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

NOTE: PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS, OF COMPLAINANT(S) PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE DISTRICT COURT
AT PALMERSTON NORTH

CRI-2015-031-001014
[2018] NZDC 4630

THE QUEEN

v

[NOAH KLINE]

Date of Ruling:	12 March 2018
Appearances:	T C Tran for the Crown I Hard for the Defendant
Judgment:	12 March 2018

RULING 1 OF JUDGE L C ROWE - MODE OF EVIDENCE

---

[1] [Noah Kline] faces 12 charges of sexual offending against three of his nieces between 2002 and 2013, including sexual violation and rape of two of his nieces.

[2] Mr [Kline] denies these charges and the matter is proceeding this morning by way of Judge alone trial.

[3] On Wednesday last week, 7 March, the Court received a Crown application for mode of evidence directions in relation to all three complainants seeking that their evidential interviews be played and that any oral evidence be given by closed circuit

television. A memorandum filed with that application records that the failure to apply earlier for mode directions was due to an oversight by the Crown.

[4] Mr Hard, who appears for Mr [Kline], filed a memorandum opposing the mode of evidence directions on Thursday 8 March. As I was not available on Friday, this application has come before me this morning at the start of the trial.

[5] In part, the oversight in relation to mode of evidence has stemmed from the charges having been filed over some months due to progressive complaints from the three nieces.

[6] The first niece to complain was [Tia Mora]. The Crown brought a mode of evidence application in June 2016 for the charges concerning her complaints. As further complaints were taken from the other two nieces over time, no further thought was given to either revisiting the mode of evidence directions in relation to Ms [Mora], or in relation to the two further complainants.

[7] The application made in June 2016 for the complainant [Tia Mora] was, at that stage, an application for her to give evidence screened from the defendant but also by playing of her EVI. The part relating to the playing of the EVI has lines crossed through it and the application was granted on a consent basis that [Tia Mora] was to give her evidence completely orally in court but screened from the defendant. Today however I have received a police job sheet which records that she is very concerned, and would suffer trauma if her EVI was not played.

[8] The Crown has explained to me this morning that the application in relation to that complainant in 2016 was amended because of defence objections and to obtain a consent order as to mode of evidence.

[9] The job sheet I have received this morning, suggests that if that complainant had been consulted, she would not have agreed to her video record being removed as part of the Crown application for her mode of evidence.

[10] It should not have to be said that mode of evidence applications are not a matter of convenience between counsel. They are not a matter for counsel to simply agree to avoid argument. Mode of evidence applications arise principally to avoid stress or trauma for complainants from having to give evidence in the ordinary way in cases of alleged sexual, domestic violence or other offending.

[11] It is my expectation that, in future, mode of evidence inquiries will be conducted, and mode of evidence statements taken, from complainants prior to the first Crown callover, and that they will be addressed as a matter of priority. Where there is to be a departure from the mode of evidence applied for, it is to be a departure on which the complainant has been consulted and their views obtained.

[12] The application filed last week suggested that all parties had been proceeding on the basis that the EVIs of all three complainants would be played and that oral evidence would be given by alternative means, whether that was by CCTV or from behind a screen.

[13] Mr Hard's memorandum confirms that there had been discussions about the editing of EVIs should they be played, but states that there was no commitment by him, and certainly no instruction to him by Mr [Kline], that the EVIs would be played as part of the complainants' evidence.

[14] Whatever else can be said, the Crown's application falls demonstrably short of the requirement in s 103(2) of the Evidence Act 2006 that an application for directions must be made as early as practicable before the proceeding is to be heard.

[15] Part of the rationale for that requirement is so a defendant approaching a trial understands the way in which the proceeding will be conducted, and they can prepare and instruct their counsel accordingly.

[16] Here, at least, the defence has been engaged in a proactive editing process of videos in case they are played. It cannot therefore be said that the late application necessarily prejudices Mr [Kline], but mode of evidence being visited so late in the piece and so close to trial is unsatisfactory and non-compliant with the legislation.

