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

IN THE DISTRICT COURT
AT CHRISTCHURCH

CRI-2017-009-002714
[2018] NZDC 3637

NEW ZEALAND POLICE
Prosecutor

v

RUSSELL TAYLOR CARR
Defendant

Hearing: 28 February 2018

Appearances: Mr Matthews for the Prosecutor
Mr Lucas and Ms Mitskevitch for the Defendant

Judgment: 19 March 2018

RESERVED JUDGMENT OF JUDGE S J O'DRISCOLL

Introduction

[1] The defendant has been charged with intentionally, without claim of right, damaging vehicles tending to cause loss to Earthquake Commission. The charge is an offence against s 269(2)(b) of the Crimes Act 1961. The offence, according to the charging document was originally alleged to have occurred on 30 June 2016, however, during the course of the hearing I amended, without opposition, the date to read 1 July 2016.

[2] The defendant first appeared in Court on this matter on 20 March 2017. He entered a "not guilty" plea and elected to be dealt with by way of a Judge Alone Trial on 20 April 2017. Ultimately the matter came before me as a Judge Alone Trial on 26 February 2018. After hearing the evidence at the Judge Alone Trial, I reserved my

decision and indicated that I would release my decision either on, or before, 19 March 2018 at 10:00am.

Background

[3] By way of background, the prosecution allege that on 1 July 2016 the defendant drove his motor vehicle along Barry Hogan Drive and sprayed a liquid in the direction of a number of cars belonging to the Earthquake Commission (EQC). It is alleged that he did that without claim of right and he intended to cause damage to EQC.

[4] The defence is that the defendant, while he may or may not have been in that area at the relevant time, did not spray the EQC vehicles with any substance either causing or intending to cause loss to EQC.

[5] The defence accept that the relevant EQC motor vehicles in question were damaged, but disputes that the defendant was the person who sprayed any liquid and damaged the vehicles.

Legal matters

[6] Before discussing the evidence, I intend to traverse a number of legal matters.

[7] First, this is a criminal prosecution and as such, the onus is on the police to prove the elements of the charge beyond reasonable doubt. There is no onus on the defendant to prove his innocence or disprove his guilt.

[8] Second, the defendant has not given evidence in this case, nor has he called any witnesses. I draw no adverse inference against the defendant for not giving evidence or calling evidence as there is no onus on the defendant to do so.

[9] Third, the defendant has provided a statement to the police denying that he was responsible for intentionally damaging the vehicles belonging to the Earthquake Commission. The statement was not on oath nor was the defendant cross-examined on the statement. As will be seen later, I will give such weight to the statement as I consider appropriate.

[10] Finally, as a matter of law, this is a case where I need to consider a number of legal issues including the evidence relating to the identification of the defendant's vehicle at the scene on 1 July 2016.

[11] This is also a case where I need to consider and direct myself on the circumstantial evidence that has been presented to the Court as there is no direct evidence implicating the defendant in the offending. I will address this matter later in my decision.

The evidence

[12] I do not intend to repeat all the evidence that I heard at the Judge Alone Trial. I intend to emphasise some of the relevant salient points.

[13] The first prosecution witness was [witness 1]. At the relevant time she was the [managerial employee] for EQC. [Witness 1] said that on 1 July 2016 she spoke to another person at EQC. As a result, she went to a place where a number of vehicles belonging to EQC were parked. She said that she went to investigate a liquid that had been sprayed on the motor vehicles. She said that she advised "Health and Safety" and let the potential drivers of the vehicles in question know that they had been sprayed. She said that approximately 5-7 vehicles had been damaged. She said that in her position for EQC, she was responsible for all these vehicles. She said that in the week prior to 1 July 2016, she had not received any reports of any damage to vehicles.

[14] [Witness 1] said that she observed CCTV footage of a vehicle travelling past EQC cars between 10.00-10.30am on 1 July 2016.

[15] [Witness 1] said that she looked at the footage and was able to observe a vehicle travelling on the wrong side of the road and could see a spray coming from that vehicle. She said that the vehicle then travelled onto the correct side of the road and travelled towards Princess Street.

