

**IN THE DISTRICT COURT
AT WELLINGTON**

**CRI-2017-091-000106
[2017] NZDC 19788**

THE QUEEN

v

[SPENCER GALLAGHER]

Hearing: 4 September 2017
Appearances: L Hann for the Crown
G Newell for the Defendant
Judgment: 4 September 2017

**RULING OF JUDGE P A H HOBBS ON MODE OF EVIDENCE
APPLICATION**

[1] This is a Crown application for directions that the complainant give her evidence-in-chief by way of pre-recorded DVD interview and any further evidence be behind a solid screen. The defendant, represented by Mr Newell, does not oppose the use of a screen but does oppose the use of the complainant's pre-recorded evidential video interview as her evidence-in-chief.

[2] The defendant is facing four charges, one of sexual violation by rape, two charges of indecent assault and one charge of burglary. The allegations arise out of an incident on [date deleted]. The defendant was at the time working for a [business] that also delivered to homes. The complainant made an order for [items]. The defendant delivered the [items] but it was short [an item]. The defendant returned with the [item] to the complainant's address and by this stage it is alleged that the

complainant had gone to bed for the night. She was awoken by the defendant's knock at her sliding door. When she answered the door it is alleged that the defendant brought the [item] inside the complainant's flat, sat on her bed and then without her consent began to feel her legs and breasts through her clothing which gives rise to a charge of indecent assault. The defendant stopped that and told the complainant that he had to return to work so left the address.

[3] It is alleged that the defendant returned to the address a third time and entered the complainant's flat uninvited. The complainant says she pretended to be asleep. It is alleged the defendant got undressed, got into bed with the complainant and touched her breasts, upper chest and genitalia despite the complainant telling the defendant repeatedly that she did not want him to do any of the things that were being done. It is then alleged that the defendant inserted his penis into the complainant's vagina and had sexual intercourse with her without her consent. The complainant says she ultimately fell off the bed and soon thereafter the defendant is said to have left the address.

[4] The jurisdiction to give the directions sought by the Crown is found in s 103 Evidence Act 2006. In this case the Crown makes its application based on the age of the complainant, she was 19 at the time of the alleged offending, the trauma suffered by the complainant and the nature of the proceedings and the nature of the evidence the complainant will be expected to give at trial later this year.

[5] The complainant has told the officer in charge of the case that she would definitely prefer to have her evidential video interview played in Court as her evidence-in-chief. She describes herself as a private person and the thought of having to relive the experience in front of strangers is described by the complainant as terrifying and extremely embarrassing. The complainant also expresses the concern that she might panic, freeze and forget important information. She expresses a fear of the Court process and is daunted by it.

[6] In giving any directions under s 103 I must have regard to the need to ensure the fairness of the upcoming criminal trial and I must have regard to the views of the complainant and the need to minimise the stress on her and the need to promote her

recovery from the alleged offending. Mr Newell, in opposition to the Crown application, submits that there is no specific evidence from either the complainant or a medical expert as to why giving evidence in the ordinary way would be particularly stressful or traumatic for the complainant. Mr Newell submits that to the extent that giving evidence in a case involving allegations of sexual abuse is inherently stressful, the use of a screen would be sufficient to minimise that stress and promote her recovery. In support of those submissions Mr Newell, without wishing to downplay the serious nature of the alleged sexual offending, submits that the facts of this case are unremarkable. In making that submission Mr Newell notes that there were no threats made by the defendant nor do the allegations include the use of violence. In addition, Mr Newell submits that the complainant's evidential video interview is lengthy, just over two hours long, unnecessarily repetitive and the chronological order broken in several places making it more difficult for the jury to follow.

[7] Mr Newell also submits that the trial will focus on the credibility of the complainant and it inevitably involves a claim of invention. Mr Newell submits that it is pivotal that the defence be given the opportunity to explore and cross-examine on the differences between the complainant's narratives in the evidential video interview and her evidence-in-chief in Court. Mr Newell submits that the right to a fair trial cannot be otherwise ensured.

