

CANADA / JUDGMENT

R. v. V.H.V.R.

2024 BCSC 2356

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Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. V.H.V.R.,

2024 BCSC 2356

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Rex

v.

V.H.V.R.

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Before: The Honourable Madam Justice Duncan

Oral Ruling Re Similar Fact Evidence

Counsel for the Crown:

D.J. Pruim

Counsel for the Accused:

D.L. Karp

Place and Date of Trial/Hearing:

Vancouver, B.C.

December 2 and 4, 2024

Place and Date of Judgment:

Vancouver, B.C.

December 16, 2024

- [1] THE COURT: This is my ruling on admissibility of similar fact evidence in this case. As is usual with oral rulings, I reserve the right to correct grammar or syntax and other errors that may occur, but the result will not change. I also would propose to identify the passages I am reading in from cases but not necessarily read the direct quotations, and the transcriber will fill those in.
- [2] The accused, V.H.V.R., is charged with three counts of sexual assault contrary to s. 271 of the Criminal Code, R. S.C. 1985, c. C-40, three counts of sexual touching of a person under the age of 14 years contrary to s. 151, and one count of sexual touching of a young person in a relationship of trust or dependency with him contrary to s. 153. The offence dates are between November 2005 and January 2022.
- [3] Two of the complainants, C. and A., are the accused's stepdaughters. One, N., is his biological daughter. M., who gave evidence during a similar fact voir dire, is the accused's stepdaughter.
- [4] C. is the eldest, she was born in November 1995. M. is about two years younger than C. A. was born in June 2002. N was born in November 2008.
- [5] The Crown applies for a ruling concerning the admissibility of similar fact evidence falling into two categories: extrinsic or off-indictment, and count-to-count.
- [6] The extrinsic similar fact involves M. It falls into two categories:
- 1) allegations that the accused grabbed and slapped her buttocks which resulted in the accused entering a guilty plea to sexual assault contrary to s. 271 in Provincial Court on March 7, 2012 (the "charged conduct"); and
 - 2) allegations that were not included in the guilty plea, including breast massages by the accused with VapoRub and two incidents in which the accused laid on top of her in bed. On one of those occasions he kissed her and on another he put his face near hers.
- [7] M.'s evidence on the voir dire also contains some potentially confirmatory evidence about the complaints made by her sisters against the accused. Mr. Pruim maintains that no admissibility ruling is required for that aspect of M.'s evidence and I agree.

- [8] The count-to-count similar fact evidence engages allegations by C., A., and N. that the accused subjected them to sexual assaults and sexual touching over a number of years.
- [9] Mr. Karp, counsel for the accused, submits that the probative value of the evidence is low and does not outweigh its prejudicial effect. The context of some of the alleged similar fact evidence is innocuous or ambiguous or, in some cases, unclear and calls into question whether it is reasonably capable of belief.
- [10] Mr. Karp says the most significant issue with finding the evidence meets the admissibility standard for similar fact evidence is collusion.
- [11] Mr. Pruim, Crown counsel, acknowledges there is an air of reality to collusion, but maintains that the Crown has disproven it on a balance of probabilities.

The Law

- [12] Counsel were in general agreement about the law concerning the admissibility of similar fact evidence. I will provide a brief overview before moving on to the purposes for which the Crown seeks the admission in this case, as well as a review of the evidence and the other principles.
- [13] Similar fact evidence is presumptively inadmissible because it is evidence of an accused's propensity or disposition to act in a certain way that tends to support the conclusion that he or she acted in that way again. It may be relevant to the ultimate issue of guilt, but it carries significant prejudicial effect that often outweighs its probative value. This is particularly so when an accused is tried by judge and jury. While jury instructions can ensure that jurors use similar fact evidence for a proper purpose, the trial judge must still carefully analyze the evidence to ensure its probative value outweighs its prejudicial effect.
- [14] The same analysis applies in a judge-alone trial. It is not the case that a judge sitting without a jury simply hears all the evidence, including similar fact evidence, and weighs it at the end of the case. Judges must ensure they scrutinize similar fact evidence proffered by the Crown before an accused is called on to testify or otherwise tender evidence.
- [15] The Supreme Court of Canada has consistently endorsed a principled approach to the admission and use of similar fact evidence. In *R. v. B.(C.R.)*, [1990] 1 S.C.R. 717, [B.(C.R.)], McLachlin J., as she then was, reviewed the historical category-based approach to the admission of similar fact evidence, which yielded to the modern principled approach endorsed in *Director of Public Prosecutions v. Boardman*, [1975] A.C. 421. McLachlin J. said:

Two points emerge from the foregoing discussion of Boardman. The first is the reaffirmation of the importance of a general exclusionary rule for evidence which goes merely to character or disposition and nothing more, albeit in a qualified form. For all the judges, it is from this rule that consideration of the admissibility of similar fact evidence begins. Boardman does not take us back to the 17th century where evidence of character and disposition could be freely received. Rather it formulates a new and essentially strict test for the reception of such evidence, which is

admitted as an exception to the general exclusionary rule as a consequence of its high probative force.

The second point emerging from Boardman is the proposition that to be admissible, the probative force of the evidence must outweigh its potential prejudice in all the circumstances of the case. This introduces the idea of a sliding scale of admissibility. The degree of probative value required to establish the admissibility of similar fact evidence will generally be high where the evidence is Crown evidence suggesting serious criminality or immorality, as was the case in Boardman; hence their Lordships' insistence on such phrases as "striking similarity", the potential of the evidence to negate all "coincidence", "exceptional circumstances" and a "strong degree of probative force". Yet the possibility is left open that in other cases, where there is less prejudice to overcome (for example, in similar fact evidence presented by the defence or evidence of habits or business practices in civil cases) the degree of probative value required for admission may be lower.

[16] The use of the phrases "striking similarity" and "high indeed" has waxed and waned in the jurisprudence since B.(C.R.). A formulation of the test tends to arise in cases where the Crown tenders similar fact evidence to prove identity of a perpetrator.

[17] In R. v. Shearing, 2002 SCC 58 at para. 72, Justice Binnie observed that the descriptor "high indeed" did not add to the balancing test. It "merely emphasizes the potentially poisonous nature of the similar act evidence and the correspondingly high probative value required to overcome it." Where the Crown tenders similar fact evidence for purposes other than to prove identity, the test is whether the probative value of the evidence outweighs its prejudicial effect on a balance of probabilities, and that is R. v. Handy, 2002 SCC 56 at paras. 42 and 43.

[18] In order to ensure that similar fact evidence is not used for an impermissible purpose, it is incumbent on the Crown to identify the purposes for which it is to be used. This focuses the inquiry on the true probative value of the evidence and ensures vague assertions of a legitimate purpose to the admission do not lead judges into error.

[19] In this case, the Crown seeks a ruling that the similar fact evidence be admitted to:

- 1) support the credibility of one or more of the complainants;
- 2) to prove the actus reus of the offences charged, in particular the sexual nature of the alleged behaviour; and
- 3) to rebut the anticipated defence of denial or innocent association.

[20] Handy, Shearing, and R. v. T.L.M., 2012 SCC 6, all stand for the proposition that similar fact evidence may be admitted for any of these purposes, provided of course that the probative value of the evidence outweighs its prejudicial effect.

Probative Value

[21] The strength of similar fact evidence is derived from the objective improbability of coincidence or, to put it another way, the connectedness of the alleged similar acts. In *Handy*, Binnie J. provided a non-exhaustive list of factors to consider in assessing the connectedness of similar facts:

82 . Factors connecting the similar facts to the circumstances set out in the charge include:

