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

IN THE DISTRICT COURT
AT PALMERSTON NORTH

CRI-2016-054-002989
[2017] NZDC 28095

THE QUEEN

v

ROBERT WILLIAM DIXON
Defendant

Hearing:

Appearances: Mr Blaschke for the Crown
Ms Walker for the Defendant

Judgment: 11 December 2017

DECSION OF JUDGE J D LARGE

Introduction

[1] There are two applications currently before the Court, one by Ms Walker for the defendant, seeking a s 147 discharge in respect of counts 1, 2, 4, 5, 6 and 7.

[2] The second application is a propensity application. Counsel agree that the propensity application would follow the s 147 decision.

[3] In my memorandum dated 4 October 2017 I indicated to counsel that I would be granting a s 147 in respect of counts 6 and 7 in the charge notice, that is the burglaries in respect of [address 1] and the other in [address 2].

[4] I indicated to counsel that in respect of those two counts there was insufficient evidence. That which was there was highly prejudicial with nothing to confirm that the partial glove prints were from the same gloves in the other burglaries in respect of the other counts.

[5] In addition to the s 147 application the Crown applied for a cross-propensity in respect of the burglary charges (which is unrelated to the propensity application which relates to Detective Parlane's evidence.

[6] I indicated at that time that the s 147 application would be dismissed in respect of counts 1, 2, 4 and 5 and they would need to go to trial and that the cross-propensity would be granted). That left the Crown propensity application which counsel at that time, Ms Walker for the defendant and counsel for the Crown Mr Blaschke, were to discuss and I was to hear the matter on 16 October. At that time Ms Walker was granted leave to withdraw and subsequently Mr Bedford has been assigned and appears on the propensity application for the Crown.

[7] Ms Walker applies for dismissal of charges 1, 2, 4, 5, 6 and 7 pursuant to s 147 of the Crimes Act. Ms Walker's application was based on the proposition that the glove impressions found in [addresses 1 – 4] were analysed by the ESR and the forensic evidence of those glove prints provided "moderate support" of identification only. Ms Walker argued that such support without more means that a jury properly directed could not find guilt beyond reasonable doubt. In respect of charge 5, Ms Walker argues that there is no evidence that the fingerprints found at [address 5] belonged to the defendant.

[8] In respect of charge 5, Ms Walker argues that other than being in possession of a red car, a backpack and a couple of bags of clothing there is insufficient evidence that a properly directed jury would find the defendant guilty beyond reasonable doubt.

[9] The Crown however submits there is sufficient evidence which on analysis of the trial charges the Crown will ask the jury to work from the strongest charge or charges, use that circumstantial evidence and on a cross-propensity analysis show sufficient evidence to support a conviction.

[10] The Crown argues that the defendant had pleaded guilty to attempting to break into another car using gloves at night outside a residential address in Palmerston North close to the time of the alleged burglaries.

[11] The Crown submits that demonstrates a particular propensity in terms of willingness to break and enter motor vehicles which is a necessary component of much of the alleged burglaries.

Background

[12] By way of background, there were a series of burglaries between 20 and 25 October 2016 in a localised area of Palmerston North.

[13] The strongest evidence for the Crown in terms of charge for trial relates to the burglary at [address 3] on 23/24 October 2016.

[14] That is because on 25 October the defendant was found at an address with four laptops, a television, a cell phone belonging to one of the victims of that burglary and parked outside the address was a vehicle stolen from that address which had been wiped down with a wet towel.

[15] Most importantly the defendant was found with a key to that car.

[16] The Crown argue that the stolen property found with the defendant is evidence of burglary on other charges and the nature of some of the property is inconsistent with the mere receipt of stolen property (a wallet with $5 cash) taken from [address 6] on 24/25 October.

[17] The remainder of the burglary counts rely on a mix of cross-propensity and strong circumstantial evidence.

[18] When the defendant was arrested he had a large amount of the property linked to the other burglaries and was found with a dotted gardening glove which had his DNA on the cuff and inside a fingertip.

[19] The Crown say that the ESR analysis compared the patterns of the glove to impressions taken at four other burglaries and from one of the cars taken and the pattern was the same type of pattern as the defendant's glove imprints from three of the addresses.

