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**IN THE YOUTH COURT  
AT MANUKAU**

**CRI-2016-204-000004  
[2016] NZYC 788**

**NEW ZEALAND POLICE**  
Prosecutor

v

**[JP]**  
Young Person

Hearing	14 October (part heard) completing 17 November 2016
Appearances:	Sergeant G Gurnick for the Prosecutor V Reid for the Defendant
Judgment:	12 December 2016

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**RESERVED JUDGMENT OF JUDGE F J EIVERS**

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## **Introduction**

[1] [JP] faces one charge of burglary<sup>1</sup>. The offending is alleged to have occurred on [date deleted] 2016. At the time [JP] was 14 years one month old. A defended hearing was held on 14 October 2016 part heard, being completed on 17 November 2016. The issue for hearing was admissibility of the DVD interview which was conducted by [the Constable] on [date deleted] 2016. Counsel for [JP] opposed its admissibility on the grounds that the interview was a breach of her rights under the CYPF Act<sup>2</sup>. In particular it is claimed that the police failed to explain [JP]’s rights pursuant to s 215(c) – (f) of the Act.

## **Relevant Facts**

[2] The following facts are relevant:

- (a) On [date deleted] 2016 at about 10.05pm [the Constable] attended the scene of an alleged burglary at an address at [address deleted].
- (b) At the scene [the Constable] spoke to a group of neighbours. He was advised that the home owners were away and that intruders had been discovered in the house. Some had fled the address. One had remained at the scene.
- (c) [The Constable] went to the back of the address and located [JP] who was with other neighbours.
- (d) [The Constable] took [JP] to his colleague’s car. He asked [JP] “Who are the others?” She [JP] replied “Ask that [person]” and gestured towards the [person] in [the Constable’s] car.
- (e) He left [JP] in the care of his colleague while he checked the address.

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<sup>1</sup> Sections 231(1) and 66 of the Crimes Act 1961

<sup>2</sup> Children and Young Persons and their Families Act 1989

- (f) [The Constable] returned to the [region deleted] police station and spoke to [JP]. His notes state that he obtained her details and read [JP] her rights and caution for Children and Young Persons as per the version 10 aide memoire in his notebook. He then queried her details and saw that she was breaching her bail conditions. At 11.00pm he arrested [JP] for breach of bail.
- (g) At 1.38am [the Constable] took [JP] into an interview room and began the DVD interview, with [KC] present as her nominated person. The DVD concluded at 2.01am.
- (h) A relevant portion of the interview challenged by counsel is set out at page 2 line [30] of the transcript, as follows:

[The Constable] Ah, reminding you that the interview is being recorded electronically, this is the microphone, keep your voice directed in towards there, I am gonna go through and read you your rights again. So, and I am repeating myself but, for each of your sake the way this works is I'll, I'll read you a line and have you explain to me in your own words what it, what that means to you so I know that you are understanding. \_So you have the right to remain silent, tell me what that means to you.

[JP] I have gotta be silent, like I can't talk.

[The Constable]If you choose to, you do not have to make any statement or answer any questions, tell me in your own words what that means to you.

[JP] I don't have to answer questions or like, oh.

[The Constable]Mhm, if you agree to make a statement or answer any questions you can change your mind and stop at any time, what does that mean to you? Would you like me to repeat that? If you agree to make a statement or answer any questions you can change your mind and stop at any time.

[JP] If you wanna like, oh, I dunno.

[The Constable]So this interview is your statement and if you agree to make a statement or answer these questions you can change your mind and stop at any time, do you understand that?

[JP] Yeah.

[The Constable] I will read it to you again, if you agree to make a statement or answer any questions you can change your mind and stop at any time, does that make sense?

[JP] Yeah, but, oh, yeah, it does.

[The Constable] Anything you say will be recorded and may be given in evidence in Court, this means if you are taken to Court for this burglary what you say to me may be retold to the Judge or jury, tell me what that means to you.

[JP] So if I tell you something about it you can tell the Judge in Court or something.

[The Constable] Mm, you have the right to speak with a lawyer 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 to you?

[JP] I am allowed to talk to my lawyer or nominated person about, about this, ah, I dunno.

[The Constable] I will read it again, you have the right to speak with a lawyer or any person nominated by your without delay and in private before deciding whether to make any statement or answer any questions, tell me what does that mean to you?

