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

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA73/2022
[2022] NZCA 377

BETWEEN	R (CA73/2022) Appellant
AND	THE QUEEN Respondent

Hearing:	4 May 2022
Court:	French, Venning and Moore JJ
Counsel:	A J Holland and R A van Boheemen for Appellant R K Thomson for Respondent
Judgment:	15 August 2022 at 11 am

JUDGMENT OF THE COURT

A Leave to appeal is granted.

B The appeal is dismissed.

C 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.

REASONS OF THE COURT

(Given by Moore J)

Introduction

[1] R is charged with the sexual violation by rape of two heavily intoxicated teenage girls at parties in October and November 2020.[1] The Crown applied to join the two charges. On 28 January 2022, Judge McNaughton granted the Crown's application.[2]

[2] R appeals. Leave is required to appeal a pre-trial decision.[3] R seeks leave on the basis that the proposed propensity evidence is of critical importance to the trial and that the matter cannot adequately be dealt with post-trial.

[3] The Crown did not oppose a grant of leave, but submitted that the appeal should be dismissed on its merits. Given that the outcome of the appeal will necessarily determine the way any trial will be conducted, leave is granted.

The alleged offending

[4] The Crown case is that R raped two heavily intoxicated teenage girls at two different parties in late 2020. Those within his social circle attended the parties. The two complainants, "U" and "O", knew each other at the time and were friends, albeit not close.

[5] R does not dispute that he had sexual intercourse with both complainants. His defence is that the complainants consented, or alternatively that he reasonably believed that they were consenting.

[6] The description which follows is drawn from the summaries of fact.

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1 Crimes Act 1961, ss 128(1)(a) and 128B.

2 *R v [R]* [2022] NZDC 803.

3 Criminal Procedure Act 2011, s 217(2)(f). Subsection (f) specifically relates to an appeal against the making or refusal to make an order under s 138(4) (that defendant be tried separately on one or more charges). In *R v Hall* [2020] NZCA 317 at [4] this Court treated a ruling refusing joinder as being in substance a decision to sever the subject charges and found the appeal could proceed pursuant to s 217(2)(f).

Sexual violation by rape of U — 1 October 2020

[7] R was 22 years old at the time of the first alleged rape. U was 16.

[8] It is alleged that in the early hours of 1 October 2020, R and U were with a group of friends at a party in a garage in Auckland. Throughout the night R was pouring U drinks. She became intoxicated and fell asleep on a couch.

[9] U requested that a friend, A, take her to the bathroom because she felt sick and wanted to vomit. A assisted U to the bathroom. U lay on the bathroom floor and vomited into the toilet. She was unable to stand.

[10] A then took U back to the garage where the remainder of the group were. She put her down on a bed. U said she wanted to vomit again. A carried her back to the bathroom for a second time.

[11] R entered the bathroom. He told A to leave. He told her that he would look after U. R closed and locked the bathroom door, leaving him and U in the bathroom alone.

[12] Shortly afterwards A returned to the bathroom. She tried to open the door. She called out to R. He told her that U was "okay" and to "fuck off". A could hear U's voice but was unable to work out what she was saying. She left but returned about five minutes later. She called out again. This time there was no answer.

[13] R is alleged to have had non-consensual sex with U in the bathroom. He returned to the garage about 15 minutes later. He told A that U was still on the bathroom floor. He claimed he tried to carry her back but she was too heavy and resistant.

[14] A returned to the bathroom. She found U semi-conscious. A noticed that U's pants had been rearranged. They looked as if they had been removed and not put back on properly. A carried U back to the garage. They left the party together shortly afterwards.

[15] In certain respects, U's recollection of the incident differs from A's. For example, she said in her evidential video interview (EVI) that it was R who walked her back to the garage.

Sexual violation by rape of O — 27 November 2020

[16] R is then alleged to have raped O at a party on the night of 27 November 2020. O was 16 at the time. She had been introduced to R by a mutual friend, T, several months earlier. T considered R his closest friend.

[17] T knew O from high school. They were close friends although not in a formal relationship. T described them as "seeing each other" but not as boyfriend and girlfriend.

