

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

This judgment cannot be republished without permission of the Court. Publication of this judgment on the Youth Court website is NOT permission to publish or report.

See: [Districtcourts.govt.nz](http://Districtcourts.govt.nz)

**NOTE: NO PUBLICATION OF THIS PROCEEDING IS PERMITTED UNDER S 438 OF THE CHILDREN, YOUNG PERSONS, AND THEIR FAMILIES ACT 1989, EXCEPT WITH THE LEAVE OF THE COURT THAT HEARD THE PROCEEDINGS, AND WITH THE EXCEPTION OF PUBLICATIONS OF A BONA FIDE PROFESSIONAL OR TECHNICAL NATURE THAT DO NOT INCLUDE THE NAME(S) OR IDENTIFYING PARTICULARS OF ANY CHILD OR YOUNG PERSON, OR THE PARENTS OR GUARDIANS OR ANY PERSON HAVING THE CARE OF THE CHILD OR YOUNG PERSON, OR THE SCHOOL THAT THE CHILD OR YOUNG PERSON WAS OR IS ATTENDING.**

**IN THE YOUTH COURT  
AT ROTORUA**

**CRI-2015-277-000014  
[2016] NZYC 323**

**THE QUEEN**

v

**RK**

Hearing: 20 and 25 May 2016

Appearances: N Tahana for the Crown  
M Simpkins for the Young Person

Judgment: 30 May 2016

---

**JUDGMENT OF JUDGE P W COOPER  
[As to reliability of defendant's statement]**

---

[1] RK is charged with aggravated robbery allegedly committed by her, together with [relationship details deleted], HM, and [relationship details deleted], OE.

[2] HM and OE have pleaded guilty in the District Court and been sentenced for this aggravated robbery.

### **Background**

[3] The complainant is an elderly man who was at his home in [location deleted] on 19 April 2015. A summary of the evidence in his formal written statement is as follows:

“At about 8.30 pm on 19 April he heard a knock on his door and saw one person standing outside.

He opened the door and three males rushed in.

The face of the first male who had knocked was uncovered but he later covered it with a bandana.

The attackers pushed the complainant over and he fell to the floor, lying on his stomach with his hands over his head.

His attackers said that they were going to kill him. He thought they might have had a gun because he saw something black and they were pointing it at his head.

They were kicking him all over his body.

While he was still on the ground, one of them attempted to force a feather duster into his mouth warning him to keep quiet.

After they beat him, ‘one of the guys’ picked him up off the ground and told him to get his Eftpos cards and wallet and [PIN] number.

He was told that two of them would stay with him while the other was going to get the complainant’s money from the bank.

He saw ‘one of the guys’ pick his cellphone up off a table. He saw ‘one of the other guys’ unplugging his Sky decoder. ‘One of the guys’ also picked up an Arnott’s tin truck from a shelf in the lounge and looked inside it.

The complainant told ‘the guy’ that his wallet was in the washhouse so the offenders let him walk to the washhouse by himself.

This was a ploy. The complainant went to the washhouse and grabbed a machete and came back swinging the machete.

He chased the offenders outside and saw them run to a vehicle parked in front of his gate. He described the three offenders as follows:

Offender 1

‘Short and stocky. He was the one who did most of the talking and most of the kicking.

He had a black and white bandana like the Black Power wear, across the bridge of his nose like a cowboy.

For the short period that his face was uncovered, I saw that he had a round chubby face, clear skin and a wide nose. He looked like a fair skinned Maori.

He had a hoodie over his head. He had squinty dark coloured eyes.’

Offender 2

‘Tall. He wore a black and white bandana like the Black Power wear over the bridge of his nose like a cowboy. He had a hoodie on over his head. He had dark eyes.’

Offender 3

‘It’s the one who dragged me up to my feet. He went into the kitchen while I was going to the washhouse.

I had a better look at this guy because he only wore his bandana across his mouth below his nose like a cowboy does. I would describe offender three as: skinny and tall, he was definitely a Maori. He had a long thin nose. I think he had grey track pants on.

I think that all three of the males wore grey hoodies... When all three males come into my house, I did not see any tattoos or marks on their faces or anything that was quite distinguishing.’”

