

**IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION)**

CR 1753/23, 1754/23, 1755/23, 1756/23, 1757/23

R

v

TRAVEL JACK ENGU

For trial: 17–19 March 2025
Counsel: T Scott for the Crown
M Tangimama for the defendant
Ruling: 6 March 2025
Reasons for ruling: 12 March 2025

**REASONS FOR RULING (No 1) OF TOOGOOD J
[Application by the Crown to lead similar fact evidence]**

Introduction

[1] On 17 March 2025, Travel Jack Engu is due to stand trial by judge and jury on:

- a) Four charges of being a male, assaulted a female (s 214(b), Crimes Act 1969;
and
- b) One charge of assault with intent injure (s 213, Crimes Act).

[2] The charges arise from several alleged assaults by Mr Engu and his then partner, KM, with whom he is said to have been in a domestic relationship for about one month. The Crown's case is that the offending occurred when Mr Engu became jealous while they were out drinking and assaulted KM multiple times over a period of several hours between 11 and 12 November 2023.

[3] The Crown signaled in an application dated 29 January 2025 that it wished to support its case against Mr Engu by calling evidence of Mr Engu's prior convictions on similar charges on 13 December 2024

[4] It was submitted that the evidence of the nature and circumstances of the offending giving rise to the December convictions is probative in the present case as evidence demonstrating a pattern of strikingly similar conduct by Mr Engu towards a different complainant. The nature of Mr Engu's defence or defences has not been disclosed, but the Crown argued that the evidence of Mr Engu's prior conduct will assist the jury to make findings on the credibility of KM's evidence of the nature and circumstances of the alleged assaults on her. Ms Scott submitted that it will not be unfairly prejudicial to Mr Engu.

[5] For Mr Engu, Ms Tangimama objected to the admission of the evidence of the recent prior convictions, arguing that it has only limited probative value that is outweighed by the highly prejudicial effect the evidence would have on the jury's deliberations.

Ruling

[6] After consideration, in a ruling dated 6 March 2025, I granted the order sought in the exercise of the Court's discretion under ss 3 and 4 of the Evidence Act 1968. I said I would give my reasons for the decision later. These are my reasons.

Reasons

[7] The principal test for the admissibility of evidence in a criminal trial is whether the evidence is relevant to the issues at the trial. Usually, the fact that a defendant has prior conviction for offending is regarded as irrelevant to the proper consideration of whether the defendant committed an offence alleged to have been committed on another occasion.

[8] Under Cook Islands law, a court has a broad discretionary power in any proceeding to:

admit and receive such evidence as it thinks fit, and accept and act on such evidence as it thinks sufficient, whether such evidence is or is not admissible or sufficient at common law.¹

The power to admit evidence is complemented by a wide discretion to reject evidence. Section 4 of the Evidence Act provides:

Notwithstanding anything to the contrary contained in this Act, a Court may in any proceeding refuse to receive any evidence, whether admissible or not at common law, which it considers irrelevant or needless, or unsatisfactory as being hearsay or other secondary evidence.

[9] Although, the broad discretions vested in a court by the Evidence Act are plainly intended to be broader than the powers of the courts to admit or exclude evidence at common law, the courts have looked to common law principles for guidance. In a criminal case, the overriding duty of the court is to ensure that the defendant receives a fair trial. For that reason, courts are mindful that evidence of prior convictions of a defendant carries with it the inherent danger that the decision-maker, particularly in a trial by jury, may be unduly influenced by evidence that the defendant is of bad character or has offended previously.

[10] The test applied by the common law is whether the probative value of the evidence outweighs its prejudicial effect.² The New Zealand Court of Appeal explained that:

To be probative or legitimately prejudicial, the evidence must be relevant in the sense of logically tending to prove a fact or facts in issue.³

[11] The approach of the Court is to consider the nature of the evidence; what it was sought to prove; what other evidence there is and its relationship; and whether the evidence relates to prior proved offending or to concurrent charges, all against the underlying dangers inherent in propensity or bad character evidence.⁴

[12] In a case where there is no question about identification – that is, no question about whether it was the defendant and not some other person who committed the alleged offences

¹ Evidence Act 1968, s 3.

² *DPP v P* [1991] 3 WLR 161 (UKHL)

³ *R v Bull* CA 313/03, 17 November 2003 at [8].

⁴ *R v Holtz* [2003] 1 NZLR 667 at [35].

– and the issue is whether the conduct alleged occurred at all,

... the probative force of similar fact evidence ... is not as direct proof, in the sense that if the [defendant] has behaved in a certain way on another occasion, he must have done so on the occasion now under consideration ... Rather, the probative force of the similar fact evidence lies in the support that it gives to the credibility of the complainant because of the unlikelihood, absent collaboration, that the relevant specifics of that complainant's allegations have been manufactured when the [defendant] is said can be shown to have behaved in that specific way on another occasion.⁵

[13] Put another way, if it can be shown that on a prior occasion involving a different complainant the defendant acted in a way that is so similar to what is alleged in the instant case, the jury is entitled to infer that the instant complainant's account is credible.

[14] In New Zealand, principles developed at common law are codified in s 43 of the New Zealand Evidence Act 2006, which follows:

43 Propensity evidence offered by prosecution about defendants

- (1) 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 which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant.
- (2) When assessing the probative value of propensity evidence, the Judge must take into account the nature of the issue in dispute.
- (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, omissions, events, or circumstances that are the subject of the evidence have occurred;
 - a) the frequency with which the acts, omissions, events, or circumstances that are the subject of the evidence have occurred;
 - b) the connection in time between the acts, omissions, events, or circumstances that are the subject of the evidence and the acts,

omissions, events, or circumstances which constitute the offence for which the defendant is being tried;

- c) the extent of the similarity between the acts, omissions, events, or circumstances that are the subject of the evidence and the acts, omissions, events, or circumstances 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;
- f) the extent to which the acts, omissions, events, or circumstances that are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried are unusual.

