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

IN THE DISTRICT COURT
AT GISBORNE

CRI-2017-016-000318
[2018] NZDC 7204

THE QUEEN

v

[KIRK SHARPE]
[JOHN GERMAN]
[GROVER ELLIS]

Hearing: 15 February 2018

Appearances:
C R Walker for the Crown
L H Maynard for the Defendant [Sharpe]
A M Sceats for the Defendant [German]
D D Rishworth for the Defendant [Ellis]

Judgment: 9 May 2018

JUDGMENT OF JUDGE W P CATHCART
[REASONS]

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[1] On 15 February 2018, I granted the Crown's application under s 103 Evidence Act 2006 directing that the key Crown witness, Ms [Romana], give her evidence by way of audio visual link from a location outside of Gisborne.

[2] This judgment sets out my reasons for granting the application.

Background

[3] The Crown alleges the three defendants were part of a team who disguised themselves with balaclavas entered and then robbed an employee at the [store] in [location deleted]. At least one of the unidentified males was armed with a hammer. Approximately $300 cash was taken from the till. CCTV footage shows the offenders coming from and leaving towards the left side of the [Mall] where the [store] premises were located.

[4] A police cordon was put in place shortly after the incident was reported. A vehicle that passed through the cordon shortly thereafter was a vehicle of interest. That vehicle was registered in the name of Ms [Romana]. She and the vehicle were located by the police the following day but she denied any knowledge of the robbery.

[5] About four months later, on 22 May 2016, Ms [Romana] made a witness statement implicating all three defendants in the robbery. In that statement, she described how she was in the vehicle with the defendants, both before and after the robbery, but without any knowledge or involvement in the offence. She was a friend of Mr [Sharpe] and knew the other defendants through him. In her statement, she said she was particularly fearful of Mr [Ellis].

[6] The Crown's case against all three defendants is entirely reliant on the evidence of Ms [Romana]. The other civilian witnesses and police officers to give evidence provide contextual material and support for the central evidence to be given by Ms [Romana].

[7] On 14 January 2018, Ms [Romana] signed a further statement about her involvement in the upcoming trial scheduled to commence on 26 February 2018. In that statement, she stated that Mr [Sharpe]'s ex-girlfriend, [Aku Hamutana] asked her about the original statement she made implicating the three defendants. She says that Ms [Hamutana] told her to "be careful of [Kirk Sharpe] because there was a target on [her] head".[1]

[8] In her second statement, Ms [Romana] said that in August 2017 she received a call from [details deleted], Mr [Hepi Romana], who also was in the [Prison] where

[1] Ms [Romana]'s statement dated 14 January 2018 at [6].

Mr [Sharpe] was on remand. She says [details deleted] told her there were "papers floating around with [her] name on it." She said [details deleted] told her not to worry about it. But she stated she was worried about "what might happen". She said that this is part of the reason why she is "very reluctant to attend" the trial.[2]

[9] She also stated "another reason" for concern. She said all three defendants are patched Black Power members and the trial is in their hometown where they all have family members and other members of their gang. She said the thought of being in Gisborne during the trial overwhelms her with fear. She said her fear is not just for herself but the possible repercussions on her family members who reside in [location deleted], and her [child].

[10] As at 14 January 2018 Ms [Romana] was [details deleted]. She advised her preference would be to give evidence by way of AVL.

[11] At the date of the hearing of the mode of evidence application—15 February 2018—Ms [Romana] did not reside in [location deleted]. Crown counsel considered her at that stage to be a reluctant, but not hostile, witness.

[12] As at 15 February 2018, the Crown relied on two grounds.

First ground

Ms [Romana]'s fitness to travel to give evidence at the trial

[13] [Ms Romana's medical details deleted]. As at [13 February 2018], Ms [Romana] was medically fit for discharge but the advice was that she should remain in [location deleted] for two weeks [details deleted]. The evidence also confirmed Ms [Romana] was medically fit to provide evidence at the trial remotely from [location deleted].

[14] The Crown accepted she could physically fly to Gisborne by trial date to give evidence by way of AVL. In the face of the medical advice, the Crown anticipated

[2] Ms [Romana]'s statement dated 14 January 2018 at [7]-[8].

Ms [Romana] would not be physically able to travel to Gisborne to give evidence until 27 February 2018, day two of the trial.

Analysis

[15] When placed in context, this ground had little force given the limited temporal effect of Ms [Romana]'s unavailability. Provided arrangements were made for Ms [Romana] to give evidence on one of the days during the week commencing 26 February, her physical incapacity to travel and the demands upon her placed by [details deleted] could be adequately met by an appropriate and brief delay.

[16] I thus accepted Mr Rishworth's submission that this ground was not sufficiently strong to warrant the grant of the application.

Second ground

[17] The Crown argued the order should be made on the ground of the witness' "fear of intimidation" as per s 103(3)(d) Evidence Act. The Crown relied on an amalgam of evidential material to support this ground. I have already addressed part of that material above; the rest below.

