IN THE SUPREME COURT OF NEW ZEALAND

SC 60/2011
[2011] NZSC 127

WARREN BRUCE FENEMOR

v

THE QUEEN

Hearing: 4 October 2011

Court: Elias CJ, Blanchard, Tipping, McGrath and William Young JJ

Counsel: G J King, B Paradza and L S Collins for Appellant
C L Mander and H R B Stallard for Crown

Judgment: 21 October 2011

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Mr Fenemor is to report to the Community Probation Service no later than 2 pm on Friday 28 October 2011.

REASONS

(Given by Tipping J)

Introduction

[1] The appellant, Mr Fenemor, was found guilty of indecently assaulting a seven-year-old girl (A) during the course of giving her a guitar lesson at her home in

2008. His appeal against conviction was dismissed by the Court of Appeal.[1] He now appeals to this Court on issues concerning the admissibility of propensity evidence called by the Crown at his trial. The conduct which gave rise to the conviction was recorded by means of a concealed video camera set up by A's parents. Her mother had become suspicious after she interrupted an earlier lesson and had seen Mr Fenemor quickly move his hand from between A's legs. The video recording showed Mr Fenemor kneeling on the floor in front of A, supporting the guitar on her lap. At one point all four fingers of his right hand went underneath A's skirt and rested for about four minutes on or near the top of her legs. A did not give evidence, but the recording was played to the jury.

[2] The Crown also called two young women, M and B, who were former pupils of Mr Fenemor. They each independently said that he had touched their genitalia over their clothing during the course of lessons which took place in 1997 and 1998. Mr Fenemor was charged at that time in relation to B but not in relation to M. M, however, gave propensity evidence at the trial where B was the complainant. This was a summary trial before a Judge alone and Mr Fenemor was acquitted on the charge of indecently assaulting B. No record of the Judge's reasons could be found some 12 years later in 2010 when Mr Fenemor was tried on the charge of indecently assaulting A.

[3] The appeal to this Court raises two related questions. The first is whether relevant propensity evidence may be led by the Crown in spite of that evidence having previously been led at a trial which resulted, as here, in an acquittal. The appellant's contention is that despite the decision of the Court of Appeal to the contrary in *R v Degnan*[2] there is or should be an exclusionary rule rendering evidence of the kind in question inadmissible in law. The second issue is whether, even if evidence of the kind in question is admissible in law, the particular evidence in this case should have been excluded on the basis that it was unfair or unduly prejudicial to the appellant to admit it in the face of its having earlier been held insufficient to support a conviction. These issues must be resolved under the

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1 *Fenemor v R* [2011] NZCA 206.

2 *R v Degnan* [2001] 1 NZLR 280 (CA). Understandably the appellant did not challenge this case in the Court of Appeal.

Evidence Act 2006. It is convenient for present purposes to describe the kind of propensity evidence with which this case is concerned as "prior acquittal evidence".

The Evidence Act 2006

[4] Understandably the Act does not deal specifically with prior acquittal evidence. It is axiomatic that such evidence must be relevant in terms of s 7 of the Act and must be within the definition of propensity evidence set out in s 40(1). That being so the prosecution may, by definition, offer prior acquittal evidence about the defendant, but only if, in terms of s 43(1), it has a probative value in relation to an issue in dispute which outweighs the risk that it may have an unfairly prejudicial effect on the defendant. If its probative value does outweigh any such risk, prior acquittal evidence is admissible. If the converse applies, it is inadmissible. That, of course, is the position with all propensity evidence.

[5] Parliament has thereby provided that prior acquittal evidence is admissible if the prosecution can satisfy the requirements of s 43(1). There is therefore no room for an absolute exclusionary rule such as the appellant seeks. Parliament has effectively endorsed the approach taken by the Court of Appeal in *Degnan* on condition that s 43(1) is satisfied. In this respect prior acquittal evidence is no different from other propensity evidence. In *Degnan* a five-member Court of Appeal held that prior acquittal evidence was admissible in law, subject to the discretion of the trial judge to exclude it if its admission would, in the circumstances of the particular case, be unfair to the accused or would amount to an abuse of process.

