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[SQUARE BRACKETS]

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**IN THE YOUTH COURT
AT WELLINGTON**

**I TE KŌTI TAIOHI
KI TE WHANGANUI-A-TARA**

**CRI-2023-296-000031
[2023] NZYC 208**

NEW ZEALAND POLICE

v

[CL]

Hearing: 24 March 2023

Appearances: S Bishop and A Brosnan for the Prosecutor
L Sziranyi and T Gulland for the Young Person

Judgment: 24 March 2023

ORAL RULING OF JUDGE J M KELLY

Background

[1] The young person, [CL], who was 15 years at the time of the alleged offending, is currently being tried in a judge-alone trial for attempted murder, contrary to s 173 of the Crimes Act 1961.

[2] He has not denied an alternative charge of wounding with intent to cause grievous bodily harm, contrary to s 188(1) of the Crimes Act.

[3] The judge-alone trial commenced on Monday, 20 March 2023.

[4] The trial has been stood down until 27 March 2023 to allow an admissibility of evidence argument to be heard and determined.

[5] On 15 March 2023, [HE], a residential youth worker and shift leader at [youth residence name deleted], provided an unsworn formal written statement to the Crown, which was then disclosed to [CL]'s youth advocate, Ms Sziranyi.

[6] The Police indicated that they proposed to call [HE] as a witness and offer his statement as evidence.

[7] Ms Sziranyi indicated she would seek to exclude the evidence as inadmissible on the basis of unreliability under s 28 of the Evidence Act 2006 and general unfairness.

[8] The Police accordingly apply pursuant to s 101 of the Criminal Procedure Act 2011 to lead the statement of [HE] dated 15 March 2023 when the trial resumes on Monday.

The Charge and the Statement in Issue

[9] The Police submissions helpfully summarise the charge and statement in issue. For the purposes of this decision, I adopt that summary.

[10] The charge relates to a violent incident on the night of 15 May 2022, in which [CL] is alleged to have attacked the complainant with a 61-centimetre-long machete near the complainant's address.

[11] The Police case is that [CL] carefully planned to kill the complainant in response to him entering into a relationship with [CL]'s previous girlfriend.

[12] [CL] was remanded in custody at [the youth residence] in [location deleted] from 15 July 2022 until he was granted electronically monitored bail on 15 February 2023.

[13] On 15 February 2023, a Police Notification Referral was made by the residential case leader for statements [CL] was reported to have made while at [the youth residence]. The referral states that care team staff members had come forward on 15 February 2023 with the following concerns:

- (a) A staff member had recorded their recollection of a statement made by [CL] in December 2022 where the youth worker was having a conversation with [CL], as he seemed down. At this point, another young person joined the conversation and stated (about [CL]) that he needs to get over that girl, and [CL] stated it was not her (the girl) that was in issue, but the guy (victim of offence). [CL] then expressed that once he gets out that he will finish the job that he started and kill him; and
- (b) Another staff member had verbally stated that [CL] had had a similar conversation with them around harm towards the victim of the offending. I understand that in relation to this other staff member, no written confirmation has been obtained, and the Crown do not seek to lead it as evidence.

[14] It is unfortunate that although the police had been aware of [CL]'s statement to [HE] since 15 February 2023, contact details for [HE] were not provided to the officer in charge until 15 March 2023.

[15] At that point the officer in charge immediately began making inquiries, contacted [HE], produced a job sheet, and prepared the unsigned statement that was then disclosed to Ms Sziranyi.

[16] I have now been provided with a copy of the unsigned statement. I note that there may be parts of the statement that are inadmissible and that will be discussed by counsel.

[17] For the purposes of today's hearing however the crucial parts of the statement are as follows:

About a month before [CL] left the facility, he came out with me for a run.

There was one other boy with me also for that run.

I had told him to come out running, as it might clear his mind.

I asked [CL] how he had been, as I had heard from the shift change that he was a bit depressed.

[CL] told me that he is sick of the place.

[CL] said that he was having an early release hearing.

I asked him how long till he gets out, and he said hopefully not long.

[CL] then said when he gets out, he wanted to finish what he started.

[CL] said it was to do with his girlfriend and how he had planned something against the boy.

He said that he wanted to finish what he didn't get done.

He never named who he was talking about.

[CL] seemed pretty set in what he wanted to do.

[CL] said that he wants to get out.

I told him he needs to leave it in his past or it will follow him for life.

We left it at that and didn't say anything more about it.

He didn't tell me any plan or go into the specifics about how it would happen.

The other kid running was also in for serious stuff.

I don't think [CL] was trying to show off to him.

[CL] was quite straight up with me and was talking to me.

Discussion

[18] The starting point is s 7 of the Evidence Act 2006 which provides all relevant evidence is admissible in a proceeding except if it is inadmissible or excluded. Relevant evidence is defined in s 7(3) as evidence that has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

[19] I accept the Police's submission that on the face of it, the evidence of [HE] is clearly relevant. Although [CL] never named who he was talking about, an inference could be drawn that he was referring to the complainant.

[20] The Police case is that the admissions to [HE] enable an inference to be drawn that [CL] had an ongoing intent to kill the complainant.

[21] It is well established that the threshold for relevance is low. In my view, the evidence I have referred to is clearly relevant.

[22] Turning now to s 27 of the Evidence Act which provides the prosecution may offer a defendant's out of court statement as evidence against that defendant unless it is excluded by ss 28, 29 or 30. In this case the issue of reliability of the statement has been raised under s 28.