[18] On the night in question R and a number of others, including O, were partying in a garage drinking bourbon. O became very drunk. At around 1:00 am she went outside with approximately four others to smoke cannabis. When she returned, she was seen to be stumbling and incoherent. She felt sick. T helped her to vomit. He then put her on a couch in the garage and called a friend to arrange a ride home for her.

[19] R and the host of the party found O unconscious on the couch. With the assistance of another they carried her upstairs to the host's bedroom. They put her on the bed. While R was putting O onto the bed, she hugged him around his neck. She said she wanted someone to stay with her. R told her his name and that he was not T. O said that she knew that but continued to hug him.

[20] R pulled away from O. One of the partygoers tried to walk him downstairs. However, O continued to hold onto him. R was asked to stay with O until she fell asleep. The others left the bedroom. The door was left open.

[21] R closed the door. He began to kiss O. Then he inserted his tongue into her mouth. He unbuttoned and partially pulled down O's jeans. Four of the partygoers returned to the bedroom. They opened the door. They saw R lying topless next to O. He was hugging her. O was motionless apart from opening her eyes from time to time.

One of the partygoers told R not to touch O. He replied "bro, I'm just a man". The partygoers left.

[22] R lay on top of O while she lay on her back. He then had sexual intercourse with her.

[23] About 10 minutes later, some of those who had been upstairs earlier told T what they had seen. T went upstairs. Several others followed him. T opened the door. He saw R and O on the bedroom floor. O's pants were around her knees. R was naked on top of her having sexual intercourse.

[24] T yelled at R. R got up and left. He repeated his earlier comment; "bro, I'm just a man". Shortly afterwards he commented to another partygoer that he was sorry and that he did not know why he "did that" to T. He left the address at around 5:00 am.

[25] O remained in the bedroom. She woke up at about 10:00 am. The host told her about the incident with R. She reacted in disbelief. She claimed she had no recollection of what had happened. Later that day she told her sister and through her, her parents were informed. A complaint was made to police and later that day O gave a preliminary statement to the police.

[26] Several days later R told T that he was sorry because he knew that T "liked" O. However, to another partygoer, he said that he did not take advantage of O.

[27] On 17 December 2020 O gave an EVI to the police.

[28] R was charged with O's rape on 1 March 2021.

[29] Although the incident involving U pre-dated that involving O, it was not until later in March 2021 that U made her complaint to the police and gave an EVI. Apparently, this was because O had told her about what R had done to her. R was charged with U's rape in June 2021.

[30] In August 2021, the Crown applied to join the charges.

Legal principles — joinder, severance and propensity evidence

[31] The prosecutor may, by notifying the court before which a proceeding is being heard, propose that two or more charges against a defendant be heard together.[4] If the court considers it is in the interests of justice to do so, it may order that one or more charges against the defendant be heard separately.[5]

[32] The principles stated by this Court in *Churchis v R* relating to joinder and severance are well-known:[6]

(a) Offending that is unrelated in time or circumstance should not be tried together, unless the evidence of one incident is relevant to another to an extent that its probative value outweighs its prejudicial effect. That relevance may arise in a variety of circumstances, such as where the facts are so similar or the allegations interconnected to a point that it would be artificial to present them separately.

(b) Joinder may be granted if evidence relevant to one charge is also relevant to one or more other charges.

(c) The practicalities of the criminal process may be taken into account, including:

(i) the degree of connection between the charges;

(ii) the impact of successive trials on the accused and witnesses; and

(iii) the likely effect of publicity of the first and subsequent trials.

(d) Prejudice to the accused is a factor to be taken into account. The fact that an accused may be obliged to give evidence is a relevant but not decisive consideration.

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4 Criminal Procedure Act, s 138(1).
5 Section 138(4).
6 *Churchis v R* [2014] NZCA 281, (2014) 27 CRNZ 257 at [28].

(e) The discretion is wide. In the end, what is required is a balancing between the legitimate interests of an accused and the public interest in the fair and efficient despatch of the Court's business.

[33] Evidence may be relevant to more than one charge if it is cross-admissible propensity evidence. In such a case it has been said it will often be in the interests of justice to hear those charges together.[7] In practice it will be usual for charges to be heard together in such circumstances.