[6] The Law Commission, whose work formed the basis of the Act, was well aware of *Degnan* and made no suggestion that what it decided should be altered; indeed, in a related report, the Commission supported the Court of Appeal's conclusion.[3] There is also nothing in the legislative history suggesting that Parliament considered the approach taken in *Degnan* was unsatisfactory. Hence, it is

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[3] See New Zealand Law Commission *Acquittal Following Perversion of the Course of Justice* (NZLC R70, 2001) at vii in which the Commission said there was "no justification for us to advise that New Zealand should by statute depart from the judgment in *Degnan*".

appropriate to conclude that, when enacting the Evidence Act, Parliament was generally content with what *Degnan* decided and wished it to continue as part of the law of evidence which was now being codified.

Application of s 43(1)

[7] It is necessary to consider next the application of s 43(1) when prior acquittal evidence is under consideration. Section 43(3) sets out various matters under lettered paras (a) to (f) which, "among other matters", the judge may consider when assessing the probative value of propensity evidence. None of these matters, except perhaps para (e), which deals with collusion or suggestibility, can logically be affected by the evidence being prior acquittal evidence. Section 43(4) sets out two matters which the judge must consider "among any other matters", when assessing the prejudicial effect of propensity evidence on the defendant. Those matters are:

> (a) whether the evidence is likely to unfairly predispose the fact-finder against the defendant; and
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> (b) whether the fact-finder will tend to give disproportionate weight in reaching a verdict to evidence of other acts or omissions.

[8] When a judge is considering the extent of any unfair prejudicial effect on the defendant, the judge should examine whether the fact that the propensity evidence is prior acquittal evidence gives rise to any, or any additional, unfair prejudice. To the extent that it does, the judge should consider how that additional dimension affects the overall balance between probative value and unfair prejudice. Of course if the prior acquittal evidence is not admissible in terms of s 43(1), even without the acquittal dimension, it cannot be led. It is important to make this point because it must not be assumed, simply because the acquittal dimension itself does not give rise to unfair prejudice, that the prior acquittal evidence will therefore be admissible. If, however, the propensity evidence would otherwise be admitted, the judge must consider the acquittal dimension and decide whether it alters the balance. Adopting this approach will assist in properly determining what, if any, bearing the acquittal dimension truly has on the assessment required by s 43(1).

[9] In carrying out that evaluation the focus will be on whether it is unfair to expect the defendant to respond again to the evidence in question in light of the fact that it was not regarded as sufficient to result in a conviction on the earlier occasion. An example given in *Degnan* of when that might be so is a case where a defence of alibi was successfully raised against the earlier charge. This example was first given by Lord Hobhouse in *R v Z*,[4] a case upon which the Court relied in *Degnan*.[5]

[10] It is important to be clear that any prejudice resulting from the fact of an earlier acquittal must be *unfair* prejudice deriving from that fact before it can weigh against admission. There will always be some prejudice to a defendant in having to address the same allegations a second time. That is inherent in the fact that this kind of evidence is generally admissible, if otherwise satisfying s 43(1). There must therefore be something about the circumstances of or leading to the acquittal which gives rise to prejudice that is unfair.

[11] After *Degnan* was decided, there were suggestions by commentators that the Court of Appeal should have given further examples of potential unfairness or should have provided a list of factors which might, either alone or in combination, give rise to unfairness of the kind in question.[6] Mr King supported these suggestions in his submissions. Neither the commentators nor counsel provided satisfactory examples.

[12] At common law criminal evidence could be excluded if there was unfairness in the way it had been obtained or if it would otherwise be unfair to admit it. This uncategorised approach was adopted by Parliament in the language of s 30(5)(c) of the Act which provides that evidence is improperly obtained if it is obtained "unfairly". In accordance with the common law Parliament did not provide any elaboration. In the same way we do not consider it would be right for the courts to

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4 *R v Z* [2000] 2 AC 483 (HL).

