EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

IN THE DISTRICT COURT
AT WELLINGTON

CRI-2017-096-002574
[2018] NZDC 3709

THE QUEEN

v

RYAN NEIL TREWEEK
JARED DEYS

Date of Ruling:	27 February 2018
Appearances:	R Georgiou for the Crown S Gill for the Defendant Treweek B Crowley and V Thursby for the Defendant Deys
Judgment:	27 February 2018

RULING 3 OF JUDGE J M KELLY

Section 147 application on behalf of Mr Deys

[1] The defendant, Mr Jared Deys, faces one charge of aggravated robbery pursuant to s 235(b) Crimes Act 1961. It is alleged that between [dates deleted] 2017, Mr Deys together with Ryan Treweek did rob [the victim], at Lower Hutt.

[2] At the close of the Crown case, Mr Crowley has made an application on behalf of Mr Deys to dismiss the charge pursuant to s 147 Criminal Procedure Act 2011.

[3] Section 147(4)(c) provides that the Court may dismiss the charge in relation to a charge being tried by a jury if the Judge is satisfied that as a matter of law a properly directed jury could not reasonably convict the defendant.

[4] As Mr Crowley has helpfully set out in his written submissions, the leading case is *R v Flyger*[1]. In delivering the decision of the Court of Appeal, Anderson J said at [15]:

> … It is not a question of what a jury would be likely or unlikely to do but what a jury may properly do. The evidence in support of a charge may be barely adequate and so tenuous as to lead a Judge to the view that the jury could not properly convict, and accordingly the interests of justice require an order for discharge.

[5] In *Parris v Attorney-General*,[2] the *Flyger* test was cited with approval with the Court stating at [13] and [14]:

> … There should be a s347 discharge when, on the state of the evidence at the stage in question, it is clear either the properly directed jury could not reasonably convict, or that such conviction would not be supported by the evidence. In most cases, these two propositions are likely to amount to much the same thing.
>
> The issue is not what the Judge may or may not consider to be a reasonable outcome. Rather, and crucially, it is whether as a matter of law a properly directed jury could reasonably convict …

Defence Submissions

[6] Mr Crowley has also usefully set out in his written submissions the relevant cases regarding s 235(b).

[7] In the decision of *R v Feterika*,[3] the Court of Appeal discuss the distinction between s 235(1)(b) and the offences of robbery aggravated by grievous bodily harm, robbery aggravated by possession of a weapon, and assault with intent to rob under s 237.

---

[1] *R v Flyger* [2001] 2 NZLR 721
[2] *Parris v Attorney-General* [2004] 1 NZLR 519 (CA)
[3] *R v Feterikia* [2007] NZCA 526

[8] In relation to each of those latter offences, an offender can be a party under s 66 but aggravated robbery under s 235(1)(b) contains the distinctive aggravating ingredient of being together with any other person or persons. That collective element displaces s 66. Each participant must be principally culpable and two or more must be so for the offence to be committed at all.

[9] The Court said in *R v Joyce*[4] at 1075:

> In the case of a charge laid under that paragraph, in our opinion the Crown must establish that at least two persons were physically present at the time the robbery was committed or the assault occurred. We reached this conclusion for the reason that we are of the opinion that the legislature in enacting s 235(b) carrying, as it does, a higher penalty, intended to provide for cases where the victim was confronted by two or more persons acting in concert.

[10] In *R v Galey*[5] the Court held, at 234:

> We believe that the expression "being together with any other person or persons" … [is] intended to apply only in situations where the presence together is proved of two or more persons having the common intention to use their combined force, either in any event or as circumstances might require, directly in the perpetration of the crime.

[11] The Court also said at 234:

> The judgment in *Joyce* strengthens our view that s 235(1)(b) was intended to apply only to cases where the forces of two or more persons, acting in concert, are deployed against the victim in the actual commission of the offence. *Joyce* demonstrates that a lack of physical proximity may negative the statutory requirement of "being together".

[12] In *R v Edwards*,[6] the Court of Appeal confirmed that when in *R v Galey* they spoke of force, it did not mean actual violence. They said at [17]:

> The dictum in that case requires only that there be a common intention by the co-offenders to use their combined force directly in the perpetration of the crime. It does not matter that no violence occurred or that no violence was necessarily intended. What is required for the purposes of *R v Galey* is that the co-offenders have combined for the purpose of committing the crime in question; in this case, the crime of aggravated robbery.

---

[4] *R v Joyce* [1968] NZLR 1070
[5] *R v Galey* [1985] 1 NZLR 230
[6] *R v Edwards* CA60-00, 25 July 2000

[13] It is clear from these cases that the primary issue for the jury, in relation to the aggravated robbery charge for Mr Deys, is whether Mr Deys and Mr Treweek were complicit in the joint enterprise.

[14] As the Court of Appeal held in *Feterika*, it is clear that two or more persons must be physically present and share an intent to rob, inherent in which is the intent to steal using their collective force should that be called for.

[15] Sharing that intent, each must play some definite part to accomplish the design. One may assault or threaten to assault and rob. Another may be present when the threats are made and the robbery is accomplished and do little more than afford active support. Under s 235(1)(b) he will still be a principal.

[16] It is also accepted that if, by contrast, two or more persons are present, at an assault, or threaten to assault, and one robs, without the other anticipating that or willing it, that will fall short of aggravated robbery under s 235(1)(b).

Defence Submissions

[17] Mr Crowley submits that the evidence is insufficient by referring to page 6 of the transcript of the 111 call, where [the victim] says that Mr Deys was down the driveway at that time. Mr Crowley submits that this was before the theft of the proximity sensor as [the victim] says, the man at the door is wanting something valuable so he told him he would go up and look for something. Mr Crowley submits this is confirmed in the notes of evidence at page 23, line 21.