[8] Mr Newell accepts that giving evidence in a case of this nature is, for a complainant, inherently stressful. With respect, I think Mr Newell underestimates the level of upset and trauma that is involved, particularly for a 19 year old, in a case such as this. Effectively this case involves allegations of a stranger intruding into the complainant's own home and bedroom late at night. Had there been additional violence over and above that which is inherent in offending of this kind then the potential stress and trauma is obviously heightened but I have little doubt that this will still be a stressful and traumatic event for the complainant to recall. The complainant herself has said that reliving the experience in front of strangers will be terrifying and extremely embarrassing. The Act directs me to take into account the complainant's views and to minimise the stress on her. The complainant also expresses a concern that she might panic, freeze and forget important information. If that were to occur then it would not promote the fairness of the trial, remembering the need to ensure the

fairness of the trial means not just fairness to the defendant but also to the complainant and the public at large who have an interest in the fair and efficient despatch of justice.

[9] I have already referred to Mr Newell's submission that credibility will be central and the defence need the opportunity to explore in cross-examination the differences between the complainant's narrative in the evidential video interview and evidence-in-chief. It cannot be correct that the evidential video interview should not be played simply to enable the defence to explore differences between what would be a previous statement and evidence-in-chief. While that might be an age-old defence strategy I do not accept that the evidential video interview should be excluded or not played for that reason.

[10] It is clear that the complainant would prefer to give her evidence by way of pre-recorded evidential video interview. The information before me indicates that this would minimise the stress on her and also allow her to give the best evidence. It would therefore be fair to her in the proceedings in general if that were able to occur. Significantly, Mr Newell has been unable to point to any unfairness to the defendant if the complainant's evidential video interview were to be played as her evidence-in-chief. The complainant will be available for cross-examination in the ordinary way. The defendant will be able to see at all times the complainant's image on the screen projected through the video technology. The Judge will, no doubt, give the customary direction about the use of the screen and the evidential video interview. Experience has shown that juries are not prejudiced and influenced by the use of these methods. The rate of acquittal would certainly indicate that juries are not so prejudiced or affected by such techniques.

[11] I am satisfied that this is an appropriate case to grant the Crown's application to play the complainant's pre-recorded evidential video interview and I make an order that her evidence-in-chief be dealt with in that way. As I have already noted, Mr Newell does not object to the use of screens so I formally make that order without opposition.

[12] Mr Newell has, in his written submissions and in oral argument today, raised some issues in relation to material in the interview with the complainant that he says

is inadmissible. It is apparent that the defence and prosecution will continue to discuss those matters and it is hoped no further judicial intervention will be required. However, I have been asked, and will now confirm, that the passage on page 14 of the transcript of the complainant's interview beginning at line 12 where she refers to her reputation in sexual matters and what others think of her in that regard is inadmissible pursuant to s 44(2) Evidence Act. The Crown accept that and it should be removed from the transcript. On page 39 of the transcript, at the top of the page, there is an exchange that could potentially engage s 44 Evidence Act. The Crown wish to lead that evidence. It seems to me that it is inextricably linked to what occurred on the night in question. The complainant says she told the defendant she was not interested in what he was doing because she wanted to wait until married before engaging in sexual activity. She goes on to say that she is not in fact waiting until marriage but hoped obviously that saying so would dissuade the defendant from what he was doing. Clearly, as I have said, that is inextricably linked to the events in question. Her reference to waiting until she was married was the complainant's attempt to dissuade the defendant from engaging in the conduct alleged. It would be entirely artificial and inappropriate if she could not give that evidence, however, it must also include the entire passage where she confirms that she was not waiting until marriage. It would be wrong for the jury to be left with the impression that she was in fact waiting for marriage which might, therefore, bolster her credibility. It is admissible simply to confirm and illustrate how she tried to dissuade the defendant on that occasion from engaging in the alleged sexual conduct.

[13] I reserve the parties' right to come back to the Court should there be any further arguments about admissibility issues that require judicial intervention.

P A H Hobbs
District Court Judge