[4] Relevant to the complainant’s comment that the offenders might have had a gun was the fact that police found a magazine to a BB gun on the floor in the lounge where the complainant was attacked.

**The defendant’s statement**

[5] On 3 June 2015, the officer in charge of the case, Detective Constable Plant, spoke to RK. He was making inquiries to locate HM who was a suspect in the aggravated robbery. RK gave Detective Constable Plant some contact information and said that she believed [details deleted], HM, had something to do with the robbery.

[6] On 16 June 2015, Detective Constable Plant went to OE's address in Hamilton to execute a search warrant. HM and OE were present and so was RK. It appeared that they had been sleeping in the garage.

[7] Later that afternoon, Detective Constable Plant uplifted RK from the [location deleted] in Hamilton. He invoked s 48 Children, Young Persons, and Their Families Act 1989 which provides as follows:

**“48 Unaccompanied children and young persons**

- (1) Where a child or young person is found unaccompanied by a parent or guardian or other person who usually has the care of the child or young person in a situation in which the child's or young person's physical or mental health is being, or is likely to be, impaired, a [constable] may, using such force as may reasonably be necessary, take the child or young person and—
  - (a) With the consent of the child or young person, deliver the child or young person into the custody of a parent or guardian or other person usually having the care of the child or young person; or
  - (b) If—
    - (i) The child or young person does not wish to be returned to a parent or guardian or other person having the care of the child or young person; or
    - (ii) No parent or guardian or other such person is willing or able to have custody of the child or young person,—

place the child or young person in the custody of the [chief executive] by delivering the child or young person to a Social Worker.”

[8] Detective Plant's evidence was that he was concerned for RK in that she was supposed to be living with her grandmother but was in fact living in a garage and appeared to be more or less homeless. She had told him that she just wanted to party and that is why she left home. She was hanging out with HM and OE, who he suspected was involved in the aggravated robbery. She herself was a suspect in the aggravated robbery and he wanted to make sure that she was safe and did not want her to be committing further crimes.

[9] The Detective Constable did not take RK to her parent or guardian. Instead, she went with him to the Tokoroa Police Station where she was interviewed on DVD. The Detective Constable arranged for RK's grandmother to meet them at the police station. Mr Simpkins, counsel for RK, submitted that the Court should be concerned that RK was taken to the police station and not to her home where she was staying with her grandmother. There is no concern in that regard, given that the police arranged for RK's grandmother to meet them at the police station.

[10] In the car on the way to the police station, RK said to Detective Constable Plant, "What happens if I confess?" He told her that she should wait to talk to a lawyer. RK said to the Detective Constable that she did not want one and then asked if she could just confess and get it over with and take the consequences. The Detective Constable told her that was an option.

### **The statement itself**

[11] RK made a full confession to the aggravated robbery. In her interview she asserted, in effect, that she took the principal role. She said it was she who knocked on the door and that when the door was opened, she punched the complainant in the face and when he fell to the ground, it was she who kicked and punched him, after first dragging him from the doorway into the house. She said it was she that had a gun and asserted it was a real gun. She described HM and OE's role as being also in the house, that HM asked her to ask the complainant where the money was. She said that HM and OE were looking around in the lounge. In general terms, her account is broadly consistent with the complainant's evidence about what happened in the house but with some significant discrepancies, which will be discussed later.

[12] RK's DVD statement to the police was made approximately two months after the aggravated robbery, during which time there was ample opportunity for the incident to have been discussed between RK and [details deleted] HM and [details deleted] OE.

[13] Detective Constable Plant carefully explained RK's rights to her and sought and obtained feedback from her to ensure that she understood those rights. However

a feature of the statement is the number of times RK said that she did not want to say anything further, but the Detective Constable continued on regardless. The nominated person (RK's grandmother) did not intervene. I did not appreciate the extent of these breaches of RK's rights until after the conclusion of the hearing on 20 May 2016 when, by consent, I was viewing the DVD interview. I directed the hearing be reconvened on 25 May 2016 to hear further submissions in relation to his aspect of the case.

[14] There were four separate occasions where RK's right to silence or to discontinue the interview were overridden. At page 10 of the transcript of her interview, the following passage appears:

“RK But I was involved, yeah.  
SP Yeah?  
RK Our aim wasn't to steal  
SP Yeah  
RK At the start it was suppose to be talk to Robert  
SP Yeah  
RK But then it ended up with something more  
SP Ah yeah?  
RK And that's about it, that's all I got to say.”

