IN THE DISTRICT COURT
AT TAURANGA

CRI-2016-070-001260
[2017] NZDC 4023

THE QUEEN

v

DAMIEN OLLIVER
MARGARET OLLIVER
DANNY TE URA
NARII TE URA

Hearing:	27 February 2017
Appearances:	Mrs Sheridan for Crown Mr Owers for Damien Olliver Mrs Nabney for Margaret Olliver Mr Toner for Danny Te Ura Ms Bromiley for Narii Te Ura
Judgment:	1 March 2017

GROUND RULES DIRECTION OF JUDGE T R INGRAM

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[1] The defendants face a number of charges alleging violence towards children in their care, who are aged respectively 10, 11 and 12 years. Damien Olliver faces three charges of breach of protection order by physical abuse of all three complainants. He also faces five charges of assault on a child, four of which relate to one child. Margaret Olliver faces a single charge of assault on a child, whilst Danny and Narii Te Ura each face two charges of assault on a child.

[2] The case is set down for hearing as a Judge Alone Trial commencing on the 6 March next. At a pretrial hearing on 8 February 2017, an unopposed application by the Crown to slightly amend the charges was granted. An application for orders that

the three child complainants give their evidence by closed circuit television was not opposed, and duly granted. A trial direction was given that the complainants' evidential video interviews were to be played as their evidence in chief. A further direction was given that the copious extraneous material irrelevant to the Crown case be edited from the videos, and that they be reduced to a length of 40 minutes or less. None of those orders were opposed.

[3] A further order was made, again unopposed, that the complainants would be permitted to view their edited evidential video interviews before the trial to avoid the necessity for playing the evidential video interview in the presence of the individual complainants. That order was made by consent.

[4] After a discussion with counsel, because of the age of the complainants, and the close family relationship between them and the defendants, I directed that there would be a Ground Rules hearing at 2.15 pm on 27 February 2017 to discuss appropriate trial directions. The individual defendants' personal attendance was excused at defence counsel's request.

[5] At the Ground Rules hearing on 27 February a range of matters were discussed. The Crown set out a proposed timetable for the trial. On the first day of the trial, legal argument will be heard on the admissibility of certain evidence, then the tendering of s 9 admissions and exhibits and the calling of the complainants' mother, and possibly a detective, followed by the playing of the first complainant's evidential video interview.

[6] The second day of the trial will involve the evidence of the first complainant to start the day, followed by the playing of an evidential video interview of the second complainant.

[7] The third day of the trial will follow the same pattern, with a child complainant called promptly at 10 o'clock followed by the playing of an evidential video interview of the third complainant.

[8] The fourth day of trial will again commence with the evidence of the third child complainant followed by a detective's evidence and the playing of video interviews of two of the defendants.

[9] The timetable proposed by the Crown is sensible and practical, and it will allow each child to give their evidence in the morning, when they are fresh. Each of them is likely to face cross examination from all four defence counsel, with a possibility of re-examination. Defence evidence is likely to be called, and it may last a day or so.

[10] No objection was taken to the proposed timetable. This timetable may have the effect of extending the trial a little. It is intended to provide the child complainants with the best opportunity to give their evidence when they are not tired, and with a minimum of unnecessary stress.

[11] None of the orders and directions given above are controversial, and no counsel sought to persuade me that such directions were either unnecessary or unhelpful.

[12] The final issue that I dealt with by way of directions was for defence counsel to provide the Court with their proposed cross examination of each child complainant in the form of written questions. Mr Owers, for Damien Olliver, lead the opposition for the defence, and he objected to the direction that cross examination questions be provided in writing.

[13] The case for defence counsel keeping their defence under wraps until the commencement of the cross examination is solidly grounded traditional processes of the criminal trial. Cross examination has traditionally been regarded as the province of defence counsel, who might expect to conduct the cross examination of prosecution witnesses in a manner of their choosing, using the language of their choice, putting the questions asked in an order of their choice, in a manner best calculated to achieve the particular objectives of the cross examination of that individual witness in the context of the individual defendant's case, as a whole.

[14] In this case, Mr Owers argues that his cross examination should not be disclosed to the Court, or to the Crown, or indeed to other defence counsel, because it involves disclosing the defence hand before the trial. He submits that the law as is set out in *Metu v R* [2016] NZCA 124 should be adopted, with the result that he should be free to frame his questions as he chooses, on the day, with the presiding Judge's powers being limited to allowing or disallowing any individual question, after it has been asked, with an articulated reason or reasons being given for each ruling.