[18] On 25 March 2017, Mr [Sharpe], whilst on remand, made two telephone calls to his girlfriend, Ms [Hamutana]. During the first call at 10.42 pm, Mr [Sharpe] told Ms [Hamutana], "[the witness'] trying to say that I robbed the [store]." Ms [Hamutana] appears surprised. In the second call, a few minutes later, Mr [Sharpe] says, "The lawyer said when I go to trial I'll probably go to trial in about December or early next year. If [the witness] doesn't show up twice then it gets thrown out." Ms [Hamutana] tells Mr [Sharpe] that Ms [Romana] told her that it was not her. Mr [Sharpe] then says he has got a copy of her statement. Ms [Hamutana] retorts:

> Yeah, I know and she was just like, um, I got told that wasn't oh she was just like me cuz and, I wouldn't do that to you and I wouldn't do that to baby. I just said, oh fuck, I said I'm going to smash you fucker.

[19] Also, the Crown relied on a Facebook message on 24 January 2018. The message reads, "Yo [name deleted] get at me ASAP ghee wats going on man WTF."

Ms [Romana] told the police she believed that message was sent to her by, or on behalf of, Mr [Sharpe]. She interpreted that message as a request by Mr [Sharpe] asking her to contact him in relation to her proposed evidence. If so, that also raises the spectre Mr [Sharpe] has attempted to contact the key Crown witness in defiance of his bail conditions.

[20] Also, Ms [Romana], as per the requirement under s 103(4), expressed her view that she prefers to give her evidence by way of an audio-visual link.

Relevant legal principles

[21] In *R v GJ*,[3] Katz J observed:

> It is now widely recognised … that the requirement to give evidence orally at a trial can place a considerable stress on some witnesses. This can impact on the quality of the evidence they are able to give, which potentially undermines the truth finding process and the just determination of proceedings.

[22] Wide recognition of these problems has led to the principle that there is now no presumption in favour of the ordinary way in giving evidence.[4] The overarching principle on any application for an alternative mode of evidence (apart from child witness cases) is the need to ensure a fair trial for both the prosecution and the defendants.[5]

[23] As noted, the Crown grounds its application on Ms [Romana]'s fear of intimidation under s 103(3)(d) Evidence Act 2006. This ground is not uncommon in gang-related cases. In such cases, Courts have understandably pointed to the desirability of using alternative modes of giving evidence such as CCTV systems or AVL links to overcome the intimidation factor.

[24] Brewer J, for instance, said in *R v Christian:*[6]

> … Although it is more simple and logistically desirable to have witnesses give evidence in Court, those considerations are easily outweighed by the need to encourage witnesses to give their evidence in a way that makes them feel safe

[3] *R v G J* [2014] NZHC 2276 at [3].
[4] *V(CA492/10) v R* [2011] NZCA 525 at [8].
[5] *R v Christian* [2016] NZHC 1568 at [15].
[6] *R v Christian* [2016] NZHC 1568 at [19].

> (or, at least, safer). This need will be assisted by a mode of evidence which does not subject them to direct confrontation with the defendants and their supporters, and which accordingly minimises stress.

[25] Also, it is important to remember that s 103(3)(d) is "framed broadly"[7]. Also, the fact a witness can be intimidated by someone other than a defendant in a criminal proceeding is implicit in s 105(1)(a)(i). This is because s 105(1)(a)(i) acknowledges that a Judge may direct an alternative mode of giving evidence while in the courtroom with the witness unable to see the defendant "or some other specified person".

[26] Intimidation by gang associates is a classic example of the need for a broad framing of the ground provided a principled approach is adopted. It is important to remember that the presumption in favour of open justice means the proceedings must be open to the public unless countervailing factors are compelling. And to remember that many gang members—particularly in Gisborne and Wairoa—have familial connections with other members and associates. Absent compelling grounds, any alternative mode of evidence ordered must not interfere with the public nature of the proceedings.

[27] The gang reprisal factor was relied upon by the High Court in *R v L*[8]. Allan J ordered that certain Crown witnesses, fellow prisoners, should give their evidence from outside the courtroom on a CCTV system in a prison-murder trial. The prisoners were all prisoners at the relevant time and were still in prison at the time of trial. Allan J concluded:[9]

> … In my opinion, it would not be fair to the witnesses in this case to subject them to the pressure inherent in being in the same room as those against whom they were giving their evidence. There is a risk that they would not give of their best, or might simply decline to give any useful evidence at all, despite their cooperation with the authorities to date.

[28] The nature of the test under s 103(3)(d) is also instructive. In my view, that test cannot rest solely on the witness' *bona fide* fear of intimidation. A pure subjective test would permit honest but irrational fears to carry the day and subvert fair-trial rights. There must be an element of objectivity to the test. In short, the witness' *bona*

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[7] *Adams on Criminal Law – Evidence* at EA103.02(4).
[8] *R v L* High Court, Auckland, CRI-2009-404-2878, 21 March 2011.
[9] *R v L* High Court, Auckland, CRI-2009-404-2878, 21 March 2011 at [79].

fide fear of intimidation must be substantiated on an objective basis. The fact-specific inquiry must approach the test in that way.

