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IN THE YOUTH COURT
AT HAMILTON

I TE KŌTI TAIOHI
KI KIRIKIRIROA

CRI-2018-219-000117
[2018] NZYC 644

THE QUEEN

v

[BG]

Hearing: 15 November 2018

Appearances: A Alcock for the Crown
M McIvor for the Young Person

Judgment: 16 November 2018

ORAL JUDGMENT OF JUDGE JOHN WALKER

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[1] [BG] faces two charges, one of unlawfully taking a motor vehicle and secondly a charge of aggravated robbery. The charges have been heard together and properly so as they are alleged to be a part of the same course of events. The standard of proof to be attained is proof beyond reasonable doubt and the burden of proving the charges rests on the prosecution. There are a number of facts in the case which are not disputed and they form part of or are contained in a statement of agreed facts. Rather than recite those I will simply attach the agreed facts to the final written Judgment as an appendix.

[2] What is alleged is that on the morning of [date deleted] this year [BG] in the company of another or others went to a carpark located on River Road in Hamilton, breaking into a white Mazda Demio motor vehicle and taking the vehicle from the scene. It is alleged that later in the day about four o'clock [BG] and three others drove this vehicle to the [store] in Hamilton East where these people, it is alleged including [BG], went in. One was armed with a wooden pole and cigarette products were stolen. It is alleged that [BG] and the other three then left in the white Mazda Demio as a getaway vehicle.

[3] The issue in the case is whether it is proved beyond reasonable doubt that [BG] was one of the persons in the [store] when the events occurred at that [store] and whether it was proved beyond reasonable doubt that he was one of the persons who took the getaway car from the carpark. Now the evidence given by the storekeeper and what is apparent on the closed-circuit television footage is that persons entered the store, faces were obscured and a weapon was in the possession of one of those coming in. The storekeeper says that the circumstances that confronted her led her to believe that a robbery was about to take place. She immediately took herself to a safe place behind the shop itself, closed the door and then activated a fog cannon. The robbery, if that is what it was, was already in progress when the fog cannon went off. The cigarettes were being taken from the shelves and placed into a bag. The fog cannon appears to have been effective in shortening the time at which the persons were able to remove property.

[4] Mr McIvor submits that on the fact of this case it cannot be established that this was a robbery and if it is not a robbery then it cannot be an aggravated robbery. His submission is that the retreat of the storekeeper and the absence of any actual

violence means that this was not theft accompanied by violence. Section 234 of the Crimes Act 1961 provides that robbery is theft accompanied by violence or threats of violence to any person or property used to prevent or overcome resistance to it being stolen. The threat of violence does not have to be an explicit threat. It is sufficient if there is a threat manifested by words or conduct or a combination of both. I have considered a Court of Appeal case in *R v Butler* where it was said at paragraph 20[1]:

> …..
>
> **Discussion**
>
> [20] We are satisfied that the jury could have been in no doubt as to the competing merits of the Crown and defence cases. The Crown's case was that the bag was snatched from the complainant by the appellant wearing a balaclava or similar on his head and that a weapon was used. The defence case was that the appellant watched and waited for the complainant to put his briefcase down and then approached and grabbed it whilst the complainant's back was turned: at the time he had is singlet wrapped around his head. Presented with those clear alternative scenarios, it was open to the jury to find the appellant guilty on any of the three counts in the indictment. Clearly by their verdict they were not satisfied that a weapon was used. But equally as clearly, they were satisfied either that the bag was snatched from the complainant's hand or that it was taken under threat of violence. Even if they accepted the appellant's explanation that he had grabbed the bag from the bonnet of a car, it would have been open to them to conclude that the sudden appearance of a tall man wearing a balaclava in circumstances where the complainant was securing his premises for the night and had a large amount of cash in his briefcase was inherently violent and thus amounted to a threat of violence. Such a combination of circumstances could well cause a person so confronted to 'freeze', thus facilitating a theft. There is no reason why the jury should not have accepted the complainant's word that he had turned around and was confronted by the appellant, rather than the appellant's version that the complainant had his back turned to him at the crucial time. Although Mr McKean submitted that the appellant's evidence could not be regarded as "impeccable" because the jury had not accepted his evidence that a weapon was involved, that is not a justified analysis of the jury's verdict. The complainant's evidence was that the gun he believed was presented at him was wrapped in some clothing, so there was room for a reasonable doubt about what he had seen, as opposed to rejection of the complainant's evidence as untruthful.

