EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT WHANGAREI

CRI-2016-088-001579
[2017] NZDC 23056

THE QUEEN

v

[MASON NEWTON]
[NICHOLAS OWENS]

Date of Ruling:	10 October 2017
Appearances:	K MacNeil for the Crown J Moroney for the Defendant [Newton] J Watson for the Defendant [Owens]
Judgment:	10 October 2017

RULING 1 OF JUDGE C M RYAN

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[1] This is meant to be the first day of a re-trial for Mr [Mason Newton] and Mr [Nicholas Owens]. The previous trial was aborted in July this year because of the complainant's evidence about an admission to [the hospital] of which neither the Crown nor defence were aware. After a voir dire, Judge McDonald discharged the jury. The re-trial that was due to start yesterday but was adjourned for the reasons outlined in my earlier minute.

[2] Mr MacNeil now asks for an adjournment of this trial on the basis of alleged intimidation of the Crown's key witness, [the complainant]. I have been provided with a copy of a job sheet from [Detective 1] recording conversations with [the complainant] over the last two days. The job sheet records that the officer text

messaged [the complainant] on Sunday, reminding him to be at the Whangarei District Court and asking if he had spoken to his ex-partner who is also a witness.

[3] The job sheet records that at 6.54 am yesterday, which was meant to be the morning of the first day of the trial, the officer received a text message from [the complainant] saying that he felt that his life was in danger after recent threats so that neither he nor his partner would be attending Court.

[4] [The complainant] said that he had gone to his work address on Sunday evening to prepare for the next day. He parked his [vehicle] at the rear of the property. He was then approached by a female who emerged from the trees and was unknown to him. Standing about five to six metres from him, away, she asked, "Are you [complainant's name deleted]?"

[5] He replied, "Who wants to know?" She then recited his current residential address, where he has been for [a short time] and the address of his former partner and children. She was obviously aware of his business address because she was there.

[6] She said, "We know your movements." She told him that it was not in his best interests to talk at Court the following day. He told her to, "get fucked," and said he would do what he wanted. She said, "You've been warned," before walking off toward the [Business name deleted] carpark.

[7] [Detective 1] advised the complainant that he would be contacting a member of the Organised Crime Unit to speak with him. The detective has a good knowledge of the [name deleted] motorcycle gang to which Mr [Newton] belongs and the gang connections. [Detective 2] was then tasked to meet with the complainant and take from him the formal written statement which I saw yesterday morning.

[8] Today [Detective 1] texted the complainant asking how he was and if there were any updates. He did not have face-to-face contact. The complainant replied that he was not so good today and had not slept much. The detective advised him of progress made in the investigation into the allegations about the woman from the trees.

He also told the complainant that there was the possibility that the matter would be "thrown out by the Court" if he did not provide evidence.

[9] The complainant said he was aware of this but would not come to Court and would not change his mind, given his grave concerns for his ex-partner's safety as well as his. The detective raised the possibility of an adjournment of the trial so that police could investigate the allegations further. The complainant appeared happy with this prospect. The complainant appeared to need some time to deal with his emotions and the current situation after being threatened.

[10] He was asked whether he would consider giving evidence and said that first, he is supportive of the case, has always been supportive and has already been on the stand to give evidence. Secondly, he has always been aware of the potential for threats or violence against himself, given the people against whom he was testifying. He had always considered such a threat to be against him.

[11] Third, after Sunday he has now become genuinely scared for his partner's wellbeing and her children's wellbeing as well as his. Fourth, he feels unsafe because he has only been living in his current address for [a short time] and "they" are already aware of it. "They" also know his business address.

[12] Next, he feels his own physical safety will be in jeopardy if he gives evidence and he feels that his ex-partner's physical safety is in jeopardy also. He believes that if he was to give evidence, something would happen to him, his partner or to one or more of the three properties about which "they" are aware. He believes that whether he gives evidence in court or outside it by CCTV will not affect the risk of harm to him.

[13] Next, the detective notes that the complainant genuinely believes the threats and that this is having an impact on his life and his physical wellbeing. He is sleeping at his place of business as not to put anyone else at risk. He is not sleeping well and is currently living in fear.