- (1) proximity in time of the similar acts: *D. (L.E.)*, supra, at p. 125; *R. v. Simpson* (1977), 1977 CanLII 1142 (ON CA), 35 C.C.C. (2d) 337 (Ont. C.A.), at p. 345; *R. v. Huot* (1993), 1993 CanLII 8652 (ON CA), 16 O.R. (3d) 214 (C.A.), at p. 220;
- (2) extent to which the other acts are similar in detail to the charged conduct: *Huot*, supra, at p. 218; *R. v. Rulli* (1999), 1999 CanLII 3712 (ON CA), 134 C.C.C. (3d) 465 (Ont. C.A.), at p. 471; *C. (M.H.)*, supra, at p. 772;
- (3) number of occurrences of the similar acts: *Batte*, supra, at pp. 227-28;
- (4) circumstances surrounding or relating to the similar acts (*Litchfield*, supra, at p. 358);
- (5) any distinctive feature(s) unifying the incidents: *Arp*, supra, at paras. 43-45; *R. v. Fleming* (1999), 1999 CanLII 18921 (NL CA), 171 Nfld. & P.E.I.R. 183 (Nfld. C.A.), at paras. 104-5; *Rulli*, supra, at p. 472;
- (6) intervening events: *R. v. Dupras*, 2000 BCSC 1128 (CanLII), [2000] B.C.J. No. 1513 (QL) (S.C.), at para. 12;
- (7) any other factor which would tend to support or rebut the underlying unity of the similar acts.

83 On the other hand, countervailing factors which have been found helpful in assessing prejudice include the inflammatory nature of the similar acts (*D. (L.E.)*, at p. 124) and whether the Crown can prove its point with less prejudicial evidence. In addition, as stated, the court was required to take into account the potential distraction of the trier of fact from its proper focus on the facts charged, and the potential for undue time consumption. These were collectively described earlier as moral prejudice and reasoning prejudice.

84 This list is intended to be helpful rather than exhaustive. Not all factors will exist (or be necessary) in every case. A comparable approach is utilized in other common law jurisdictions, including England (see *Director of Public Prosecutions v. Kilbourne*, [1973] A.C. 729 (H.L.), at p. 758), and in the United States (see *C. B. Mueller and L. C. Kirkpatrick*, *Federal Evidence* (2nd ed. 1994 & Supp. 2001), vol. 2, at § 161; *United States v. Enjady*, 134 F.3d 1427 (10th Cir. 1998), certiorari denied, 525 U.S. 887 (1998)).

[22] In *Shearing*, Binnie J. cautioned against adding up similarities and dissimilarities like an accountant to arrive at a net balance:

[60] At microscopic levels of detail, dissimilarities can always be exaggerated and multiplied. This may result in distortion: Litchfield, *supra*. At an excessively macroscopic level of generality, on the other hand, the drawing of similarities may be too facile. Where to draw the balance is a matter of judgment. In this case, for the reasons already given, the "differences" urged by the appellant do not have the importance he asserts. The defence, as discussed earlier, wants to compartmentalize the appellant into roles. I do not think this is realistic. The Kabalarian cult created a closed domestic and "spiritual" system under the appellant's authority to which all of the complainants, to a greater or lesser extent, were subject.

Prejudicial Effect

- [23] There are two types of prejudice to be considered in the similar fact admissibility analysis: moral and reasoning prejudice.
- [24] Moral prejudice refers to "the risk of an unfocused trial and a wrongful conviction. The forbidden chain of reasoning is to infer guilt from general disposition or propensity": Shearing at para. 65.
- [25] In Handy, the inflammatory nature of the similar fact evidence of the accused's ex-wife was more reprehensible than the charged conduct. Binnie J. observed at para. 140 that, "[t]he jury would likely be more appalled by the pattern of domestic sexual abuse than by the alleged misconduct of an inebriated lout in a motel room on an isolated occasion."
- [26] Moral prejudice is significantly attenuated in a judge-alone trial, particularly where the similar fact evidence is of a like nature to the charged offences: *R. v. T.B.*, 2009 ONCA at paras. 16 to 33, and *R. v. Pickton*, 2006 BCSC 1448 at para. 47.
- [27] Reasoning prejudice refers to the danger that a trier of fact, particularly a jury, may become confused by the number of incidents and be distracted from examining each count individually. For example, in Handy, the jury had to consider seven allegedly similar acts that were extrinsic to the indictment. They were denied by the accused, which compounded the difficulty in properly assessing and using the alleged similar acts.
- [28] On the other hand, in Shearing, the similar fact evidence was intrinsic or related to the charges on the indictment which posed less of a danger of reasoning prejudice, even though it was a jury trial.
- [29] In a judge-alone context, Mr. Justice Watt in *R. v. MacCormack*, 2009 ONCA 72, said:
- [67] The potential prejudicial effect of evidence of similar acts includes both moral and reasoning prejudice. Moral prejudice, the potential stigma of "bad personhood", refers to the risk of an unfocussed trial and a wrongful conviction, a verdict based on prejudice as a surrogate for proof: Handy at paras. 100 and 139. Reasoning prejudice has to do with the distraction of the trier of fact from properly focussing on the charge(s), aggravated by the consumption of time in dealing with a multiplicity of incidents: Handy at para. 144.

