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**IN THE YOUTH COURT
AT AUCKLAND**

**CRN: 16204000007
[2016] NZYC 625**

NEW ZEALAND POLICE
Prosecutor

v

[QJ]
Young Person

Hearing	3 October 2016
Appearances:	H Taufalele for the Prosecutor M Winterstein for the Young Person
Judgment:	25 October 2016

DECISION OF JUDGE A J FITZGERALD
[Admissibility of a DVD interview]

Introduction

[1] [QJ] is charged with aggravated robbery and unlawfully taking a motor vehicle on [date deleted] January 2016. At the time of the alleged offending [QJ] was 14 years

old. She is jointly charged with another young person, [SF] . Both have denied the charges.

[2] The police have applied to have an interview that [QJ] had with [a Detective Constable] (“[the DC]”), which was recorded on DVD, admitted as evidence against her. That application is opposed on the following grounds:

- (a) there was undue delay between [QJ] ’s arrest and the commencement of the DVD interview;
- (b) [QJ] withdrew her consent during the interview;
- (c) the nominated person ([QJ] ’s mother, Ms [ER]) did not sufficiently assist [QJ] with exercising her right to withdraw her consent to the interview;
- (d) [QJ] ’s rights were not sufficiently explained to her or would have been confusing and as such she was unable to properly exercise those rights.

Allegations

[3] The police allege that at about 8.10am on [date deleted] January 2016 the complainant drove into the car park at [location deleted]. As she walked to the Pay and Display machine she passed [QJ] who was sitting with an unnamed associate.

[4] As the complainant was putting her Eft-pos card back in her wallet, after paying for a ticket, [QJ] came up from behind, grabbed her hair and pulled her to the ground dragging her about two metres away from the machine. [QJ] and her associate were then joined by [SF] and all three kicked, punched and swore at the complainant. The punches and kicks were to the complainant’s head and body while she lay in a foetal position on the ground. [SF] then took the keys to the complainant’s car and all three left in it.

Arrest and interview

[5] At about 6.00pm the same day a police officer stopped the complainant's car. Some of the young people in it ran off. [QJ] was one of those who remained and at about 6.04pm [QJ] was arrested and given initial advice as to her rights by the arresting officer.

[6] At 6.50pm [QJ] was transported to the [Auckland region deleted] Police Station.

[7] At 7.25pm [QJ] was transported to Auckland Police Station and arrived there at 7.51pm.

[8] At about 8.00pm [QJ] chose her mother, Ms [ER] , as her nominated person to be present to support her during the interview.

[9] At about 8.10pm [the DC] called Ms [ER] who said she could not make her own way to the station and so a police car was arranged to go and pick her up.

[10] [QJ] was told at 8.55pm that her mother was on her way and was given something to eat and drink.

[11] At 10.00pm [the DC] met with Ms [ER] and explained the role of nominated person to her and Ms [ER] then spoke to [QJ] alone until about 10.04pm.

[12] At 10.05pm the DVD interview started and the rights were repeated to [QJ] . [the DC] explained to [QJ] her right to remain silent and had her repeat that back to him in her own words. He then said,

[THE DC]: Cool, if you agree to make a statement and/or answer any questions
you
can change your mind and stop at any time

[QJ]: Erm if you like if I was telling you aw I can stop whenever I want

[THE DC]: Yeah so if you start talking you can always just change your mind
and
stop if you want to, do you understand that?

[QJ]: Yeah

[13] In relation to the right to talk to a lawyer and have both a nominated person and lawyer present, [the DC] said:

[THE DC]: ...Er you have the right to speak with a lawyer and/or any person nominated by you without delay and in private before deciding whether to make any statement or answer any questions. What does that mean?