[JP] I am allowed to talk to a lawyer or my nominated person about, um, oh ...

[The Constable] About whatever ...

[JP] ... I dunno I can't think.

[The Constable] ... about, whatever you like, you can talk to them about whatever you like, you can talk to them about this about what's happened or you can talk to them about talking to us, do you understand that one?

[JP] Yeah.

[KC] Which we have done right that time we had together that's basically what that's saying.

[JP] Oh, yeah.

[The Constable] You have the right to have a lawyer or nominated person with you while you make any statement or answer any questions, what does that mean to you?

[JP] I am allowed to make a statement with them around me.

[The Constable] Mm, which we will, which we are doing, and Police have a list of lawyers you may speak to for free, what does that mean to you?

[JP] It means youse have like some lawyers I can talk to or, choose or something.

[The Constable] Mm, do you, do you feel like you understand your rights?

[JP] Yeah.

[The Constable] Are you happy that she understands her rights?

[KC] Mm, just the one, where you say you can, um, stop the interview at any time is the one I mentioned with you, even if you are half way through answering a question, all right.

[JP] Yeah.

[KC] And you don't want to say any more on that sub-, matter you can stop, okay.

[JP] Yeah.

[KC] Okay.

[The Constable] So basically we, we can't make you talk if you don't wanna talk, we can't force you to talk so I'll, I will just go through with what's happened to get us to this point so, ah, we got, Police got called to ah, Otara this evening ...

## **The law**

### ***Principles***

[3] Counsel for [JP] set out the principles relevant to the issue. This was accepted by the prosecution<sup>3</sup>

[4] Special protection is afforded to young people under the principles of the Act governing youth justice<sup>4</sup>. Section 208(h) specifies:

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

[5] The Court of Appeal in *R v Z*<sup>5</sup> sets out the nature of the obligation under section 208(h):

“[32] In our view, this places a positive obligation on investigators to accord special protection to children and young persons during any investigation relating to the possible commission of any offence by that child or young person. That special protection must be given in a manner that respects the autonomy of the child or young person and with (if possible) the support of his or her parents or guardians, in accordance with the principles set out at s 5(d) and (e) of the CYPFA.

[33] We do not consider that this positive obligation to accord special protection will necessarily be met by doing what is specifically provided for under the following sections. For example, we consider that s 208(h) would require language appropriate to the age and level of understanding of the particular child to be used in all questioning of children and young persons and not just in relation to the explanations required by s 215. Further, s 208(h) would require children and young persons to be questioned at age appropriate times and in age appropriate conditions, taking into account any special

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<sup>3</sup> Paragraph [1.3] of the Police submissions

<sup>4</sup> Part IV of the Act

<sup>5</sup> [2008] NZCA 246

characteristics of the particular child or young person, such as any medical condition or disability.

[34] Whether any failure to meet the s 208(h) special protection standard would lead to inadmissibility of any interview would of course depend on the seriousness of any such failure and its effect on the interview. Admissibility would also be subject to the balancing exercise in s 30(6) of the Evidence Act. ...”

[6] The onus of proof is on the Crown to establish that a statement obtained by an enforcement officer from a child or young person is admissible at trial. The standard of proof is the balance of probabilities having regard to the gravity of the matters in issue:

***Special provisions with respect to statements***

[7] Section 215 of the Act provides that a child or young person is to be informed of their rights before being questioned by an enforcement officer.<sup>6</sup> Section 215A provides that the rights are to be explained to a child or young person on request<sup>7</sup>. Any explanations of the rights are to be given to the young person in a manner and language appropriate to their age and level of understanding of the particular child or young person.<sup>8</sup>

[8] Section 221 of the Act provides for the admissibility of statements made by children and young persons, specifically:

- (a) Every child or young person who is being questioned by an enforcement officer in relation to the commission or possible commission of an offence by that child or young person; and
- (b) Every child or young person who is arrested or has been detained in custody following an arrest;

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<sup>6</sup> Section 215 is annexed to the end of this judgment for ease of reference

<sup>7</sup> Section 215A is annexed to this decision for ease of reference

<sup>8</sup> Section 218 of the Act

- (c) No oral or written statement made or given to the enforcement officer by a child or young person is admissible in evidence and proceedings against that child or young person for an offence unless:
- (i) Before the statement was given, the rights of the young person or child are explained to them in a manner and in language that is appropriate to the age and level of understanding of that child or young person, and;
  - (ii) Where they have been given the opportunity to consult with a barrister or solicitor and any person nominated by that young person, and;
  - (iii) The child or young person makes or gives the statement in the presence of the barrister or solicitor or a nominated person or any other adult.<sup>9</sup>

[9] There must be reasonable compliance with these requirements before the statement can be admitted<sup>10</sup>.

