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IN THE YOUTH COURT
AT MANUKAU

CRI-2015-255-000060
CRI-2015-257-000049
[2016] NZYC 193

NEW ZEALAND POLICE
Informant

v

NC
KL
Young Persons

Hearing 1 April 2016

Appearances: P Winiata for Informant
G Earley for NC
K Leys for KL

Judgment: 8 April 2016

RESERVED DECISION OF JUDGE I M MALOSI
[Mode of evidence application]

Introduction

[1] This is an application by the Police pursuant to s 107 of the Evidence Act 2006, for directions about the way their two child complainants (both 15 years old at the time of the alleged offending) are to give evidence.

[2] Specifically they seek a direction for these witnesses to give their evidence from behind a screen.[1]

[3] NC (16 year old male) and KL (15 year old female) are [relationship details deleted]. They are alleged to have committed the following offences on 17 November 2015:

(i) Aggravated robbery of RP – s 235(b) and s 66(1) Crimes Act;

(ii) Aggravated robbery of EJ – s 235(b) and s 66(1) Crimes Act;

(iii) Common assault of CJ – s 196 Crimes Act: KL only.

[4] Although the Charging Document in respect of the common assault charge alleges that KL jointly offended with NC, I note that he has not been similarly charged.

[5] All charges have been set down for a two day Judge-Alone Trial commencing 3 May 2016.

The allegations

[6] In respect of the aggravated robbery charges, the Police allege that at approximately 5.30pm on 17 November 2015, RP and EJ were together making their way along [name of road deleted]. RP was walking while EJ was on a scooter.

[1] s 103(1) and s 105(1)(a)(i) of the Evidence Act 2006

[7] They were approached by NC and KL, who were with a male associate. NC asked to ride the scooter, but EJ refused. In response NC grabbed the scooter and punched EJ in the jaw prompting him to flee.

[8] RP was then surrounded by the group, whereupon KL reached into his pockets and pulled out his iphone 4 and wallet. After rifling through the wallet she took a $2.00 coin (all the money he had) and threw the wallet on the ground.

[9] Meanwhile, NC was continuously pushing RP with his open hands. Before he left to follow KL and their associate who had begun walking towards [name of road deleted], NC punched RP in the face.

[10] NC, KL and their associate were located about four hours later in [location deleted] by EJ's father, who is presumably CJ, the complainant named in respect of the common assault charge.

Relevant legal principles

[11] It is relatively settled law that when dealing with challenges to mode of evidence applications, there is no default position or presumption in favour of giving evidence in the 'ordinary' way.[2]

[12] Section 107(1) of the Evidence Act[3] is clear that in respect of child complainants i.e. those aged under 18 years, 'the prosecution must apply to the court in which the case will be tried for directions about the way in which the complainant is to give evidence in chief and cross examination'.

[13] When the application is made each party must be given an opportunity to be heard in chambers[4] and the Court may call for a report from a suitably qualified person as to the effect on the complainant of giving evidence in the ordinary way or any alternative way.[5]

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[2] R v O [2012] NZCA 475 at [37]; V v R [2011] NZCA 525 at [21]; R v Shone [2008] NZCA 313 at [28]

[3] Located in Subpart 5 of the Act which provides for alternative way of giving evidence

[4] s 107(3)(a)

[5] s 107(3)(b)

[14] In *Connolly v The Queen* [6], the Appellant and his partner were jointly charged with various sexual offences against the complainant and her sister when they were children. In that instance the Court of Appeal was critical of an application pursuant to s 103 of the Evidence Act (the mandatory considerations being essentially the same as those in s 107) in which the only evidence was an affidavit from the Officer in Charge.

[15] Amongst other things, Defence Counsel in that case submitted that the Crown's application was primarily 'police driven' and lacked a proper evidential foundation. The response of the Court was as follows:

> *'[9] We do not consider an expert opinion is required in a case such as this. We do think it would have been much preferable had the opinion expressed by the Detective come from – or been supported by – someone better qualified to express it, for example one of the staff in Child, Youth and Family who was supporting the complainant and her child. Also, given s 103(4)(b), it would have been preferable for the prosecution to have placed the complainant's views more directly before the Court. That would have entailed an explanation to the complainant of the alternative methods of her giving evidence, and a careful recording of any request she made or preference she expressed that her evidence-in-chief comprise the playing of her videotaped evidentiary interview, and the reasons for that request or preference.*
>
> *[10] Notwithstanding these deficiencies. We consider Detective Curtis' view provided, by a narrow margin, a sufficient evidentiary basis for the Judge to make the order he did.'*

[16] When considering an application under s 107(1), the Court *must* have regard to:

(a) The need to ensure –
  (i) The fairness of the proceeding; and
  (ii) That there is a fair trial; and

(b) The views of the complainant and –
  (i) The need to minimise the stress on the complainant; and
  (ii) The need to promote the recovery of the complainant from the alleged offence; and