[15] Without further inquiry, the constable simply carries on asking questions of RK.

[16] A little further on at page 13 of the transcript there is the following exchange:

“SP Yeah and what was um said in that discussion?  
RK Some stuff about Robert  
SP Yeah, carry on?  
RK And that's all I'm gonna say about that”

[17] The constable then simply continued to ask questions about the discussion.

[18] At page 38 of the transcript, the following passage appears:

“RK Do I have to keep talking?

SP No you don't have to.

RK So can I just listen now?

SP Now um

RK Cause I'm sort of done talking now.”

[19] The constable simply continues with the interview without further inquiry.

[20] At page 77 of the transcript after answering questions about the gun and the bullet, RK says, “So can I go now?”

[21] Without further inquiry or comment, the constable simply carries on asking questions.

[22] There are some significant inconsistencies between what the complainant says in his formal written statement and what RK says in her interview. These are as follows:

<b>WHAT RK SAYS</b>	<b>WHAT COMPLAINANT SAYS</b>
<b>Where the car was parked</b>	
The car was parked a couple of streets from the complainant's house and the offenders walked to the complainant's house.	The complainant saw the vehicle parked in front of his gate and the three males ran to the car. He heard the car start and so there might have been a fourth person.

<b>What happened at the door</b>	
RK knocked on the door. The other two offenders were out of sight. When the complainant opened the door, RK punched him in the face a couple of times.	There was a knock on the door and when the complainant answered the door, he was “rushed” by three <b>males</b> . The male who knocked on the door had his face uncovered. They then pushed the complainant and he fell to the floor.
<b>The assault while the complainant was on the floor</b>	
RK said she was kicking and punching the complainant after first dragging him from the doorway.	<b>They</b> kicked him basically everywhere around the body.
<b>The gun</b>	
RK said she had the gun. It was a real gun not a BB gun. It felt heavy. She saw the bullets and described them as gold and heavy not plastic and they were in a red, long packet.	The complainant said that he thought they might have a gun or something. He saw something black that was being pointed at his head. (A magazine for a BB gun was found at the house left by the attackers).
<b>Feather duster</b>	
RK knows nothing about a feather duster.	While on the ground, one of the attackers attempted to force a feather duster into his mouth to keep him quiet.
<b>Machete</b>	
RK helped the complainant to the kitchen and he grabbed a machete from out behind the fridge.	“I told the guy that my wallet was in the washhouse so they let me walk into the washhouse by myself. I went to the washhouse and grabbed the machete and ... came out swinging.”
<b>Description of offenders</b>	
RK is female. She is 16 years of age. She is a solid stocky build, short to medium height.	All three offenders were male. Offender 1 – “Short and stocky. Did most of the talking and kicking. Wearing a black and white bandana across the bridge of his nose. For a short period of time, his face was uncovered. He had a round chubby face – clear skin, wide nose. A fair skinned Maori.”



	<p>Offender 2 – “Tall, wearing a black and white bandana over the bridge of his nose like a cowboy.”</p> <p>Offender 3 – “This was the one who dragged me to my feet. He went to the kitchen while I was going to the washhouse. I had a better look at this guy – bandana across his mouth below his nose. Tall skinny Maori, long thin nose.”</p>
--	---

[23] So the major discrepancies are:

- (a) The complainant describes all three offenders as male. RK is female.
- (b) The complainant said it was a male who knocked on the door, that his face was uncovered but he later covered it with a bandana. RK says it was she who knocked on the door.
- (c) The complainant says he was rushed by three males and pushed over and fell on the floor. RK said that she alone punched him twice in the face.
- (d) RK says that she was in possession of a real gun. It was not a BB gun. She saw and described the bullets – description consistent with real bullets and not BBs. The complainant thought they might have a gun, something black was pointed at his head. A magazine for a BB gun was found by the police at the scene.
- (e) The complainant says that “they” were kicking him about his body. RK says that she alone punched and kicked the complainant.
- (f) The complainant says a feather duster was attempted to be shoved into his mouth. RK knows nothing about this.
- (g) The complainant says that he was dragged up to his feet by offender ‘3’, who he “had a better look at”. Offender ‘3’ was a tall, skinny

male Maori. RK says it was she who helped the complainant to the kitchen.