- [68] This case involves the invocation of similar act principles across counts in a multi-count indictment. The evidence relating to each count is relevant to and admissible in proof of the allegation contained in that count. Each incident is of equivalent gravity and of minimal inflammatory potential. This is not a case, in other words, in which conduct extrinsic to the crimes alleged in the indictment is enlisted as evidence of similar acts to prove what is alleged, and lugs with it inflammatory claims of greater gravity or moral depravity.
- [69] In large measure, the practical realities of a trial by judge sitting alone in a case in which the allegedly similar acts do not extend beyond the counts of a multi-count indictment reduce significantly, if not to the vanishing point, the virus of reasoning prejudice. The judge is less likely than a jury to be distracted by a focus on similar acts

See also *R. v. West*, 2015 BCCA 370 at para. 78.

- [30] As to moral prejudice, I remind myself that the accused is on trial for specific criminal offences, not for allegations that he is generally of bad character or that he was a bad father figure to the complainants. This is particularly important in this case because the complainant's mother appears to have deferred all parenting authority to the accused.
- [31] As to reasoning prejudice, while two sets of extrinsic allegations by M. are advanced by the Crown, one of them resulted in a conviction as a result of his guilty plea. The accused is entitled, should he choose to give evidence, to dispute the validity of the conviction. At this stage, however, the prior conviction is strong proof that the conduct in question happened: *R. v. Jesse*, 2012 SCC 21 at paras. 36 and 52.
- [32] The accused is also entitled to dispute the uncharged allegations of M. The extent of the uncharged allegations in this case is not burdensome, it does not outstrip the amount of evidence underpinning the charges on the indictment.
- [33] I turn now to the evidence and first the extrinsic similar fact evidence involving M.

The Evidence

The Extrinsic Similar Fact Evidence Involving M.

1. Conduct which resulted in the guilty plea

- [34] On March 7, 2012, the accused entered a guilty plea to one count of sexual assault of M. The transcript of submissions was in evidence on the voir dire. The Crown outlined the circumstances concerning M.'s matter coming to the attention of police. M. had gone to school showing visible injuries. M. advised the school counsellor that she had been assaulted primarily by her mother, with an allegation that her stepfather, the accused, was present.

[35] M.'s mother entered guilty pleas to the assault, but in the context of investigating those allegations, M. also reported that she had been touched by her stepfather, the accused. The Crown referred to comments by the accused and discussions about sexual issues such as masturbation that "would have been over the line and were making her uncomfortable." The Crown then said:

The allegation of the sexual assaults is that there had been a variety of touches, but when I spoke to her she wasn't sure if some of these might well have been accidental. However, the touching that is the subject now of this plea is the grabbing of her buttocks. That occurred during this relevant period, and the basis of the plea, of course, is that she made it known that she was uncomfortable with this and that if not suggested that he stop it, made it known that she did not like it. While in a kitchen area leaning over the counter he -- she says that he grabbed her buttocks again, and she has been around the house in her spandex shorts which she uses for volleyball and has had him slap her bottom, et cetera, all of which she felt was inappropriate and had told him that she did not want it to occur.

[Emphasis added.]

[36] Counsel for the accused confirmed that there was no disagreement with the facts and the matter was adjourned for a sentencing hearing.