[16] [Witness 1] said that she subsequently observed (from the CCTV footage) the van travelling on three occasions on Barry Hogan Drive on 1 July 2016. She said that she went back to the footage that commenced at 6.30am that morning.

[17] [Witness 1] said that she was not able to see the spray in enough detail to confirm that she was able to observe it when looking at the CCTV footage while in Court.

[18] [Witness 1] said that when she observed the original CCTV footage in much slower still images, she was able to see a [details deleted] logo on the van that went past the EQC vehicles on 1 July 2016. She also said that she was able to see two initials and a surname with four letters on that vehicle, along with the words [details deleted].

[19] [Witness 1] said that on 8 July 2016, she received a phone call from another witness, namely [witness 3]. [Witness 3] conveyed information to [Witness 1] regarding [Witness 3] observing a van in Barry Hogan Drive on that date.

[20] [Witness 1] said that she went outside and saw the vehicle. She said that it had a [details deleted] sticker on it, along with the words [details deleted]. She said that she saw the driver and recognised him as Mr Carr, although she had never personally spoken to him. She said that the driver then drove onto Princess Street and drove away.

[21] In cross-examination, [witness 1] accepted she had been told of the incident involving the damage at about 9.30am on 1 July 2016. She also accepted that she could not see the licence plate of the vehicle or give a good description of the driver from her observations of the CCTV footage on 1 July 2016. She accepted that she did not see the vehicles being damaged personally. [Witness 1] said that she could not recall that one of the vehicles may have been damaged the previous day.

[22] The second prosecution witness was [witness 2]. She is employed as a senior chemical consultant by [details deleted]. She received a call on 1 July 2016, advising that a number of their vehicles had been attacked with some form of chemical

substance. She was asked to assist with the identification of the substance used to damage the vehicles.

[23] [Witness 2] said that she was told of the attack at around 11am that morning, and arrived at the EQC site at 56 Princess Street, Christchurch at around 12.45pm that day. She said that it had been reported to her that another vehicle, [licence plate details deleted], had been attacked the previous day and some residue of this attack was present at the time of the site visit.

[24] [Witness 2] said that she noted that the substance had contacted the painted surfaces of the vehicles and the paint had disintegrated and bubbled away from the underlying surfaces. She photographed those areas and collected three samples of the substance. She made observations that the substance had a strong phenolic odour; it was acidic in nature and it was not readily water soluble.

[25] The laboratory observation and confirmed effect on the painted surface indicated that the substance was consistent with a commercial paint stripper or similar product. [Witness 2] said that such products often contain a solvent such as methylene chloride.

[26] [Witness 3] was the third prosecution witness. In July 2016 he was employed as the [managerial position] at EQC.

[27] [Witness 3] said that on 8 July 2016 he was exiting the main EQC building. He said that he saw a white van drive past. He said that he noted on the back window of the van the words [details deleted]. He said that he was concerned about that vehicle driving around the EQC building. He said that he was aware that the owner of that vehicle was a suspect for the earlier incident that occurred on 1 July 2016.

[28] [Witness 3] said that he did not see the driver at the time the van went past the EQC building. He said that he had had no direct previous dealings with Mr Carr. [Witness 3] said that he saw the van drive to the end of Barry Hogan Drive. He said that he rang [witness 1] and told her that the vehicle was in the area, and suggested that she go outside.

[29] [Witness 3] said that he walked to the back of the drive. He said that he observed the van parked and could see a male in the seat. He said that as he got closer, the driver started the vehicle and drove off. [Witness 3] said that the video function on his phone was activated and he was able to film the vehicle. He referred to various photographs which were taken from his video and confirmed photographs that had been taken from the video footage.

[30] The fourth prosecution witness was [witness 4]. He is the defendant's son. A formal written statement was placed before the Court by consent. [Witness 4] said that although he had driven his father's van in the past, he does not know of the EQC site in Princess Street. He said that he had not been there before.