[15] This trial involves children aged 10, 11 and 12. They are required to be cross examined by four defence counsel in respect of traumatic events allegedly occurring some 14 months or so prior to trial. I am not persuaded that there is any merit in Mr Owers' objection to providing written cross examination questions to the Court in advance of the trial. I have a number of reasons for reaching that conclusion.

[16] The statutory matrix in which a Judge carries out the role of overseer and umpire in respect of cross examination is currently expressed in s 85 of the Evidence Act 2006. It reads:

> **85 Unacceptable questions**
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> (1) In any proceeding, the Judge may disallow, or direct that a witness is not obliged to answer, any question that the Judge considers improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand.
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> (2) Without limiting the matters that the Judge may take into account for the purposes of subsection (1), the Judge may have regard to—
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> (a) the age or maturity of the witness; and
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> (b) any physical, intellectual, psychological, or psychiatric impairment of the witness; and
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> (c) the linguistic or cultural background or religious beliefs of the witness; and
>
> (d) the nature of the proceeding; and
>
> (e) in the case of a hypothetical question, whether the hypothesis has been or will be proved by other evidence in the proceeding.

[17] Having regard to the age and immaturity of these witnesses, and the traumatic nature of the alleged behaviour giving rise to this proceeding, it will be absolutely necessary for defence counsel to be extremely careful and considerate of the complainants' respective ages and language abilities when crafting questions in cross examination. It will also be necessary for them to ensure that the questions are as simple and as clear as possible, without negatives or interrogative tags.

[18] The circumstances here, involving three child complainants and four defendants, require that each question be properly reduced in form and content, sufficiently so as to allow the essential factual contest in relation to each charge to be put squarely to each witness, without any element of suggestion of the answer. To be competently done, that task will likely require the entirety of the cross examination to be written out in advance in any event. If that task has been undertaken, there can be no legitimate reason why the presiding Judge cannot peruse and consider the questions in advance of the trial, and require any necessary changes to the questions.

[19] Whilst the provision of written cross examination questions to the Court for review in advance may be novel in New Zealand jurisprudence, the vast array of international research on the topic has persuaded the judiciary in England and Wales, and in Australia, that vulnerable witnesses, including children, require substantial protection from the rigours of unfettered cross examination.[1] Judges in those jurisdictions have recognised the necessity for all practical means to be employed to ensure, as far as possible, that the evidence obtained from vulnerable witnesses is accurate and reliable. The underlying principle was recently recognised in New Zealand in *R v Hetherington* [2015] NZCA 248 where it was held that:[2]

> ...a fair trial requires fairness towards both the defendant and the complainant, and this requires the complainant to be able to communicate in a way which best presents his or her evidence to the jury.

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[1] See E Henderson "All the proper protections - the Court of Appeal rewrites the rules for the cross-examination of vulnerable witnesses" [2014] Crim LR 93 and E Henderson "Best evidence or best interests? What does the case law say about the function of criminal cross examination?" (2016) 20 International Journal of Evidence & Proof 183.

[2] *R v Hetherington* [2015] NZCA 248 at [22].

[20] The English Appellate Courts have recognised that it is necessary for the processes of the Court, and Counsel's forensic techniques, to be adapted to meet the needs of the witness, in order that the vulnerable witness be afforded a fair opportunity to give their evidence; see *R v Barker*;[3] also *R v Lubemba*.[4] To that end, best practise in England and Wales, and in my view, in New Zealand, now requires that a ground rules hearing should precede every trial involving children or other vulnerable witnesses.

[21] The steps required to meet the needs of different vulnerable witness will necessarily vary, but a requirement for the provision in advance of written questions in cross examination has been expressly approved in *R v Lubemba* [2014] EWCA 2064:[5]

> So as to avoid any unfortunate misunderstanding at trial, it would be an entirely reasonable step for a judge at the ground rules hearing to invite defence advocates to reduce their questions to writing in advance.

[22] The provision of full written questions for cross examination to the Court and the Crown at a Ground Rules hearing is now completely uncontroversial in England. Given an undertaking from Crown Counsel not to discuss the questions with the witnesses, the English Courts have been unable to discern any potential injustice or derogation from fair trial rights in following that course. It is difficult to see how there could be any material difference in fair trial considerations between New Zealand and England.

[23] Confrontation of an accuser has long been regarded as an integral feature of the cross-examiner's task. The forensic value of such confrontation with children has been comprehensively re-examined in a series of cases in the English Appellate Courts, from *Barker* to *Lubemba* (and more), with the result that counsel's duty to confront a child in cross-examination has in many cases been watered down or removed entirely.