[34] Propensity evidence is evidence which tends to show a person's propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events, or circumstances with which a person is alleged to have been involved.[8] The rationale for the admission of propensity evidence rests largely on the concepts of linkage and coincidence — the greater the linkage or coincidence, the greater the probative value that the evidence is likely to have.[9]

[35] The prosecution may offer propensity evidence about a defendant in a criminal proceeding only if the evidence has a probative value in relation to an issue in dispute in the proceeding that outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant.[10] The court must therefore take into account the nature of the issue in dispute when assessing the probative value of the evidence.[11] Probative value may be assessed with reference to the factors set out in s 43(3) of the Evidence Act 2006.

[36] When assessing the prejudicial effect of the evidence, the court must then consider whether the evidence is likely to unfairly predispose the fact-finder against the defendant and whether the fact-finder may give disproportionate weight to it in reaching its verdict.[12]

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7 See for example *Banks v R* [2011] NZCA 469 at [12].
8 Evidence Act 2006, s 40(1)(a).
9 *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [3].
10 Evidence Act, s 43(1).
11 Section 43(2).
12 Section 43(4).

District Court decision

[37] Judge McNaughton noted that the issue at trial will be whether there was an absence of consent or that R had a reasonable belief in consent.[13]

[38] He considered that the two complaints were closely connected in time and circumstance, with "striking" similarities between the events.[14] Those included the age of the complainants, that R knew them both, the context of a small social gathering in a garage, and that both complainants were drinking and became intoxicated to the point of vomiting. R offered assistance as a means of isolating them.[15] The Judge considered that "taking advantage of a severely intoxicated 16-year-old immediately after she had vomited" and subsequently refusing to leave when confronted were unusual features of the alleged offending.[16]

[39] He considered that the possibility of collusion or suggestibility was insignificant.[17] He characterised U's account as that of a young girl who after the event has come to the realisation that sexual intercourse in circumstances where one party is so severely intoxicated that they are not in a position to give free and informed consent meets the legal definition of rape.[18] That was the limited extent to which U was suggestible.[19] The Judge considered that O's account was to the same effect.[20] Both complainants were clear as to what they independently recalled and what other people told them.[21] Nor was there evidence to support any possibility of collusion.[22]

[40] The Judge was satisfied that the probative strength of the evidence "significantly" outweighed any risk of prejudice.[23] He noted that the hearing of the evidence together would explain U's delayed complaint and would save time,

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13 *R v [R]*, above n 2, at [45].
14 At [45].
15 At [45].
16 At [46].
17 At [48].
18 At [48].
19 At [48].
20 At [49].
21 At [56].
22 At [56].
23 At [57].

particularly for the two Crown witnesses giving evidence relating to both charges.[24] The Judge thus granted the Crown's application for joinder.[25]

Approach on appeal

[41] Where an appeal is brought against a pre-trial decision, the appeal court may confirm or vary the decision appealed from, or set aside the decision and make any other order it considers appropriate.[26]

Issues on appeal

[42] The issues raised by R on appeal are:

(a) whether the Judge overstated the probative value of the evidence as cross-admissible propensity evidence;

(b) whether the Judge gave insufficient consideration to the unfair prejudice faced by R if the charges were heard together; and

(c) relatedly, whether the Judge erred by joining the charges.

Did the Judge overstate the probative value of the proposed propensity evidence?

[43] We first turn to consider the probative value of the proposed propensity evidence.

[44] In our view, the relevant propensity established by the proposed propensity evidence is R's tendency to identify heavily intoxicated girls or young women within his friend cohort at parties and to use the pretext of looking after them to position himself alone with them and then sexually violate them.

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24 At [57].
25 At [57].
26 Criminal Procedure Act, s 221.

[45] Plainly this propensity is relevant to the issues in dispute at trial, which the Judge correctly identified as whether the complainants consented to sexual intercourse with R and/or whether he reasonably believed that they were consenting.

[46] There is a high degree of coincidence between the two complaints. Both young women knew R. They were very drunk at parties where he was present. They both made complaints that their sexual conduct with R was not consensual. This type of propensity evidence was referred to as "scenario three" by the Supreme Court in *Mahomed v R*:[27]

> "Scenario three", where a number of witnesses give disputed evidence of broadly similar offending (usually of a sexual nature) by the defendant. The evidence of each witness supports that of the others because of the unlikelihood that independent witnesses would make up similar stories. If the evidence of one of the witnesses is much stronger than that of the others (perhaps because of independent corroboration), scenario three is similar to scenario one. But more commonly, as with scenario two, a conclusion that the defendant has the relevant propensity will simply be a corollary of, and not a stepping stone to, a conclusion that the charges have been proved.