A sufficient implied threat can be found from inherently violent circumstances such as the appearance of a person in a threatening circumstance and a vulnerable complainant. The Court of Appeal held that can amount to a threat of violence used to overcome resistance to goods being stolen.

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[1] CA 384/00 7 December 2000

[5] In this present case the lone storekeeper is confronted by the sudden entrance of masked people accompanied she says by a loud noise uttered which she said was threatening. She feared for her safety and retreated to a locked room. The circumstances in my assessment give rise to a threat that violence would be used if there was resistance. The closed-circuit television shows one of the persons armed with a stick using it against property, sweeping it across the counter area signalling, in my assessment, to the storekeeper that she should not come out of the room where she had gone. The conduct of those who entered the shop I am satisfied beyond reasonable doubt amounted to a threat to use violence to prevent resistance to property being stolen. Property was stolen and cigarettes taken. The elements of aggravated robbery are proved. The issue is whether it is proved beyond reasonable doubt that [BG] was one of the four people involved.

[6] This is a circumstantial evidence case. What then are the strands relied on by the prosecution to support the conclusion that [BG] was one of the people who stole the car and committed the robbery? The strands are that the Demio motor vehicle on the day of the robbery was stolen from a carpark. That that motor vehicle was used in the robbery and that [BG]'s fingerprint was found on the driver door pillar. The clothing of one of those who stole the car is common in combination to one of the robbers a maroon sleeveless jacket or vest, black trousers with white stripes and white shoes. I am satisfied that the person dressed this way was part of the stealing of the car which was used in the robbery and entered the shop taking part in the robbery.

[7] When a search of [BG]'s house is carried out on the 15 June 2018, a place where he lived with his [family] a maroon vest is found, shown in the photographs, a pair of white shoes similar to those being worn by one of the robbers, the one wearing the vest and the striped trousers. [BG] had access to those items of clothing, he was able to make up the combination apparent as being consistent with the person involved in the taking of the motor vehicle and the robbery of the store. When [BG] was arrested on 17 June he was wearing black trousers with white stripes similar in appearance to those worn by one of the robbers. [BG] had the ability to put the combination together, the maroon vest, the white shoes and the black trousers with white stripes. The fact that this combination is present and is found where he lives and what he was wearing on arrest there would need to be a coincidence that [BG] had

these three items available to him just as one of the robbers did which I find to be an unlikely coincidence.

[8] When I add this to the fact that his fingerprint is on a stolen car in which a person with that very combination of clothing drives to a robbery I am satisfied beyond reasonable doubt that [BG] was one of those in the [store] carrying out the robbery.

[9] In coming to this conclusion I have put to one side the evidence that [BG]'s sister has said to have identified him as one of those in the [store]. She denies saying that and also what photographs she was shown is unable to be ascertained. The quality of that evidence cannot therefore be assessed if it occurred. In any event she does not in evidence accept that she did so and despite a written statement having been taken from her she does not say that in any such statement.

[10] Nor do I rely on any way on the propensity evidence advanced by the Crown and allowed by an earlier ruling. The issue has been simply identification and I do not find anything in the previous behaviour of [BG], robberies in which he was involved add any weight to the Crown case.

[11] It is the repeated combination of clothing and the fingerprint which takes me to the point of being satisfied beyond reasonable doubt that the charge of aggravated robbery is proved. The taking of the car integral to all of the facts as I have found them to be must result in my coming to the same conclusion that [BG] was one of the persons involved in the taking of the motor vehicle later used in the robbery.

[12] Each of the charges is therefore proved beyond reasonable doubt and there needs to be now a family group conference directed and the matter can come back before me once that family group conference has taken place so I know that I am back on 6 December. So if I say 2.15 on 6 December to find out what has happened at the family group conference and I would encourage family to be able to be present at that conference which hopefully could take place in Hamilton rather than in Rotorua and there needs to be a face-to-face situation not an AVL situation and I will find out what has happened at the family group conference when I come back on the sixth and then we will take it from there.

[13] So [BG] I know I had to use a lot of words to go through why I have come to the decision I have but I have found that you were one of the robbers and have found that to be proved so family group conference is the next thing, we will find out what comes out of that and where we go from there.

John Walker
Principal Youth Court Judge