[20] It is acknowledged that the prints were of insufficient quality to give a direct comparison of the glove, however in respect of one of the burglaries ([address 4]) there was a moderate correspondence with the pattern.

[21] Of note in respect of [address 4] is that the defendant was found with a key to the vehicle along with two keys that were taken from [address 5] which belonged to the vehicle taken from that property. In addition, the defendant was found with a key to the car stolen from [address 3].

[22] The Crown argue there is a strong degree of linkage between the alleged burglaries either through the glove impressions having a matching pattern or the car keys or both, and therefore on the cross-propensity basis, the burglaries where the pattern is the key linking factor that also fit the pattern of the other burglary which, of course, raises the question of coincidence.

Section 147 application/Cross-propensity application

[23] I remind myself that I am not the fact finder in the matter and am solely considering the application under s 147 of the Criminal Procedure Act. The test for dismissing a charge prior to trial pursuant to s 147 is well settled and I refer to *R v Flyger*[1] which was affirmed in *Parris v Attorney-General.*[2] Both of those cases related to jury trials where it was for the jury to determine whether the evidence was or was not sufficient to establish guilty and it was not for the Judge to predict what the jury would find.

[24] In this particular fact situation, the Court is to consider only the s 147 application and not to consider the facts and make a final determination.

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[1] *R v Flyger* [2001] 2 NZLR 721.
[2] *Parris v Attorney-General* [2004] 1 NZLR 519.

[25] As settled in *Parris* at para [13]:

> … There should be a s347 discharge when, on the state of the evidence at the stage in question, it is clear either that a properly directed jury could not reasonably convict, or that any such conviction would not be supported by the evidence. In most cases these two propositions are likely to amount to much the same thing.

[26] And further, at para [14:

> It is vital, however, to appreciate the proper compass of the word "reasonably" in this context. The test must be administered pre-trial or during trial on the basis that in all but the most unusual or extreme circumstances questions of credibility and weight must be determined by the jury. The issue is not what the Judge may or may not consider to be a reasonable outcome. Rather, and crucially, it is whether as a matter of law a properly directed jury could reasonably convict. Unless the case is clear-cut in favour of the accused, it should be left for the jury to decide. If there is a conviction this Court on appeal has the reserve power to intervene on evidentiary grounds. The constitutional divide between trial Judge (law) and jury (fact) mandates that trial Judges intervene in the factual area only when, as a matter of law, the evidence is clearly such that the jury could not reasonably convict or any such conviction would not be supported by the evidence.

[27] Having heard and considered counsel's written submissions and oral arguments, I am of the view that in respect of counts 6 and 7, the burglaries in respect of [address 1 and address 2] respectively, there is insufficient evidence primarily because no property was located from those burglaries in the defendant's possession, and while there is a similarity to the mode of entry and the use of gloves, there is nothing unusual in that all burglaries could be said to use gloves and similar points of entry and those aspects would be highly prejudicial and contrary to a fair trial. I am of the view that no properly directed jury could convict a defendant of those two charges and accordingly, charges 6 and 7 are dismissed pursuant to s 147.

[28] The application in respect of charges 1, 2, 4 and 5 is dismissed and those charges should be left to the jury.

[29] The basis for that conclusion is that there is sufficient evidence with the coincidental possession of property, including car keys located in the possession of the defendant to allow the matter to go to trial proper.

[30] The Crown's cross-propensity application was enmeshed in the opposition to the s 147 and, having analysed the Crown's submissions above and considered Ms Walker's reply in opposition to the cross-propensity application, I find there is considerable circumstantial evidence which goes beyond mere coincidence.

[31] Applying *Gorgus v R*[3] where there was a similar spate of burglaries and a similar set of circumstantial evidence, here, there is the similar set of coincidences which make it more likely and the probative value of the circumstantial evidence far outweighs the prejudice, particularly in view of the fact that the defendant was found in possession of various articles from the various burglaries which if he were a receiver, it would be incredibly coincidental.

[32] Accordingly, I rule that the Crown's application for cross-propensity is granted.

J D Large
District Court Judge

[3] *Gorgus v R* [2012] NZCA 415.