[47] The probative value of the proposed propensity evidence turns on the factors contained in s 43(3) of the Evidence Act, to which we now turn.

(a) Did the Judge overstate the similarities between the alleged rapes and their unusualness?

[48] Ms van Boheemen, for R, submitted that the Judge overstated the similarities between the alleged incidents.[28] Specifically, she submitted that many similarities arise from the fact that the alleged incidents occurred at parties within the same group of friends. She submitted that R did not inveigle himself with the complainants under the guise of looking after them because O asked R to stay with her and hugged him.

[49] Ms van Boheemen also observed that there is no evidence that R knew O had vomited. She submitted that it follows this factor cannot be elevated to a claim it was part of his modus operandi. She thus submitted that the Judge erred in his assessment of unusualness.[29] Nor, she submitted, is it clear that R had "taken advantage" of O

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27 *Mahomed v R*, above n 9, at [85(c)].
28 Evidence Act, s 43(3)(c).
29 Section 43(3)(f).

when it was O who had asked him to stay with her. She added that while R was confronted during the incident with O, that was not the case in his involvement with U.

[50] Ms Thomson, for the Crown, submitted that the Judge did not overstate the similarities between the incidents. She highlighted a number of these similarities. She submitted that in a trial where the issue is consent or reasonable belief in consent, these similarities supported the probative value of the evidence because it would be an unlikely coincidence that R had sexual intercourse in two highly similar sets of circumstances, where both complainants subsequently claimed that they did not consent.

[51] In our view there are extensive similarities between the two incidents, for the reasons which follow.

[52] First, both involve young women of similar age who were a part of R's social circle. He had met both previously. Each was very drunk, apparently on bourbon, a circumstance R was plainly aware of. He represented to others that he was going to care for both of them. In doing so he created an ostensibly laudable subterfuge which placed him alone with them and concealed the fact that he intended to exploit that circumstance to sexually violate them. After the alleged offending, he took steps to conceal the offending; for example by closing the door and (where possible) locking it. R persisted with the sexual violation of both complainants despite being interrupted by others.

[53] We accept Ms van Boheemen's point that some aspects surrounding the offending were simply a function of events occurring at parties within the same social diaspora. For example, that both parties took place in a garage and that the complainants were drunk on bourbon may be seen as socially generic given the age and circumstances of the partygoers. These features provide context but are not, in themselves, particularly unusual. To assess their probative value they must be considered in the context of the whole of the evidence. Taken together, the above similarities are significant because they support the Crown's case that R's modus operandi was to sexually violate very drunk young women at parties.

The essential character of the opportunity to offend is the same across both incidents. That R is alleged to have exploited that opportunity on two separate occasions bolsters the strength of each of the complainants' accounts.

[54] Second, we cannot accept Ms van Boheemen's submission that R did not place himself alone with both complainants under the guise of looking after them because O asked R to stay with her. That O may have sought R's company is of little moment when the appellant's conduct is viewed in the broader context. It was R who told the others present that O was holding onto him and that she wanted him to look after her. It was this circumstance which enabled him to create the impression he was looking after her and that others would be unlikely to disturb them while he was in her company. This circumstance not only facilitated the alleged offending, but also provided a convenient narrative to conceal it. The effect of both O's and U's evidence is that R took that opportunity to offend against them.

[55] Third, we accept that there is no evidence that R knew O had vomited. It follows we accept Ms van Boheemen's submission that the Judge attached too much weight to the unusualness of that circumstance. However, to the extent this represents an error, it does not materially affect the analysis. That both complainants vomited is directly relevant to the jury's assessment of the level of their intoxication. Irrespective of whether R actually knew O had vomited, it may be inferred from other evidence that he knew each was very drunk and thus less likely to resist and remember what happened.

[56] While Ms van Boheemen criticised the Judge's characterisation of the incidents as R being confronted in the course of his alleged offending, we would not frame the relevant propensity in that way. What is common to both allegations is that R was interrupted by others both times and despite that he persisted. Although A did not confront R directly when he was in the bathroom with U, she nevertheless knocked on the door to check on U and attempted to enter. In direct language R told her to go away and continued despite the risk of raising A's suspicions. However that conduct is viewed, it adds to the unusualness of the common feature of the brazenness involved; that R continued to engage in sexual activity despite interruptions by third parties.

