EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

IN THE DISTRICT COURT
AT TAURANGA

CRI-2015-019-001504
[2016] NZDC 5116

NEW ZEALAND POLICE
Prosecutor

v

RICHARD SILVER
Defendant

Hearing: 22 March 2016

Appearances: Sergeant M Charmley for the Prosecutor
M McIvor for the Defendant

Judgment: 22 March 2016

ORAL JUDGMENT OF JUDGE A-M J BOUCHIER

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[1] In the trial of Richard Silver, the defence make an application, pursuant to s 90 Criminal Procedure Act 2011, for an oral evidence order in respect of three witnesses. Section 90(1) states:

> Either party may apply to the Court for an order allowing the oral examination of a potential witness whether or not that witness has provided a formal statement.

[2] The two remaining subsections pertain to time factors. The making of such an order is dealt with in s 92 Criminal Procedure Act where it states in subs (1):

> On an application under s 90 the court may make an oral evidence order if the Court is satisfied that:
>
> (a) It is necessary to take the oral evidence of the witness in order to determine a pre–trial application or any matter; or

(b) The person has been requested to give evidence in the form of a formal statement but has failed or refused to do so, and the anticipated evidence of that person is relevant to the charge against the defendant; or

(c) It is otherwise in the interests of justice to take the oral evidence of the witness.

[3] Then there are matters in subs (3) in which the Court may refuse an application if the Court considers it was made:

(a) For the purpose of delay; or

(b) For any other improper purpose.

[4] Subs (4) states:

> The Court must determine an application for an oral evidence order on the basis of:
>
> (a) The witness' formal statement (if any); and
>
> (b) Any other written evidence; and
>
> (c) Any submissions from the parties.

[5] So what I have to determine this on is written evidence by way of an affidavit from a Mr Tinsley and the submissions of the parties.

[6] Interestingly, when looking at the commentary on this matter and the cited cases under this particular section, none of them involve the defence making an application. But, of course, under s 90 any party may make this application.

[7] The written evidence that I have is from Glenn Tinsley, a private investigator, who deposes on oath that he is a licensed private investigator with a company and was instructed by a local lawyer to undertake defence investigations in respect of Mr Silver.

[8] As part of his investigation in June 2015, he emailed one, Karla Mason and asked her to take part in an interview with him in relation to a complaint that was made to her by the complainant in this trial whose name is Stephanie Wynne. He

attached his email. The interview was declined. That was in writing from a lawyer and is also attached to his affidavit.

[9] Then in May 2015 he made a similar request to one Rosalyn Dory, who is the person who is supposed to have received what was a complaint and interviewed Stephanie Wynne. He attached written evidence of his email to her and then the response declining the interview.

[10] He then deposed that he also sent an email to one, Norma Selby, [occupation details deleted], asking if she would take part in an interview covering Mr Silver's character as he understood that Ms Selby had known the defendant for 21 years as they were colleagues. She also declined to be interviewed and evidence of that is also appended.

[11] In his affidavit, Mr Tinsley says that it is his understanding that the first two witnesses could be expected to give evidence in relation to a false complaint of a sexual nature made by the complainant. Also, that the person Rosalyn Dory could give evidence of the complainant and a family member previously speaking of the defendant in favourable terms. The third person was expected to give evidence as to exemplary history with [occupation details deleted].

[12] Then in submissions today, the defence have stated that their application is under s 90(1)(b) but it could also be under subs (c) as well, and they referred to Mr Tinsley's affidavit which I have just traversed. They have expanded upon the witnesses (as I asked counsel to deal with each of them separately) as they appeared to have different information to impart which may need to be viewed separately.

[13] First of all, in relation to Ms Mason, it is submitted that she is [occupation details deleted]. In October 2014, the complainant is alleged to have gone to her and to have disclosed sexual abuse by her then boyfriend. That abuse – being made to comply with anal sex with the boyfriend which led to serious injury, pain and discomfort.