- (h) The complainant said he got a machete from the washhouse. RK said the complainant grabbed a machete from out behind the fridge in the kitchen.

### **RK's personal circumstances**

[24] RK was assessed by a clinical psychologist, Dr Eggleston, in March 2016 and again in April 2016. His report is as follows:

- “30. RK likely experienced disrupted attachment due to inconsistent, insufficient, abusive and unpredictable care arrangements. It is clear that she did not have her basic emotional needs met by caregiving adults and had repeated changes in caregivers over the course of her development. The experience of attachment to a primary caregiver in the first three years is a critical human need and the foundation for the way we relate to other, relationships in later life, temperament and the formation of personality. The balance of evidence suggests that RK likely missed these attachment experiences and is consequently at much greater risk than the general population for mental health problems, behavioural disorder, emotional dysregulation and personality disorder.
- 31. In addition, RK was the victim of, and observed severe and chronic physical abuse in the home and given her early sexual behaviour, likely was a victim of sexual abuse as a child (not yet assessed). She says she cannot remember her life before ten years of age. This suggests trauma and likely Post Traumatic Stress Disorder, though does not confirm it. More assessment is needed here in the context of a safe and trusted therapeutic relationship. To date, attempts at this work have not been successful.
- 32. The results of her environmental history are evident in her lack of boundaries, suicidal behaviour, emotional dysregulation, prostitution, vulnerability to depression, and drug abuse from about 12-13 years of age.
- 33. The obtained profile on cognitive testing was of low average intellectual functioning and this has been a consistent finding over time. The initial testing at the first assessment was not valid (could be due to impact of drugs or low effort) and subsequent comprehensive testing has found average level ability for working memory and visual spatial reasoning (tests of raw ability not impacted by schooling) with low average ability for quantitative reasoning and verbal fluid reasoning (somewhat impacted by schooling). Vocabulary comprehension tests have been lower than would be expected based

on RK's intelligence and presentation. The convergence of opinion is that this reflects lack of schooling not her underlying potential or any disability.

34. RK has been a drug and solvent user. At the first assessment she talked about using glue and synthetics in the last month and P and cannabis in the past few months. Her reported history includes a range of other drug use that is difficult to verify. She 'could not remember' what drugs she had used at the more recent assessment – though looked much less tired and to have a healthier complexion in her face. Drug abuse can be a maintaining factor for prostitution and antisocial behaviour.

**UPDATED OPINION ON VULNERABILITY AND PERSONAL SUSCEPTIBILITY IN THE CONTEXT OF HER CIRCUMSTANCES RE THE MAKING OF HER STATEMENT TO THE POLICE:**

35. *General Self Report:* Observations at interview were that RK is not vulnerable to being manipulated. She can be evasive, stubborn, untrusting, non-compliant and as noted above she can lie or obstruct the truth. It is not just negative information that she refuses to divulge. She was only willing to recall basic details about her mood and mental health and appeared frustrated when asked about her day-to-day activity. Despite a good memory ability, even when well engaged at the second interview, she said she could not remember whether she used drugs yesterday, last week or in the last month. She has little concern about her welfare and/or the potential negative consequences of not giving accurate information.
36. RK did present as possibly impaired even though she is not and it took comprehensive testing, performance validity tests, seeking of corroborative sources and a second session to accurately rule that out. In my opinion this reflects the complexities of assessing RK and in the context of any interview the need for strong corroboration to be sure what she is saying is correct. This is not suggestibility, rather a lack of self-preservation and her low confidence in the value or relevance of any assessment process.
37. *Self-Report of the Offending:* RK described the background to the offending in some detail. I have not sought to repeat that here though do note that RK reported that the victim in the present offence was a former client who paid her for sex. She reports that she was at his house prior to the offence, that there was a conversation about further sex and that she became upset. RK said HM overheard her recalling that she had become upset about what had happened and this is what led to the offending and then to RK feeling the obligation to protect HM from the consequences of his offending.
38. *Pattern of Lying:* RK has admitted that she does lie. She knows in principle that she should not lie and in particular, should not lie in court or lie about the offending to the Police. Her report is that she did lie about the offending to protect HM. RK has a pattern over time of engaging in deceptive behaviour towards her caregivers, CYFS, and the law. Her mother and stepfather appear to have modelled and endorsed this behaviour, including for example (a) a DVD that was

presented to CYFS in which RK ‘disclosed ongoing abuse while in the care of the service, this was extremely coached ... RK withdrew her previous disclosures which collaborated HM’s evidential interview,’ and (b) the parents used RK to assist with the abduction of her younger sister from [details deleted].