[QJ] : Erm I could have a conversation with anyone I choose or that like my mum

[THE DC]: Mhmm

[QJ] : In private before doing the video thing we're talking

[THE DC]: Cool and who else can you talk to

[QJ] : Erm another person

[THE DC]: Aw lawyer

[QJ] : Yeah

[THE DC]: Yeah, so you can also speak to a lawyer and have a lawyer here if you want one. Do you understand that?

[QJ] : Yeah

[THE DC]: Do you want a lawyer here?

[QJ] : No.

[THE DC]: Do you want to talk to a lawyer?

[QJ] : (Shakes head)

[THE DC]: Cool erm and you have the right to have your lawyer and/or nominated person with you while you make any statement or answer any questions.

[QJ] : Erm my nominated person or lawyer could be with me while I'm talking to you.

[THE DC]: Yeah cool and Police have a list of lawyers you may speak to for free

[QJ] : Aw the Police have lawyers I can speak to for free

[THE DC]: It's pretty self-explanatory aye, free means yeah no cash no money. Cool so you understand all that?

[QJ] : Yeah.

[14] And a bit later on he then says,

[THE DC]: We worked out, I explained to you about a nominated person and you nominated your mother

[QJ]: Yeah

[THE DC]: And er we've obviously got your mother here present for you and I also asked if you wanted to have a lawyer present and you said that you didn't. Is that a fair summary?

[QJ]: Yeah

[15] At 10.11 pm he then says,

[THE DC]: Cool okay so like I said this is your statement, okay this is your chance to tell us your side of the event, what you've seen and what you've done today er we can go as fast and as slow as you want. If you want to take a break at any point that's totally fine just let me know, this is a secured erm environment so if you want to take a break I need to know. If you want to use the toilet, need a drink or anything like please let me know.

[16] Shortly after that [QJ] exercises her right to remain silent when it comes to mentioning the names of her associates.

[17] At about 10.15 pm [QJ] says,

[QJ] "...oh my gosh, this is stressing me out" and soon afterwards "I'm fucking tired, oh my gosh".

[18] Shortly before 10.20pm, there is the following exchange,

[QJ]: Er I don't feel like explaining I'm tired it's annoying

[The DC] This is your statement, this is your chance.

[QJ] I need to like remember stuff I am like you know asleep right now.

[The DC] Take your time."

[QJ] Nearly there, I know cos I don't want to take forever I want a chocolate ...yeah that's it that's all I want to say

DCB Just have some photos here that I'll show you

[QJ] Yeah

[19] In the questions and answers that then follow [QJ] makes her most incriminating admissions. For approximately six minutes [QJ] is questioned about issues that go to the heart of the charges. Then, shortly after 10.26pm there is the following exchange between [QJ] and her mother, [ER] ,

[ER] : Wake yourself up and answer the question properly

[QJ] : Don't tell me what to do.

[ER]: You're gonna bury yourself

[QJ] : Aw I don't care, fucking hell.

[20] Soon afterwards [QJ] says,

[QJ] : Yeah, can we finish soon?

[THE DC]: Yeah is there anything else you want to say?

[QJ] : No

[THE DC]: No, I just want to wrap up everything you've told me then.

[21] From then (shortly before 10.29pm), to the end of the interview at 10.32pm, [the DC] goes over the core issues and allegations by putting mainly leading questions or statements based on what has been said during the interview and getting [QJ] to confirm her admissions.

Statutory provisions

[22] Firstly and importantly s 208(h) of the Children Young Persons and their Families Act 1989 ("the Act") provides:

S 208 Principles

Subject to section 5, any court which, or person who, exercises any powers conferred by or under this Part or Part 5 or sections 351 to 360 shall be guided by the following principles:

...

(h)

the principle that the vulnerability of children and young persons entitles a child or young person to special protection during any investigation relating to the commission or possible commission of an offence by that child or young person.