[14] Then the second person that the defence seek the oral evidence in respect of, Rosalyn Dory, that person is a social worker who interviewed the complainant in this particular matter. When interviewed, there was a minimisation of anything that went on, it is submitted; almost a retraction of the original allegations in respect of the boyfriend. The complainant was challenged as to what she had told Ms Mason, [occupation details deleted]. The defence submit that this is relevant because the complainant has made a complaint of some form of sexual assault and has then made a retraction.

[15] This, it is submitted, goes to her veracity and a Judge needs to authorise any such questions. So the Court should make an oral evidence order to see if there is substance and exactly what has been said. It is relevant because there had previously been some form of complaint against a teacher which was found to have no substance. Also, when speaking to Ms Dory, the complainant is said to have spoken highly of the defendant.

[16] This is a Judge–alone trial. It is not going to be a trial in front of a jury. The defence disputes that this is any form of fishing expedition and submits that it is relevant to the veracity of the complainant.

[17] The police submissions are in opposition. Sergeant Charmley has spoken to those today and refers the Court to s 92, the making of an oral evidence order, and then looks at the three witnesses that the defence seek to have the order in respect of.

[18] Firstly, they set out what the defence have said. But not in respect of the two people, Mason and Dory. They submit that there was no actual complaint of a sexual nature. "It was a report of concern" in the prosecutor's words, and there was no police involvement in this matter.

[19] Regarding Ms Selby and essentially what is character witness, (and all witnesses have declined to provide a formal statement) the police submit that it is more expeditious to deal with this issue by way of the filing of an application, more effective use of time to hear evidence pre–trial and in front of the presiding Judge.

[20] I have said that the matter is before me today and that I am here to hear it and I will give a decision, which I am now doing. The basis upon which the police oppose the application – they submit that the grounds advanced do not comply with s 91(1)(b) and therefore the application is for any other improper purpose pursuant to s 92(3)(b) and it is in fact, in the police submission, a fishing expedition.

[21] The police refer the Court also to s 44 Evidence Act 2006 relating to the evidence of sexual experience of complainants in sexual cases and set out s 44 which, again, is well–known. So in the police submission any such evidence from Ms Dory and Ms Mason of "a false complaint of a sexual nature" is not directly relevant to the facts in issue in this proceeding and therefore inadmissible pursuant to s 7 Evidence Act. They submit there is nowhere sufficient nexus or connection or relevance to the current charge and it would be contrary to the interests of justice to include it.

[22] Police also submit that there was no complaint or false complaint, merely the complainant mentioning an unpleasant experience in an interview. No supporting evidence to suggest that a false complaint of a sexual nature was made and subsequently denied. It is submitted that as far as Ms Selby is concerned, essentially being a character witness, there are no special circumstances as to why her evidence should be heard pre–trial.

[23] They have referred the Court to the case of *Reed v R* [2014] NZCA 535 (CA) where the Court refused to grant leave to cross–examine the complainant in a trial on possibly false allegations she had made to the defendant's wife against persons other than the defendant. The Court said:

> … we consider that to be entirely speculative and devoid of any proper foundation. There is no evidence to suggest that teenage complainants in sexual cases make false allegations against third parties rather than their true abusers so as to bring the police into their lives. We also agree with the Crown that is drawing a very long bow to suggest that [the complainant] would make a false allegation of sexual abuse against [the defendant] because his wife accused her of lying.

[24] The Court considered it was a fishing expedition.

[25] *Ngataki v Police,* CRI–2009–083–1639, 20 August 2009, that is a case which I certainly have also looked at. In the police submission here, His Honour Judge Radford looked at the previous provisions under the Summary Proceedings Act 1957 and the phrase "otherwise in the interests of justice". The police submit that Judge Radford determined a threshold had to be met and the interests of justice required some special or exceptional reasons as to why oral evidence has to be heard. It is not, in the submission of the police, in the interests of justice.

[26] The defence response is that the first two witnesses that they seek to have an oral evidence order in relation to, that their evidence relates to the veracity of the complainant. Once there was an order for oral evidence given, then this evidence and when evidence was given, there would have to be a hearing as to any relevance of what the witnesses said.

