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

IN THE DISTRICT COURT
AT BLENHEIM

CRI-2017-006-000688
[2018] NZDC 5496

THE QUEEN

v

DANIEL WAYNE HAPE

Date of Ruling: 20 March 2018

Appearances: J R T Crawford for the Crown
R M Gould for the Defendant

Judgment: 20 March 2018

JUDGMENT OF JUDGE P A H HOBBS
ON CROWN MODE OF EVIDENCE APPLICATION

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[1] This is a Crown application under s 103 Evidence Act 2006 that the complainant give his initial evidence by way of a pre-recorded evidential video interview and any further evidence, including cross-examination be behind a screen so that the complainant cannot see the defendant, but the defendant can see the complainant by means of the technology available in the courtroom.

[2] That application is opposed by Ms Gould for the defendant.

[3] I only received notice of the application on Friday 16 March, although it appears that the Crown application is dated 14 March. The trial is due to begin tomorrow 21 March. I enquired of Ms Crawford, for the Crown, as to the late filing

of the application. Ms Crawford has given some explanation as to why this application has been filed late.

[4] The Crown make its application on the grounds contained in subss 103(3)(c), (d), (g) and (h) of the Evidence Act. In giving any direction under s 103(1), I must have regard to the need to ensure the fairness of the defendant's trial. I must also have regard to the views of the complainant and the need to minimise the stress on the complainant and to promote the recovery of the complainant from the alleged offence.

[5] In terms of the allegations faced by the defendant, it is alleged by the Crown that the defendant committed an aggravated robbery, together with kidnapping and possession of a knife and assault with intent to injure. There is also a charge of driving whilst disqualified which is not particularly relevant for the purposes of this application.

[6] It is alleged that the defendant who I understand is the [relation] of the complainant, presented a firearm at the complainant. It is accepted that the firearm was a slug gun of some description. It is alleged that the defendant threatened to use the slug gun, pushing the barrel of the slug gun into the complainant's head unless the complainant handed over the keys to his car. It is suggested that the complainant owed money to a gang for unpaid drug debts. It is alleged that the defendant was effectively collecting or attempting to collect that debt on behalf of the gang or at least to deliver the complainant to the gang for collection of that debt.

[7] In addition to the alleged use of the firearm, there is an allegation that the defendant used violence against the complainant, in particular by choking him while in the car. There are other allegations involving violence and threats of violence. Ultimately it is alleged that the defendant took the complainant's motor vehicle.

[8] The defendant denies all of these allegations and has pleaded not guilty to the charges he faces.

[9] In terms of the application, the Crown have provided two job sheets which set out the views of the complainant about giving evidence in Court. One is dated 28

February, the other 16 March. The complainant has experienced significant anxiety as a result of the incident. He has suggested that he has known the defendant most of his life, if not his whole life and has been subject to this kind of intimidation and threatening behaviour in the past. It is also suggested that because of the familial connection between the parties, pressure has been brought to bear on the complainant to withdraw his complaint. The complainant says he is struggling with the thought of coming to Court and giving evidence and believes he will struggle to remember everything he needs to remember. The complainant refers to being traumatised by the event and taking some time to recover from it.

[10] In the latter job sheet, the complainant says that if the Crown's application is not granted, he is unlikely to answer his summons to appear because he is worried about giving evidence in person in the courtroom. It is clear that the complainant thinks the playing of his evidential video interview and a screen would assist him in giving his evidence in this matter.

[11] Ms Gould, for the defendant as I have said, opposes the application. Ms Gould raises concerns about the lateness of the application. I agree it is late and should have been made earlier, but that in itself is not a disqualifying factor. Ms Gould denies that there has been any intimidation by anybody connected with the defendant. Ms Gould also submits that the complainant should be required to give evidence without the assistance of his evidential video interview, because that will be the best way to ensure that the best evidence is available to the Court. Ms Gould submits that the evidential video interview should not be used as a means to allow the complainant to remember things if he is having difficulty remembering them.

[12] Ms Gould submits that the Crown are simply concerned that the complainant will not come up to brief and the evidential video interview should not be a means to circumvent that concern. Ms Gould also suggests that at the time of the incident the complainant had been consuming alcohol and therefore his memory should be tested in the ordinary way with that in mind.

[13] I have no doubt that I have jurisdiction to grant the application on any one or more of the grounds advanced by the Crown. It is apparent that the incident in question

was traumatic. The complainant will be expected to give evidence about those traumatic events. It is relevant to note that the complainant has a familial connection with the defendant and his family. I acknowledge the defendant denies any active intimidation on the part of the defendant or his family, but that is a concern expressed by the complainant, which I cannot dismiss out of hand.

[14] I think it relevant to note that the defendant has a significant criminal history including convictions for violence. It is also relevant to note that Judge Ruth has admitted propensity evidence which would suggest the defendant has a propensity for stand-over tactics, so the complainant's suggestion that he might be intimidated is hardly fanciful.

[15] In making any direction to give evidence in an alternative way, as I have said, I must have regard to the views of the complainant. His views are clear, as I have indicated. As I suggested to Ms Gould, giving evidence in Court is not intended to be a memory test. Even if the complainant were having some difficulty remembering things, he could be referred to the original or earlier statement he had made.

[16] I cannot see the relevance of the fact that the defendant might have been drinking on the night in question. Indeed I would have thought the evidence gathered at the time of an interview, only a matter of days after the alleged incident is likely to be more reliable than evidence given many months later without the assistance of an earlier statement.

[17] One of the grounds upon which such a direction can be given, not relied upon by the Crown, is any other ground likely to promote the purposes of the Act, namely the Evidence Act, one of the purposes is to promote fairness to parties and witnesses and clearly the defendant, being able to rely on his earlier recorded evidential video would promote fairness to him as a witness.

[18] I acknowledge that I am also required to balance the views of the complainant with the defendant's right to a fair trial. Experience in my view has shown that defendants simply are not prejudiced by the playing of pre-recorded evidential video interviews. That only needs to be considered in light of the acquittal rates in cases

where pre-recorded evidential video interviews are relied upon. Any prejudice that might result is clearly ameliorated by the standard judicial direction that will be required if the evidential video interview is played. Again, in my experience those directions are followed by juries and defendants are not prejudiced by the use of alternative techniques for witnesses to give evidence. It is my experience that juries concentrate on the evidence that they are being presented with, rather than the means by which it is being presented, particularly in light of the standard judicial direction that will be given.

[19] In addition, the witness will be cross-examined in the ordinary way, in the presence of the jury and in the courtroom. The complainant's evidence therefore can be fully and thoroughly tested by Ms Gould in the customary manner. I see no unfairness to the defendant in the playing of a pre-recorded evidential video interview that was recorded at a time closely connected to the allegations in the circumstances of this case.

[20] I am satisfied there are grounds to make the direction sought by the Crown and I am also satisfied that this is an appropriate case for such directions.

[21] Accordingly, I direct the complainant will give his initial evidence by way of his pre-recorded evidential video interview. Any further evidence and cross-examination will be given behind a screen, so the complainant cannot see the defendant, but the defendant can see the complainant by means of the technology available in the courtroom.

P A H Hobbs
District Court Judge