ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF APPELLANT UNTIL FINAL DISPOSITION OF TRIAL.

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF ALL COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF ALL COMPLAINANTS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA121/2023
[2023] NZCA 256

BETWEEN	W (CA121/2023) Appellant
AND	THE KING Respondent

Hearing:	1 May 2023
Court:	Courtney, Hinton and Churchman JJ
Counsel:	S Brickell for Appellant C P Howard for Respondent
Judgment:	23 June 2023 at 10 am

JUDGMENT OF THE COURT

A Leave for an extension of time is granted.

B Leave to appeal is granted.

C The appeal is dismissed.

D Order prohibiting publication of the name, address, or identifying particulars of the appellant until the final disposition of trial.

REASONS OF THE COURT

(Given by Hinton J)

Introduction

[1] W faces nine charges of historical sexual offending against his adoptive nephew, RW. There are seven charges of committing an indecent act on a male and two of inducing an indecent act. The alleged offending occurred between 1975 and 1979 when W was aged between 17 and 21 years and RW was aged between seven and 11 years.[1] A seven-day jury trial is set down for 28 August 2023. It is a retrial following a hung jury at trial on 11 July 2022.

[2] Judge Forrest held that propensity evidence of W's convictions in 2005, 2010 and 2022 for sexual offending against three young children between 2004 and 2014 is admissible.[2] W seeks leave to appeal the decision. His application was filed approximately two months late, so he also requires an extension of time to bring the application, which the Crown opposes.

[3] The trial already includes propensity evidence of allegations by RW's older sister that W sexually offended against her when she was five to seven years old and similar allegations by his younger sister of offending when she was five or six years old. The offending is alleged to have occurred on a regular basis between about 1971 and 1973. W has not been charged in relation to any of these propensity allegations because he was too young.

[4] Extension of time applications generally turn on the reasons for the delay and the merits of the proposed appeal.[3] Ultimately, an extension will be granted if it is in the interests of justice to do so.[4] W has offered no explanation for his delay but,

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1 RW alleges offending against him from 1973 to 1979 but W is only charged with incidents after October 1975 due to his age.

2 *R v [W]* [2022] NZDC 24914 [District Court Decision].

3 *Mikus v R* [2011] NZCA 298 at [26] citing *R v Slavich* [2008] NZCA 116 at [14].

4 *Mikus v R,* above n 3, at [26] citing *R v Knight* [1998] 1 NZLR 583 (CA) at 587 and *R v Lee* [2006] 3 NZLR 42 (CA) at [96].

nonetheless, we consider it is in the interests of justice to grant an extension and to grant leave. The appeal relates to the admissibility of evidence that is significant to both parties[5] and is at least arguable. We thus grant the applications both for an extension of time and for leave to appeal.

The alleged offending

[5] RW alleges that between 1973 and 1979 W sexually assaulted him. Specifically, RW alleges that W:

(a) rubbed RW's penis;

(b) induced RW to rub W's penis;

(c) put his penis into RW's mouth until he ejaculated; and

(d) rubbed his penis on RW's bottom (without penetrating the anus).

[6] The offending allegedly occurred in RW's family home where RW resided with his parents and siblings and where W stayed from time to time. As noted, evidence of alleged sexual offending against RW's two sisters has already been found to be admissible propensity evidence. In his interview RW describes several instances during which he and his siblings were allegedly aware of offending against one other at the time it occurred.

The propensity evidence

[7] The Crown proposes to lead the evidence of W's past convictions by way of an agreed summary of facts compiled from the relevant sentencing transcripts. The following is a summary of the draft agreed facts:

(a) W's 2005 Australian convictions:

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[5] This is a factor that supports leave being granted. See *Practice Note – R v Leonard* [2007] NZCA 452, [2008] 2 NZLR 218 at [13]–[14]; affirmed in *Hohipa v R* [2015] NZCA 73, [2018] 2 NZLR 1 at [27].

