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

IN THE DISTRICT COURT
AT WELLINGTON

CRI-2017-096-000389
[2017] NZDC 25670

THE QUEEN

v

[MARTIN HUGHES]

Date of Ruling:	14 November 2017
Appearances:	A Britton for the Crown C Tennet and C Thorburn for the Defendant
Judgment:	14 November 2017

PRE-TRIAL RULING 1 OF JUDGE S M HARROP

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[1] This is a ruling immediately before the trial of [Martin Hughes] begins, or is scheduled to begin.

[2] Mr [Hughes] is before me today for his jury trial on three charges which arose on 6 December last year. The charges are assaulting [complainant 1] using a firearm as a weapon; assaulting [complainant 2] using a firearm as a weapon, and aggravated burglary relating to the circumstances in which those alleged assaults occurred.

[3] There have been a number of pre-trial hearings before Judge Barry in recent weeks, most recently last Thursday, and it was always understood that the Crown may not be able to call [complainant 2] as a witness, although the Crown certainly wished to do that in the most recent advice to the Court, but it has not been possible to serve

her with a summons. Accordingly the Crown indicated at the pre-trial conference I convened yesterday, that it was intending to proceed today with its sole key witness being [complainant 1]. However, Mr [complainant 1] is not here despite having been summoned, and the Crown has accordingly asked that I issue a warrant for his arrest and that the trial be adjourned so that he is available. Mr Tennet has instructions to oppose the application.

[4] The first question that arose today was whether there had been proper service of the summons and whether [complainant 1] therefore knew of his obligation to be here today. I have been shown an unsigned statement of service but been told that it was Officer Matthew Hayes who arranged for this service of a summons on Tuesday 7 November at [address deleted] in Upper Hutt, where my understanding is that [complainant 1's] cousin, [name deleted], lives. Service on a person who is over the age of 18 years and residing with the witness is, under the Criminal Procedure Rules 2012 adequate, but there is always a concern as to whether in fact the witness has learnt of the obligation to be present at Court.

[5] The Court has been assisted this morning by oral evidence given by Detective Constable Rogers, the officer in charge, who has explained that she spoke to [complainant 1] at [address deleted] last Thursday at about 7.40 am. He confirmed that he had received the summons and indicated he would be answering it and attending Court today or at least would be available to be collected by the officer at about 8.30 this morning and brought to Court. But he did ask what would happen if he did not come to Court. She explained that a warrant to arrest would likely be issued and if so then she would be seeking to arrest him and hold him in custody until the trial started. He observed to her that he would be making things a lot worse for himself if he did not show up in Court and said, "Well, I'd better come along." So the officer in charge was left with the impression that he would be at the [address deleted] address to be collected at 8.30 am this morning. When she went there this morning, he was not there.

[6] As a precaution, the officer had responsibly checked the position yesterday and went to [address deleted] and was told by the cousin that he was not there but had gone to Levin; she was not sure where in Levin, that he had left last Friday and was, in her

understanding, with his brother. Detective Constable Rogers checked his room and found that it was empty of any belongings of [complainant 1]. She then called Detective Yates in Levin and asked for enquiries to be made at [complainant 1's] mother's address. The mother said she did not know where he was, but his brother [name deleted] was there and he told Detective Yates that [complainant 1] was scared of giving evidence and had gone into hiding.

[7] In these circumstances, with a summons having been served and a deliberate choice having been made by a witness on the face of it not to attend, whether through fear or any other reason, an application for adjournment in respect of the central Crown witness needs a great deal to overcome it. Mr Tennet has not been able to put anything significant in the scales. The reality is these are serious charges and there is a strong public interest in their being determined on their merits if that is possible, in other words in giving the Crown a reasonable opportunity to ensure [complainant 1's] presence so that the case can be determined on its merits. In these circumstances I have no hesitation in granting the Crown application for adjournment of the trial.

[8] There are these two other issues. The first one is whether we can sensibly today deal with the question of the admissibility of the visual identification evidence obtained by Detective Yates from [complainant 1] on 19 April through the photo montage procedure. As I have just indicated to counsel, while there is considerable information and perhaps more than one might normally have through [complainant 1's] interview, I would have thought that this matter can only be properly dealt with with his giving evidence as to the circumstances of identification: how light it was in the garage, how long he had to observe the offender etc coupled with the point which Mr Tennet has quite properly raised as to whether there has been any "contamination" since the incident, or between then and 19 April.

[9] Given the relationship between [complainant 1] and [complainant 2] it would seem inevitable that they discussed what had happened and possibly photographs were shown to [complainant 1] which may have contaminated his identification. We just do not know at the moment and I do not think that the matter can be fairly determined without [complainant 1] here.

[10] So that is my preliminary view on the admissibility issue.

[11] For now I confirm the trial is adjourned to an uncertain date and I direct the issue of a warrant to arrest [complainant 1].

S M Harrop
District Court Judge