[10] In *R v Z* the majority at para [35] held that the use of the word “*explain*” in ss 215A-217 requires the interviewing officer to ensure that the individual child or young person understands the various rights and how to exercise them.

[11] In *R v Elia*<sup>11</sup> the Court of Appeal confirmed and endorsed the approach in *R v Z* in terms of how a young person’s rights should be given and explained:

- (a) The decision recognises the vulnerability of children and young persons which requires their special protection.
- (b) In explaining rights more is required than a mere recitation of rights or an imparting of information.

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<sup>9</sup> Section 221 is annexed to this decision for ease of reference

<sup>10</sup> s 224 CYPF

<sup>11</sup> CA798/2011

- (c) The presence of a nominated person does not in itself diminish the responsibilities of police officers to explain the rights in language that is appropriate to the age and level of understanding of the child or young person.
- (d) The decision notes that a young person could be intimidated by the moment even if they have had contact with police on a prior occasion<sup>12</sup>.
- (e) The Court observed at paragraph [80]:

“It is not enough that it is possible that Mr Elia understood his rights. The questions and responses must show on the balance of probabilities that the young person understood the rights available to him or her and was in a position to make an informed decision whether or not to exercise them”.

### **Submissions on behalf of [JP]**

[12] It is counsel’s submission that there is a breach of the rights of no obligation to give a statement, and the right to a lawyer.

#### ***No obligation to give a statement***

[13] Counsel raises issue with the dialogue at page 391 of the transcript, as follows:

[The Constable] So you have the right to remain silent, tell me what that means to you.

[JP] I have gotta be silent, like I can’t talk.

[14] It is submitted that [JP]’s response suggests that she believed she had to be silent and could not talk. [The Constable] did not correct her on this. There is an inherent risk that she is not feeling entitled to say everything. And there is a risk that may have believed she could only provide answers to police questions as opposed to feeling able to tell the police all of her version of events, details that may have been relevant to her defence.

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<sup>12</sup> *R v Elia* Paragraphs [67] and [68]

[15] It goes further in that [JP] did not understand that she did not have to make or give a statement to police. She appears to have been unaware of her right to say nothing at this stage of the interview.

[16] Ms Reid challenges the explanation provided to [JP]:<sup>13</sup>

[The Constable] Mhm, if you agree to make a statement or answer any questions you can change your mind and stop at any time, what does that mean to you? Would you like me to repeat that? If you agree to make a statement or answer any questions you can change your mind and stop at any time.

[JP] If you wanna like, oh, I dunno.

[The Constable] So this interview is your statement and if you agree to make a statement or answer these questions you can change your mind and stop at any time, do you understand that?

[JP] Yeah.

[The Constable] I will read it to you again, if you agree to make a statement or answer any questions you can change your mind and stop at any time, does that make sense?

[JP] Yeah, but, oh, yeah, it does.

[17] Counsel submits that [JP] did not understand the rights which allow her to change her mind and stop the interview. She answers “*I dunno*” or a one line response “*Yeah*”. Ms Reid submits that [the Constable] is not convinced she did understand and that is why he read it to her again at line [24]. Again she responds with “*Yeah, but, oh, yeah, it does*”.

[18] [The Constable] did not ask [JP] to explain what this meant to her to ensure that she adequately understood the right. She was not asked to explain provided the right in her own words.

[19] The nominated person had concerns about [JP’s] understanding of this right. [The Constable] asked the nominated person if he was happy that [JP] understood her rights<sup>14</sup>. [K C] was concerned and attempted to explain it to her. Her response was “*Oh yeah*”.

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<sup>13</sup> P3 line 11

<sup>14</sup> P5 line 9

[20] It is Ms Reid's submission that this was a serious breach. It is clear from [JP's] answers that she misunderstood the rights. [The Constable] was obliged to ensure she did understand them. Although it was clear that she did not, he continued on to the next right part of the rights. In her submission this was unfair and raises issues as to whether her statement was given voluntarily and whether there was a breach of her right to silence.

