

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

**NOTE: PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR  
IDENTIFYING PARTICULARS, OF COMPLAINANT(S) PROHIBITED BY S  
203 OF THE CRIMINAL PROCEDURE ACT 2011.**

**NOTE: PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR  
IDENTIFYING PARTICULARS, OF ANY COMPLAINANT(S)/ PERSON(S)  
UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS [OR  
NAMED WITNESS UNDER 18 YEARS OF AGE] PROHIBITED BY S 204  
OF THE CRIMINAL PROCEDURE ACT 2011.**

**IN THE DISTRICT COURT  
AT WHANGAREI**

**CRI-2017-088-001146  
[2018] NZDC 6390**

**THE QUEEN**

v

**[HOHEPA STEWART]**

Date of Ruling: 20 March 2018  
Appearances: R Annandale for the Crown  
J Watson for the Defendant  
Judgment: 20 March 2018

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**RULING OF JUDGE D J McDONALD**

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**Applications**

[1] On 14 March the Crown filed two applications. The first is that Ms [Annabel Wilder] give evidence an alternative way. The way sought is for her to give evidence from an appropriate place outside the courtroom by way of closed circuit television.

[2] The separate second application is identical except that it is in relation to the witness Ms [Judy Wilder].

### **Background**

[3] 14 March 2018 was last Wednesday. The trial was set and has commenced on Monday 19 March 2018. That trial date was set some time ago. This is the second trial in relation to this case. The first trial was aborted on grounds that are not relevant to these applications. The earlier trial date was to commence on 12 September 2017 and did so. No mode applications were made in relation to the earlier trial.

[4] Ms [Annabel Wilder] is the mother of the two complainants [both now aged under ten years]. Ms [Judy Wilder] is the [relative] of the complainants. She was the partner of the defendant at the relevant time. The two are no longer in a relationship.

[5] Ms [Annabel Wilder] gives evidence not only of her dealings with the defendant after she learned that her daughters were making the allegations they had been sexually abused by him but also, of one incident [more than 10 years] years prior when she says herself, was the subject of one act of sexual abuse by the defendant. I made a ruling that evidence can be called as propensity evidence.

[6] Section 103 allows for the application to be made by a party or on the Judge's own initiative, that a witness give evidence-in-chief and be cross-examined in an alternative way as provided in s 105.

[7] As was said in *R v O*<sup>1</sup>, there is no presumption in favour of giving evidence in the ordinary way.

[8] Section 103 allows broad facts specific to the enquiry. It appears to signal a distinctive shift in the legislative policy to extend the scope for the mode of giving evidence by alternative means beyond the previous limitations to young and mentally impaired complainants in sexual cases. The provision vests a broad and unfettered discretion in the trial Judge once the jurisdiction to make an order is established.

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<sup>1</sup> *R v O* [2012] NZCA 475, (1999) 1 NZLR 347

[9] Section 103(2) states that:

An application for directions under subsection (1) must be made to a Judge as early as practicable before the proceedings is to be heard, or at any later time permitted by the Court.

[10] This application was filed three days including the date of filing of the application before the trial was to commence. That is not as early as practicable before the proceedings is to be heard. This case has been ongoing for years. The application thus being made requires the indulgence from the Court.

[11] I accept having heard from [the Detective] that she kept in contact with the witnesses as the officer in charge of the case. She did so on a regular basis. However, she only turned her mind to an alternative mode when asked about that by the current prosecutor Mr Annandale.

[12] Leaving mode of evidence enquiries until almost the day of trial is, itself, I would have thought, stressful on a complainant. If a complainant or witness is left thinking that she would give her evidence one way and then that does not eventuate. That, in my view, is the reason subs 103(2) is in the Act.

[13] The Crown should not be left with the view that regards when the application is made, and however late, that the Court will always grant them.

[14] There have been a number of late applications by the Crown this year in this regard. In relation to one that came before me, I refused it on the basis there is insufficient evidence before me for any ground to be made out under s 103. That witness was not a complainant but the complainant's mother. In the end, that witness gave very good evidence in open Court.

[15] I deal with each of the applications in turn.

**[Annabel Wilder]**

[16] As I have said, [Annabel Wilder] gives evidence as to what she did on learning of her daughters' allegations. She went down and confronted the defendant at

[location deleted]. She assaulted, or attempted to assault him. She is not, and does not claim to be a person who is intellectually challenged, is particularly sensitive, is immature.

[17] I have a job sheet from [the Detective] which states:

I do not want to see his disgusting face, he is sick. I really do not want to see him. It will bring back all those memories of when he ruined my kids' life and ruined me. This is taking a lot of healing and it would take me right back." She is then asked by the detective, "How would it affect you giving your evidence?" "I would feel angry, I hate him. It would be hard if I really have to do it but I don't want to.

[18] It is her preference that she give her evidence by way of closed circuit television. The grounds which may be relied upon to make an order, are those set out in (a) through (j) of s 103. They are not exhaustive.

[19] What is relied upon in the Crown's application s 103(3)(c), "Trauma suffered by the witness." "The nature of the proceedings, and the nature of the evidence that the witness is expected to give" in s 103(3)(f) and (g). "The relationship with a witness to any party in the proceedings." As I have said, [Annabel Wilder] is the complainant's mother. She knows the defendant as he was living in a long term relationship with her [relative], s 103(3)(h). "The views of the witness and the need to minimise stress on her," s 103(4).

[20] While it is often sufficient for a job sheet to be provided, in my view, what is set out in it does not provide the grounds currently for me to make a direction. What she sets out would be unfortunately normal feelings and reactions to a man who is alleged to have sexually abused not one, but two of her daughters. I do not lose sight to the fact she has to give some evidence about the one off touching of her many years ago.

[21] While there is no default position of giving evidence in the ordinary way, grounds have to be made out for me to order it in an alternative way. My view, what is put before me, does not. In making that decision I take into account the lateness of the application.

**[Judy Wilder]**

[22] I have heard oral evidence today concerning her and her wish is she wishes to give evidence by way of closed circuit television. She has mixed feelings about the defendant having lived in a [details deleted] relationship with him for some time then these allegations are made then no longer. She, herself, has not been the subject of any offending that I am aware of by him.

[23] The grounds in relation to her are even less compelling than those in relation to [Annabel Wilder].

[24] In my view again, the grounds have not been made out. I take into account the lateness of the application. It is not acceptable unless there are exceptional reasons for applications such as this to be made so late. There was no digital time available last week. I was on circuit in Northland presiding over a trial in Kaikohe and no other jury warranted Judge was available to deal with this application. Therefore, it has had to be dealt with inter-trial.

[25] I would commend the Crown to make these sorts of decisions well before the week prior to the trial as to whether an alternative mode is to be sort.

[26] The applications that have been made late this year have all related to witnesses other than complainants. I would have thought that the Crown solicitor's office would have made it known to at least the Child Protection Team of the Northland Police, and officers in charge should turn their minds to such matters with applications for alternative modes/means for other witnesses other than complainants.

[27] In saying that, I am not, in any way whatsoever, criticising the detective in this case for not having done that off her own bat.

**Conclusion**

[28] Both applications for alternative ways of giving evidence are refused. At this stage, each of the witnesses will give their evidence in the ordinary way.

[29] I will make an order closing the Court in relation to [Annabel] as she does speak about alleged sexual offending in relation to her perpetrated by the defendant.

[30] If there comes a point where their evidence, or they are unable to give evidence, then I will revisit as I am entitled to do myself whether they should continue giving evidence in the ordinary way, or whether they should continue to give it by way of closed circuit television. There is that facility permanently here in Whangarei.

D J McDonald  
District Court Judge