[17] The police job sheet covers, in part, the concerns that the complainants have about giving evidence in the ordinary way. Again, that material should have been filed months ago, or at least at the same time as the application for mode of evidence directions.

[18] The sort of pressure the complainants are reported as saying they are under in the job sheet, and the type of trauma they say they will suffer by giving evidence in open Court, or without their EVIs being played, means it will not be a fair or just process to not consider the Crown's application. I therefore permit the late application in terms of s 103(2).

[19] It is worth pointing out however, that leaving mode of evidence inquiries until almost the day of trial, is itself a stressful process for a complainant and it underscores why these inquiries and applications need to be made as early as practicable and certainly well before trial.

[20] The police job sheet provided to me first thing this morning, as I say, details in part the concerns of two of the complainants, but it falls short of the type of information that the Court of Appeal in *Connolly v R*[1], suggested needed to be made available to the Court to comply with s 103(4)(b).

[21] It is a basic requirement that a complainant have explained to them the alternative methods by which they may give evidence, that there is a careful record made of any request the complainant makes, or preference they express, and the reasons for that request or preference.

[22] Because the police job sheet falls short of this basic prerequisite, but because the job sheet also detailed issues of trauma, concern or pressure for the complainants in giving evidence, I allowed the Crown the opportunity to take statements from the complainants that complied with s 103(4)(b).

[23] At this stage the police have been able to obtain a statement from the first complainant who will give evidence, [Nyla Kline]. This decision is therefore an

[1] *Connolly v R* [2012] NZCA 41.

interim one, in relation to her only. I will assess the position of the other two complainants once their statements become available.

[24] [Nyla Kline]'s statement confirms that she has been advised by the officer in charge of alternative ways in which she may give evidence. She says at paragraph [5] that she struggled to come forward and tell police about what happened to her. If she has to re-tell the story from the beginning, this will cause her to re-live everything again.

[25] She said at paragraph [6] that she always understood, that when she gave her EVI, it would be played in Court rather than her having the "trauma', to use her words, "of going over everything again causing unnecessary stress".

[26] At paragraph [7] she says, "I really don't think I can sit in Court facing [Noah] without a screen and having to re-tell the horrific things he did to me." At paragraph [8] she said, "I really don't want to tell my story in Court, the panic I feel right now with the possibility of me having to do that is more than I can cope with." Paragraph [9] "This makes me feel like a victim all over again."

[27] She then expresses a preference that her EVI be played and that she give oral evidence arising either by way of further examination in chief or cross-examination in Court behind a screen to answer questions.

[28] At first blush this statement seems inconsistent with the police job sheet where she is reported as saying that she was asked how she would feel if playing her video interview was opposed and she had to give her evidence orally, and she advised she thought she would be fine giving evidence either way.

[29] In her statement, she clarifies that what she said about giving evidence orally was based on an understanding that her EVI was going to be played. She did not mean to say that she wanted to tell her story from the beginning.

[30] The issue then is whether I have enough information to find that the jurisdictional basis under s 103(3) to make mode directions is made out.

[31] In considering the jurisdictional basis, I must have regard to the need to ensure the fairness of the proceeding, that there be a fair trial, the need to minimise stress on [Nyla Kline], and the need to promote her recovery. I also must have regard to any other factor relevant to the just determination of this proceeding.

[32] Mr Hard's submission is to the effect that fairness from Mr [Kline]'s point of view is that this witness should front up and give evidence in the normal way in open Court.

[33] Mr Hard points out that this witness is a grown woman, she is now [over 18] years old, that she does not suffer any of the difficulties that are envisaged in paragraphs (a) or (b) of ss (3).

[34] In relation to paragraph (c), he notes that any issue of trauma is contested in this case.

[35] In relation to (d) he says this witness does not disclose any issue of intimidation.

[36] In relation to (e) there are no linguistic or cultural background, or religious beliefs that are relevant.

[37] In relation to (f) his submission is that the nature of the proceeding is self-evident but not determinative.

