

**IN THE DISTRICT COURT
AT TAUPO**

**CRI-2017-069-000297
[2017] NZDC 15639**

NEW ZEALAND POLICE
Prosecutor

v

CARLOS BURTON
Defendant

Judgment: 17 July 2017

JUDGMENT OF JUDGE G S COLLIN

[1] Carlos Burton is charged that on 12 March 2017 he stole property belonging to the complainants who were at the Spa Park in Taupo. There are four complainants all of whom are Danish tourists, who do not normally reside in New Zealand, and have now departed. Each one of them gave a statement to the police. The prosecution say that they will not be available to give evidence on the day of the hearing.

[2] The prosecution seek to admit as hearsay statements, the statements taken from each of the witnesses. The application is opposed by the defendant who wishes to have the opportunity to cross-examine the makers of the statements.

[3] Section 7 of the Evidence Act 2006 provides:

Fundamental principle that relevant evidence admissible

(1) All relevant evidence is admissible in a proceeding except evidence that is—

(a) inadmissible under this Act or any other Act; or

(b) excluded under this Act or any other Act.

(2) Evidence that is not relevant is not admissible in a proceeding.

(3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

[4] There is no doubt that the evidence that could be given by the makers of the statements is relevant to:

(a) The identification of the items allegedly taken;

(b) The identity, conduct and demeanour of the defendant;

(c) The issue as to whether or not the defendant was the person who took the items from the complainants.

[5] As required by s 22 the prosecution have filed a notice seeking to admit the statements under s 18, which provides:

18 General admissibility of hearsay

(1) A hearsay statement is admissible in any proceeding if—

(a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and

(b) either—

(i) the maker of the statement is unavailable as a witness; or

(ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.

(2) This section is subject to sections 20 and 22.

Do the circumstances relating to the statements provide a reasonable assurance that they are reliable?

[6] The focus of s 18(1)(a) is on the reliability of the hearsay statement.

[7] The four statements relied upon are hand written statements taken by [the Constable] and recorded in his notebook. Each of the statements is signed by the

maker of the statement. All four statements concern the same event, and are generally consistent with each other. The events were reported to the police on 12 March 2017, and the statements were provided to [the Constable] on 13 March 2017, so were given in close proximity of the alleged events.

[8] The prosecution maintains that the veracity of the makers of the statements is not an issue and says that none of them have previous convictions. However I place little weight on this argument as the makers of the statements were all tourist to New Zealand. There is nothing contained in their statements saying they do not have convictions, and no independent evidence has been provided regarding their criminal history in either New Zealand or Denmark.

[9] As I understand the case, identification of the defendant, as the person who approached and spoke to the makers of the statements is not an issue. However there is no evidence that any of the statement makers saw the defendant take the items. The case will turn on :

- (a) The complainants observations of the defendants conduct, statements and demeanour.
- (b) The tracking of items to an address occupied by the defendant.

[10] Even if the statements are reliable the defendant wishes to cross-examine the witnesses as to their observations. The opportunity to do so will be denied to the defendant if the statements are admitted as hearsay evidence.

[11] The four statements are made by the most critical witnesses. Upon those witnesses the case depends. Although this does not mean the statements are inadmissible as unreliable, it does call for the exercise of caution.

[12] Although I am satisfied that the circumstances relating to the taking of the statements provide reasonable assurance that they are accurate, and that the test for admission under s 18(1)(a) is met, I question the weight that the Court could give to the statements if the makers are not available for cross-examination.

Are the makers of the statements unavailable as witnesses?

[13] Provided that the statement is reliable, a hearsay statement is admissible pursuant to s 18(1)(b)(i) if the maker of the statement is unavailable, or pursuant to s 18(1)(b)(ii) if undue expense or delay could be caused by requiring the maker of the statement to be present as a witness.

[14] It is the prosecution's position that the statement makers are now unavailable as witnesses, because they are outside New Zealand and it is not reasonably practicable for them to be a witness (s 16(2)(b)). However I am not satisfied that the makers of the statements are either unavailable or unwilling to be witnesses, despite the fact that they are no longer within New Zealand. The police remain in email contact with them, and the written statements make references to the defendant being punished, going to jail and other people being prevented from becoming victims. There is nothing in the statements that indicate any reluctance by their makers to give evidence. The contrary appears to be the case.

[15] In addition I am not satisfied, that it is not reasonably practicable for the makers of the statements to be witnesses. No information has been supplied to the Court indicating that any of the witnesses refuses to return, nor has any information been provided that suggests that evidence cannot be given by technological means. In the absence of information to the contrary, I am not satisfied that the prosecution has discharged the burden of demonstrating that it is not reasonable practical for the makers of the statements to be witnesses.

Would requiring the makers of the statements to be witnesses create undue expense or delay?

[16] This assumes that the makers of the statements are available but that the costs of having him or her give evidence would create undue expense, or that requiring them to be present will create delay. The onus is on the prosecution to establish either undue expense or delay. No information regarding cost or delay has been given to the Court. The onus has not been met sufficient to satisfy the Court that undue cost or delay would result from a requirement that the statement maker be present as a witness.

[17] Accordingly I am unwilling to make a finding that either undue expense or delay would be caused of the makers of the statements be required to be witnesses.

Conclusion

[18] The s 22 application to admit the statements of [the four complainants] as hearsay statements is accordingly declined.

G S Collin
District Court Judge