[27] As the defence have then submitted that the matter relates to veracity of the complainant, I go to the Evidence Act to consider that. Section 37 deals with veracity rules. In subs (1):

> A party may not offer evidence in a criminal proceeding about a person's veracity unless the evidence is substantially helpful in assessing that person's veracity.

[28] In subs (3):

> In deciding for the purposes of subsection (1) whether or not evidence proposed to be offered about the veracity of a person is substantially helpful, the Judge may consider among any other matters whether the proposed evidence tends to show one or more of the following matters:
>
> (a) A lack of veracity on the part of the person when under a legal obligation to tell the truth.
>
> (b) Whether the person has any convictions (which is not relevant here.)
>
> (c) Any previous inconsistent statements made by the person.
>
> (d) Bias on the part of the person (which is not relevant here)
>
> (e) A motive on the part of the person to be untruthful (which is not relevant here).

[29] So essentially the issue is s 37(3)(c). So in considering what veracity means, veracity means the disposition of a person to refrain from lying whether generally or in the proceeding.

[30] The police have also mentioned s 44 Evidence Act which relates to the questioning of a witness in bringing of evidence about sexual experience of complainants in sexual cases.

[31] I have considered s 44, but at this stage of the piece I am not of the view that s 44 is relevant. The matter falls to be determined, firstly of course, under ss 90 and 92 Criminal Procedure Act, and then in respect of s 37 veracity rules, and in respect of the third proposed person, in respect of the propensity rules under s 40. Of course, a person may call propensity or lack of propensity evidence about themselves under s 41(1).

[32] I wish to deal, first of all, with whether there should be oral evidence orders in respect of the first two witnesses because I consider that they fall to be dealt with in respect of any possible veracity, or otherwise, of the complainant in this case. Obviously, the veracity of a complainant in any trial is a very important factor.

[33] Considering that, I am of the view that there may be evidence from those two witnesses which could form important evidence as far as veracity of the complainant is concerned. So accordingly, I am of the view there should be an oral evidence order made in respect of those two witnesses.

[34] What they may or may or not say, however, will be subject to any other possible applications by either the Crown or the defence as to the relevance under s 7 of anything that they have to say.

[35] In respect of the third proposed witness, as I said that concerns the propensity or otherwise. In considering whether there should be an oral evidence order in respect of that person, I am of the view that one needs to look at a couple of the decided cases in respect of this: *R v Alettson* [2009] and *Gharbal v R* [2011] NZCA 601

[36] In the case of *Alettson,* the trial Judge (myself) prevented the defendant from calling what was "character" evidence at trial and the proposed evidence was from the Vicar–General and Canon of the Traditional Anglican Community in New Zealand who would say that the defendant had been strongly religious when he was young and was an honest young man. It was considered that this could not meet the substantial helpfulness test applicable to veracity evidence.

[37] In *Gharbal* – the calling of evidence supposedly in support of the defendant's veracity that he was an old–fashioned, a very polite good man and a traditional Muslim known to be honest and not the sort of person who would commit rape. That he had never behaved inappropriately to a particular witness who would be called on his behalf. The majority of the Court of Appeal held that that was not admissible evidence and supported the trial Judge (again myself) in refusing to let that evidence in.

[38] Whilst I accept that this particular evidence is perhaps a little broader than the evidence that is referred to in both *Alettson* and *Gharbal,* I am still of the view that this comes under what used to be called "character" evidence and now it is "veracity" evidence, and that at the present moment that it is not substantially helpful to the fact–finder in this matter in deciding whether the complainant is giving evidence, which is true or not in the complainant's veracity. Accordingly, I refuse an oral evidence order in respect of that witness.

[39] The application is granted for oral evidence order in respect of Karla Mason and Rosalyn Dory. Then the matter should be further remanded to 26 April. The prosecution may consider taking statements from those witnesses and then deciding whether there is to be any application for consideration of the relevance of anything that they may have to say.

A–M J Bouchier
District Court Judge