2. Conduct apart from the guilty plea

(a) Unwanted contact with M's buttocks

[37] M. also testified at the voir dire that the accused touched, smacked, slapped, and squeezed her buttocks so often that it became normalized. It sometimes happened when she was doing dishes. The nature of the contact changed from slapping to squeezing as she got older. He would sometimes compliment her on her appearance. When she told him to stop, she would say he was playing around and she should stop being dramatic.

(b) Breast massages

[38] M. testified that the accused would rub VapoRub on her breasts. Her first recollection of this happening was when she was catching a cold. The accused rubbed her chest and then her nipples and breasts with one hand. On other occasions, he would check her breasts for lumps by feeling them with her hands. This happened every few weeks.

[39] M. also testified that she was present when this happened to C., although C. does not recall this.

(c) Accused lying on top of her and trying to force her to kiss him

[40] M. testified about two occasions where the accused came into her room at night, he lay on top of her and either kissed her or tried to kiss her.

The Evidence of C.

(a) Unwanted contact with C.'s buttocks

[41] C. testified about a specific incident when she was in the kitchen wearing pyjamas. The accused smacked her buttocks and told her she looked good. He would smack her buttocks multiple times per week and joke or call her sexy. C. said the touching was not punishment.

(b) Breast massages

[42] C. testified that she found a lump in her breast and told her mother. The accused said he could give her a massage to dissolve it. He applied VapoRub to her breasts and nipples and massaged them with one hand while holding the VapoRub in the other. C. said the massages happened up to four times per week. She does not recall anyone else being present although, as noted, M. said she was present with C. when breast massages happened.

The Evidence of A.

(a) Unwanted contact with A.'s buttocks

[43] A. testified that the accused would slap or grab her buttocks, usually while she was walking past her in the kitchen. This conduct started when she was around 10 years of age. She said it would happen almost every day, and when she told him not to, he would say it was just a joke.

[44] A. recalled that when she was in high school, the frequency increased and the accused would grab and squeeze her buttocks. Sometimes he called her sexy. The conduct continued until she left home. A. said it was not punishment.

(b) Breast massage

[45] A. said on one occasion after walking home from school, she complained to her mother of a sore back. The accused offered to massage it with some kind of cream. A. said he had her bend over and put her upper body on the bed in the room he shared with A.'s mother. He used two hands to rub her back, then moved them around her sides and cupped her breasts and massaged them. A. said this was a fleeting moment.

The Evidence of N.

(a) Unwanted contact with N.'s buttocks

[46] N. described the accused touching her buttocks by brushing them or slapping and squeezing them. She recalls this unwanted contact began when she was six or seven years of age.

(b) The accused lying on top of N. and kissing her

[47] N. described an incident where the accused came into her bedroom one morning and laid on top of her and started kissing her face. She had very little recall of the details and thought it was a joke, then she changed her mind after the family meeting in March 2022.

Other Evidence of Alleged Sexual Misconduct

- [48] The Crown referred to other aspects of the evidence, including allegations that the accused had C. and M. massage his legs, discussed masturbation with C., M., and A., showed pornographic videos to M. and C., stared at the breasts of M., A., and N., and entered their rooms at night. This evidence falls into context or background evidence, the relevance of which will be assessed with all the evidence at the end of the trial, rather than discrete acts of sexual misconduct.
- [49] In addition, I am mindful of C.'s evidence that she believed the accused was in her room and had his hand on her leg as she awoke from a dream, which caused her to have an orgasm. However, this is a discrete event unrelated to the complainant's general dislike of the accused entering their rooms at night. No other analogous conduct is alleged by the other complainant.