[31] The final witness was [Constable 1]. He spoke to [witness 1] on 8 July 2016. He was shown the CCTV footage of the white van that had been filmed on 1 July 2016. He said that he was able to observe liquid being squirted by the driver from the vehicle.

[32] [Constable 1] said that he also observed the footage from the video taken by [witness 3] on 8 July 2016.

[33] [Constable 1] said that he spoke to the defendant on 4 August 2016. He gave Mr Carr his rights and transported him to the Christchurch Central Police Station where a formal interview was conducted on DVD.

[34] Mr Carr accepted that he had gone to EQC on two or three occasions for meetings.

[35] Mr Carr denied squirting any liquid at the EQC cars. He said that he had not bought a paint stripper for six years and did not use paint strippers. He said he was unable to say whether or not it was him who was driving the vehicle on 1 July 2016. He accepted that he did not hold EQC in "high regard".

[36] As far as whether he was the driver of the vehicle on 8 July 2016, Mr Carr accepted that he would have been driving the vehicle but said that he was going to get

coffee and had gone to a specific coffee shop near to EQC on a number of occasions, for a period of time.

[37] [Constable 1] said that he was able to observe the raw footage from the CCTV footage on 1 July. He said that with technology, he was able to observe the van passing the EQC vehicles, was able to zoom in and out from the footage and was able to slow the CCTV footage down.

[38] [Constable 1] said that he was able to compare the vehicle from the CCTV footage on 1 July 2016 with the video footage that [witness 3] took on 8 July 2016. [Constable 1] said that the wheels were similar, the hubcaps were the same, the wing mirrors were identical, the position of the door handles were identical, the shape of the mirrors were identical and the [details deleted] sign was the same that appeared on both vehicles. [Constable 1] accepted that he was not able to obtain the number plate from the 1 July CCTV footage.

[39] [Constable 1] said that he was able to observe the [details deleted] sign on the vehicle from the 1 July 2016 CCTV footage. He said that he was able to observe the phone number which Mr Carr had given him during the interview. In addition to the [details deleted] sign, [Constable 1] said that he was able to see two initials and four letters in the surname on the window of the vehicle on 1 July, along with the words [details deleted]. [Constable 1] said that he was able to observe the cellphone numbers on the vehicle on 1 July which began "027" and had a digit [number deleted] in it.

[40] [Constable 1] said that he was able to see white dots when he viewed the CCTV footage and could see a stream of liquid being squirted by the driver of the vehicle. He said that he was able to see splatters of liquid on the ground and droplets being squirted over the EQC vehicles. He said that he was able to observe what he thought was two squirting motions. [Constable 1] said that the driver of the vehicle on 1 July looked similar to the driver of the vehicle on 8 July.

[41] The thrust of Mr Lucas's cross-examination was that [Constable 1] had been forewarned of evidence relating to the defendant before he made his observations from the CCTV footage. He accused [Constable 1] of being biased and looking at the CCTV

footage with hindsight with other matters relating to Mr Carr.

[42] [Constable 1] accepted that he had not used any photo montage to attempt to identify Mr Carr. [Constable 1] explained that that was due to [witness 1] and [witness 3] being familiar with Mr Carr's photo that was on the EQC file. [Constable 1] accepted that no search warrant had been executed at Mr Carr's home nor on his van.

[43] [Constable 1] did not accept that his observations in relation to the sign on the vehicle on 1 July 2016 simply showed "white blotches" as [Constable 1] said that he had been able to observe the footage on the EQC CCTV system which provided a greater degree of clarity than in the equipment used in Court.

[44] [Constable 1] accepted that Mr Carr did not have any previous convictions.

[45] No evidence was called by the defendant.

No case to answer submission

[46] Mr Lucas made a submission at the end of the prosecution case that there was no case for the defendant to answer.

[47] Mr Lucas's submission was that it appeared there was evidence that one vehicle had been damaged the day before on 1 July 2016. He referred to the difference in timing between [witness 1]'s evidence and the timing on the CCTV footage. Mr Lucas referred to s 137 of the Evidence Act 2006 which provides that machines are presumed to be accurate. In addition, Mr Lucas highlighted that there was no evidence that the defendant had solvent in his possession, either at home or in his vehicle and submitted that the evidence was insufficient for the matter to go further.