***Right to a lawyer***

[21] It is Ms Reid's submission that [the Constable] merely recited [JP's] rights to a lawyer. He did not explain the rights. He did not ensure that [JP] understood the rights so that she could make an informed decision whether to exercise her rights or not. The relevant part of the transcript commences at page [4] line [1] of the transcript:

[The Constable] Mm, you have the right to speak with a lawyer 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 to you?

[JP] I am allowed to talk to my lawyer or nominated person about, about this, ah, I dunno.

[The Constable] I will read it again, you have the right to speak with a lawyer or any person nominated by your without delay and in private before deciding whether to make any statement or answer any questions, tell me what that means to you?

[JP] I am allowed to talk to a lawyer or my nominated person about, um, oh ...

[The Constable] About whatever ...

[JP] ... I dunno I can't think.

[The Constable] ... about, whatever you like, you can talk to them about whatever you like, you can talk to them about this about what's happened or you can talk to them about talking to us, do you understand that one?

[JP] Yeah.

[KC] Which we have done right that time we had together that's basically what that's saying.

[JP] Oh, yeah.

[The Constable] You have the right to have a lawyer or nominated person with you while you make any statement or answer any questions, what does that mean to you?

[JP] I am allowed to make a statement with them around me.

[The Constable]Mm, which we will, which we are doing, and Police have a list of lawyers you may speak to for free, what does that mean to you?

[JP] It means youse have like some lawyers I can talk to or, choose or something.

[22] In support of her submissions Ms Reid makes the following points:

- (a) The use of *or* at lines [1], [7] and [27] should have been *and* so that it is clear and in accordance with the wording of s 215(1)(f). The language used is complicated and confusing for a young person.
- (b) The language used is not appropriate for a child of the age of 14 years. This is further supported by the fact that [JP] was unable to explain what those rights meant to her. It was a statement of the right only. [The Constable's] efforts at line [17] to explain what was meant by the right to speak with a lawyer was unclear and confusing and failed to adequately explain the right to a lawyer.
- (c) [The Constable] failed to get feedback from [JP] so that he could be sure that she understood her right. She was initially asked to explain it in her own words, however after indicating that she did not understand, he then told her what it meant. She replied with one word "*Yeah*". There is a real risk that given her inability to explain the right in her words on two prior occasions, she simply answered "*Yeah*" so as to avoid further pressure of having to explain something she still did not understand.
- (d) She was told she could have a nominated person or a lawyer present. She is entitled to have a nominated person and a lawyer. Given that the nominated person was already there, [the Constable's] statement would have left her believing that she was not entitled to also have a lawyer present during the interview.
- (e) There is no explanation as to what a lawyer's role is in the process so that [JP] can make an informed decision as to whether she wants to consult a lawyer or have one present during the interview.

- (f) The fact that [JP] was told that the police have a list of lawyers that she could speak to for free, does not cure the problems outlined. There is no explanation of this right. In addition her answer in relation to what this right means, suggests uncertainty. Her answer is “*it means youse have like some lawyers I can talk to or, choose or something*”. This suggests an uncertainty in her mind which [the Constable] ought to have clarified to ensure she understood the rights.
- (g) The Act places a positive obligation on the police to accord special protection to young persons during an investigation. No special protection was afforded to [JP] in relation to her right to a lawyer.
- (h) Ms Reid submits that the breach is serious.

### **Police submissions**

[23] The police submit that there has been no breach of [JP’s] rights and that [the Constable] explained her rights to her in a manner and using a language whereby she understood. This is evidenced by the interviewing being conducted in an easy and relaxed manner. There were relevant pauses between each question and at no time was [JP] pressured or rushed to answer.

[24] [The Constable] sought [JP’s] understanding of the rights by having her explain what each right meant to her. While her responses were not always grammatically correct it is submitted that it did not suggest a lack of understanding but rather an inability of [JP] to explain that or express the right using her own words

[25] [The Constable] repeated her rights to her a number of times.

[26] While [the Constable] has no independent recollection of [JP] speaking to the nominated person, [KC] prior to the DVD interview, comments by [KC] suggest this occurred. For example when discussing the right to speak to a lawyer or nominated

person without delay and in private, [KC] states<sup>15</sup> “Which we have done right, that time we had together, that is basically what that is saying”.