[23] Section 215 of the Act provides:

215 Child or young person to be informed of rights before questioned by enforcement officer

(1) Subject to sections 233 and 244, every enforcement officer shall, before questioning any child or young person whom there are reasonable grounds to suspect of having committed an offence, or before asking any child or young person any question intended to obtain an admission of an offence, explain to that child or young person—

(a) subject to subsection (2), if the circumstances are such that the enforcement officer would have power to arrest the child or young person without warrant, that the child or young person may be arrested if, by refusing to give his or her name and address to the enforcement officer, the child or young person cannot be served with a summons; and

(b) subject to subsection (2), that the child or young person is not obliged to accompany the enforcement officer to any place for the purpose of being questioned, and that if the child or young person consents to do so, that he or she may withdraw that consent at any time; and

(c) that the child or young person is under no obligation to make or give any statement; and

(d) that if the child or young person consents to make or give a statement, the child or young person may withdraw that consent at any time; and

(e) that any statement made or given may be used in evidence in any proceedings; and

(f) that the child or young person is entitled to consult with, and make or give any statement in the presence of, a barrister or solicitor and any person nominated by the child or young person in accordance with section 222.

(2) Nothing in paragraph (a) or paragraph (b) of subsection (1) applies where the child or young person is under arrest.

(3) Without limiting subsection (1), where, during the course of questioning a child or young person, an enforcement officer forms the view that there are reasonable grounds to suspect the child or young person of having committed an offence, the enforcement officer shall, before continuing the questioning, give the explanation required by that subsection.

[24] Section 215A requires an officer to explain any of the matters covered in s 215 to the young person if the young person makes an enquiry about such matters.

[25] Section 218 requires explanations about the matters covered in s 215, 215A, 216 and 217 to be given in a manner and language that is appropriate to the age and level of understanding of the child or young person.

[26] Sections 221 to 226 are the provisions relating to admissibility of statements made by children and young people; essentially no oral or written statement is admissible unless the enforcement officer has, before the statement has been made or given, explained in a manner and in a language that is appropriate to the age and level of understanding of the child in person the matters specified in s 215(1)(a) – (f).

[27] Section 222 provides that a young person may nominate an adult in the category specified in the section to be present to provide support.

[28] Section 224 provides that reasonable compliance can be sufficient to enable a statement to be admissible.

Analysis

Undue delay

[29] In deciding whether the delay between [QJ] 's arrest and the interview was undue I borrow from the cases dealing with the issue of undue delay,¹ the following factors; the length of the delay and the reasons for it including the inherent time requirements of the case, the actions of [QJ] and of the police, institutional resources, other reasons for delay and prejudice to [QJ] .

[30] Having regard to such factors I do not find there to have been undue delay here. The delay was about four hours in total. About half of that related to the time it took to get [QJ] 's mother to the police station after [QJ] had asked for her to be the

¹ *Police v [T]* HC PN CRI 2005-454-62, 3 May 2006 Wild J and *Martin v Tauranga District Court* [1995] 2 NZFLR 419 (CA).

nominated person. Other factors such as transporting [QJ] from [Auckland region deleted] to the Auckland Central police station occurred within time frames that were not unreasonable.

[31] There was however some prejudice to [QJ] as a result of the delay which I find to be relevant in combination with several other factors to which I now turn.

Withdrawal of consent

[32] Although I am satisfied [QJ] understood her right not to make a statement, and to withdraw her consent to make one at any time, I find that when she attempted to exercise her right to do so, the interview continued in breach of her right.

[33] This issue needs to be seen in the context of this particular case. [QJ] is 14 years old. She was being interviewed after 10pm and complained of being tired and stressed before she specifically says “yeah that’s it that’s all I want to say.”²

[34] However [the DC] ignores that comment and instead asks [QJ] to look at some photographs and then continues with the interview and obtains incriminating admissions.

[35] It was submitted for the police that [QJ]’s immediately preceding comment, “I don’t want to take forever, I want a chocolate,” suggests [QJ] was just being facetious and not withdrawing her consent entirely. However, even if that was the case, some attempt should have been made to have [QJ] clarify what she meant and what she wanted to do.

