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**IN THE YOUTH COURT
AT WHANGAREI**

**I TE KŌTI TAIOHI
KI WHANGĀREI-TERENGA-PARĀOA**

**CRI-2020-288-000100
[2021] NZYC 427**

**NEW ZEALAND POLICE
Prosecutor**

v

**[HT]
Young Person**

Hearing: 29 June 2021
Appearances: G Kelly for the Prosecutor
J Young for the Young Person
Judgment: 29 September 2021

RESERVED JUDGMENT OF JUDGE K B de RIDDER

[1] [HT] faces with two charges of doing an indecent act on a child under the age of seven years.

[2] The complainant was evidentially interviewed on 13 May 2020, and was aged [under eight] at the time of the alleged offending and at the time of the interview. Accordingly, pursuant to s 107 of the Evidence Act 2006 it is proposed that the complainant's evidence be given by way of playing of the evidential interview.

[3] [HT] challenges the admissibility of the evidential interview on the grounds that it did not comply with reg 8(d) of the Evidence Regulations 2007 as the interview did not include a promise by the complainant to tell the truth.

[4] The prosecutor also applies to amend the charging documents as to the date of the alleged offending. That application is opposed by [HT].

Background

[5] [HT] was born [date deleted] 2006. Between [date A] 2020 and [date B – 20 days after date A] 2020 [HT] lived at an address in [location 1]. The complainant lived in the same street at a different address but the complainant and [HT] were known to each other.

[6] On one occasion it is alleged that [HT] took the complainant to a street toilet in the area where they lived and locked them in a cubicle. It was alleged that [HT] pulled his clothing down and made the complainant play with his testicles.

[7] On another occasion when the complainant was at [HT]'s house it is alleged that [HT] took the complainant to his bedroom where he pulled down the complainant's clothing and proceeded to touch the complainant's penis and testicles.

[8] The complainant later told his grandmother about what he said [HT] had done and she immediately reported it to the police. Steps were then put in place to arrange for the evidential interview. [HT] was subsequently charged with the two offences and the charges contain the allegation that the offending occurred between 1 January 2020 and 25 April 2020. Thus, part of that date range precedes [HT] turning 14.

Discussion

Interview

[9] The interview was watched by counsel and myself for the purposes of determining the admissibility of the interview.

[10] The interview follows a standard pattern of the interviews of young complainants where the interviewer introduces herself and obtains the complainant's details. After stressing to the complainant that he should tell the interviewer if he does not understand what she is asking him and to tell her if she has got anything wrong, the interview then contains the following passage early in the interview:

INTERVIEWER	Oh okay and that's what we're gonna talk about today eh? But before you tell me all about that I just need you to promise that everything you tell me here today is the truth and you don't tell any lies okay. So do you promise that everything you tell me today is the truth?
COMPLAINANT	Mmhmm. And he locked me in the toilet, won't let me out, playing with his balls.

[11] The interviewer then goes on to invite the complainant to tell her about that, and the interview continues.

[12] The issue is whether or not there has been compliance with reg 8(d) in that brief exchange between the interviewer and the complainant at [10] above.

[13] When the interviewer is asking the complainant to promise to tell the truth the complainant is looking directly at the interviewer and he responds immediately with the expression as recorded without any hesitation. The issue is whether or not the exchange between the interviewer and the complainant complies with s 8(d)(ii), that is, is the complainant "...making a promise to tell the truth (in any form, provided the overall effect is a promise to tell the truth)...".

[14] In considering whether or not the expression used by the complainant amounts to a promise, account has to be taken of his age. For a [under eight]-year-old child the expression is a valid response in the affirmative. As such it does amount to a promise to tell the truth. Regulation 8(d)(ii) provides that the promise can be "in any form". It

is likely the regulation is couched in that way to take account of the fact that young children will reply in such a manner.

[15] Throughout the interview the complainant demonstrates he clearly understands what he is being asked and makes appropriate responses. The interview is generally and broadly coherent. At one point in the interview the complainant corrects the interviewer when she says something incorrect. There is nothing to suggest that he did not understand what the interviewer was talking about when she asked him to promise to tell the truth.

[16] In all the circumstances there has been sufficient compliance with reg 8.

[17] Then in the event that I am wrong in that view it is appropriate to now give a direction pursuant to reg 8(d)(ii) that the interview is admissible. Ms Young for [HT] raises some issues about what appear to be some inconsistencies about exactly when the offending had happened and on how many occasions, but those are matters going to credibility of the complainant's evidence, not the admissibility of the interview. A contrary direction accords with the comments of Clifford J in *R v Morton* and Court of Appeal in *S v R*.¹

[18] Furthermore, the complainant can be asked at the defendant's trial if everything that he said in his interview was the truth.

Amendment to the charge

[19] The prosecutor seeks to amend the charges to allege that the offending occurred between [date A] 2020 and [date B] 2020, that is when [HT] had turned 14. The Crown point to a notebook statement obtained by the police from the complainant's grandmother about when she was told by the complainant about the alleged offending on [date B] 2020. That is consistent with the date range now proposed.

[20] There is no prejudice to [HT] in amending the date range specified in the charges as sought by the prosecutor. Accordingly, that application is granted.

¹ *R v Morton* HC Wellington CRI-2009-485-51, 20 May 2009; *S v R* [2013] NZCA 598.

Result

[21] The evidential interview of the complainant is admissible at [HT]'s trial.

[22] The charging documents are amended to record an amended date range of between [date A] 2020 and [date B] 2020.

Judge KB de Ridder

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 29/09/2021