[14] Finally, the police officer opines that the trial should be adjourned so that the woman described by the complainant can be identified and held to account for her actions. This will restore a sense of security and is likely to assist the progress of the trial.

[15] The application for adjournment is strongly opposed by counsel for Mr [Newton] and Mr [Owens]. Mr Moroney has taken me through the evidence that the complainant gave last time and has pointed to a number of inconsistencies in it. In particular, he contrasts the complainant's evidence at the last trial about his admission to [the hospital] and his treatment with the medical records which were unavailable at the last trial but which have now been obtained and disclosed to counsel. They paint a very different picture which of course the defendants now know and which will form the basis of cross-examination as to the complainant's credibility and reliability.

[16] Mr Moroney is sceptical of what he describes as a last-minute claim of a threat or intimidation. He argues that this is a ruse by the complainant to avoid being confronted at trial by the contradictions in his police statements and previous sworn evidence. The complainant is now aware that the defendants have this information, including the medical records which dispel his claims of significant injury so that he is fearful not of threats by a mysterious woman but threats of being exposed in court by informed lawyers.

[17] Mr Moroney points out that there have been no previous complaints of threats especially before the last trial or until now. He submits that it would be stupid and hence unlikely that the defendants would dissuade or direct others to dissuade by threats the complainant from giving evidence when they are in a stronger position at this trial because of the medical records.

[18] Mr Watson concurs with Mr Moroney's submissions. He goes one step further by vigorously characterising the complainant as a liar, lacking credibility and reliability and now well aware of the questions defence counsel will ask. That is why this sudden allegation of threat has emerged. Mr Watson insists that neither defendant is involved.

[19] He argues that that the complainant's statement that he had gone to his work address to prepare for the next day shows he had already formed an intention to work rather than attend trial. His sleeping at his business address, alone and vulnerable to attack, is inconsistent with his fears.

[20] Those fears are in marked contrast to the way he spoke to the woman telling her in no uncertain terms to go away and he would do what he liked. That showed no fear and indicated to her that he was likely to give evidence at trial. Nothing further has happened to him over the last two days as a result.

[21] The defendants have offered their phone records to be checked by the police, confident that no link to any threat will be found. I simply observe that threats can be made by means other than a telephone.

[22] Mr Watson submits that it is not in the defendants' best interests or in the interests of justice if the trial is adjourned because it is likely they will remain in custody and there will be a lengthy delay. They want the matter dealt with. Both counsel remind me of the defendants' rights to be tried without delay.

[23] If the trial is adjourned today, Mr [Newton] and Mr [Owens] could be in custody for quite some time. They of course could apply for bail, but while investigations as to perverting the course of justice are pending, coupled with the previous judicial decisions about bail and the charges which they face, it is unlikely that they will obtain bail and even e-bail has its issues. Realistically, Mr [Newton] and Mr [Owens] will remain in custody for some time if the trial does not proceed this week.

[24] Defence counsel both submit that these are untested allegations, denied by the defendants, who have the right to a fair trial without undue delay. If I grant the adjournment, and if they are found not guilty by a jury, the extra time in custody will be extremely unfair.

[25] I had earlier raised with Mr MacNeil the possibility of the complainant's giving evidence behind a screen or via CCTV. At the time, that had not been raised with the

complainant, but it would appear from the job sheet that it has now. What is very clear from the job sheet is that while there are some sanguine pronouncements about the assistance of an adjournment, the fear remains.

[26] Defence counsel argue that those issues, assuming they are genuine which they deny, remain live today. They remain live if the matter is adjourned for three months. They remain live if the matter was adjourned for a year. An adjournment is not going to negate the fear of giving evidence, if it is genuine. If I adjourn and when the next trial date arrives and a further allegation of threats is made, does the Court adjourn it again? Mr MacNeil submits at that point there may well be an application for stay. Defence counsel counter that if that is the Crown's position, why then and not now?