39. *Cognitive Functioning:* Cognitive assessment with performance validity tests indicates that RK has cognitive potential that is in the average range for memory. While it was initially considered possible that she had neuro-cognitive impairment this has not borne out with further testing. She has average ability in areas of raw potential (memory/visual spatial reasoning) and low average ability in quantitative reasoning and verbal fluid reasoning. The pattern is of average ability in areas not impacted by education and borderline to low average ability in areas where education is relevant. The test scores from my previous session with RK were not a valid reflection of her ability and must be disregarded.
40. *Hopelessness:* A further factor, that I note has been discussed by previous assessors is RK’s hopelessness about her situation and her future chances. Hopelessness is a symptom of depression, predictive of suicide attempts but also low effort because of low self belief and ‘nothing really helps’ or matters. I think this is also a factor in RK’s approach to being interviewed. Perhaps that is changing somewhat, though I suspect hopelessness has been a strong characteristic of her approach to assessments and treatment over time.
41. *Suggestibility:* A psychometric assessment of suggestibility was planned though could not be undertaken because of low tested verbal memory and comprehension on initial screening. Adequate verbal memory and comprehension are required for the test of suggestibility. On final reflection and further testing memory, at least, was adequate. In my opinion there is not a strong argument to be made about suggestibility as other variables noted above better explain her interview behaviour.”

### **RK’s state at the time of interview**

[25] It appears that RK had been sleeping in a garage the night before the interview and may well have been taking drugs. When spoken to by Detective Constable Plant on the morning of 16 June 2015, she did not appear to be under the influence of any substances. During the interview, she was noticeably tired and yawning a lot. She was able to express herself clearly during the interview. At times, the Detective Constable clearly had some concerns about her account not matching some of the other evidence gathered during the investigation. At times, he had some concerns about RK’s truthfulness in perhaps exaggerating her role. He put that to her, but she was steadfast in her assertions about the role that she played in the offending.

## **Some matters triggering initial reliability concerns**

[26] On 3 June 2015, Detective Constable Plant spoke to RK about the involvement of HM in the aggravated robbery and his whereabouts. A text message was found on RK's phone sent on 3 June 2015 to [details deleted], OE, along the following lines:

“You don't know what fuckin happened, I'm gonna take the rap for you and HM, fuck youse both, pigs come over and questioned youse, you say you ain't no shit about it, ok.”

[27] Following RK's arrest and remand in a youth justice residence, she sent a typed letter to the Court saying that she lied about being involved in the incident and that she was trying to cover HM and two other guys.

## **The law**

[28] This application is governed by s 28 Evidence Act 2006 which provides:

### **“28 Exclusion of unreliable statements**

- (1) This section applies to a criminal proceeding in which the prosecution offers or proposes to offer a statement of a defendant if—
  - (a) the defendant [or, if applicable, a co-defendant] against whom the statement is offered raises, on the basis of an evidential foundation, the issue of the reliability of the statement and informs the Judge and the prosecution of the grounds for raising the issue; or
  - (b) the Judge raises the issue of the reliability of the statement and informs the prosecution of the grounds for raising the issue.
- (2) The Judge must exclude the statement unless satisfied on the balance of probabilities that the circumstances in which the statement was made were not likely to have adversely affected its reliability.
- (3) However, subsection (2) does not have effect to exclude a statement made by a defendant if the statement is offered only as evidence of the physical, mental, or psychological condition of the defendant at the time the statement was made or as evidence of whether the statement was made.