[57] Standing back and considering the similarities in their totality, it is plain that each complainant's account, supported by the evidence of the other, has probative value as cross-admissible propensity evidence. For those reasons, we consider that the two alleged incidents of rape share extensive similarities and a degree of unusualness.

(b) Did the Judge give insufficient weight to the suggestibility of U?

[58] The final aspect of the Judge's analysis which Ms van Boheemen criticised, and on which she focused in her oral submissions, is the claim that U is and was "suggestible".[30] The number of allegations made against a person will not be a factor supporting the probative value of propensity evidence if those allegations are the product of suggestibility.[31]

[59] Ms van Boheemen submitted that the Judge misunderstood counsel's argument and framed it as collusion rather than suggestibility. Her point was that the fact the parties know each other should temper the assessment of probative value. Specifically, she emphasised that A, the key witness to the alleged rape of U, was also present after the alleged rape of O and expressed disapproval towards O because she perceived a betrayal of T.

[60] Ms van Boheemen referred to U's evidence that she had spoken to her psychiatrist, who had proffered the view that, on U's account, R's conduct amounted to rape. U then spoke to O, who told her that R had raped her. Ms van Boheemen thus submitted that U was likely to have been influenced by these conversations, such that she belatedly viewed her interactions with R as sexual violation.

[61] In response, Ms Thomson submitted that the Judge did not overstate the suggestibility of U. U's account is coherent and unchanged by her interactions with others. U's frankness about what she recalled and what she was told by others is indicative of reliability. As for the specific examples cited by the appellant, U's psychiatrist simply told U that based on her account, the circumstances constituted

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30 Section 43(3)(e).
31 Section 43(3)(d).

rape. That did not influence any change in U's account. Furthermore, U's communications with O were unlikely to have influenced U's recollection, particularly in light of the corroborative independent evidence of her drunkenness and R's actions.

[62] In order to properly consider this issue it is necessary to examine U's accounts to others.

[63] First, U disclosed in her EVI that she had spoken to others about the incident. She said that she spoke to her psychiatrist who expressed the view it constituted rape:

> … the people that I talked to *I talked to my Psychiatrist about it, he said it is rape* …
>
> (Emphasis added.)

[64] Next, she mentioned that she had spoken to another young woman (it appears to be common ground that was O) who said R had raped her:[32]

> [U] No … he did it to me first and then he did this to this other girl
>
> MH Right
>
> [U] She's already told her like reported it so I thought I'd just come in now and report mine
>
> MH Was that something you saw?
>
> [U] No, … I wasn't there at the time but
>
> MH Alright um
>
> [U] Like yeah I also know her as well
>
> MH Okay
>
> [U] Um because it's like my friend I guess but we're not very, very close it's just like
>
> …
>
> Yeah, yeah I just wasn't there but she told me of it yeah

[65] O confirmed, in her EVI, that another young woman had messaged her and said that R had sexually violated her.

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[32] In the transcript of the EVI, U denotes U and MH denotes the interviewer.

[66] U mentioned that she had spoken to A about the incident with R around two months later:

> MH Okay and who was the first person that you told about or yeah about that?
>
> [U] Um … [A] I'm pretty sure
>
> MH Yeah … tell me all about telling her
>
> [U] Um … I just told her just cause the other girl that like reported hers and then everyone, I think [A] … I don't if [A] was there … I'm not like but like the um the you know the gathering that I was at, um they were also friends of like other people at that party that she went to yeah that's how like we all kind of like came to find out what happened to her but um
>
> …
>
> Yeah and then and then I told [A] and then she's like oh my god I'm so sorry that happened I didn't know that that was happening to you
>
> …
>
> You should've told us earlier yourself. Like I probably should've told her earlier but I just I wasn't, I wasn't ready like

[67] U said that A mentioned that R "was saying like telling her to leave" during the incident. U noted that this was how she knew R had told A to leave, thereby explaining how it was she ended up alone in the bathroom with R.

[68] Any question of U's suggestibility will only detract from the probative value of the propensity evidence if these interactions influenced U to wrongly claim that she was not consenting to sexual intercourse with R.