(i) On 20 August 2004, W was babysitting an 8-year-old girl, KT, and her younger cousin. He had been friendly with KT's family for several years and had babysat her on previous occasions.

(ii) After the cousin went to sleep, W placed his hand under KT's shirt onto the bare skin around her stomach. He then moved his hand up until it touched KT's breasts. His hand then went under KT's pyjama pants, under her underwear and touched near her vagina.

(iii) In April 2005, W was convicted in the Southport District Court on two charges of indecent treatment of a child under 16 years. He pleaded guilty to these charges.

(b) W's 2010 Australian convictions:

(i) Between 30 December 2008 and 25 January 2009, on four different days, W indecently touched an 8-year-old girl, LJW. LJW's father is a cousin of W's. LJW referred to W as an uncle.

(ii) W used his hand to repeatedly touch LJW's breast area and her vagina. There were also instances of W forcing LJW to rub his penis on the outside of his shorts. W also kissed LJW with his tongue.

(iii) On one occasion, W enticed LJW into his bedroom, and he closed the door. He then lay with the lower part of his body on hers before having her lie on top of him, while at the same time kissing her.

(iv) On 29 March 2010, W was found guilty in the Southport District Court of seven charges of indecent treatment of a child under 12 years.

(c) W's 2022 New Zealand conviction:

(i) At some point between 25 July 2012 and 10 December 2014, W was driving his great niece, SJ, back from Northland. At the time she was aged seven to nine years old. SJ's younger uncle, aged six to eight years old, was also in the car.

(ii) While W was driving, and after SJ's uncle fell asleep in the back seat, W penetrated SJ's vagina with his finger. He threated to hurt SJ's uncle if she told anyone.

(iii) In May 2022, W was found guilty in the Manukau District Court of one charge of sexual violation by unlawful sexual connection.

The District Court decision

[8] Judge Forrest noted that propensity evidence about W's alleged offending against RW's siblings had already been found to be admissible.

[9] The Judge said the key issue to be determined at trial is whether the alleged offending against RW occurred. Therefore, the reliability and credibility of RW's evidence will need to be assessed by the jury.

[10] The Judge characterised the proposed evidence as showing a clear propensity by W to have a sexual interest in young family members who are known to him, and a preparedness to act on that interest, even when others are present.[6]

[11] The Judge accepted the probative value of the evidence was reduced by the length of time between the index offending and the convictions.[7] However, she did not consider that this reduced the value of the evidence so far as to make it inadmissible.

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6 District Court Decision, above n 2, at [39].
7 At [25].

[12] In finding that the propensity evidence had high probative value, Judge Forrest highlighted the strong similarities between the conviction evidence and RW's allegations. She noted that:

(a) LJW and SJ were both members of W's extended family, and KT's family were close friends of W's;

(b) both the propensity offending and the alleged offending involved, among other things, W touching young children on or near their genitalia;

(c) much of the offending occurred in the presence of others; and

(d) each of the complainants was of a similar age at the time of the offending.

[13] Judge Forrest accepted that evidence relating to sexual offending against children has inherent prejudicial effect.[8] However, she was not satisfied that the evidence would be unfairly prejudicial in these circumstances. The Judge considered the presentation of the evidence by way of an agreed summary of facts, accompanied by a judicial direction, would effectively guard against any risk of unfair prejudice.

The argument on appeal

[14] Mr Brickell for W submits that Judge Forrest was wrong to find the probative value of the proposed evidence was high. He says that the value of the evidence is significantly diminished by the difference in W's age at the time of the alleged offending[9] and the corresponding weak connection in time between the alleged offending and the conviction evidence. Mr Brickell says the Judge failed to discuss whether it was legitimate for the jury to assume that the sexual behaviour of an adult male would evidence propensity to behave in a similar way in his youth. Rather, the

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8 At [35].

9 W was a young man at the time of the index allegations, whereas at the time of the propensity offending he was in his 40's and 50's.