- (4) Without limiting the matters that a Judge may take into account for the purpose of applying subsection (2), the Judge must, in each case, take into account any of the following matters that are relevant to the case:
  - (a) any pertinent physical, mental, or psychological condition of the defendant when the statement was made (whether apparent or not):
  - (b) any pertinent characteristics of the defendant including any mental, intellectual, or physical disability to which the defendant is subject (whether apparent or not):
  - (c) the nature of any questions put to the defendant and the manner and circumstances in which they were put:
  - (d) the nature of any threat, promise, or representation made to the defendant or any other person.”

[29] An issue in this case is to what extent can the Court take into account the significant inconsistencies between RK’s account and of the prosecution evidence? What part does the truthfulness or untruthfulness of the confession play in assessing reliability as a threshold issue for the Judge under s 28(2)?

[30] These issues were discussed by the Supreme Court in *R v Wichman* [2015] NZSC 198. Paragraph [83] of the judgment of the majority (Justices William Young, Arnold and O’Regan) says:

“[83] Given the legislative history, it would be wrong to construe s 28(2) as permitting admissibility to be determined on the basis of a trial before a judge as to the truthfulness of the confession. To this extent we agree with the Court of Appeal.”

[31] However, the majority on to consider the difficulty that this can throw up and went on to say at paragraph [84]:

“[84] We see the s 28(2) inquiry as particular in character. It is addressed to the reliability of ‘the’ statement in issue rather than ‘a’ statement in the abstract. We consider that the ‘circumstances in which the statement was made’ encompass the nature and content of the statement and the extent to which those circumstances affected the defendant. We are also of the view that congruence (or the reverse) between what is asserted in the statement and the objective facts and the general plausibility (or otherwise) of the statement are relevant to the s 28(2) decision. This is consistent with at least the drift of the judgment of the majority in *CT (SC 88/2013) v R*, which was concerned with unreliability for the purposes of s 122 but proceeded on the basis that the ability (or inability) to challenge the truthfulness of the evidence in question

may be material to its reliability. It is, as well, generally consistent with the approach proffered by Glazebrook J in her reasons.”

[32] At paragraph [431] of the Supreme Court judgment, Justice Glazebrook said:

“[431] As stated above, the debate over what can be taken into account under s 28 must be considered in light of the purpose of s 28. The justification for the exclusion of evidence under s 28 is the concern about reliability, as the heading of the section indicates. It is important to remember too that the task for the judge under s 28 is to assess the threshold reliability of the statement. Essentially, the question is whether it would be unsafe for the fact-finder to rely on the statement for the purpose the Crown submits it. Looked at in this way, the reliability of a statement itself must at least be relevant to the threshold issue. In that regard, the judge is not engaged in an exercise of assessing the truth or otherwise of the admission (in the sense of a mini trial) but merely taking into account the contents of the statement and any obvious indications of reliability or unreliability with regard to other aspects of the case.”

### **Assessment**

[33] RK’s stated purpose in making a false statement referred to in the text message of 3 June 2015; her typed written letter to the Court; and her evidence on this application, namely that she wanted to protect HM, is something that would be relevant at trial but not to the threshold question under s 28(2). I observe that in her DVD interview, RK did in fact implicate HM in the aggravated robbery, although she appears to be taking on her shoulders the instigation of the offending and violence involved. I do not take into account the explanation given by RK to Dr Eggleston (paragraph 37 of his report) as being relevant to the threshold reliability question.

[34] There is an evidential foundation for raising the issue of reliability of the statement (s 28(1)). The statement must then be excluded unless the Court is satisfied on the balance of probabilities that the circumstances in which this statement was made were not likely to have adversely affected its reliability (s 28(2)).

[35] The standout features of the statement, which are obvious indications of unreliability are the significant discrepancies between RK’s account of the offending and other evidence in the case. When one views this in a context of RK’s age; her

background and circumstances as set out in Dr Eggleston's report; the sense of helplessness and that "nothing really helps or matters", the concerns about the statement's reliability become even more acute. When one adds to that the overriding of RK's right to silence or to discontinue the interview, there is then, in my view, such a combination of factors that I am not satisfied on the balance of probabilities that the circumstances in which this statement was made were not likely to have adversely affected its reliability. Accordingly, this statement has not passed the threshold test for reliability in s 28(2) and is inadmissible.

P W Cooper  
Youth Court Judge