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**IN THE YOUTH COURT
AT NELSON**

**CRI-2016-242-000069
[2017] NZYC 130**

NEW ZEALAND POLICE
Prosecutor

v

KF
Young Person

Hearing: 15 February 2017

Appearances: Sergeant W Johnston for the Prosecutor
J C S Sandston for the Young Person

Judgment: 16 February 2017

**ORAL JUDGMENT OF
PRINCIPAL YOUTH COURT JUDGE JOHN WALKER**

[1] In this case KF faces two charges of indecent assault. In relation to the first charge, it is alleged that he approached the complainant in the street, touched her breast on the outside of her clothing. In the second case it is alleged that he gained entry to a house by asking to use the toilet, and while inside it is alleged he touched the complainant's breast and put his hand down between her legs.

[2] There is no dispute that the two assaults took place, and that they amounted to indecent assaults, that is that there was an intentional application of force in circumstances of indecency, and that the person who carried out the assaults must have intended that the assault be indecent.

[3] The issue in the case is whether it is proved that it was KF who carried out the assaults. KF denies that he did so.

[4] The onus of proving that it was KF rests on the prosecution, and the standard of proof to be attained is proof beyond reasonable doubt.

[5] This is a case, therefore, where the issue of identification is central to the prosecution case, and I must therefore exercise special caution when considering the identification evidence. I must remain aware that serious miscarriages of justice have occurred because of mistaken identification evidence. I remind myself that honest and even adamant witnesses can be mistaken, and that more than one witness can be mistaken.

[6] The prosecution rely not only on the identification evidence of the two victims, but also on the evidence of two other women who were not offended against but who identify KF as a stranger who came to their homes in circumstances which had marked similarities as between each other, and the circumstances of the offences.

[7] I approach consideration of this case in two stages. First, I consider whether the evidence establishes that one or more than one person was involved in the conduct described by each of the women. There are a number of critical elements which need to be examined for commonality in the narratives:

- (a) The dates involved, 27 September, 5 October, 6 October, 7 October 2016. The events occurred over a short period, and three events occurred on successive days.
- (b) The time of the events, in three cases, the evidence is that the events occurred early to mid-afternoon. In one case no time is given in the evidence.
- (c) The location, three of the events took place within a few houses close to each other in the same street. One is a different but nearby street, all within the Victory area of Nelson.
- (d) In two cases the person involved made reference to needing to repair his belt.
- (e) In three cases the person asked to borrow a tool, pliers in two cases and a wrench in the other.
- (f) On two occasions the person gained entry to the house by asking to use the toilet.
- (g) On one occasion the person was riding a scooter. On another he referred to the belt breaking because of his scooter-riding.
- (h) The person was said to be young, between 13 and 16 in all cases.
- (i) The two assaults included touching of the breast on the outside of clothing.

[8] I will set out in the written form of this judgment, in diagrammatic form, the incidents of the factors that I have just mentioned.

Table referred to at [7]

	PW	MB	GD	HY
DATE	27/09	05/10	06/10	07/10
TIME		Around 1 or 2 pm	Early afternoon	3 – 3.30 pm
LOCATION	[street name 1 deleted] Street	[address 1 sdeleted]	[address 2 deleted]	[address 3 deleted]
BELT		✓	✓	
SEEKING TOOL		✓	✓	✓
ASKING TO USE THE TOILET			✓	✓
SCOOTER	✓	Person said he had been riding a scooter		
AGE	13 – 16	Young	14 – 15	15 – 16
ASSAULT (Breast)	✓			✓

[9] What is clear is that there is such commonality of factors that it admits of no other conclusion than that a single person was responsible for the actions described by each of the women. The issue then becomes whether it is proved beyond reasonable doubt that that single person was KF.

[10] Each of the four women took part in a formal identification process by way of being shown a photo montage. There is no dispute that the procedure was compliant to s 45 Evidence Act 2006. Each of the women identified KF as the person involved. While in a jury trial I would need to decide first whether the identification evidence was reliable and therefore admissible, and leave the assessment of its weight to the jury. In a Judge alone trial, such as this, the screening and adjudication steps can properly be one process. If I am satisfied, taking into account the totality of the evidence, that the prosecution has proved the reliability of

the identification evidence beyond reasonable doubt, in other words that it is accurate, then the admissibility test has also been satisfied. I make reference to the case of *Harney v R*¹. I adopt that approach.