Judge should have followed this Court's reasoning in *Stark v R,*[10] to conclude that the probative value of the proposed evidence was low:[11]

> We have reservations about whether it would be appropriate to assume, in the absence of expert evidence, that the actions and sexual interests of a 28 year old male would evidence a propensity to behave in a certain way as a 15 or 16 year old. There is no such evidence before us in this case. Without that, we consider that the probative value of the evidence as to the tendency of the appellant to have a particular state of mind is low.

[15] In terms of what Mr Brickell described as the 25 to 39 year gap between the alleged offending against RW and the propensity evidence offending, he drew our attention to cases where similar time periods contributed to findings by this Court that the probative value of the propensity evidence was only "minimal"[12] or "modest".[13]

[16] Mr Brickell says the Judge overstated the similarity between the alleged offending and the conviction evidence. The allegations are only broadly similar in that they involve offending against young children of a similar age in W's family circle. Also, Mr Brickell points out that not all the offending involved others being present, pointing to KT's cousin having gone to sleep, and SJ's uncle being also asleep in the car. He highlights that the offending against KT involved the touching of the area near her genitalia, not the genitalia itself.

[17] Mr Brickell submits that Judge Forrest failed to consider the relevant differences between the offending. In particular, RW is the only male who has made allegations against W, even though his younger brother was also in the family home during the time W lived there. Mr Brickell also says the offending differs in terms of its seriousness. Although W is charged with indecent offending against RW, the allegation made is that RW was repeatedly sexually violated by way of unlawful sexual connection. None of the proposed propensity victims alleged offending in that way. Mr Brickell claims that the significant difference in seriousness should materially affect the probative value of the propensity evidence.

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10 *Stark v R* [2015] NZCA 90.
11 At [13].
12 *G v R* [2017] NZCA 309 at [24]; with a gap of 42 to 46 years between the two complaints.
13 *Lowe v R* [2011] NZCA 400 at [25]; with a gap of at least 32 years.

[18] Finally, W's case is that there is a significant risk the propensity evidence would cause the jury to reason illegitimately and be predisposed against him. Against what is characterised as modest probative value, Mr Brickell contends that the prejudicial risk of admitting this evidence is too great to be mitigated by judicial direction or presentation method. Therefore, the evidence should be ruled inadmissible.

Is the conviction evidence admissible?

[19] Propensity evidence is evidence that 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.[14] The rationale for the admission of propensity evidence rests largely on the concepts of linkage and coincidence — the greater the linkage and coincidence, the greater the probative value of the proposed evidence.[15]

[20] Section 43 of the Evidence Act 2006 (the Act) governs the circumstances in which the prosecution can adduce propensity evidence about a defendant. The propensity evidence must have probative value in relation to an issue in dispute which outweighs the risk of unfair prejudicial effect.

[21] Under s 43(3), when assessing the probative value of propensity evidence, the Judge may consider, among other matters, the following:

(a) the frequency with which the acts that are the subject of the evidence have occurred;

(b) the connection in time between the acts that are the subject of the evidence and the acts which constitute the offence for which the defendant is being tried;

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14 Evidence Act 2006, s 40(1)(a).
15 *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [3] and [51].

(c) the extent of the similarity between the acts that are the subject of the evidence and the acts which constitute the offence for which the defendant is being tried;

(d) the number of persons making allegations against the defendant that are the same as, or are similar to, the subject of the offence for which the defendant is being tried;

(e) whether the allegations described in paragraph (d) may be the result of collusion or suggestibility; and

(f) the extent to which the acts that are the subject of the evidence and the acts which constitute the offence for which the defendant is being tried are unusual.

[22] The key issue at the trial will be whether the alleged offending occurred.

[23] Turning to the various s 43(3) factors, the frequency of the propensity offending is high. In all, the convictions relate to six separate sets of offending between 2004 and 2014. The already admissible propensity evidence relates to alleged continuous offending over a two-year period from 1971–1973.