Defence arguments

[29] Mr Rishworth, who took the lead in opposing the application, argued several points. First, he submitted there was insufficient evidence. He described the evidence as "failing to cross the threshold" under s 103(3)(d). Mr Rishworth argued the intimidation relied upon was based on Ms [Romana]'s hearsay remarks. Also, he submits, Ms [Romana] did not allege the intimidation emanated directly from any of the defendants.

[30] Second, Mr Rishworth emphasised that the principle of orality that allows a defendant to see his or her accuser face to face at trial was relevant to fair-trial considerations, including the jury's assessment of this undoubted key Crown witness. Mr Rishworth submitted that observance of this principle was important because Ms [Romana]'s witness statements may lay a basis for suggesting she was a party to the alleged robbery under s 66 Crimes Act 1961, or at the very least, an accessory before or after the fact. In his view, it was important for the jury to see Ms [Romana] in person rather than just her head and shoulders, especially if identification was in issue.

[31] All these arguments have force. But, in the end, I formed the view that the factors relied upon justified the grant of the order under s 103(3)(d).

Analysis

[32] The evidential material relied upon established that Ms [Romana] holds not only a *bona fide* fear of intimidation but also one that is objectively substantiated. She is to testify about her association with the three defendants both immediately before and after the aggravated robbery. She is not an eye witness to the aggravated robbery. She is said to be in the vehicle driven to the scene where the three defendants got out disguised. And she remained in the vehicle when they returned moments after the

robbery and then fled the scene. Her evidence is relied on to build significant components in the Crown's circumstantial case against the defendants.

[33] All three defendants are patched Black Power members. Ms [Romana] has already been quizzed by Mr [Sharpe]'s girlfriend about her role in giving a statement to the police implicating the defendants. As at 14 January, the girlfriend warned Ms [Romana] she is now a "target". Two months later, the girlfriend talked to Mr [Sharpe] about Ms [Romana]'s witness statement and then tells her boyfriend she is "going to smash" Ms [Romana]. Ms [Romana]'s fear of intimidation thus is independently supported by the underlying threat made by the girlfriend.

[34] Moreover,]'s [details deleted], a serving prisoner in [location deleted], specifically warned her about the fact her name was on police documentation circulating inside the prison. The fact [details deleted] took it upon himself to telephone her from prison and speak about that topic again points to an objective basis to Ms [Romana]'s fear of intimidation and reprisal.

[35] Also, Mr [Sharpe] has sent, or someone on his behalf has sent, a Facebook message to Ms [Romana] requesting she contact him. The message implies that Mr [Sharpe], or someone on his behalf, disapproves of Ms [Romana]'s decision to give evidence. That conduct raises the spectre of an attempt to pervert the course of justice. And any contact between Mr [Sharpe] and Ms [Romana] would be a serious breach of his bail.

[36] I accept Ms [Romana]'s account of her conversation with the girlfriend and [details deleted] is hearsay. But I did not consider that this evidence was so unreliable that it should be ignored, especially when the combined force of all the evidence is considered.

[37] After all, the hearsay nature of information in cases under s 103(3)(d) is not uncommon. A basis for fear of intimidation often lies with the actions and comments of third parties. Intimidation by those directly or indirectly associated with the gangs is a classic example. And the breadth of orders under 105 contemplates that possibility.

[38] In the end, it is the combination of all these threads of evidence that makes Ms [Romana]'s claim of fear of intimidation not only a *bona fide* one, but also a compelling one. Moreover, the cumulative effect of this evidence provides more than adequate objectivity to her genuine fear of intimidation.

[39] Having established that Ms [Romana]'s fear of intimidation was made out, I then had regard to the need to minimise the stress placed upon her in giving evidence. As noted, the defendants are all patched members of the Black Power. The trial is in their 'patch'. The case is likely to take place before those members of the defendants' whānau and associated gang members who choose to attend. It was unrealistic to suggest Ms [Romana] would not be under genuine stress at the prospect of attending the Gisborne Court in these circumstances. The minimisation of that stress could only be achieved by the AVL procedure.

[40] Also, I accepted that the observance of the principle of orality was a relevant factor to consider because the jury's assessment of Ms [Romana]'s credibility and reliability is likely to be the major issue in the case. And at a general level, the principle reflects an assumption that a fact-finder is likely to benefit from seeing and hearing a witness give evidence in person[10].

[41] I considered these fair trial concerns. But, there is no presumption in favour of giving evidence in the ordinary way. Ms [Romana] is not an eye witness to the aggravated robbery. But she does provide crucial circumstantial evidence for the Crown. Her evidence may trigger a warning against self-incrimination. But that does not appear to be presently the case on her written statements. Also, this is not a case where the use of the AVL procedure will likely be cumbersome during her evidence. Finally, in the circumstances, Ms [Romana]'s genuine fear of intimidation called for nothing less than the AVL procedure. In the absence of that mode of evidence, the quality of her evidence may be affected which potentially undermines the just determination of proceedings.

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[10] *Taniwha v R* [2016] NZSC 123 at [35].

Conclusion

[42] For all the above reasons, I considered the Crown's application should be granted.

W P Cathcart
District Court Judge