(c) Any other factor that is relevant to the just determination of the proceeding.[7]

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[6] [2012] NZCA 41
[7] Section 107(4)(a)-(c)

[17] As noted by the High Court in *R v G J*[8]:

> *'One of the key rationales identified by the Law Commission for allowing vulnerable (or intimidated) witnesses to give evidence in an alternative way is that more witness friendly court processes are likely to significantly reduce the stress of giving evidence for such witnesses. That, in turn, is likely to benefit the truth finding process. Obviously, this is a highly desirable objective, provided it can be achieved without compromising a defendant's fundamental fair trial rights.'*

[18] In recognising that alternative means of giving evidence should be provided for, the Court of Appeal in *R v M*[9] opined that the legislature 'must have been of the view than an accused may have a fair trial if these alternative means of giving evidence are utilised.'

Evidence of [Officer in Charge of this case]

[19] The Police rely solely on the evidence of the Officer in Charge of this case, [name deleted] who swore an affidavit on 8 March 2016. After speaking with RP and his mother, his evidence was that he was 'able to make the following observations':

(i) RP was only 15 years old at the time of the incident;

(ii) He is still suffering from 'the stress and trauma' of the aggravated robbery, and is fearful about his safety if he has to give evidence;

(iii) He still 'feels scared of his attackers' and no longer uses the train or goes anywhere near the scene for fear of running into any of them (or their associates) and further violence being inflicted upon him;

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[8] [2014] NZHC 2276 at [10]
[9] [2009] NZCA 455 at [40]

(iv) This will be the first time he has had anything to do with the Criminal Court and he is ‘a little overawed and scared about giving evidence in open Court’.

(v) Because of the stress of the offending against him, RP has indicated his ability to give evidence may be impaired if required to give it in open Court.

(vi) His mother, who was to have been his support person, died in [date deleted] 2016 [cause of death deleted].

[20] [The Officer in Charge of this case] then expressed two opinions: firstly, that RP’s fear of violence was real given what he had been subjected to and secondly, that ‘in order to promote the recovery of the witnesses and to minimise any stress as a result of them giving evidence, and in the interests of justice, that consideration be given for him to give his evidence in an alternative manner from behind a screen.’

Defence submissions

Mr Earley for NC

[21] Because in the first instance the mode of evidence application by the Police was made under s 103, the written submissions in response from Counsel were framed accordingly. At the hearing on 1 April however, it was accepted that they were equally relevant to the recast s 107 application.

[22] Mr Earley made the following submissions:

(i) In terms of the evidential basis for the application, the Police are relying solely on the brief affidavit of [The Officer in Charge of this case] which is focussed on only one of the complainants, namely RP. Unlike the situation in *R v JG* [10], there are no medical or expert reports in support of the

[10] *Ibid*

application, and nor is there anything directly from either of the complainants. That said, even if there was direct evidence from them, it is submitted those views would still have be balanced against all of the other relevant considerations, including the right of the accused to a fair trial;

(ii) Whilst it is accepted that both of the complainants are young people and giving evidence in a criminal trial might well be overawing for them, the Youth Court is probably the most witness friendly and least formal of all the criminal jurisdictions;

(iii) There is no way to avoid the stress that inevitably comes with giving evidence in a criminal proceeding. A civilian witness who has no experience of the criminal justice system is not so unusual, and any concerns around that can be adequately managed by the Prosecution through preparing/familiarising the witnesses prior to trial;

(iv) Without wishing to minimise the allegations and the effects on the complainants, the violence inflicted is nowhere near the top end of the scale, and correspondingly there is no medical or psychological evidence of any form of on-going trauma;

(v) Furthermore, there is no evidence of any violent or intimidating behaviour by NC towards either of the complainants before or after the alleged offending. Indeed, he was not able to be identified by either of them during a formal identification process;

(vi) The use of screens or the absence of a witness from the Courtroom will inevitably impact upon NC's ability to fully

participate in his trial and present an effective defence, in a negative way;

(vii) Section 11 of the Children, Young Persons and Their Families Act 1989 places a positive duty on the Youth Court to encourage and assist a young person to participate in Youth Court proceedings to the degree appropriate to their age and level of maturity where necessary and appropriate. To permit the complainants to give evidence from behind a screen or by some other alternative method, will impair the young person's ability to effectively present their defence and fully participate in their trial;

(viii) Article 40(2)(iv) of the United Nations Convention on the Rights of the Child (to which New Zealand is a signatory) confirms a child or young person's right to 'examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality.' This is reinforced in the Beijing Rules: United Nations Standard Minimum Rules for the Administration of Juvenile Justice. At Rule 7.1 the right of a child or young person to confront and cross-examine witnesses is guaranteed. To allow a screen between a young person and their accuser would seriously erode those rights, and could not be said to be 'conditions of equality.'