[24] The connection in time is low. We consider that, contrary to Mr Brickell's submission, the time gap should be taken from the end of the index offending in 1979 to the start of the propensity offending in 2004, which is 25 years. The gap cannot fairly be characterised as 25 to 39 years. A 25-year gap is materially less than the cases cited by Mr Brickell. However, we agree the difference is still significant, particularly the difference between W being a young man of 17 to 21 and a mature adult in his 40's and 50's.

[25] A large gap in time will often weigh against the introduction of propensity evidence but is not necessarily determinative.[16] As stated by this Court:[17]

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16 *F (CA7/2018) v R* [2018] NZCA 100 at [41].
17 At [41], citing *Howard v R* [2016] NZCA 379 at [15]. Footnotes omitted.

> The rationale is that the probative value of historical evidence may be reduced because it may be less likely that an offender will act in a similar way many years later. People may change and mature over time, and leave their youthful (or sometimes not so youthful) antisocial or criminal behaviour behind them. However, a remote connection in time between the propensity evidence and the subject offending is not necessarily determinative of the issue of probative value. It is only one factor to be considered in an overall assessment.

[26] We agree with the Judge and the Crown that the gap is not determinative in the present circumstances. This is not a case where the proposed propensity evidence is historical. There is no risk, as there is in many cases with a large time gap, that W has changed and that using prior convictions as evidence would lead the jury to impermissibly conclude "once a paedophile, always a paedophile."[18] Nor can there be a suggestion that the offending sought to be adduced as propensity evidence is attributable to a lack of maturity or impulsiveness that has since been outgrown. Rather, the convictions relate to offending that occurred some decades after the alleged offending. This suggests propensity that has become entrenched over time.

[27] Also, the proposed propensity evidence itself spans a nine-year time period and RW's siblings' propensity allegations span a further two-year period. The index offending sits between the two, albeit immediately following the already admissible propensity evidence. Nonetheless, the book-ending effect of the two sets of propensity evidence and the fact the evidence overall spans a period of some 11 years, materially offsets the significance of the gap in time.

[28] In any event, "significant gaps in time between offending against different children do not necessarily render evidence inadmissible".[19] Gaps in time are ultimately one factor to be considered in the holistic assessment of the (non-exhaustive) s 43(3) factors.[20]

[29] We consider this case to be distinguishable from *Stark.* First, the factors discussed at [27] were not present in *Stark*. Secondly, the facts of the proposed

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18 See, for example, *Lowe v R*, above n 13, at [31] where this Court held that evidence of prior convictions was inadmissible because of the risk of unfair prejudice arising from the risk that the jury would give disproportionate weight to the evidence of earlier sexual assaults.

19 *Robin v R* [2013] NZCA 105 at [26] and [27] where propensity evidence of prior sexual offending was admissible despite a time gap of 21 years. See also, *R v Bevin* [2014] NZCA 637 where a time gap of 22 years did not render propensity evidence inadmissible.

20 *Howard v R,* above n 17.

propensity evidence in *Stark* were "materially different" from the alleged offending.[21] Not only were there differences in the circumstances of the offending, but the propensity evidence pertained to Mr Stark's actions towards a sexually mature but underage girl (aged 14), while the alleged offending involved a "sexually immature child" (aged eight to nine).[22] Such a difference can reduce the probative value of any evidence irrespective of a time gap.[23] The same factual differences are not present here. RW was aged between five and 11 during the alleged offending and aged between seven and 11 in terms of the charges. This is within the same range as KT, LJW and SJ.

[30] We also agree with the Judge that there are strong similarities between the alleged offending and the proposed propensity evidence. Both sets of evidence involve a familial or quasi-familial connection; touching on or near the genitalia; and victims who were young children of similar ages. We do not take account, as the Judge did, of similarity in terms of offending being in the presence of others as that factor has varied, and we do not consider it material in any event in this case.