[36] Later on, when [QJ] again says she does not want to say any more, [the DC] goes through the key admissions [QJ] has made again and has her confirm them.³

² See para [18] above.

³ See paras [20] & [21] above.

[37] Although I find [QJ] adequately understood her right to have a lawyer present as well as her mother,⁴ there is no evidence that the role of a lawyer was explained to her. This is an issue addressed in more detail below.⁵

[38] The fact that [QJ] did not have a lawyer present made her more vulnerable and therefore some care was required when it came to ensuring she was able to exercise her rights. If a lawyer had been present it is almost certain he or she would have intervened to give [QJ] advice at those points when [QJ] indicated that she was withdrawing her consent to continue with the interview.

The nominated person

[39] [The DC]'s advice to Ms [ER] about the role of nominated person, and Ms [ER]'s meeting in private with [QJ] before the interview, occurred within about four minutes.⁶ As no evidence was given by [the DC] in relation to what he told Ms [ER], nor any evidence from Ms [ER] about what she understood her role to be, questions remain about the adequacy of the advice to Ms [ER] and her understanding of the role. I do not believe that four minutes would have been sufficient time for Ms [ER] to get adequate advice and also for her to confer with [QJ] properly prior to the interview. The concern regarding Ms [ER]'s understanding of her role is increased given that the only significant intervention she makes is not to assist [QJ], nor support her, but rather to tell her to wake up and answer questions and then to tell her she is going to "bury herself".⁷

[40] In *R v Z*⁸ the Court notes that the role of the nominated person includes taking reasonable steps to ensure the young person understands the rights explained to them and provide support during the interview. The Court said the nominated person is not merely a cipher; to carry out their role they need to know the jeopardy faced by the young person they are asked to support.⁹

⁴ See para [44] below.

⁵ See paras [45] to [48] below.

⁶ See para [11] above.

⁷ See para [19] above.

⁸ [2008] NZCA 246.

⁹ *Supra* at [87].

[41] In relation to the involvement of a nominated person, the Court of Appeal in *Riley Campbell v R*¹⁰ noted that, in contrast to *R v Z*, the police officers allowed Mr Campbell and his father an extended period to confer before commencing the interview. That did not happen in this case. The Court also noted that the statutory duty on a nominated person under s 222(4)(a) of the Act is to take reasonable steps to ensure that the young person understands the matters set out in s 221(2)(a).

[42] Given the brevity of the meeting Ms [ER] had with [QJ] before the interview, and her conduct during it, I do not find that duty to have been met in this case. Whilst I acknowledge that the Court of Appeal also held that the legislature did not envisage that a comprehensive judicial inquiry is required into the nature and quality of the support given by a nominated person in any particular case, the bare facts in this case lead me to conclude that Ms [ER] could not have fulfilled her statutory duty adequately, if she even knew what it was.

Sufficiency of the explanation given as to [QJ]’s rights

[43] In a number of respects [the DC] approaches the task of explaining [QJ]’s rights to [QJ] in a careful and appropriate way. He goes through issues that need to be explained to [QJ] and checks [QJ’s] comprehension by having [QJ] tell him what he has said in [QJ’s] own words.¹¹

[44] Some time was taken explaining to [QJ,] [QJ’s] right to have a nominated person and a lawyer present.¹² It is possible [QJ] is confused early on about whether [QJ] is entitled to have both [QJ’s] mother and also a lawyer present because that is not made expressly clear and [the DC] does make use the confusing grammatical conjunction “and/or” immediately after which [QJ] says “my nominated person or lawyer could be with me while I’m talking to you.” However he goes on, when Ms [ER] is present, to ask [QJ] is [QJ] wants a lawyer present.¹³ The context in which he does that satisfies me that [QJ] was aware [QJ] could have a lawyer there as well as [QJ’s] mother.

¹⁰ [2015] NZCA 452 at [51].

¹¹ See para [12] above.