The Probative Value of the Evidence

(a) The Standard of Assessment of the Evidence

- [50] The Crown acknowledges that the evidence of the witnesses was not perfect. There are gaps and inconsistencies, but at the admissibility stage, the standard of proof is whether the evidence is reasonably capable of belief, per Handy at para. 134, not whether the Crown has proven its case beyond a reasonable doubt.
- [51] Two authorities from this court are helpful in further refining the standard. In *R. v. Pickton*, 2006 BCSC 1448, Mr. Justice Williams rejected the assertion by defence counsel that the strength of similar fact evidence must be great before it can be admitted. He said:
- [35] In my view, "reasonably capable of belief" reduces to this: I must be satisfied that the proposed evidence is such that, having full regard to its deficiencies and frailties, a jury, acting reasonably, could find it to be credible. If I am not so satisfied, then I am obliged to conclude that the evidence does not meet the necessary threshold. As the trial judge, my function is limited to that of a gatekeeper; the ultimate assessment of credibility rests with the trier of fact.
- [36] I have reviewed the parties' submissions and have examined in detail the affidavit material that has been filed. Additionally, as I indicated to the parties that I would do, I have read the entire transcript of Ms. Ellingsen's testimony at the preliminary inquiry and have also reviewed her statements and other materials that were filed. I have taken considerable care to ensure that I have a proper appreciation of her evidence and its context.
- [37] There is certainly a measure of validity to the criticisms that Mr. Pickton raises. There are inconsistencies among Ms. Ellingsen's statements and as compared with her testimony. It is also most apparent that her recollection of events is compromised, impacted, no doubt, by her use of alcohol and drugs. Cross-examination of Ms. Ellingsen is quite certain to be a fertile field for the defence. All that is so. However, I cannot say that the jury would not be

entitled to believe her evidence. Accordingly, in my view, it meets the threshold of being reasonably capable of belief.

[52] Mr. Justice Schultes in *R. v. Lai*, 2017 BCSC 2594, followed the reasoning of Williams J. in *Pickton*, noting that "reasonably capable of belief" is a prospective assessment of how the evidence is capable of being treated by a trier of fact acting reasonably when deciding the case, rather than a current finding of believability by a trial judge in the gatekeeper role: at para. 136.

[53] There were undoubtedly some frailties in the accounts of the complainants in this case, but I cannot say the evidence is not reasonably capable of belief, with one exception concerning N.'s evidence of the accused lying on top of her. I will deal with that later in these reasons.

(b) Collusion

[54] As noted, the Crown acknowledges there is an air of reality to the defence contention that the complainants and M. may have colluded. Collusion significantly undermines the cogency or probative value of similar fact evidence by stripping away the objective improbability of coincidence: that is Handy at paras. 104 and 110.

[55] In *Shearing*, Justice Binnie described the potential for collusion in the following manner:

43 There was evidence of some communication among the complainants. With respect to the G sisters, this was almost inevitable. They had also kept in touch with JV. Other complainants were in touch with each other prior to trial. Civil proceedings had been commenced by the G sisters for compensation and to close down the Kabalarians. KWG expressed the hope that the appellant would "rot in Hell".

44 The evidence here is far more speculative than in *Handy*. In that case, there was consultation between the complainant and the similar fact witness prior to the alleged offence about the prospect of financial profit. Here, there is some evidence of opportunity for collusion or collaboration and motive, but nothing sufficiently persuasive to trigger the trial judge's gatekeeper function. There is no reason here to interfere with the trial judge's decision to let the collusion issue go to the jury. He instructed the jury to consider "all of the circumstances which affect the reliability of that evidence including the possibility of collusion or collaboration between the complainants". He defined collusion as the possibility that the complainants, in sharing their stories with one another, intentionally or accidentally allowed themselves to change or modify their stories in order that their testimony would seem more similar or more convincing. It was for the jury to make the ultimate determination whether the evidence was "reliable despite the opportunity for collaboration" or that "less weight or no weight should be given to evidence which may have been influenced by the sharing of information".

45 While the trial judge did not specifically link the potential of collusion to the issue of admissibility, he appears to have thought collusion (as distinguished from contact) was not a serious danger. The evidence supports his decision. He was justified in letting the collusion issue go to the jury with an appropriate warning.