[11] I now turn to consider the quality of the identification evidence in each case. Dealing firstly with Ms PW, she saw the person who assaulted her at close quarters. She saw him when he turned around to face her as he was leaving. She described the person as young. She was reluctant to ascribe a race to the person. She herself is [ethnicity deleted], and described the skin colour as similar to her own, she said, “Brown I guess.” She was being commendably careful not to ascribe race such as Māori or Pacifica. This was not helped by her being asked what nationality the person was, which is a feature of citizenship rather than ethnicity.

[12] She was shown the photo montage on 10 October 2016, which was nearly two weeks after the event. She said that she saw her attacker two to three days after the event, on the street, and that when she looked at him he gave her the finger. She said in evidence that the person’s hair was [identifying description deleted]. This description of the hairstyle accords with the appearance of KF in the video interview, and with the photo in the montage. She described her attacker as young, brown-skinned, with the hairstyle she described, and that it was KF from the montage.

[13] While the time that she had to observe KF may have been brief, it could not be described as fleeting and, of course, she had good reason to pay particular attention to him, having regard to what had occurred.

[14] Turning to MsMB, she saw the person at close quarters, in daylight, and for the time it took to converse about the need for a tool, the attempt to look for a tool and his departure from the address. She also saw this person arrive. She described the person as young, Māori or Polynesian, slender in build with thick hair. She selected KF from the photo montage. She told the police officer, “Number 2 looks very much like the person who came to our house. Number 1 does look slightly similar.” It was KF’s photograph which was number 2. This is certainly not adamant identification, “Very much like,” is not the same as, “That is the person.”

¹ *Harney v R* [2010] NZCA 264

What can be said is that Ms MB selected the photo of KF as looking very much like the person she saw. If this was the only identification evidence it would not, of itself, be sufficient to establish identity.

[15] Turning to Ms GD, she also saw the person at close quarters, at her door and inside her house, and for sufficient time to note his face. She had a conversation with him about his name and school. She described him as a young boy, 14 to 15, possibly Māori or Pacifica, that he had short hair, [identifying description deleted]. When she looked at the montage she recognised one or two, “Probably two,” she said, hair was more correct, completing that with a question mark, and in relation to number 2 she recorded, “His innocent look is familiar.” This identification from the photo montage is uncertain and, again, standing by itself it would be insufficient to establish identity, but it does not stand on its own. The description of young, Māori, Pacific Island descent, and the black hair [identifying description deleted] is consistent with the appearance of KF in the video interview a few days later.

[16] Turning to the evidence of Ms HY, she had an opportunity to view her attacker when he came to her door, and when inside, and while he patted her dog and asked her questions, and then when she was assaulted, pushing the person out the door. She described her attacker as aged 15 or 16, with, “Short hair [identifying description deleted]” The colour was black/brown. She selected KF from the montage, and made an additional comment, “His eyes are familiar.”

[17] When I consider the identification evidence, I bear in mind Mr Sandston’s submission that nothing was found in a search of KF’s home to link him with the events; in particular, no scooter was found, but that only counts against the identification evidence if the scooter must have been in the house if it was ridden at any stage by -KF. There are, however, many possibilities as to where such a scooter might be, and it need not necessarily have been at KF’s home.

[18] It follows, from my earlier finding, that I am satisfied that each of the women is endeavouring to describe the same person. There is a commonality in the descriptions, age, ethnicity or skin colour, hairstyle, [identifying details deleted]

consistent with KF's appearance in the video interview viewed in Court, and these descriptions are consistent with the description being of the same person.

[19] When I add to this the fact that two of the women who were the subject of assaults selected KF without any reservation recorded, I am referring to Ms PW and Ms HY, I am satisfied beyond reasonable doubt that the single person being described by the women was KF.

[20] Each of the two charges of indecent assault are proved.

[21] I want to make one observation while I have the opportunity, relating to the conduct of the interview with KF where his mother was the nominated person. It was known to the constable that KF had a youth advocate, Ms Heeney. KF said that she was his lawyer. KF was told that he could have his lawyer and/or a nominated person. The "and/or" wording is likely to confuse a young person, as is confirmed when KF is asked to explain what it meant, and he said, "I can have my mum or any nominated person with me while I make a statement." He is then told that police have a list of lawyers, and told, "So if you want to speak to another lawyer, apart from Ms Heeney, we have a list," and then closed questions about his understanding of that. He did have a lawyer and, in my view, that lawyer should have been called by the police. At a subsequent interview Ms Heeney was present, and sat during the interview.

[22] If there had been anything supportive of the police case in the interview, it is likely that a challenge to its admissibility would have succeeded. There is clearly a need for some ongoing consideration of this very important issue.

John Walker
Principal Youth Court Judge