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**IN THE YOUTH COURT
AT GISBORNE**

**I TE KŌTI TAIOHI
KI TŪRANGANUI-A-KIWA**

**CRI-2018-216-000046
CRI-2018-016-000909
CRI-2018-216-000046
[2019] NZYC 33**

THE QUEEN

v

**[BY]
[CY]
[AQ]**

Date: 23 January 2019

Appearances: S Cameron for the Crown
V Thorpe for the Young Person [BY]
M Sceats for the Young Person [CY]
A Courtney for the Defendant [AQ]

Judgment: 23 January 2019

ORAL JUDGMENT OF JUDGE E P PAUL

[1] Young persons [BY] and her brother [CY] along with the adult [AQ] are charged together with [DI] that on [date deleted] at Gisborne they did rob a [VA] of a [motor vehicle] and wallet with its contents.

[2] I heard evidence over Monday 21 and 22 January 2019. I am delivering an oral decision on the morning of 23 January 2019. Because it is an oral decision I reserve the right to clarify or expand on the reasons for my decision today.

[3] In the trial there are a total of 13 witnesses. There were two civilian witnesses called to give evidence. The complainant [VA] and [WG]. [WG] being a close relative of [BY] and [CY].

[4] A number of police officers' evidence was read to me and finally a [Detective A] gave evidence he being the officer that interviewed [AQ] and finally [Constable B] the officer in charge of the case gave evidence before me.

[5] At the completion of the Crown case [BY] elected to give evidence in her own defence. The two remaining defendants declined to give or call evidence and that is their right. They are not obliged to give or call evidence in their trials.

[6] The Crown case against the defendants, [CY] and [AQ] is cast on the basis they are criminally liable pursuant to s 66(1) for participating in the violence towards the complainant [VA] in the course of the robbery. Alternatively, the Crown have also cast their case on the basis they are liable under s 66(2) being one of a group of two or more persons with a common purpose to rob the complainant and assist each other carrying out that common purpose.

[7] Given the facts against [AQ] and [CY], my decision only needs to focus on s 66(1). What the Crown are required to establish against [AQ] and [CY] as parties under s 66(1) is that they assisted [DI] who I understand has already admitted his offending in this case, they have assisted him in the aggravated robbery of [VA]. The questions the Crown are required to satisfy me of are first, that when [VA]'s keys were taken and his vehicle was taken, he was being assaulted. Secondly, the Crown must

satisfy me, this is on the basis of the criminal standard beyond reasonable doubt, that [CY] and [AQ] assisted [DI] who stole the keys by assaulting [VA]. Thirdly, Crown must satisfy me, beyond reasonable doubt, [CY] and [AQ] in fact intended to assist in the robbery of [VA] with the intention of taking his keys to his car with the use of violence. Fourthly, the Crown must satisfy me beyond reasonable doubt [CY] and [AQ] knew [DI] was going to take the keys and they would use violence to overcome any resistance from [VA].

[8] In summary, [VA]'s evidence in relation to the aggravated robbery with respect to the defendants [CY] and [AQ], was that three to four males entered his house on the evening of [date deleted]. That his door was open. That the males had masks. He described them as, "Woollen things," and I note this was never challenged throughout the course of the trial. His evidence was he had his car keys in his hand, that one of the males punched him to the face while two males held each of his arms. During the course of the attack he dropped to the floor and one of the males said, "Give me the fuckin keys." His evidence was the keys were taken from his hand, that his bag was ripped off him and shortly, thereafter, the males left together, his car was driven off, that he found his bag on the doorstep outside.

[9] It would appear from his evidence, at least, the attack stopped about the time the keys were obtained and he activated the house alarm. He described the males as wearing heavy clothing and then he went on to give evidence, he suffered injuries to his face and limbs and that is depicted in the photos which have been produced in this trial and confirmed by the attending doctor's evidence which supports blunt force trauma to the face consistent with punches to the face.

[10] Under cross-examination Mr Sceats for [CY] challenged [VA] that in fact he dropped the keys and there was no demand for them. This was rejected by [VA]. He was also challenged by [AQ]'s counsel, Ms Courtney, that [VA] had [CY] in a headlock. He rejected that and I have got to say that is not even supported by [AQ]'s own DVD interview where he says, "[VA] did not hit any of us."

[11] Police then produced [CY]'s DVD interview. In summary [CY] accepted he did attack [VA]. He accepted he took his car. He accepted he punched [VA] a few

times. He also said [DI] had punched [VA]. [CY] explained in his interview that [DI] took [VA] to the ground and it was [DI] who got the car keys out of his hands. Significantly, [CY], during the course of his interview, repeated three times that it was [DI] who took the keys from [VA]'s hand.