[48] Mr Matthews submitted there was some similarities in the evidence between the van that was observed on the CCTV footage on 1 July with the van being driven by the defendant on 8 July. Mr Matthews submitted that the defendant was

"equivocal" when being interviewed and did not deny that he was not the driver of the vehicle on 1 July 2016.

[49] I indicated that there was a case to answer and as can be seen later in my decision, I am satisfied that there was a case for the defendant to answer.

Discussion

[50] There is no direct evidence against the defendant from witnesses saying that they observed Mr Carr driving on Barry Hogan Drive spraying the EQC vehicles with a liquid substance.

[51] The case against the defendant relies wholly on circumstantial and opinion evidence.

[52] Circumstantial evidence involves the drawing of inferences. The analogy that is often used is that of strands on a rope. A single piece of evidence may not be of sufficient weight to convict a defendant, but a combination of factors can be such that the evidence can be strong enough for the prosecution to prove a case beyond reasonable doubt.

[53] In my view, the best way to analyse this case is to consider the evidence that is not really in dispute or challenged. I therefore start off with the evidence relating to 8 July 2016. Specifically, this relates to the observations made by [witness 3] and his filming of the van on that date.

[54] [Witness 3] was not challenged that on 8 July 2016 he filmed through his phone, a white van. Stills from the video footage have been produced to the Court in a booklet of photographs shown as photographs 12, 13, 14 and 15.

[55] In particular, the stills show a white van with a male occupant in it. The registration number of the van is [deleted]. It is not in dispute that the defendant owned the van. When questioned by [Constable 1], the defendant said on 4 August 2016 that he had probably been in Barry Hogan Drive or Princess Street "about five weeks ago".

[56] During the interview, [Constable 1] showed the defendant the photographs taken from [witness 3]'s video footage and the defendant accepted that the vehicle was his vehicle and when it was put to him that it looked like him in the driver's seat Mr Carr replied "possibly I think it would be yeah".

[57] Mr Carr accepted that the white van was his vehicle and as can be seen in photograph 15 there is signage at the rear of the vehicle, showing a [details deleted] sign along with the words [company details deleted].

[58] As at 8 July 2016, the defendant was the owner of a white van that was specifically identifiable with the defendant's name and phone number on it.

[59] From that point, I then go back to 1 July 2016.

[60] The defence has made two specific points which I need to address.

[61] First, there is evidence that one of the vehicles belonging to EQC may have been damaged the day prior to 1 July 2016. It appears that this information was provided to [witness 2].

[62] In response to that submission, I am prepared to give the defendant the benefit of the doubt. It is unclear whether this is a fact which is true or not. However, given the timeframe between the date of the alleged offending on 1 July 2016 and the date of the hearing of the Judge Alone Trial on 26 February 2018, I accept that one of the vehicles may have been damaged. However, it is clear that on the basis of the evidence given by [witness 1] in particular, that a number of the other vehicles were subsequently damaged on 1 July 2016. This is not a material issue on the charge. It is a representative charge and it is clear that more than one vehicle was damaged on 1 July 2016.

[63] The second matter raised by the defence is the timing of the alleged offending on 1 July 2016. [Witness 1]'s evidence is that she was informed from another person that the vehicles had been damaged at 9.30am on 1 July 2016. [Witness 1] believed that she observed the CCTV footage around 10am to 10.30am.

[64] The video footage shows the white van in question driving past the EQC cars at various times between 10.07am and 10.54am. This is clearly well over the time given by [witness 1], indicating that the damage had already been caused by the time that the van had driven past the EQC vehicles. The other relevant timeframe is that [witness 2] said she was informed of the damage around 11am that morning.

[65] There are three reasons why I do not have any concerns about the time variation. The first is that due to the timeframe between the date of the incident and the Judge Alone Trial, it is understandable that a witness such as [witness 1] may not have got her timing incorrect as to when she was informed that the damage had occurred.