¹² See para [13] above.

¹³ See para [14] above.

[45] However, whether [QJ] knew what a lawyer does and why [QJ] might have wanted one there is unknown. In *R v Z*¹⁴ the Court of Appeal noted that the Act is drafted on the assumption that most young people will have little or no understanding and experience of what a lawyer is, how to instruct one and what functions the lawyer would perform. Attention is drawn to the use of the term “explain” in s215 of the Act as opposed to “inform” which is used in s23 of the Bill of Rights Act 1990. In addition, the Court observes that merely informing a young person of the right to a lawyer, even in age appropriate language, would not meet the requirements of s218 because it would not be dealing with the level of understanding of the particular young person.

[46] In *Campbell* the Court of Appeal pointed out that it is not part of the statutory scheme that the role of a lawyer be explained to a young person but goes on to say that it is “...highly desirable this occur since the obligation under [the Act] is to explain the rights to the young person.”¹⁵

[47] Also in *R v Z*¹⁶ the Court of Appeal recorded its general concern that the young person in that case,

[92] ...was facing questioning over such a serious charge without having had the benefit of legal advice. There must be a real issue, given the duty to offer special protection under s 208(h), as to whether more ought to be done to try and ensure that a child or young person in Z's situation takes legal advice.

[93] The Canadian approach is to do just that. The brochure given to parents and guardians ... positively encourages parents and guardians to ensure that legal advice is obtained for their children. It also tells parents not to urge their children to “confess” straightaway as this will rarely be in their best interests.

[48] The Court of Appeal in *Campbell*¹⁷ noted that those comments did not go so far as to impose a positive obligation on a police officer to take that step. It noted that the duty on a police officer was to explain to a young person, before questioning him or her, the entitlement to consult with and make or give any statement in the presence of a lawyer. The Court said that whatever might be regarded as best practice, the provision settles the nature and extent of an interviewing officer's duty.

¹⁴ Supra at [37].

¹⁵ Supra at [41].

¹⁶ Supra at [92] and [93].

¹⁷ Supra at [36].

[49] The Court in *Campbell* also made it very clear that the question as to whether the explanation of rights given was adequate is always a fact-specific enquiry.

Findings

[50] Important facts in this case are that [QJ], aged 14, was being interviewed after 10pm. [QJ] complained to being tired and stressed and attempted to exercise [QJ's] right to withdraw consent but was ignored and the interview continued. [QJ] did not have a lawyer present and there is no evidence that [QJ] knew what a lawyer does and how one might help. Although there is no statutory obligation to give that advice it is best practice. [QJ's] mother did not fulfil her duty as a nominated person adequately even if she knew what it was. Given the above factors, the absence of a lawyer meant that care was required when it came to ensuring [QJ] was able to exercise [QJ's] rights. Such care was not taken.

[51] Given that combination of factors the DVD interview is ruled inadmissible under s221(2) of the Act. It is not saved by reasonable compliance under s224 of the Act.

[52] In *R v Z* the Court of Appeal assumed that s30 of the Evidence Act 2006 did not apply to evidence ruled inadmissible under s221(2) of the Act and the same view was taken by the Court in *Elia v R*.

[53] Although I therefore also adopt that approach, if s30 of the Evidence Act did apply I would have exercised my discretion in favour of excluding the DVD interview on the basis that the rights breached are important especially having regard to the principle in s208(h) of the Act. I do not find the impropriety to be deliberate nor in bad faith but the Act sets a high standard that needs to be met and was not in this case. Although the interview would have been strong evidence against [QJ] if it was admissible it is clearly not the only evidence against [QJ] given the reference made in the submissions to other evidence that exists including CCTV footage. I take into account the serious nature of the offence but would find exclusion of the interview to be proportionate to the impropriety.

Result

[54] For those reasons the application is declined; the DVD interview is ruled inadmissible.

A J FitzGerald
Youth Court Judge