[27] Further [KC] turns to [JP] to go back over one of the rights and states “... Just the one, where you say you can, um, stop the interview at any time is the one I mentioned with you, even if you are half way through answering a question, all right”.<sup>16</sup>

[28] It is submitted that [JP] did understand her right to silence.

*Page 3 lines 1-3*

[The Constable] So you have the right to remain silent, tell me what that means to you?

[JP] I have gotta be silent, like I can't talk

[29] She was asked about the identity of her co-offenders and she maintained her right to remain silent in that regard.

*Page [7] line [17]*

[The Constable] Who else was there?

[JP] I dunno.

[The Constable] I think that you do know.

[JP] Yeah, I know but I ain't gonna tell.

[The Constable] Why are you not gonna tell?

[JP] Because I don't need to.

*Page [10] line [4]*

[The Constable] And are you sure you don't wanna tell me who your other friends were?

[JP] Yeah.

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<sup>15</sup> P4 Line 23

<sup>16</sup> P5 line 7-14

[30] At the conclusion of giving [JP] her rights [the Constable] went further and said to her:<sup>17</sup>

[The Constable] So basically we, we can't make you talk if you don't wanna talk, we can't force you to talk...

[31] [KC] also made it clear to [JP] that she could stop the interview at any time even if [JP] was half way through answering questions.

[32] [The Constable] invites [JP] to say anything else to which she refuses<sup>18</sup>. Page [10] line [18]

[The Constable] ... I am happy to leave it at that, [JP], is there anything you wanna add to what you have told me?

[JP] No.

[33] [JP]'s responses on occasion to whether she understood her rights were "*I dunno*", or "*Yeah*".

[34] The police submit that these responses suggest frustration at her inability to explain in her own words what the right meant to her - an issue of an inability to articulate her understanding of that right, rather than not understanding at all.

[35] Further police submit that her manner was somewhat despondent suggesting that she did not want to be there taking part in the interview.

[36] It is accepted that [JP] acknowledges that she is allowed to speak to a lawyer or nominated person but then cannot explain what she would talk to them about. [The Constable] however interrupts her and confirms that she can speak "... *about whatever you like, you can talk with him about whatever you like, you can talk to him about this, about what's happened or you can talk to him about talking to us*". The police submit that [JP] is able to explain in her own words the right to a lawyer when she says "*I am allowed to make a statement with them around me*", and then "*It means youse have like some lawyers I can talk to or, or choose or something*".

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<sup>17</sup> P5 line 20

<sup>18</sup> P10 line 18

[37] The police submit that to insist upon [JP] explaining her understanding of her rights when she was clearly having difficulty articulating them would have been inconsistent with the principle in s 208(h).

[38] It is the police submission that despite her youth [JP] acknowledged she understood all her rights and responded logically to all questions asked of her by [the Constable].

[39] Even if the Court considers there is a breach of [JP's] rights then it is submitted that the breach would not fall within a serious category to justify its exclusion and the balancing test is outlined in s 30 of the Evidence Act 2006 would have to be undertaken.

[40] It is further submitted that if the Court were to find [JP's] statement inadmissible, then the prosecution case relies upon the apprehension of [JP] in the complainant's house at the time of the burglary and would have to make a finding as to credibility on the evidence provided by [JP].

### **Decision**

[41] The Court of Appeal decision of *R v Z* continues to provide guidance on interpretation of s 208(h) and the principles set out in the Act and the provisions set out in ss 215-224 of the Act.

[42] Special protection is provided to children and young persons because of their vulnerability and their special protection is to apply during any investigation relating to the commission or possible commission of an offence by that child or young person.

[43] I had the benefit of reading the transcript and watching the DVD interview. I agree that [the Constable] conducted the interview in a relaxed manner appropriate to [JP's] age and did his best to try to explain to her the special rights afforded to her as a young person being questioned about the commission or possible commission of an offence. When he thinks that [JP] may not understand what is put to her, he attempts to re-explain it. Considering the interview as a whole, and taking into account the circumstances, I am not satisfied that [JP] did understand her rights such that she was

able to make an *informed*<sup>19</sup> decision as to how those rights would apply, for the following reasons:

- (a) She was arrested at 11.00pm and detained by the police. The interview did not take place until 1.38am, concluding at 2.01am. This is not in my view an age appropriate time, nor condition (given that she had spent two hours in police custody) to be questioning the young person.
- (b) I do not accept that her inability to explain her rights is because of frustration or inability to articulate them, rather I consider that it points quite clearly to the fact she does not understand them. In relation to the right to remain silent explanation, her responses are in the nature of

“I don’t have to answer questions or, like, oh

“If you wanna like, oh I dunno.