[66] Second, that after observing the damage on the vehicles, [witness 1], along with others, roped off the vehicles so that unsuspecting users, bystanders or intended drivers would not come into contact with the substance. There is no suggestion that damage occurred to the vehicles after the damaged vehicles had been quarantined.

[67] Third, it is not disputed that the vehicles were damaged and the only reasonable inference that I can draw from the evidence, is that on the basis of [witness 2]'s evidence, the vehicles had been sprayed with a substance containing methylene chloride and this occurred on the morning 1 July 2016.

[68] There had been no reports of damage occurring the previous day by way of a substance being sprayed on the vehicles. [Witness 1]'s evidence is that she observed the CCTV footage from about 6.30am on 1 July 2016 and there was nothing untoward from her observations of the CCTV footage apart from the incident with the van later that morning.

[69] My assessment of the case against the defendant really involves an analysis of the CCTV footage that was taken on 1 July 2016. The prosecution case is that the van shown in the CCTV footage on 1 July 2016 is the same van that the defendant was seen to drive, and which he admitted driving on 8 July 2016.

[70] I have seen the CCTV footage from 1 July 2016, and have observed stills from the CCTV footage. I have also had the advantage of seeing the raw data from the CCTV footage which [Constable 1] has been able to modify in the form of enhancing the footage by zooming in on aspects of the footage and I have also had the advantage of seeing the CCTV footage slowed down so that there could be a frame by frame analysis of that footage. That footage was shown on the screen in Court.

[71] I have also had the opportunity to see and hear [Constable 1] give evidence and be the subject of cross-examination.

[72] In addition, I have heard evidence from [Constable 1] that he was able to observe the CCTV footage from the original footage on the EQC CCTV system. When Mr Lucas put to [Constable 1] that his observations about observing the [details deleted] sign on the van on the EQC system, [Constable 1] said that he had had the luxury of watching that footage on the EQC system. He said that the CCTV footage had been changed from the original footage to enable the CCTV footage to be shown in Court. He indicated that the CCTV footage he had observed on the EQC system was much clearer than that which was shown in Court.

[73] Photographs and CCTV footage are in law, evidence which I as a fact finder, am entitled to consider and place what weight I think is appropriate on that evidence. Similarly, when a witness gives evidence as to observations that they made and provide opinion evidence to the Court then the Court is entitled to also place weight it thinks is appropriate on that evidence.

[74] It is not uncommon for the Court to be provided with photographs and diagrams which may not accurately depict a particular situation on a given day.

[75] In this case the defendant is not being identified as the driver on 1 July 2016. The prosecution case is that the vehicle observed on 1 July 2016 was the same vehicle that the defendant was driving a few days later. The prosecution case is one whereby the Court is being asked to draw an inference that the driver of the van on 1 July 2016 was the same person who drove the vehicle on 8 July 2016.

[76] There is no evidence before me that anyone, other than the defendant, was driving the van on 1 July 2016.

[77] In addition, I am being asked to draw an inference from the evidence of [Constable 1] that the spray that was observed to come from the direction of the driver in the vehicle on 1 July 2016 contained a substance which caused damage to the EQC vehicles.

[78] I do direct myself to consider with caution, the evidence of [Constable 1]. [Constable 1] has given evidence identifying the van that he observed on the CCTV footage on 1 July 2016 as the same vehicle that he observed in the video footage that was taken on 8 July 2016, in which the defendant accepts on 8 July was his vehicle and he was the driver at the time the video footage was taken.

[79] I particularly remind myself of the matters raised by Mr Lucas that [Constable 1] has given his evidence with the benefit of hindsight and by knowing that EQC regarded Mr Carr as a suspect for the offending and [Constable 1] also had the benefit of knowing the vehicle that the defendant owned and the characteristics relating to that van.

[80] The defence is that Mr Carr was not specifically identified as the driver of the van on 1 July 2016.

[81] Even if he was in the area, the defence contend, there was insufficient evidence he sprayed the EQC vehicle.