[12] The police also produced [AQ]'s DVD interview. [AQ] accepted that he went into [VA]'s house with others. He explained his purpose was to see [BY] was all right because he had information she had been, "Touched up". His words. He said he had met others earlier that day. He accepts the car was taken from [VA]'s address and he described their actions as smashing [VA]. He then, to an extent, qualified his own actions by saying he only ripped "him," referring to [VA], off [CY] as he had [CY] in a headlock. He describes the front door being open and towards the end of his interview when put to him he accepted he was not allowed in [VA]'s house. He was not allowed to take [VA]'s car and that none of them were hit by [VA].

[13] Essentially, that is the evidence against [CY] and [AQ].

[14] With respect to the questions the Crown are required to satisfy me of, I have no doubt [VA] was assaulted and the purpose of that assault was to take his keys so his car could be stolen. The evidence supporting that is [VA]'s own evidence that the keys were taken from him, evidence of the injuries he sustained, evidence which is uncontroverted that the car was driven off, clearly captured on footage from the [petrol station], the car was crashed and we have the pictures of that. And that could have only happened if the keys had been taken from [VA].

[15] So far as [CY] is concerned his own DVD interview establishes that it was [DI] who took the keys, this was repeated three times. And there was no challenge that [VA] was assaulted in his own home.

[16] In terms of question 2, I am satisfied both [CY] and [AQ] did assist [DI] in the robbery. We have [CY]'s own evidence of punching [VA]. We have [VA]'s evidence of two of the males punching him, one holding his arm. That holding of the arm is really consistent with [AQ]'s own admission that he ripped [VA] off and we have [AQ]'s own evidence that they smashed [VA].

[17] In terms of question 3, I am satisfied both [CY] and [AQ] in fact intended to assist [DI] taking the keys with the use of violence. The intention is determined from their actions. They all entered the house together. All wore masks to disguise themselves and all left once the keys had been obtained and all used violence, and punches in [CY]'s case, or holding onto [VA] in [AQ]'s case. You also have [VA]'s evidence that while one male was taking the keys the others were wrestling with him. In terms of the final question, I am satisfied, beyond reasonable doubt, [CY] and [AQ], knew [DI] was going to take the keys and violence was required to overcome any resistance by [VA]. This is supported by [VA]'s evidence of all three males attacking him. His evidence of the demand, "Give me the fuckin keys," and the factual matters I have referred to.

[18] Having made those findings I am not required to consider s 66(2). I am satisfied the elements, the charge of aggravated robbery in terms of assisting under s 66(1) are made out and accordingly, the charges are proved against [CY] and [AQ].

[19] [BY], her circumstances are different. There are no admissions made by her as to assaulting the complainant and on the Crown case her role was very different. What the Crown are required to prove against [BY] is either she was a party by assisting her co-offenders pursuant to s 66(1) or she was part of a common purpose under s 66(2) to carry out this aggravated robbery.

[20] In this respect we need to go back to [VA]'s evidence sometime before the robbery occurred inside his home. And that time is quite certain. It is 6.51 in the evening as recorded in the messenger screenshot at tab 2 of the exhibit booklet. What that records is at 6.51 pm [BY] messages [VA], "Where are you?" He replies, "What's up, me sick." [BY] then goes on, "Can you pick me up from [location deleted] and take me somewhere please?" We then heard evidence at 8.45 [VA] sees [BY] at the front door of his house on [address deleted]. His evidence was, he looked out the window, told her to walk home but ultimately lets her into the house and agrees to give her a lift home.

[21] He makes some enquiries of [BY] including asking whether she is pregnant. It is an odd enquiry to make of a 14 year old girl. But perhaps an indicator of the

relationship as revealed under cross-examination between [VA] and [BY]. What the evidence revealed was that he had a longstanding professional relationship with her [close relative], her [close relative] being an escort, that [BY] had been to the address while her [close relative] was providing those services when [BY] was younger. The evidence demonstrates that [VA] was well-known to [BY]'s family, knew their members including the [personal details deleted]. Also the messaging demonstrated and interaction between [VA] and particularly [BY] where she would make requests to be given lifts, to be taken things, sometimes he would agree. Sometimes he would ignore her. Other times he would initiate his own conversations with her, offer to take her for a meal, that sort of thing. I got a sense [VA] had something of a proprietorial interest in [BY] which may explain the odd comment about asking if she was pregnant.

[22] What is more odd, however, is the further evidence he gave that while in the house with [BY] he has closed his eyes and walked into her with his hand out. This action was demonstrated to the police who then demonstrated it in Court where he has held his hand to his chest with his index finger pointed outwards and on [VA]'s evidence he has accidentally walked into [BY]. I will return to this evidence shortly.

[23] That explanation contrasts with [BY]'s own evidence in this trial where she said he touched her inappropriately with his hand on her skin, and I believe the demonstration was his hand above her waist and towards her back.