<u>Ms Leys for KL</u>

[23] Unsurprisingly, Ms Leys on behalf of KL advances many of the same arguments as Mr Early does for NC, so I do not intend to repeat those. The following points however, are worth noting:

(i) The evidence of [the Officer in Charge of this case] is largely hearsay or opinion;

(ii) There is an insufficient evidential basis to support the application in respect of RP, and none whatsoever in relation to EJ;

(iii) Many, if not all, of the reported cases on mode of evidence applications are in respect of situations where the witness will be giving evidence in open Court, and/or before a jury, and where the defendant is a family member or otherwise known to the complainant. None of those are factors here;

(iv) No evidence has been presented that the use of screens will assist the witnesses to recover from any ill effects of the alleged offending.

Discussion

[24] I remind myself of the duty to ensure the fairness of these proceedings and that there is a fair trial – for all concerned. The other critical considerations are the views of the complainants, the need to minimise stress on them and promote their recovery from the alleged offences. Then there is the catch all provision of being able to take into account any other factor that is relevant to achieving a just determination of the proceedings.

[25] At the risk of stating the obvious a balancing act is required, and each application will turn on its facts.

[26] I proceed on the basis that the Prosecution and Defence turned their minds to the efficacy of obtaining a report on the likely effects on the complainants of giving evidence in the ordinary way or any alternative way, and decided against going down that track. I agree that was an entirely proper approach given the nature of the allegations, the likely delay and cost to the State.

[27] In the absence of a report pursuant to s 107(3)(b) however, it falls fairly and squarely on the Prosecution to put the evidence before the Court to support their

application. I am bound to say that I have a number of concerns about [the Officer in Charge of this case]s affidavit:

(i) Most of it is either hearsay or opinion evidence.

(ii) There is no explanation as to why affidavits were not obtained from RP and EJ directly;

(iii) The lack of attention to EJ's situation is woeful;

(iv) What, and how much, [the Officer in Charge of this case]'s knows about the Youth Court jurisdiction is unknown. It would have been helpful if he had included in his affidavit details about his length of service and areas of expertise within the Police. The fact that he refers to the complainants having to give their evidence in 'open court' seems to suggest he does not appreciate the Youth Court is in fact a closed court;

(v) There is no evidence as to what information was given to RP about the processes within the Youth Court, or what the intentions are in terms of preparing him (and EJ) to give evidence. I have no confidence that they have been able to make an informed decision about coming to the Youth Court and giving their evidence in the ordinary way.

[28] I have no doubt that RP and EJ were distressed by what happened to them on 17 November 2015. That said, this appears to have been low level offending (on the aggravated robbery scale at least) which involved one punch to each of them and pushing to the chest of RP. Neither sustained any physical injuries, nor required medical attention. There had been no contact between RP and EJ and NC and KL before this incident, and has been none since. Also relevant is the outcome of the formal identification procedure.

[29] Whilst there was some discussion during the hearing about the possibility of the witnesses giving their evidence by way of CCTV (and that being the preferred option of Defence Counsel if they were to give their evidence by way of alternative means), ultimately I have not been persuaded that either witness should give their evidence other than in the ordinary way.

[30] NC and KL are facing very serious charges. Bearing that in mind I am acutely aware of s 11 of the CYPF Act, Article 40(2)(iv) of UNCROC and Rule 7.1 of the Beijing Rules. It is important these young people are able to participate as fully as possible in these proceedings. I find that a screen will inhibit that process.

[31] RP and EJ will invariably feel anxious about coming to Court to give evidence, and RP will no doubt be thinking about the fact that his mother was to be his support person and has now passed on. Both boys however, will be able to have a support person beside them when they give their evidence. They will also have the opportunity to see the Courtroom before the trial starts, and Victim Advisors will be available to them at Court.

[32] Mr Winiata referred the Court to the Evidence Amendment Bill which 'introduces a legislative presumption that all witnesses under the age of 18 use alternative ways to give their evidence. This includes the use of pre-recorded evidence, as well as audio-visual links, CCTV, and the use of witness screens in Court.' That might well turn out to the way of the future, but for now there is no such presumption.

[33] The Youth Court is well attuned to young people who are uncomfortable with being in Court, and not always able to articulate themselves properly under stress. Given the ages of all of the young people involved, I consider the chance for RP and EJ to face NC and KL has more potential for recovery than harm, and they should not be denied that carefully managed opportunity.

[34] Ultimately, I determine that the child complainants giving their evidence in the ordinary way within the more informal, young person focussed, specialist Youth Court will ensure the fairness of the proceedings, that there is a fair trial and meet the needs of the complainants.

Result

[35] Accordingly, pursuant to s 107 of the Evidence Act 2006 I make a direction that RP and EJ give their evidence (including cross-examination and re-examination) in the ordinary way.

I M Malosi
Youth Court Judge