[82] I accept that there is no direct evidence that Mr Carr was ever in possession of a chemical that may have caused the damage to the EQC vehicle.

[83] In considering the circumstantial evidence in this case I exclude the evidence that the defendant is or was a decorator. The evidence is that the relevant substance that caused the damage to the EQC vehicles was readily available in the community. Any number of persons may have had access to the substance. There is no evidence

that the substance was only available to a limited number of persons such as decorators.

[84] There are, I conclude, a number of factors that cumulatively lead me to the conclusion that the defendant was the driver of the van on 1 July 2016 and that the driver sprayed the EQC vehicle.

[85] I conclude that the driver of the van on 1 July 2016 that sprayed the EQC vehicles was the defendant.

[86] The factors that cumulatively lead me to this conclusion are:

(i) The defendant was the owner of a van on 8 July 2016 that has the words [company details deleted] on the back of the vehicle;

(ii) On 8 July 2016 the defendant was the driver of that vehicle;

(iii) On 8 July 2016 the defendant was driving the vehicle in the immediate vicinity of EQC in Princess Street, Christchurch;

(iv) I accept the evidence of [witness 1] as to her observations of the CCTV footage on the morning of 1 July 2016 was that a van travelled on the wrong side of the road as it passed EQC vehicles;

(v) I accept the evidence of [witness 1] that the footage she observed showed spray coming from the van on 1 July 2016;

(vi) I accept the evidence of [witness 1] from her observations of the CCTV footage on 1 July 2016 that the van went past EQC vehicles on three occasions. This is inconsistent with the defendant's explanation of travelling to and from a café to obtain coffee;

(vii) I accept the evidence of [witness 1] from the CCTV footage of seeing a [details deleted] logo on the van along with two initials and a surname with four letters alongside the words [details deleted];

(viii) I accept the evidence of [Constable 1] that he was able to see the [details deleted] logo on the van from the 1 July footage that he observed along with two initials and four letters in the surname along with the words [details deleted] along with part of a cellphone number on the van;

(ix) I take into account that the defendant acknowledged having "quite extensive problems with EQC …"

[87] The cumulative effect of these matters is that I conclude that the prosecution have proven beyond reasonable doubt the defendant was the driver of the van on 1 July 2016. I am satisfied the driver squirted liquid containing a substance consistent with a commercial paint stripper. I am satisfied the driver did that without a claim of right and with intent to cause loss to the Earthquake Commission.

[88] I reject the defendant's explanation that he made to [Constable 1]. The explanation was not on oath, nor was the defendant cross-examined on his denial.

[89] I have also taken into account that the defendant has no previous convictions but it goes without saying that anyone who commits an offence for the first time has no previous convictions.

[90] The only rational, reasonable and logical inference I can draw from the evidence is that the defendant was the driver of the van on 1 July 2016 who squirted the liquid in the direction of the EQC vehicles. I accept the observations of [witness 1] and [Constable 1] that they say they were able to observe spray or a stream of liquid being squirted by the driver of the vehicle.

[91] I place no weight on the Constable's evidence that the driver of the vehicle on 1 July 2016 looked "similar" to the driver of the vehicle on 8 July 2016. That evidence is of such limited probative value I have not taken that evidence into account.

[92] In effect my decision is based on the cumulative effect of the other aspects of the evidence that I have referred to above.

[93] My conclusion is that the defendant had the motive to commit the offence, the opportunity to commit the offence, and the ability to commit the offence.

[94] While it may have been possible, in different circumstances, to have concluded that there was a reasonable possibility that someone other than the defendant was the driver of the van on 1 July 2016 there is absolutely no evidence before me that anyone other than the defendant was the driver of the van on 1 July 2016. To reach a conclusion in the circumstances of this case that that was a possibility or a reasonable possibility would be to speculate or guess on a matter where there was no evidence before me.

[95] I find the charge against the defendant proved and I will consider the issue of sentence along with reparation when the matter next comes before me on 19 March 2018.

S J O'Driscoll
District Court Judge