(4) When assessing the prejudicial effect of evidence on the defendant, the Judge must consider, among any other matters –

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

[15] Even evidence not admissible at common law may be admitted by a court under the broad discretionary power in s 3 of the Evidence Act 1968. Nevertheless, the considerations set out in subsections (3) and (4) of the New Zealand provision provide useful assistance to Cook Islands courts applying the common law test of whether the prejudicial effect of the evidence is outweighed by its probative value.

The complainant's allegations in this case

[16] There were no other eyewitnesses to the alleged attacks on KM, and Mr Engu

exercised his right to remain silent when interviewed by a Police officer. Apart from the evidence of injuries observed in the medical examination of the complainant, the Crown's case turns entirely on the evidence to be given by KM. It follows that whether Mr Engu caused the injuries observed by the doctor who examined KM and, if so, whether the injuries were caused by repeated assaults over a period of some hours as alleged by KM, will be established beyond reasonable doubt only if the jury finds KM to be a credible and reliable witness.

[17] In this case, therefore, evidence of the circumstances leading to Mr Engu's prior convictions will be relevant as tending to show that KM's account is credible, if her allegations are sufficiently similar to the circumstances of the earlier conviction.

The similar fact evidence

[18] In December 2024, Mr Engu was tried before Grice J, sitting alone, on eight charges of male assaults female, contrary to s 214(b) of the Crimes Act 1969, and on one charge of assault with intent to injure, contrary to s 213 of the Crimes Act 1969. In a written judgment dated 13 December 2024, Grice J found Mr Engu guilty of all charges.⁶

[19] The following is a summary of the facts of that case based on the Judge's recorded findings:

- a) Mr Engu and the complainant had been in a relationship for about three years and were living together at the Paradise Inn in Tupapa.
- b) In the evening of Friday, 16 June 2023, Mr Engu and the complainant were drinking at Luna Bar. They had been drinking ready-to-drink beverages during the afternoon. The complainant estimated that by the time they arrived at the Luna Bar they had drunk about 10 to 12 cans. She described Mr Engu as, "quite drunk but fine".
- c) Mr Engu became annoyed about the complainant going to the toilet and was asking why she kept going to the toilet.
- d) Later, when she went back to the toilet, Mr Engu went after her, opened the

⁶ *R v Engu*, CR 1273/23 & Ors, Grice J, 13 December 2024, at [83].

door and pulled her out, accusing her of "sucking his best friend's dick". The complainant ran out of the bar and hid behind the buses parked outside. Mr Engu located her and slapped her forcefully on her left eye, causing substantial bruising and swelling. Mr Engu dragged the victim to their bike and they went back to their room at the Paradise Inn.

- e) Once they got to the residence Mr Engu continued making allegations that the victim had been with other men. Mr Engu then punched and kicked the complainant. The complainant told him to stop but he would not, and kept punching and kicking her as she lay on the floor. He also head-butted her.
- f) In the course of the altercation the complainant's earrings came off and one scratched her cheek. At some stage, Mr Engu sat on the bed and urinated on her. The complainant was bleeding and Mr Engu put her into the shower. The complainant then joined Mr Engu in bed.
- g) The next morning (17 June) when the complainant awoke she could hardly walk; she went to the bathroom and cleaned the blood up.
- h) Later that day Mr Engu started punching and kicking the complainant again, and pulling her hair. At one stage Mr Engu cut off the complainant's dress, and on two occasions made her walk outside in her underwear before dragging her back inside.
- i) As a result of her injuries, the complainant could not go to work. When she finally went to work she was wearing sunglasses to cover up her black eye. Her supervisors forced her to tell them what had happened, and one of them took her to the Police Station where she made a statement. Photographs were taken of her injuries, and she was medically examined at the hospital.
- j) The complainant suffered significant bruising and swelling all over her body, and a small cut to her face.

Analysis

[20] I was satisfied that, because of its compelling similarity to the circumstances leading to the December 2024 convictions, the similar fact evidence has significant probative value

in lending credibility to the account of KM about what happened to her. In coming to that conclusion, I considered that:

- a) There was a close connection in time between the circumstances that Grice J found to have occurred in June 2023 and the circumstances described by KM as having occurred on in November 2023, only five months later.
- b) Both complainants were in intimate relationships with Mr Engu at the relevant time.
- c) On both occasions, Mr Engu and his then partner were out drinking at local bars, Mr Engu became jealous and subsequently assaulted his partner multiple times after leaving the bar, at their home, and during the following day.
- d) There is no evidence of collusion between the two complainants.
- e) There is no risk that the jury's consideration of the evidence related to the prior convictions will overwhelm the oral evidence of the complainant and the other Crown witnesses. It will be provided by a brief summary of facts and a certificate of the convictions

[21] I acknowledged that I was bound to be more cautious about the risk of undue prejudice where the verdicts will be given by a jury of lay persons rather than by a judge. I was satisfied, however, that any illegitimate prejudice that might arise from jurors thinking that Mr Engu is guilty of the current charges merely because he has committed similar offences in the past can be dealt with adequately by appropriate directions, including as to the burden and standard of proof.

[22] For these reasons, in the exercise of my discretion under s 3 of the Evidence Act 1968, I ruled the evidence to be admissible.



Toogood J