[27] I have referred all counsel to the decision of Brewer J in *R v Christian*[1]. There too the complainants were reluctant to give evidence. In fact, at [7] of the decision His Honour noted defence submissions that the witnesses did not want to give evidence and might not give evidence regardless of the mode provided. That did not deter His Honour from granting the mode of evidence sought by the Crown.

[28] In that case, the complainants feared repercussions. One likened giving evidence in Court to signing a death warrant and he was considering refusing to give evidence at all. Another was anxious for his safety and that of his family, worried that the Head Hunters gang might come after them. He did not want to give evidence in Court and did not want to see the defendants.

[29] A third complainant said she would not give evidence, worried about the Head Hunters and their associates and fearful for the safety of her family. She had been suffering from panic attacks. A fourth complainant was also extremely reluctant to give any evidence at the trial.

[30] The defence submission in opposing the application for an alternative mode of evidence was that this was not so much a fear of intimidation as a reluctance to give evidence. The complainants knew the people against whom they were to give evidence and they all came from the same background. Whether CCTV was ordered

[1] *R v Christian* [2016] NZHC 1568

would make little difference to the witnesses. Ironically, that is what Mr Macneil is telling me in this case.

[31] Brewer J directed that evidence be given via CCTV. He held that there was an undoubted fear of intimidation but that the witnesses' evidence was crucial to the Crown's case. He added at [19]:

> We no longer have trial by ordeal. Although it is more simple and logistically desirable to have witnesses give evidence in Court, those considerations are easily outweighed by the need to encourage witnesses to give their evidence in a way that makes them feel safe (or, at least, safer). This need will be assisted by a mode of evidence which does not subject them to direct confrontation with the defendants and their supporters, and which accordingly minimises stress.

[32] These witnesses were not just intimidated, but were reluctant to give evidence. That is very similar to the present case. The application was granted, not to adjourn the case until the witnesses felt better or the police could speak sternly to or investigate the Headhunters but to have the evidence given via CCTV.

[33] While I accept that the two cases differ in that this one concerns a Crown application for an adjournment and that one concerned a Crown application for a mode of evidence, the background and underlying principles are very similar. Fearful or intimidated witnesses should be protected and this is the Court's way of doing so. In short, I would be sympathetic to an application by the Crown, written or oral, pursuant to s103 Evidence Act 2006.

[34] Bearing that in mind, I accept that if the fear of threats is legitimate, it will remain today, next week, in three months' time or in a year's time. If the complainant is not persuaded by police protection and assistance now, that is unlikely to change. In the meantime, there will be lengthy delays while the defendants remain in custody.

[35] That is unfair, especially when an alternative mode of giving evidence is available now and the defendants know the police are right now investigating a possible attempt to pervert the course of justice which could lead to further charges.

[36] This matter cannot go on forever. Mr [Newton] and Mr [Owens] have been in custody for some time. They are entitled to have their case heard. At the same time this complainant is entitled to feel safe. However, simply waiting to see whether the police may or may not find the person who they believe made the threat to him and/or her associates, then arresting her or them, then having her or them possibly plead not guilty and go through the trial process, may not afford the complainant much comfort.

[37] Mr MacNeil submits that an adjournment would let him see that the police are investigating the matter and this would give him some comfort. Well, they are already doing that and have already told him that. What say they find no-one? What say they do find someone but the person is acquitted? The only thing that might make him feel a little safer is perhaps the conviction and imprisonment of somebody for perverting the course of justice. How long do we wait to see if that is achieved? Half a year, a year, a year and a half?

[38] In my view the time has come for this trial to proceed. Protective measures can be put in place for the complainant's giving evidence. S25(b) New Zealand Bill of Rights Act 1990 is invoked. Putting off this trial can achieve no better result for the complainant or the defendants

[39] It is significant that since July 2016 nothing has happened to the complainant or his partner. His partner has not been threatened recently. An alleged threat on the eve of trial, (a) is being investigated, (b) will lead to serious charges if evidence is found regardless of what happens to this trial and (c) can be minimised by a mode of evidence and police protection.

[40] I am declining the application for an adjournment and the trial will proceed.

C M Ryan
District Court Judge