5 In alibi cases there may, for example, be particular unfairness in requiring the accused to reassemble the alibi witnesses a second time. Furthermore, an acquittal on the basis of alibi may, perhaps rarely, be tantamount to a declaration of innocence, as indicated by Lord Hobhouse at 509.

6 See, for example, Elisabeth McDonald "The Admissibility of 'Acquittal Evidence' in Criminal Trials: Toward Reform" (2003) 34 VUWLR 639.

seek to elaborate in the abstract on when it would be unfair to a defendant to admit prior acquittal evidence. It is always open to individual defendants to contend that in their particular case admission of prior acquittal evidence would be unfair. A body of case law is likely to grow up providing guidance. This is the ordinary common law method. Defendants can hardly be prejudiced in advance by not knowing what view the court will take. It would not be appropriate for the courts to attempt some form of categorisation of unfairness. The necessary assessment will inevitably be very case-specific.

[13] We turn now to address Mr King's argument that it was unfair to admit the prior acquittal evidence in the particular circumstances of Mr Fenemor's case.

The present case

[14] In this case the Courts below were of the view, leaving aside the acquittal dimension, that the evidence in question was admissible in terms of s 43(1). Leave was not given to mount a general challenge to that conclusion. For this reason it is not necessary to examine the basis on which the propensity evidence was found to be admissible under s 43(1). Our decision should not therefore be taken as any factual precedent for the application of that provision to propensity evidence generally. Nor was leave given to challenge aspects of the Judge's directions to the jury. All that needs to be said on that topic is that in the substantial majority of cases it will be necessary for the judge to tell the jury how the propensity evidence should and should not be used. The question before us is whether the acquittal dimension should, in present circumstances, have led to the evidence being excluded on the basis that overall the prejudicial effect of the evidence outweighed its probative value.

[15] The Court of Appeal dealt with this point in the following way:

> [25] Mr King argued that the admission of this evidence resulted in unfairness as the appellant was effectively forced to give evidence to counter it. A similar argument was raised in *R v Degnan* and rejected. We do not see how that alone can constitute unfairness to the appellant in the circumstances of this case. Moreover, Mr King said that evidence should not have been admitted given the lapse of time between the events relating to M and B and the present case. But the Court has accepted that much longer time gaps do

> not necessarily render propensity evidence inadmissible and there is nothing that Mr King has pointed to which justifies a different conclusion in this case. Finally, it must be remembered that propensity evidence is by its nature prejudicial to an accused. What the courts are concerned about is illegitimate prejudice. (footnotes omitted)

[16] Mr King relied on the same arguments, among others, in this Court. We consider the Court of Appeal's response to those arguments was correct. Mr Fenemor's approach to whether he should give evidence cannot have been influenced by the acquittal dimension. He would have been faced with the same issue if the propensity evidence had led to a conviction or had not given rise to any charge. The time dimension too has no logical relationship with the acquittal.

[17] Mr King also drew attention to the fact that the seven-year-old complainant, A, did not give evidence and could not therefore be cross-examined. The Crown relied in her respect on the video recording contemporaneously made of Mr Fenemor's actions. This feature of the case does not derive in any way from the earlier acquittal and cannot amount to prejudice, let alone unfair prejudice, resulting from it. In any event the fact that the complainant did not herself give evidence cannot, in context, be regarded as prejudicial to Mr Fenemor when the jury had available to it a video recording of the conduct on which the charge was based.

[18] Mr King contended that the prior acquittal evidence would have tended to undermine the ability of the jury to determine, on the basis of all the evidence, whether the charge which involved the complainant A had been established beyond reasonable doubt. We do not agree. The prior acquittal evidence was neither of such a nature nor of such an extent that it might have disabled the jury, with the assistance of the Judge, from properly focusing on the key issues. In any event this feature did not derive from the fact there had been an acquittal.