[69] In our view they are unlikely to have influenced her account in any material way. In her EVI she provided a coherent narrative. It is corroborated by independent evidence, notably of A, with the only point of material difference being who helped her leave the bathroom.

[70] That U's psychiatrist "told" her that the incident constituted rape does not assist the appellant's claim of suggestibility. As noted by the Judge, it is entirely likely that U's psychiatrist simply listened to her account before explaining why it constituted an

allegation of rape. The psychiatrist's advice was based on what he was told by U. There is no evidence he suggested any particular factual account.

[71] Furthermore, it is not the task of this Court to embark on a credibility analysis or resolve disputes of fact. Those are for the jury.[33] It will be for the defence to explore U's suggestibility with the relevant witnesses; including what U said to them and what they may have said to U.

[72] Nor is U's conversation with A indicative of suggestibility. U's evidence is that A was the first person she told about the alleged rape. This was after talking to O. Thus, at that point, U had already formed the view that she had not consented to sexual intercourse with R due to her intoxication. Presently there is no evidence to support the claim A suggested to U that she had been raped.

[73] Ms van Boheemen relies on *R v Williams* in submitting that U is likely to have been unconsciously influenced by her conversation with O.[34] There the appellant was charged with the attempted kidnapping of one complainant and the indecent assault of another in the same area of Porirua.[35] The complainants were friends and discussed their respective experiences before the second complainant reported the alleged indecent assault.[36] This Court found that:

> [35] … While there is nothing to indicate they have colluded in the allegations, talking about the allegations does increase the risk of suggestibility. Some passages in complainant B's video interview are particularly concerning in this regard as they seem to indicate that complainant B concluded that the respondent was a "stalker" after talking with complainant A or another friend. This raises the possibility that the complaint of indecent assault, which was made after complainant B talked to complainant A, could be the result of suggestibility.
>
> [36] What is particularly concerning are the references to the respondent being "known" as a stalker, which suggests that among complainant B's friends the respondent has a reputation for stalking. The existence of that reputation heightens the possibility of suggestibility. Moreover, as it is presented in complainant B's video interview that reputation is hearsay, which raises further doubts as to the reliability and therefore the probative value of the propensity evidence.

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33 See for example *George v R* [2017] NZCA 318 at [26]; and *R v M (CA642/20)* [2020] NZCA 644 at [33].
34 *R v Williams* [2012] NZCA 410.
35 At [1].
36 At [11].

[74] The circumstances in the present case are starkly different. The concern in *R v Williams* was that the second complainant was influenced by the first complainant's comments that the alleged offender was a stalker, where the defence case was that the indecent assault did not occur. R's reputation for offending in the way complained of does not arise on these facts.

[75] In any event, the mere fact that complainants in the same case may have discussed their experiences does not logically translate to a finding that a complainant's account was affected by suggestibility. As this Court commented in *B v R*:[37]

> [32] Nor do we accept that P's evidential video interview establishes a risk of suggestibility on her part. She acknowledged in her video interview that her therapist had suggested to her that she might have been provided with drugs capable of rendering her unconscious and she then speculated that Mr B could have drugged her because he owned a pharmacy. She also said that she had spoken to a "girl" who told her "they'd done the same thing to her but it was [Mr B] and a different boy." In another part of her interview she said that she was going off what people had told her, remarking that it was only Mr B who was aggressive and had held her head. She then said " … because I don't remember a lot … all I can go off is what people have … told me." In another passage relied on by Mr Dufty she said: "when I explained it to [H] and my therapist and everyone else, that's what they all thought. But I don't want to assume anything." Further, she said that another girl had messaged her saying she was at a party a year ago with Mr B; her drink was spiked, and she was then taken to hospital.
>
> [33] Much of this evidence is related to the possibility of P's drink having been spiked, which we agree is not strong. To the extent that it involves speculation and/or hearsay, it should not be put before the jury. However, it forms a small part of her interview and as we have said already, we do not consider it detracts from the properly admissible evidence which will establish that both M and P were intoxicated when the two incidents allegedly took place and the direct account she gives on what she claims happened to her. If anything, as Mr Carruthers submitted for the Crown, her frankness in identifying what others have said to her suggests she had not allowed her memory of the events in issue to be influenced.