[38] Paragraph (g), the nature of the evidence that the witness is expected to give is of course evidence of sexual offending but that is again contested.

[39] Paragraph (h), the relationship of the witness to Mr [Kline] is that of niece and uncle. He notes, however that it is alleged this offending occurred when Mr [Kline] was himself relatively young and a teenager.

[40] Coming back to fairness, he also notes that it includes the way in which the questions were asked in the EVIs, particularly some answers that were elicited by what he characterised as leading questions.

[41] The threshold here is to be considered in terms of the issues of trauma, nature of the proceedings and evidence, relationship, all of which are informed by the need to minimise the stress on the witness and the need to ensure the fairness of this proceeding and a fair trial.

[42] The fact that the issue of trauma is contested is not an answer to whether the threshold under 103(3)(c) is met. The issue is whether I have evidence that, for this witness, giving evidence in the ordinary way will, in itself, cause trauma for her.

[43] The nature of the allegations and evidence the witness is expected to give, all assist in the assessment of the complainant's statement where she talks about a struggle to come forward and tell the police about what happened, the difficulty of "re-living" this, to use her word, the trauma of going over everything again and the panic that she feels at having to do so.

[44] The nature of the allegations in relation to this complainant are of intrusive sexual experiences when she was a child, including rape.

[45] On one level, every complainant will need to re-live their allegations or experiences, because even if their EVI is played, they will be subject to cross-examination where those matters will be re-visited. But as the Court of Appeal made clear in *R v O*[2], the issue of assessing trauma and the playing of EVIs is itself an exercise in assessing how stress can be minimised for a complainant if any of the grounds under s 103(3) are made out.

[46] Here, I am satisfied that the trauma of giving evidence about these events, for the reasons explained by the witness, having regard to the nature of the proceeding and the evidence she is expected to give, which in itself will be tied to her relationship to the defendant, has been met subject to whether or not that would allow a fair trial and a fair proceeding.

---

[2] *R v O* [2012] NZCA 475.

[47] Here, the fairness of the proceeding includes fairness to a witness. The issue of a fair trial is also concerned with what is the most effective measure for obtaining the best evidence[3].

[48] As for the way in which questions were asked of the complainant in her interview, Mr Hard's memorandum suggests that part of the unfairness is that the interview was conducted by an interviewer who was not bound by the rules of evidence.

[49] Here, as I understand it, there has been editing of the EVI and, to adopt the submission of Mr Tran, it means that the EVI will be more focused and in fact more fair in that it will be more concerned with just what is at issue in this trial.

[50] With the editing, Mr Hard has also confirmed that the EVI complies with the relevant regulations. Whether interviewers understand, or are necessarily bound by rules of evidence, they are bound by the regulations that apply.

[51] The rules of evidence of course are a separate matter in terms of admissibility rather than appropriate mode.

[52] Here, I do not understand there to now be any issue of admissibility, and the EVI otherwise complies with the regulations.

[53] I also make the point that if answers are elicited by leading questions, that may affect the weight that can be placed on the answer. In a Judge alone trial the parties can expect the Court to be alive to these sorts of issues.

[54] The general issue of fairness, in other words that witnesses in cases like this, at least from the defendant's point of view, ought to "front up" and give evidence in the normal way, is itself answered by the Court of Appeal in *R v O* at paragraph [43] where the Court agreed with the assessment of Crown counsel, that no unfairness can

---

[3] *R v Simi* [2008] NZCA 515; and *R v Check* [2009] NZCA 548.

arise if the complainant gives their evidence by alternative means, and counsel for the appellant in that case did not suggest otherwise.

[55] In short, there is no unfairness implicit in a complainant giving evidence by alternative means. It is simply the way in which the information comes to the Court.

[56] In the case of [Nyla Kline] therefore I grant the Crown application that her evidence be given by the playing of her EVI, with the agreed edits, and that the balance of her evidence be given in Court but screened from the defendant.

L C Rowe
District Court Judge