[18] Mr Crowley points to the evidence of [the victim] at page 8 of the 111 transcript that he is, "Just trying to find you something," addressing Mr Treweek. [The victim] then says, at page 9 of the 111 transcript, he has just given an item out of the window to Mr Treweek.

[19] Mr Crowley submits this constitutes the theft. Mr Crowley submits there is no evidence that Mr Deys was immediately present when the theft was committed.

[20] It was put to [the victim], in cross-examination at page 31 of the transcript, that Mr Deys was not on the deck area when the sensor was handed out the window. In re-examination, [the victim] was asked specifically about this at page 35, line 28, as follows:

> Q And the man in the black, he was, was he present on the deck when the threats were being made by the other gentleman?"
>
> A I don't know because I closed the curtains again and was merely speaking through a curtain, so I couldn't tell you if he was still on the deck or not.

[21] Mr Crowley also makes some additional points about the evidence submitting that the evidence of [the victim] in the 111 call that Mr Treweek had pointed the pistol at him, should be disregarded because in [the victim]'s evidence he stated that did not happen, at the transcript page 10 line 24.

[22] Also, Mr Crowley submits that the Crown only asked about what they had done or said, even when [the victim] was making it clear he was only referring to one offender.

[23] Also, [the victim] made it clear that the second man in black did not say a word at any stage.

[24] Mr Crowley submits there is no basis upon which a properly directed jury could find Mr Deys was immediately present when Mr Treweek stole the sensor, or that he at least actively encouraged the theft. Mr Crowley submits the charge should be dismissed.

Discussion

[25] Having considered those submissions, I am of the view that the facts as alleged in this case can be distinguished from the facts in the cases referred to by Mr Crowley for the following reasons.

[26] First, on the evidence it is clear that Mr Deys drove to [the victim]'s relatively secluded property with Mr Treweek at about 4.30 am on [date deleted].

[27] Secondly, on the evidence it is accepted that Mr Deys was dressed in black and wearing a disguise, namely a t-shirt that appeared to look like a balaclava with only his eyes showing, and a glove to cover a distinctive tattoo on his hand. He accompanied Mr Treweek who was wearing a green jacket with a hood and a beanie.

[28] Thirdly, Mr Deys allegedly went to the front door with Mr Treweek.

[29] From the transcript of the 111 call, it is apparent that the very first thing [the victim] says is that, "There's two guys here with guns on my doorstep". He says "They were here two nights ago". He says, "They've got handguns and they're threatening to fucking shoot me". He says, "They're knocking on the door again. He's gonna smash that door in a minute. He's got a fucking handgun".

[30] The Police communications operator then asks [the victim] to describe the two males. [The victim] gives a description of the first male. Then, at page 3, he goes on to give a description of the second male "Who's got a balaclava on".

[31] At page 4, in response to a question "Can you tell me what's going on there?" [the victim] says, "I just talking to him at the door. He wants something valuable because he reckons my flatmate was doing something with his girlfriend, or shit".

[32] [The victim] is then asked has he seen the weapon? He says, "Yes, it was a handgun". He then says one of the males had pointed a handgun at him about five minutes ago.

[33] At page 5 of the transcript the communications operator asks, "What did he say when he pointed it at you?" [The victim] replies, "Give me something valuable so I can come back and discuss it with him later".

[34] Fourthly, it is not disputed that at that point, at page 6 of the transcript, [the victim] says, "The guy with the balaclava is on the driveway at the moment, and the other guy is at the front door". [The victim] tells the communications operator that from the balcony outside the front door, there are about 20 stairs to the driveway.

[35] At page 8 of the transcript, it appears that when [the victim] gives Mr Treweek the proximity sensor, both the males are outside.

[36] The Crown accepts that at that point, Mr Deys may still have been on the driveway. However, it is apparent that Mr Deys continued to be actively involved in attempting to steal the ute on the driveway although they were unable to steal it because the ignition was damaged.

[37] Although Mr Deys was probably not standing alongside Mr Treweek when the proximity sensor was handed out the window, I accept the Crown submission that when Mr Deys was standing on the driveway he could quickly have joined Mr Treweek on the balcony outside the door should any assistance have been required.

[38] I accept the Crown submission that at the time the proximity sensor was handed over, even if Mr Deys was down the driveway he was still physically present and proximate. He could be seen by [the victim] from the upstairs bedroom window. [The victim] was very aware of his presence as evidenced by the 111 call which lasted for 35 minutes.

[39] I accept the Crown submission that the threats were ongoing as shown at page 5 of the transcript of the 111 call.

[40] I also accept the Crown submission that [the victim] was not conflating Mr Deys and Mr Treweek. He did distinguish between "they" meaning Mr Deys and Mr Treweek, and "him" meaning Mr Treweek.

[41] I also note that in [the victim]'s evidence-in-chief, at page 16 of the transcript, when he is asked about the pointing of the gun, [the victim] says he does not recall. That was after the 111 call had been played. Whereas before the 111 call was played he said that the gun had not been pointed at him at page 10 lines 24 and 25. Those are jury issues of assessing the credibility and weight of the evidence.

[42] When looked at overall, I am of the view that there is sufficient evidence Mr Deys was actively involved in the robbery, and acting in concert with Mr Treweek against [the victim] in the actual commission of the offence. For the reasons I have identified I am more than satisfied there is sufficient evidence to go to the jury of their intent to steal using their collective force.

Decision

[43] For the reasons given, I find there is sufficient evidence which, if accepted, would, as a matter of law, be sufficient to prove the case.

[44] Further, I find that the evidence against Mr Deys in respect of charge 5 is sufficient so that a jury properly directed could convict on that count.

[45] Accordingly, the s147 application is declined.

J M Kelly
District Court Judge