[76] The facts of the present case are much closer to those in *B v R*. Particularly applicable is the principle that frankness in identifying what others have said, as opposed to what was remembered, limits the extent of suggestibility.

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[37] *B v R* [2019] NZCA 673.

[77] R's position is that U has not been truthful about the true nature of their sexual relationship, which included other sexual liaisons. In that regard there is some force in Ms van Boheemen's submission that U was suggestible insofar as she told police it was "wrong" that a "20 something" year old had sexual relations with a 16 year old. If the defence is able to establish that U had consensual sexual relations with R on other occasions and had changed her mind about this particular incident, it may lead to the jury rejecting her evidence. In that case the propensity evidence will carry no weight.

[78] Despite this, we are of the view that it would nevertheless be open to the jury to find that U was intoxicated to the extent that she could not consent. Equally, consent on a previous occasion does not qualify as consent at a later time. In either case there remains obvious force in the propensity evidence. In that event the probative value of the propensity evidence is not materially reduced by the alleged suggestibility of U.

(c) Frequency and connection in time

[79] The remaining two factors in the s 43(3) assessment are the frequency of the acts and their connection in time.[38] R is alleged to have sexually violated two complainants within two months. The fact there are two alleged rapes involves some degree of frequency, albeit not to a significant extent.

[80] There is also some degree of connection in time between the two alleged rapes in that they both occurred in the early hours of the morning and just two months apart.

(d) Conclusion

[81] Taking all of these factors into account, we consider that the proposed propensity evidence has high probative value in relation to the issues in dispute.

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[38] Evidence Act, s 43(3)(a) and (b).

Did the Judge give insufficient consideration to the unfair prejudice faced by R if the charges were heard together?

[82] Ms van Boheemen then submitted that the Judge failed to give consideration to the unfair prejudice that R will face if the charges are heard together. She submitted that O complained about the rape after her friend had become upset after discovering that she engaged in sexual activity with R and after her father had grounded her. Similarly, she submitted that R's position is that U had not been truthful about the extent of her ongoing relationship with him after the alleged rape. It was submitted that R's ability to run his defence would be severely compromised by the fact there were two complainants. It would curtail the defence's ability to highlight the issues with each complainant's account.

[83] Ms Thomson submitted that much of the unfair prejudice associated with hearing the charges together can be cured by orthodox judicial directions. In any event, she submitted that while R's primary defence to both charges will focus on consent and reasonable belief, the factual basis and/or foundation for each defence differs relative to each complainant. This minimises the risk of the jury giving inappropriate weight to the propensity aspect of the evidence. The jury would need to accept each complainant's account before using the evidence as propensity evidence.

[84] We consider that the high probative value of the proposed propensity evidence is not outweighed by the potential for unfair prejudice. Much of the prejudice resulting from the admission of the propensity evidence is a consequence of its high probative value. The possibility of unfair prejudice can also be cured to a significant extent by judicial directions.

[85] We also accept Ms Thompson's point that R has separate defences to each charge based on the credibility of each complainant's account. For example, in respect of U, it will be open to the defence to impugn her credibility by adducing evidence of other consensual sexual liaisons she had with R, and with O it is likely that her hugging of R will be relied upon. If the defence establishes that either account lacks credibility the Judge's direction will ensure the jury will not improperly rely on it as propensity evidence.

[86] For those reasons, we consider that the probative value of the proposed propensity evidence is not outweighed by the risk of unfair prejudice. The Judge did not err by finding that it was highly relevant and cross-admissible.

Did the Judge err by joining the charges?

[87] In considering this question it is necessary to consider the *Churchis* factors.

[88] We have determined that the evidence on each rape charge is relevant to and admissible in respect of the other. The practicalities of the criminal process support joinder. Hearing the charges together will save court resources and mean that witnesses will only have to give evidence once. As noted above, we are satisfied the joinder of the charges will not result in unfair prejudice to R. On the other hand, it would be an affront to justice and common sense if separate trials were ordered in respect of each complainant, only for the other complainant to give supporting propensity evidence on that charge and vice versa.

[89] The Judge was accordingly correct to join the charges.

Result

[90] Leave to appeal is granted.

[91] The appeal is dismissed.

[92] For fair trial reasons, 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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