[19] B's evidence given in 1997 included a videotaped evidential interview. The videotape was no longer available in 2010. Mr King contended that this had led to unfair prejudice to Mr Fenemor. This was because no comparison could be made between B's evidence as a young girl close to the time of the events in question and her evidence as a young woman much later. The first problem with this argument is that again the claimed prejudice does not derive from the acquittal dimension. The

position would have been the same had there been a conviction or had no charge been brought. A second problem is that the presence of unfair prejudice from this feature of the case can only be a matter of speculation. It is equally possible that the presence of the video tape may have been to Mr Fenemor's disadvantage. As it happened a written transcript of B's 1998 evidence was available.

[20] Counsel relied further on the fact that no record of the judgment in the earlier trial, at which Mr Fenemor was acquitted, was available. This is unfortunate but it would again be pure speculation to conclude that had that judgment been available it would have given any support to Mr Fenemor's contention that there was something about the acquittal that made it unfairly prejudicial to allow the prior acquittal evidence to go before the jury. It is significant, in light of the absence of the Judge's reasons, that there is no suggestion Mr Fenemor could have given evidence on a voir dire about the circumstances or nature of the acquittal that might have given some basis for his contention of unfair prejudice. Indeed, in many cases of the present kind, there will be no reasons for the acquittal because the decision was that of a jury.

[21] Mr King also argued that the prior acquittal evidence did not have the same probative value as it would have had if it had led to a conviction. That may arguably be so in abstract terms, but the answer to the proposition that this is a relevant factor in the balancing exercise is contained in the judgment in *Degnan* itself. Evidence may take on a greater probative value when viewed in conjunction with other evidence of the same kind. As the Court said in *Degnan*, there may be cases involving allegations which, viewed in isolation, leave room for reasonable doubt but which, when viewed as part of a pattern, each drawing support from the others, can fairly lead to a conclusion of guilt beyond reasonable doubt.[7]

[22] Paul Roberts put the point well, when referring to evidence that had not resulted in a conviction.[8] He said that it seemed wrong to say that a jury had already considered the evidence and rejected it when, in reality, the first jury only saw one

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7 At [33].

8 Paul Roberts "Acquitted Misconduct Evidence and Double Jeopardy Principles, From *Sambasivam* to *Z*" [2000] Crim LR 952 at 958.

frame of what was now known to be a bigger picture. Roberts' view, in his own words, was:[9]

> True, we are still dealing here with previously litigated facts. But the crucial consideration, I would argue, is that their *meaning* changes in the light of new discoveries and with the benefit of hindsight.

[23] In *Degnan*, the Court also emphasised that the defendant can never be tried again for the offence of which he was acquitted.[10] Hence there is no double jeopardy,[11] and, as the Court also said, the defendant should not be regarded as immunized from the relevant evidence for all purposes. The consequence is that it is for the trier of fact in the instant case to assess the probative value of the prior acquittal evidence as support for the instant allegations. That is a different matter from assessing the probative value of the evidence as evidence in support of an earlier, more isolated, charge. There cannot therefore be any general a priori conclusion that prior acquittal evidence has, for its relevant purpose, any different probative value from propensity evidence which has not resulted in any charge at all. There is nothing that gives any force to the proposition that the probative value of the prior acquittal evidence in this particular case should be regarded as relevantly diminished on account of the acquittal.

[24] Having considered all Mr King's arguments on this aspect of the case, we accept Mr Mander's submission that nothing relating to the acquittal has been identified as giving rise to any unfairness to Mr Fenemor in the prior acquittal evidence being led. That evidence being otherwise admissible, Mr Fenemor's appeal must be dismissed. Under s 399(4) of the Crimes Act 1961 his sentence of five months' home detention, on the conditions imposed by Judge McKegg, resumes from the date of this decision. But, given that the reporting date specified by the Court of Appeal has passed, Mr Fenemor is to report to the Community Probation Service no later than 2 pm on Friday 28 October 2011.

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9 Ibid (original emphasis).

10 At [31].

11 Section 26(2) of the New Zealand Bill of Rights Act 1990 is therefore not engaged.