“Yeah, but oh, yeah, it does”

Each of these responses is ambivalent and lack specificity, meaning they are not specific responses to the questions asked and therefore suggests lack of understanding.

- (c) Her response to the question about “*Anything you say will be recorded and may be given in evidence in Court, this means that if you are taken to Court for this burglary, what you say to me may be told to the Judge or jury, tell me what that means to you*” is incomplete in that her response is “*So if I tell you something about it you can tell the Judge in Court or something*”. There is a distinct lack of understanding about the point of it being used in evidence against her.
- (d) Her response when asked about the right to speak to a lawyer or nominated person being “... *I do know I can’t think*” together with her response to questions and explanations being very brief, usually “*yeah*”, indicates that she does not fully understand the implications of

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<sup>19</sup> My emphasis

the question. Put another way, while she may have heard the explanation and understood it superficially “*I am allowed to talk to a lawyer or my nominated person about, uhm, oh ...*” or “*I am allowed to make a statement with them around me*” or “*It means youse have like lawyers I can talk to or choose or something*”, it is evident by those responses that she does not understand why she has these rights. It might be important for her to speak to a lawyer but she does not understand why that is. This is all the more relevant when one considers she is aged 14 years one month at the time of the interview.

- (e) The fact that [the Constable] had to repeat questions or the explanation to her a number of times is evident in my view that he was not sure that she did understand the questions or the explanations. Although he attempted to do so on a number of occasions when the response was still uncertain or ambivalent, he did not attempt to explain it in a different way so that he could be satisfied that she understood.<sup>20</sup>
- (f) While [JP] appeared despondent in the interview I do not see how that has any bearing on anything other than it was very early in the morning and she was likely tired, given her young age and the situation she found herself in.

[44] I find therefore that the DVD interview is inadmissible against this charge.

[45] I turn my mind to s 30A of the Evidence Act 2006. Is this breach serious such that its exclusion of the DVD interview is justified? Applying the balancing test, I consider it is serious given the importance of giving special protection to children and young persons because of their vulnerability when being interviewed in police custody, and the fact that we have law that specifically provides for that protection. Taking into account her age of 14 years one month, the time of night of 1.38am (but having being arrested earlier at 11.00pm) and the clear indication that she does not understand the rights when explained to her as set out in the decision above, I find that the breach is not saved by s 30. The DVD interview is therefore not admissible.

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<sup>20</sup> P3 lines1-26 is one example

## **Substantive charge**

[46] At the conclusion of the police case which was centred on the issue of admissibility of the DVD interview, Ms Reid elected to call the young person to give evidence about the substantive aspects of the case.

## ***Police evidence***

[47] The police evidence which went in by consent consisted of:

- (a) The house owner [the victim], [the neighbour], and [the Constable].
- (b) The evidence of the home owner and the neighbour is as follows:
  - (i) [The victim] lives at [address deleted]. He left Auckland to go away on holiday on [4 days before burglary] 2016. He locked his house and told his neighbour [name deleted] he was going away. On [date deleted] 2016 another neighbour sent him a text asking if he had let someone in the house. He responded “no” so he then contacted [the neighbour] and the police.
  - (ii) He gave no-one permission to go into the house and take his belongings. Items taken included spare keys for the car and the remote cable for the iPad and alcohol, juice and food. He does not have insurance.
  - (iii) [The neighbour] confirmed that [the victim] and his family went on holiday on [4 days before burglary] 2016 and asked him to watch out for the house. At 9.45pm on [date deleted] 2016 he was woken by the neighbour’s dog, and he saw lights on at the house. He then received a call from [the victim], who he told him he thought there was someone at the house. He went to the house and saw a car there. It was a silver colour. He saw the ranch slider open. He noticed the TV was missing and the house in a mess. He saw two people in the kitchen, he yelled at the

other neighbour to call the police. He saw two people run and jump in the car. He did not get a good look at them it was too dark. One was wearing a sun hat and several layers of clothing. It looked bulky.