[24] It is about at this point that [VA]'s evidence is that [BY] asks to go out for a smoke and his evidence is she goes out the front door, he closes the door and she remains out there to have the smoke. He then gave evidence that he has gone to get his keys and other items, I believe his licence and wallet and bag. He was questioned about how long it took from [BY] entering his house to collecting his keys. He estimated something like five minutes to 10 minutes and that is contained at page 25 of the notes of evidence. He accepts [BY] does not re-enter the house and he only sees her again, he says, as the three or four males enter through the front door.

[25] We then have [WG]'s evidence. She describes being at home at [location deleted] that afternoon. It being kind of darkish. Her evidence was [BY] came inside and told her she was going to steal [VA]'s car. Her evidence was [BY] returned to the

others, being [AQ], [CY] and [DI] who were all outside in [another car], I believe the evidence was.

[26] It is clear in [WG]'s evidence the description she gave of the colour of [BY]'s jersey was incorrect. It was also put to her that when she first spoke to police about this incident she did not tell them about [BY] saying she wanted to take "[VA]'s" car. It was also put to her that [BY] would have spoken to her about the earlier theft of a car from [location deleted]. [WG] acknowledged they had that conversation but not at that time on [date deleted].

[27] In terms of s 66(2) the Crown case is that [BY] with the others made an agreement to rob [VA] of his car and they would support each other to do that or alternatively under s 66(1) [BY] assisted in the robbery of [VA].

[28] The evidence relied on by the Crown can be summarised as follows:

- (a) At 6.51 pm [BY] is messaging [VA]. "Where are you?" His answer, "What's up, me sick." And then this request to be picked up from [location deleted].
- (b) The evidence demonstrates [BY] was at [location deleted] with her co-offenders. They were there for one to two hours and this comes from [WG].
- (c) The evidence is she tells [WG] she is going to steal [VA]'s car and she then returns to her co-offenders outside. During the course of the trial Ms Thorpe disputed with [WG] that her client, [BY] ever said, "[VA]," but as a minimum we can accept, and I certainly accept, that [BY] did say she was going to steal a car which is consistent with [WG]'s first statement shortly after the offence was committed to the police.

Why I say we can accept that is this. There is no motive that has been established for [WG] to lie. The fact that they are close relatives would suggest she is unlikely to lie. And despite her observational error about

the top being worn by [BY] I am satisfied that does not undermine the evidence of what [BY] told [WG], that she intended stealing a car.

- (d) We know that [BY] is then seen leaving the address with her co-offenders as it is getting on to dark and again this comes from [WG]'s evidence and we know from the officer in charge that dusk was at 6.55 pm that night which is shortly after this message was sent to [VA].
- (e) [BY] has volunteered in her own evidence that the group was going to [location deleted] but acknowledges they all ended up on [address deleted] outside [VA]'s house. [BY] says the boys continued on and her intention was to get a ride back to [location deleted] from [VA].
- (f) The evidence is that [BY] requests a ride home from [VA] and ultimately he agrees. [BY] is let inside the property and that comes from [VA]'s evidence.
- (g) We know the period over which this occurred was about five to 10 minutes that [BY] was in [VA]'s house. That was [VA]'s estimate of time but also is consistent with [BY]'s evidence that he said, "Hang on, 10 minutes," before he would give her a lift.
- (h) We know a touching occurred inside that house. We have these competing explanations by [VA], an innocent explanation verses [BY]'s of indecent touching. I have got to say [VA]'s explanation was quite fantastic and contrived. Coming as it did one week out from the trial and could be viewed as an attempt to explain away [BY]'s complaint of indecent touching. Given my earlier comments and his perhaps proprietorial interest in [BY], enquiries about whether she was sleeping with a male at some earlier time, enquiring that night whether she was pregnant. The fact that he was alone with her in his own home and certainly had opportunity makes his account implausible. And on this part of his evidence I preferred [BY]'s explanation at least as being more likely.

However, regardless of that incident which I expect [BY] had not planned on she requested to go outside for a smoke and there is no dispute about this. She was permitted to go out the front door and she remained at the doorstep. She did not, on the evidence, go any further despite what she told us yesterday. For that to happen [VA] had to unlock his doors. We know there is both a glass door and a security door. We know he did not relock those doors when he went off to collect his keys and other items.

- (i) It is at this point that [BY] messages [CY].
- (j) We know shortly, thereafter, [CY] along with the co-offenders appear.
- (k) The males enter the house where we know [VA] is assaulted and his keys and bag are taken from him.
- (l) Once the keys are secured perhaps in combination with the alarm being activated all three males exit the house and with [BY] leave in the stolen motor car and that is not in dispute.
- (m) We know that the car was travelling away from [VA]'s address at 8.42 pm. This is captured by the cameras at the [petrol station] on [street deleted].