- [56] M. made her complaint about the accused in 2011 and he entered a guilty plea in 2012. M. went into foster care and C. went back to live in Chile with her father.
- [57] N. would have been around five or six at the time of the 2011 complaint by M. A. would have been about nine. N. and A. were generally aware of M.'s complaint as it resulted in the accused being out of the family unit for sometime after.
- [58] C. had limited contact with her siblings for some time after she moved back to Chile. When C. was about 19, M. came to Chile. C. told M. about the breast massages after seeing a magazine article about a celebrity whose stepfather had done something similar to her.
- [59] M. said she did not discuss things that had happened to her with C. They only talked about things that happened when both were present. M. said talking about what had gone on was embarrassing.
- [60] In 2019, M. met with the accused at a White Spot. She wanted to be part of her siblings' lives and had to go through him in order to achieve that. She apologized for getting him into trouble with the police and said she did not know he was going to get into trouble as a result of what she said. M. denied that she apologized to him for lying to police.
- [61] In early 2022, N. engaged in self-harm. C. and M. were very concerned for her. They pressed their mother to ensure she received medical care for her wounds. M. encouraged N. to tell the police what had been going on at home as they would help her, "they" being the police.
- [62] N. gave statements to police on January 14, 2022, March 24, 2022, and July 27, 2022. C. gave her statement to police on January 19, 2022. A. gave her statement on January 19, 2022. A. agreed that M. explained to her that making an allegation would likely result in the accused being removed from the residence.
- [63] M. gave statements on April 14 and 15, 2011, and January 20, 2022.
- [64] A. seemed to be the impetus behind a family meeting on March 18, 2022, between her sisters, except C., and their mother. They wanted to confront their mother with the fact that the accused had been cheating on her.
- [65] In the course of the meeting, M. and A. talked a bit about some of the accused's treatment of them, because before the meeting, N. said she was uncomfortable about the accused staring at her chest. None of this persuaded their mother to end her relationship with the accused.

- [66] In the summer of 2023, M. surreptitiously recorded a conversation with the accused. Her mother had been evicted from where she was living and M. decided to have a talk with him about it. M.'s goal was to get him to admit that he had been cheating, and she referred to this as a big, long chess game.
- [67] I find that the impetus for the sisters to say more about what had happened to them was their concern about N.'s self-harm in early 2022. I accept N. was encouraged by her older siblings to seek help and talk about what her fears about the accused were, and agreed that she looked up to her older sisters and did not think that the accused's conduct was sexual until after the family meeting in March 2022.
- [68] Following N.'s self-harm, but before the family meeting, the sisters gave statements. Thereafter, their focus shifted to trying to persuade their mother to leave the accused as a way to protect their younger siblings who still lived at home, most notably N.
- [69] In *Handy* at para. 11, Binnie J. found that the evidence of potential collusion between the complainant and the accused's ex-wife went beyond mere opportunity. The ex-wife told the complainant about receiving money from a criminal injury claim. A few days later, the complainant had sex with the accused and then the allegations arose. It was the "whiff of profit" that was of concern to the court, not the fact that there was contact.
- [70] On the facts before me, there is no whiff of profit. The sisters were concerned about the well-being of N. after she engaged in self-harm. They wanted, above all, to persuade their mother to finally leave the accused, but I am not satisfied that they consciously colluded and made things up to make their point with her. Their statements largely predated the family meeting. Cross-examination on changes in statements after the family meeting will no doubt be a significant feature of defence closing submissions, but at the gatekeeping stage, I cannot say they are so significant that they lend credence to active collusion between the complainants.
- [71] There are aspects of the evidence which may lend themselves to a finding of unconscious adoption of some details, but unconscious adoption in this case is a byproduct of communications, as was the case in *Shearing*, not an orchestrated campaign by the sisters. I am satisfied the Crown has shown, on a balance of probabilities, that the evidence of the alleged similar facts is not tainted with collusion.
- [72] Finally, M.'s one-on-one meetings with the accused do not lend themselves to a finding that she was intent on colluding with her siblings. She knew she had to deal with the accused in order to have a relationship with her younger siblings. Her meeting with the accused in 2023, after her mother had been evicted, was understandable as a gesture of concern, rather than padding the ledger of bad acts that she and her sisters could accuse him of. But again, what effect these meetings have on M.'s credibility and reliability will be determined at the end of the case.