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[3] See *R v Barker* [2010] EWCA Crim 4 at [42]: "Forensic techniques of the advocate[s] (in particular in relation to cross examination) or the processes of the court … have to be adapted to enable the child to give the best evidence of which he or she is capable".
[4] See *R v Lubemba* [2014] EWCA Crim 2064.
[5] *R v Lubemba* [2014] EWCA Crim 2064 at [43].

[24] Putting each detail of the defence case to a child or vulnerable witness is no longer required, unless the challenge will be meaningful and productive of a response which is reliable. Accusations of lying, the putting of other witnesses' proposed testimony, and the eliciting of background information which can be obtained from other reliable witnesses, are no longer seen as a requirement for cross examination, and have been recognised to be substantially counter-productive to a search for the truth.

[25] Particularly with child witnesses, untagged questions have been acknowledged as best practise when eliciting children's evidence, rigorously excluding questions which contain a statement of the answer sought, particularly in cross examination. The rationale for that stance lies in avoiding misunderstandings. Comprehensibility is the first requirement of any question, but is not by itself enough. The danger that a child witness may agree with a proposition simply to please the adult questioner is substantial. In *R v Edwards* [2011] EWCA Crim 3028, the Court of Appeal of England and Wales recognised the danger that is posed with child witnesses, pointing out that:[6]

> the reality ... is that a direct challenge that he or she is wrong or lying could lead to confusion and worse, to capitulation ... experience ... has shown that young children are scared of disagreeing with a mature adult whom they do not wish to confront.

[26] Provided only that the defence is given an appropriate opportunity to put those matters before the jury, or the Judge in Judge Alone Trials, accusations of lying, other confrontational questions, and the eliciting of background material from child witnesses will often have limited value. In the statutory terms applicable to veracity under s 37 of the Evidence Act 2006, such questioning may well fail to produce "substantially helpful" evidence. In *Barker,* the logical conclusion of this approach was enunciated thus:[7]

> [T]he advocate may have to forego much of the kind of contemporary cross examination which consists of no more than comment on matters which will be before the jury in any event from different sources.

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[6] *R v Edwards* [2011] EWCA Crim 3028 at [28].
[7] *R v Barker* [2010] EWCA Crim 4 at [42].

[27] In the nature of this case, which involves allegations of violence and physical abuse, allegedly perpetrated by close family members, there can be no doubt that pre-teenage children would find unfettered cross examination by four separate defence counsel a very substantial ordeal. From a practical point of view, unless the questions are tightly controlled, there is highly likely to be needless repetition, with a high probability of judicial intervention, and the prospect of confusion for child witnesses looms unacceptably large. An average of 25 questions from each Counsel will produce at least 100 questions in cross examination, a rather daunting prospect for a child.

[28] The available defences to charges of this kind are limited to essentially three options. Firstly, it may be suggested that the violence and physical abuse did not occur. Secondly, it may be the defence case that even if some or all of the violence and physical abuse did occur, one or more of these individual defendants may have been mis-identified as the perpetrator. A third line of defence relates to the witnesses individual conduct, in that it may be suggested that one or more of these witnesses has colluded with others to concoct a story, and the evidence of such witnesses is thus not reliable.

[29] Such matters can easily be addressed by putting simple questions in the following form; "Did Grandma drag you by the hair to your room?", and "Are you sure it was Grandma?". "Did Aunty drag you by the hair?". "Did you talk to your brother about being dragged by the hair?", "Did you talk to your sister about being dragged by the hair?", "Did he/she tell you what to say?" "Are you sure?"

[30] Beyond questions of that nature to the relevant witness in relation to each charge, the evidential value of confrontational questions, and questions to elicit background detail from these child witnesses is hard to discern. Proper signposting will help, as will economy of questioning where a topic has been covered by other defence counsel. In my view, the task of reducing a cross examination to writing is an essential requirement in this case, and there is much to be gained in savings of time, effort, and avoidance of confusion if that task is undertaken by Counsel, and reviewed by the trial Judge before the hearing. I am not aware of any risk to a fair trial if that process is undertaken.

[31] I accordingly direct that all defence counsel file written cross-examination questions by 5 pm on 3 March 2017. I will hear counsel on the issue of disclosure of the questions to the Crown as a pre-trial matter on the morning of trial, when I will also raise the question of Counsel and myself meeting the complainants before they commence their viva voce evidence.

T R Ingram
District Court Judge