- (iv) He went in to the house and a young girl walked out. He grabbed her and walked out with him.
- (v) [The Constable] was on duty that night. He saw a male running up the road breathing heavily. He went to the scene and spoke to the neighbours. He found a young female, he checked her details and noticed that she was on active charges and was breaching her bail. He arrested her; he spoke to the CYF call centre at 12.28am and told them of her arrest. He spoke to her father who did not want to go to the police station as the nominated person. He spoke to [KC] who [JP] had chosen as the nominated person from the list.

***[JP's] evidence***

[48] [JP's] evidence was as follows:

- (a) She was at home on [date deleted] 2016 at [address deleted] in [suburb deleted] and she got picked up by some friends, [name deleted], a girl by the name of [name deleted], another [two people], not named by her. She did not know their names. They came to her house after her curfew about 8pm and they went straight to the address in [suburb deleted]. She had not been there before. She knew they were going there because they were planning it on the way there. She said “*nah, I don't want to do it. I am going to stay in the car and be a lookout*”.<sup>21</sup>
- (b) When they got to the address the boy she did not know got angry with her and said she had to get out of the car. He threatened her with a knife

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<sup>21</sup> P8 line2-3 NOE

and made her go in. She described the knife as white handled. She said he threatened to stab her if she did not go in. He then pulled her out of the car and threatened her and told her to watch from the back. She went into the house. She did not think about running from the house because she was scared.

- (c) While in the house the others were running in and out with things and she was just sitting in the room waiting. She heard the neighbours, and saw them coming but did not want to say anything because she did not want to be there in the first place. The others heard the neighbours and then jumped out the window and ran. She just stayed there because she *“knew [she] didn’t do anything wrong. [She] didn’t even want to be in the house...”*
- (d) She did not tell the police officer what told the Court at the hearing because she was in shock and thought they would not believe her.
- (e) Under cross examination it was put to her that when the neighbours came over and she saw them, she told her friends to *“...drop it and they ran”*. Her answer was *“Yeah that was what I said to them”*. Then responded *“But really I didn’t”*.
- (f) It was put to her that her role was to be the lookout and she responded *“Yeah in the car”*. Under cross examination she said another reason did not leave the address was because she had been in a car accident with [name deleted] before and did not trust [their] driving.

## **Issues**

[49] The Police must prove the elements of the offence beyond reasonable doubt. There is no issue that there was a breaking and entering into the property by [JP] and her associates. What is in issue is whether [JP] intended to commit a crime or was she under duress?

## **Conclusion**

[50] [JP] went willingly with the group of friends to the property. On the way to the property she learnt of the plan to do the burglary. She was reluctant to take part and offered to be the lookout in the car. On her evidence she was threatened by one of the young people there that if she did not get out of the car and go into the house and act as lookout, he would hurt her. He held a white handled knife up to her by way of intimidation. She therefore went into the house and watched while the burglary took place. In evidence in chief she said she did not alert the young people when the neighbours came to the property to check it out, under cross examination however, she says she did.

[51] She chose not to leave the property because she did not want to be involved in a car accident, having previously been involved in a car accident with the young person who was driving the car.

[52] It is an issue of credibility as to whether or not I believe [JP's] evidence about the boy holding the knife and threatening to act as lookout. On balance I do not find that this is credible for a number of reasons:

- (a) [JP] did not disclose this to the police officer from the outset when she had ample opportunity to do so.
- (b) She was unable to describe the threat in any specific detail - it was described merely in general terms.

[53] I accept that [JP] was a reluctant participant in the burglary and in many respects given her young age was led on by the older participants. Perhaps to a large degree she could not pull herself out of the situation when she [JP] realised it was wrong and when she clearly did not want to be a part of it. That being said however, she was involved, she knew what was happening and she took part.

[54] I therefore find the charge proven beyond reasonable doubt.

F J Eivers  
Youth Court Judge

**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 their 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, the child or young person 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.

**215A Rights to be explained to child or young person on request**

Subject to sections 233 and 244, where—

- (a) any enforcement officer is questioning any child or young person in relation to that child's or young person's involvement in the commission of any offence or suspected offence; and
- (b) that child or young person makes any enquiry of that enforcement officer, being an enquiry that relates (in whole or in part), or that may reasonably be taken as relating (in whole or in part), to any of the matters set out in any of paragraphs (a) to (f) of section 215(1),—

that enforcement officer shall explain to that child or young person such of those matters as, in the circumstances of the particular case, are appropriate to the enquiry that was made.