Application of the Handy Factors to the Evidence

(a) The Evidence of Butt Grabbing and Squeezing

- [73] I am satisfied that the accused's 2012 sexual assault conviction, which related to grabbing and squeezing of M.'s buttocks, is admissible in relation to the allegations of C., A., and N., to prove the actus reus of sexual assault, and to rebut a potential defence of innocent association.
- [74] M.'s allegations arose in 2011. C., A., and N. all testified about what appears to be a continuous course of conduct by the accused in grabbing or slapping or squeezing their buttocks. It was not punishment and they did not consent. The conduct is similar across the board.
- [75] The conduct occurred frequently. One could even say that the Crown's evidence showed it was persistent and a near-daily occurrence. At least one of the sisters said it happened so often that it was normalized.
- [76] The surrounding circumstances generally involve the accused walking past the complainant, often in the kitchen, and slapping or grabbing her buttocks. The contact would often, but not always, be accompanied by a gratuitous sexual remark.
- [77] There are no intervening events, apart from the sisters leaving home for foster care or to live with their father in Chile, or when they were old enough to move out in the case of A. There are no other relevant factors. Moral prejudice is attenuated, because the off-indictment conduct is no more reprehensible than the count-to-count, and the single off-indictment conviction does not distract from examining each count individually.
- [78] The same analysis applies to the count-to-count similar fact. Evidence from one complainant is admissible in relation to the allegations of the other complainants concerning unwanted contact with buttocks.

(b) Breast Massages

- [79] M., C., and A. all testified about the accused having contact with their breasts and nipples. While less frequent than the butt grabbing, M. and C. described this behaviour going on for some time.
- [80] M. said the accused would rub VapoRub on her breasts when she caught a cold. He would rub her chest and nipples and check her breasts for lumps by feeling them with his hands every few weeks.
- [81] C. said she told her mother she felt a lump in her breast and the accused offered to rub it with VapoRub. Thereafter, the accused rubbed her breasts on many occasions.
- [82] The distinctive features in relation to M. and C. include the use of VapoRub on the pretext, in both cases, of massaging a lump or offering to check for lumps.

- [83] A.'s evidence was that on one occasion, the accused massaged her back and used that opportunity to reach under and cup her breasts. He used some kind of lotion.
- [84] I am satisfied that M.'s evidence is admissible to support C.'s credibility in relation to her allegations of breast massages. The circumstances that each described are compellingly similar and amount to a modus operandi that the accused devised to access their breasts.
- [85] I am not satisfied that M.'s or C.'s evidence should be admitted to support the credibility of A. The only similar feature was the accused coming into contact with A.'s breasts once for a fleeting moment when she was lying face down, versus his focus on the chest and breast area while massaging M. and C.
- (c) Pinning Down on the Bed and Kissing
- [86] M. and N. both testified that the accused, in M.'s case on at least two occasions, pinned them down on their beds and kissed them or tried to kiss them. Having examined the surrounding circumstances that M. and N. relate, I am not satisfied that the events have sufficient contextual similarity to be admitted as similar fact evidence.
- [87] The events M. described occurred at night when the accused would come home and was trying to force a greeting on her. The event that N. described occurred in the morning and seemed a much more benign act of a parent trying to wake up a child and, as I observed earlier, I am not persuaded that N.'s tentative description of the single event rises to the standard of reasonably capable of belief.

Summary

- [88] In summary, the accused's prior conviction in relation to M. is admitted to prove the actus reus and rebut the potential defence of innocent association on all counts.
- [89] The evidence of all the complainants about the accused's unwanted contact with their buttocks is admitted across all counts.
- [90] M.'s evidence of the accused massaging her breasts is admissible to support C.'s credibility in relation to similar conduct.
- [91] The evidence of M. and C. is not admissible to support A.'s evidence of breast touching during a back massage.
- [92] M.'s evidence of the accused lying on top of her on two occasions is not admitted in relation to N.'s evidence that the accused laid on top of her.

"Duncan J."

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