[31] There are differences, as there almost invariably are. The alleged offending is against a male while the proposed propensity evidence is against females. The alleged offending is also more serious than the proposed propensity evidence. However, this Court has already held that when it comes to sexual acts against young children, whether the victim is male or female is of little significance.[24] In this case the Court has already upheld admissibility of RW's siblings' propensity evidence notwithstanding the male/female distinction. Difference in seriousness will not, of itself, outweigh any probative value of the evidence.[25] Further, the difference in this case is not marked. We note, as did this Court in *F (CA7/2018) v R*, that the difference in seriousness may be explained, or at least partially explained, by the different circumstances in which the two sets of offending occurred.[26] The alleged offending is said to have occurred while W lived with RW and his family on and off for a period of

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21 *Stark,* above n 10, at [16].
22 At [13].
23 *R v Pio* [2019] NZCA 634 at [17]–[20]; and *R v Elmer* [2019] NZCA 470.
24 *Rompa v R* [2010] NZCA 277 at [9]–[10].
25 *R v Khan* [2010] NZCA 510 at [25], citing *Solicitor-General v Rudd* [2009] NZCA 401 at [39].
26 *F (CA7/2018) v R*, above n 16, at [35]–[36], citing *R v Khan*, above n 25, at [25].

years, where W would have had greater opportunity to offend. The propensity evidence arose out of circumstances where it appears W had much less exposure to the victims.

[32] Here, the real significance of the evidence is it tends to establish that W has a general propensity to engage in sexual activity with young children with whom he has a familial or quasi-familial relationship. It is not necessary for the facts to be completely the same for there to be a strong degree of similarity.

[33] In any event, the important point is that despite some factual differences, there is a very substantial degree of similarity between the propensity evidence and the alleged offending.

[34] The other factors listed in s 43 clearly increase the probative value of the propensity evidence. Including RW, there are six individuals making allegations against W. This is a significant number. Significantly, the current proposed propensity evidence resulted in convictions and therefore cannot be the result of collusion or suggestibility, nor can it be said that the summary of facts is lacking in credibility. And as to unusualness, sexual activity with children is inherently unusual.[27]

[35] We agree with the Crown that the propensity evidence will clearly be relevant to the likely key issue in dispute being whether the offending occurred. The proposed evidence is highly relevant to the credibility of RW. Taking a holistic view of the s 43(3) factors, we consider the case similar to that in *D (CA716/2015) v R* where:[28]

> Although the sexual activities alleged are of different types against children of different genders, … they bear "an innate overall similarity", demonstrating inherently unusual behaviour.

[36] While the significant time gap and difference in W's age does diminish the probative value of the evidence, we agree with Judge Forrest that taking account of the strength of all the other factors, the evidence overall nonetheless has a high probative value.

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27 *Robin v R*, above n 19, at [25].
28 *D (CA716/2015) v R* [2016] NZCA 190 at [36]. Footnote omitted.

Does the probative value outweigh the risk of unfair prejudice?

[37] As is repeatedly stated, it is not enough that the evidence may be prejudicial, it must be unfairly so. We consider that any risk of unfair prejudice can be addressed through:[29]

(a) an appropriate jury direction by the trial judge; and

(b) the use of an agreed statement of facts detailing the offending against KT, LJW and SJ.

[38] We agree with the Judge that the probative value of the evidence outweighs the risk that the evidence will have an unfairly prejudicial effect and we therefore find that the evidence is admissible.

Result

[39] Leave for an extension of time is granted.

[40] Leave to appeal is granted.

[41] The appeal is dismissed.

[42] To protect W's fair trial rights and to avoid identifying all complainants, we make an order prohibiting publication of the name, address, or identifying particulars of the appellant until the final disposition of the trial.

Solicitors:
Kayes Fletcher Walker, Manukau for Respondent

[29] *R v Rutene* [2019] NZCA 322 at [46].