[29] In terms of any timeline it starts at 6.51 when [BY] contacts [VA] for a ride and ends shortly two hours later at 8.42 when the car is being driven off by the offenders and captured on [street deleted] by camera.

[30] Because this is a Judge Alone trial I have had to remind myself that where [BY] has elected to give evidence there are three outcomes of that.

- (a) If I accept what [BY] has said in her evidence that she was simply going to [VA]'s address to get a ride home to [location deleted] I would have to acquit her.

- (b) If what she told me leaves me unsure about her involvement then I would have to acquit her.
- (c) Even if I disbelieve what [BY] has told me in the evidence, that is that she was only there to get a ride from [VA], I am not permitted to jump to guilt. I simply put that evidence to one side and consider all the evidence that I accept is reliable in this trial.

[31] It is correct that the Crown case against [BY] is a circumstantial case but it is well-known that in circumstantial cases that is still evidence on which a Court can properly find a charge proved. The definition of circumstantial evidence is well-known to counsel but perhaps for the benefit of [BY] I will explain it.

Circumstantial evidence relies on reasoning by inference. It gets its force from a number of factors that independently point to the guilt of a defendant. The analogy that is sometimes used is that of a rope. That no single strand, no single factor could support guilt. That those combined strands of the rope are sufficient to establish guilt.

And the point is made that the defendant is either guilty or the victim of an implausible, unlikely series of circumstances.

[32] So what then are the factors that can be relied on by the Crown to establish their circumstantial case. What is it that is revealed?

[33] The facts relied on by the Crown on examination by me revealed a particular picture. What the facts tell me is that [BY] wanted to steal a car that night. We know even without [WG] specifically naming it as [VA]'s car that it was [VA]'s car she intended to steal, not only because of what [WG] told us but because of the focus of [BY]'s messages that night. They were directed towards [VA]. [BY] full well knew that [VA] has a car, [details deleted], that was ultimately stolen that night.

[34] It was [BY] who messaged [VA] to pick her up. He replied he was sick. At 6.51 [BY] knew that he was sick, he was at home, he lives alone, effectively a soft target. We know that she had spent some time with the co-offenders and it defies belief that she would not have discussed her plans with those boys while they were outside for that one to two hours in the broken down car.

[35] What the picture reveals is after this messaging [BY] leaves her [location deleted] with her co-offenders. What the picture reveals is ultimately they end up outside the target's address, [VA]'s home, on [street deleted]. We know [BY] enters the property and is let into [VA]'s house, he needs to unlock his doors to do that.

[36] Despite [VA]'s advances towards her, which I accept [BY] would not have expected, she goes outside for this smoke. For that to happen the front door had to be unlocked and it remained unlocked. This is important because it permits entry of her co-offenders.

[37] At that point [VA] goes off to get his keys. [BY] knows this. Despite his indecent advances to her she does not leave the address. This is somewhat surprising given her own experience in these matters. She remains and it is only then that she messages her brother [CY]. Shortly after [CY] along with others arrive and we know they enter the house together carrying out the robbery of the keys and bag. All the time [BY] remains. Why because the clear inference is she has fulfilled her role, she has ensured the front door was unlocked so her co-offenders could gain entry.

[38] When the co-offenders run out of the house she joins them. She does not object. She goes with them. And what that picture shows is [BY] ends up with the result she had expressed to [WG] not some two hours earlier. That she was going to steal [VA]'s car because she is in [VA]'s car with her co-offenders being caught on camera, at least the car, on [street deleted] driving past the [location deleted]].

[39] I am satisfied that the circumstantial evidence does support a finding that [BY] either assisted under s 66(1) when she ensured the front door was unlocked to allow entry or she was part of a common purpose to steal [VA]'s car that night. The fact that [VA] touched [BY] was unexpected but does not detract from the overall circumstances as identified by me that night. Perhaps fortuitously it provided some justification for confronting [VA] but nothing more. Certainly it did not justify these offenders entering his house, robbing him of his property and I have got to say probably best captured by [AQ]'s own comments in his interview acknowledging they should not have been in his house at all. They should not have taken his car and that he never assaulted any of them.

[40] Having reached those findings the inescapable conclusion is the charge must be proved, likewise against [BY]. I have found the charges proved for [BY] and [CY]. I am directing a family group conference also cultural reports and I direct social work report and plan for sentencing on 9 April back in front of me.

[41] For [AQ] the adult, there cannot be an FGC but I will direct a cultural report. I will also ask for a neurological pre-sentence report and full appendices so we have all options.

[42] All three of you will have to sign new bail notices.

E P Paul
Youth Court Judge