when they were assaulted by the accused.

[15] In that passage Venning J rightly put the focus on the similarity in the complainants' age at the time of the alleged offending. That accords with what this Court said in *R v Conroy* CA443/05 23 February 2006 at [14]:

> It has been said often that the focus of the analysis in cases such as this needs to be on the similarities rather than on the dissimilarities. We endorse that comment.

[16] The second difference emphasised by Mr Goodwin was between the types of offending alleged. MS alleged indecent assault on two occasions (penis rubbed

against vagina/private parts), KL alleged indecent assault (digital touching on outside of vagina), and both AH and SB alleged rape. Mr Goodwin submitted that "the sexual activities were commonplace and bore no distinctive trademark: *R v Tulisi* (2000) 18 CRNZ 418 (HC)".

[17] Venning J was alive to these differences: we have largely taken our summary of the offending alleged by each complainant from his ruling. He rightly focused on the similarities: each complainant being around 13 at the time of the offending; the appellant taking both AH and SB into deserted subdivisions; the appellant telling the complainants to keep what he had done to them a secret and threatening them about the consequences of telling anyone.

[18] Sensing resistance to his argument that the Judge was wrong to rule the evidence of both SB and KL admissible, Mr Goodwin submitted that at least the evidence of KL should have been excluded. He argued that the appellant's use of the pornographic video, his digital touching of KL's vagina and his sniffing his fingers afterwards were all features that differentiated this offending. We accept those differences of detail. But they are overwhelmed by the similarities: KL's age, the offending occurring while KL was staying with the accused, the "sexual education" banter that preceded the offending and the threats that followed it.

[19] Mr Goodwin submitted that Venning J's refusal to order severance sufficiently established the similarities in the appellant's offending. If there is anything in this point, it is defeated by the potential for the appellant to submit that the two complainants, MS and AH, have colluded. Indeed, that very submission was put to Venning J but then withdrawn, possibly because counsel realised that it was distinctly unhelpful to the defence attempt to shut out the evidence of SB and KL. Absent that evidence, collusion could be put to the jury at the appellant's trial.

[20] We reject Mr Goodwin's initial suggestion that propensity evidence of later offending is somehow to be distinguished from evidence of earlier offending. Indeed, Mr Goodwin ultimately accepted that the admissibility principles are the same. This Court expressly rejected any distinction in *R v Yum* CA54/01 16 May 2001 at [17].

Conclusion

[21] No point is served in our reciting the principles governing the admissibility of propensity evidence, or referring to the cases from which they can be drawn. There was no challenge to Venning J's summary of them.

[22] Mr Goodwin also made the almost standard submissions that the proposed propensity evidence will complicate the jury's task, and risk the jury illegitimately reasoning that because the appellant had been convicted of similar offending on later occasions, he must also be guilty of the earlier offending with which he is charged. Venning J was alive to these points. The risk of illegitimate reasoning will be a matter for direction by the trial Judge if appropriate. We say "if appropriate", because the Crown does not intend leading evidence of the later convictions, but only the evidence of SB and KL as to what the appellant did to them.

[23] We can see no error in Venning J's carefully and succinctly reasoned ruling.

Result

[24] The application for leave to appeal is granted, but the appeal is dismissed.

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