[23] The first step for me to consider under s 28(1) is whether the defence has raised an evidential foundation in relation to the reliability of the proposed statement.

[24] In this case, I am satisfied that Ms Sziranyi has raised an evidential foundation in relation to the issue of the reliability of the statement, given the lack of specificity of the time and date on which the statement was made, exactly who was present when the statement was made, the lack of any contemporaneous record of the statement, and the fact that it appears the Police Notification only occurred in relation to inquiries about how [CL] was doing in residence in relation to the issue of EM bail.

[25] Having found an evidential foundation under s 28(1), the onus of proof shifts to the police to prove the test for reliability has been met.

[26] I must now consider s 28(2) which provides that the statement must be excluded unless I am satisfied on the balance of probabilities that the circumstances in which the statement was made were not likely to have adversely affected its reliability.

[27] Section 28(4) provides a non-exhaustive list of matters the Judge may take into account when making this assessment.

[28] It is well established that the focus of the inquiry under s 28(2) is on the circumstances in which the statement was made.

[29] In considering the circumstances in which the statement was allegedly made, it is relevant, in my view, that [HE], as a residential youth worker and shift leader charged with the care of [CL], had no good reason to fabricate such a statement. There is no evidence to suggest he has any motivation or incentive to cast aspersions about [CL] by making up the allegations.

[30] Further, in my view it is important that [HE]'s evidence will be that [CL] made the statement voluntarily, and his statement was unsolicited.

[31] I accept the Police submission that the questions put to [CL] by [HE] in no way related to the actual offending but were innocuous questions about how [CL] was feeling and how long until he was going to be released.

[32] I also accept the Police submission that [HE] in no way can be construed as having exerted pressure on [CL] to induce him to make the statement.

[33] In addition, although there is reference in [HE]'s statement to the fact that [CL] seemed a bit depressed and reference in the Police Notification that [CL] seemed down, there is no suggestion that any mental conditions adversely affected the reliability of [CL]'s alleged statement.

[34] Taking all those matters into account, I am satisfied on the balance of probabilities that the circumstances in which the statement was made were not likely to have adversely affected its reliability.

[35] Therefore, the statement will not be excluded under s 28.

[36] Turning now to the issue of unfairness raised by Ms Sziranyi. Although the police apprehended that Ms Sziranyi would be relying on s 30 which is concerned with improperly obtained evidence, Ms Sziranyi confirmed at the hearing that she was not relying on s 30. Rather she was relying on the general unfairness of allowing a statement made to a Youth Justice Residence worker being used as evidence against a youth.

[37] I accept without hesitation Ms Sziranyi's submission that youth workers in Youth Justice Residences have an important role in developing therapeutic relationships with young persons in residence. Youth workers work closely alongside case workers, psychologists, and psychiatrists who also work with young people remanded in residence.

[38] As a Youth Court judge, I am well aware that residence workers endeavour to build rapport and develop relationships of trust and confidence with young people.

[39] Ms Sziranyi submits that to allow statements made by young people to youth residence workers to be admitted in evidence against them is fundamentally unfair and would have the effect of undermining the relationship between youth workers and young people.

[40] Although I accept Ms Sziranyi's submissions generally on the role of youth residence workers and the potential to undermine their relationships with young people if any evidence was to be admitted, in my view the particular evidence in this case that the Police are seeking to admit falls into a different category. That is because of the duty on youth workers to notify the police when they become aware of statements made by young people that are of particular concern, as is evidenced by the Police Notification that was made in this case on 15 February 2023.

[41] In terms of the general exclusion of evidence under s 8 of the Evidence Act where the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceeding, although

it does not quite fit the circumstances here, in any event I am of the view that the probative value of [HE]'s evidence outweighs any unfairness in the terms submitted by Ms Sziranyi.

[42] Therefore, I do not exclude the evidence under the general exclusion in s 8.

[43] As I have however indicated to Ms Sziranyi, it seems the real issue in relation to [HE]'s evidence will be the weight to be given to it.

[44] I am of the view that many of the matters raised by Ms Sziranyi can be tested in cross-examination. Those matters include the following:

- (a) the inconsistencies I have noted between the unsigned formal written statement and what is recorded in the Police Notification;
- (b) the lack of specificity about the time, place, and date of the run where the statement was alleged to have been made;
- (c) the lack of detail about the other young person who was on the run and what that young person may or may not have said;
- (d) the fact that there is no contemporaneous record of the alleged statement;
- (e) the fact that [CL] was not given any opportunity to comment on any record of the statement or sign correct or refuse to sign correct any written record;
- (f) the fact that there is no statement from the other young person present;
- (g) the fact that it appears the alleged statement was first reported on 15 February 2023 some months after it was allegedly made;
- (h) importantly, the fact that [CL] was 15 years old at the time; and

- (i) the statement was allegedly made when another young person was present, and the possibility of bravado, showing off, et cetera would need to be explored.

[45] As I say, these are some of the matters that can be tested in cross-examination and will ultimately go to the weight given to the statement of [HE].

Decision

[46] For the reasons given I rule that the proposed evidence of [HE] contained in the unsworn formal statement dated 15 March 2023 is admissible.

Judge J M Kelly
Youth Court Judge | Kaiwhakawā o te Kōti Taiohi
Date of authentication | Rā motuhēhēnga: 28/03/2023