IN THE HIGH COURT OF THE COOK ISLANDS **CR NO'S 599-601/2016**
HELD AT RAROTONGA
(CRIMINAL DIVISION)

CROWN

v

NGATAMARIKI KATUKE and TOUMITI KATUKE

Date of hearing: 25 April 2017 (2.05pm to 2.55pm NZT via Skype)

Counsel: Ms A Mills and Ms T Koteka for the Crown
Mr N George for the Defendants

Date of Judgment: 27 April 2017

DECISION OF HUGH WILLIAMS, CJ
(on the Crown's Pre-Trial Applications)

Charges

[1] Currently both Defendants have been charged that between 1 January to 4 February 2016 with intent to injure Miimetua Rongo Katuke, they jointly did injure Miimetua Rongo Katuke by hitting him around the head (representative charge). Ngatamariki Katuke is also charged that between the same dates with intent to injure Miimetua Rongo Katuke he did injure him by kicking him (representative charge).

[2] At the hearing on 24 April 2017 the Crown advised that it was intending to amend the phrase "hitting him around the head" in the joint charge to "assaulting him around the head".

[3] The Crown is also considering amending the joint charge to a charge against each of the accused separately and will advise Defence counsel as soon as possible if it intends to proceed to amend the charge in that respect.

Applications

[4] On 12 April 2017 the Crown applied for:

a) Orders for the admission in evidence of the previous convictions for assault on the same complainant of each accused together with the Summaries of Fact in relation to those offences; and

b) Directions as to the manner in which the evidence of the complainant be given in Court and as to how he is to be cross-examined.

[5] The Defence agreed with the relevance of evidence of previous assaults by the accused on the complainant but submitted the evidence should be given by the witnesses in relation to those assaults, not by production of certificates of conviction and the Summaries of Fact.

[6] By the time of the hearing there was a large measure of agreement on the directions to be given in relation to the evidence of the complainant and his cross-examination. These are referred to later in this Judgment.

Factual background

[7] As outlined by the Crown, the complainant in this case is 35 years of age and has a severe intellectual disability. He has never been diagnosed with any specific condition but the senior medical officer on Atiu where these offences are alleged to have occurred, describes him as having always been physically fit but being "very slow intellectually". The senior medical officer, Nurse Tangatapoto, has known the complainant all her life and is familiar with him personally and professionally. The complainant cannot read or write, needs assistance with money and day to day living and, she says, is likely to forget things and confuse recall of time and dates. Ms Tangatapoto is concerned about the complainant's ability to give evidence in the unfamiliar and intimidating environment of the Court.

[8] In addition to his intellectual handicap, the complainant's eyesight deteriorated in 2016 and he currently has very limited vision in one eye and is functionally almost blind.

[9] The Crown's case is that until the complainant's grandmother's death in July 2012 he was well cared for and had no history of falls, injuries or accidents but in 2013 the two accused moved into his home where Ngatamariki Katuke assaulted him following which the complainant moved in with his aunty, Nurse Teina Windy. He subsequently returned to his family home with the accused in mid-2014 and in September 2015 further assaults on the complainant were notified to the police and he was treated in hospital.

Previous convictions

[10] Ngatamariki Katuke was charged with assaulting the complainant on 7 August 2013 on Atiu and was convicted on that count on 29 August 2013. The material before the Court does not give details of the penalty (and it should not be given in evidence before the jury).

[11] The Summary of Facts on which Ngatamariki Katuke was convicted show that on 7 August 2013 the complainant refused to listen to his uncle, the accused, and he was grabbed, punched in his left eye and in his left ear. A later examination by a medical officer showing the complainant's left eye was seriously swollen and he was bruised. The accused admitted the assault to the police.

[12] On 30 September 2015 the Summary of Facts in relation to the assault conviction against Toumiti Katuke shows that when her 3 year old complained of being smacked by the complainant the accused became frustrated and angry at the complainant's silence when questioned about the smacking and was then punched with a right clenched fist on the face. On 30 September the complainant was medically examined which showed a bruise on his right eye with minor cuts on the eyelids and the right side of his neck. Despite the plea, the Summary of Facts was not marked as being "accepted" and Toumiti Katuke has not yet been sentenced as the sentencing has been held up pending disposal of the present charges.

[13] There is no basis to delay a sentencing in circumstances such as that and the accused, Toumiti Katuke, should by now have been sentenced on the assault charge to which she pleaded guilty.

[14] It is evidence of these two convictions that the Crown wishes to adduce at this trial together with the Summaries of Fact.

[15] The Crown filed full and helpful submissions on its various applications but because of the large measure of agreement between the Crown and Defence no detailed review of those submissions is required.

[16] It is sufficient to say that under ss 3 and 4 of the Evidence Act 1968 the Court has a discretionary power admitting and rejecting evidence while s 15 provides for previous convictions being proved by a Registrar's Certificate. Previous conviction evidence or similar fact evidence which has been admitted as an evidentiary exception ever since *Makin v Attorney General for New South Wales*[1]. Over time the test became to balance the probative value of the evidence against its prejudicial effect while avoiding evidence of general propensity or bad character[2]. Such evidence has been permitted in the Cook Islands and the test was set out in *R v Benioni*[3].

[17] It is undoubtedly not competent for the prosecution to adduce evidence down to or to rebut a defence which would otherwise be open to the accused.

[18] Relevance is tested by posing the question as to whether the similar fact evidence logically tends to prove a fact or facts in issue[4].

[19] The Evidence Act 2006 (NZ) has partially codified the law on similar fact and leads to an inquiry into the frequency with which the acts, subject to the evidence, have occurred, the connection in time between them and the extent of similarity balanced against whether the evidence is likely to unfairly predispose the fact finder against the accused or will give disproportionate weight to the conviction.

[20] For the Crown, Ms Mills pointed in Ngatamariki Katuke's case to the identity of the complainant, the similarity in the assaults and the physical injuries, the location of the assaults and the reasons given for it (not listening or doing as requested) and what was submitted to be a relative closeness in time. Ms Mills submitted that any potential prejudice to Ngatamariki Katuke would be minimised if the notice of conviction and the Summary of Facts is admitted rather than re-litigating the charge. She also submitted that the convictions

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[1] [1894] AC 57
[2] R v Holtz [2003] 1 NZLR 667
[3] HC Rarotonga, CA 18/16, 480/16, 7 March 2017, Williams CJ
[4] R v Bull, CA NZ 313/03, 17 November 2003

would assist the jury in deciding whether what the Crown speculated were to be the likely defences - accident or that the accused were not the authors of the complainant's injuries - were credible[5].

[21] Largely the same similarities were submitted as applying to the charge against Toumiti Katuke,

[22] She also submitted that this evidence will form part of the overall narrative of the case where nurses, police, welfare officers and others involved who were also involved in the accused earlier offending will refer to it in their evidence.

[23] Assuming that the principal defences will be that the complainant's injuries are not the result of assaults by the accused but the result of clumsiness and accidents stemming from his visual and intellectual impediments or that if those defences are rejected, the accused are not the authors of the disabilities, the similarities in the previous offending on which the Crown relies are cogent as a means of assisting the jury to decide whether the Crown can prove its case on the current charges. It is also considered that production of both Summaries of Fact and the certificate of conviction of Ngatamariki Katuke together with an appropriate direction from the Judge are the best ways of minimising the prejudice possibly stemming from the production of that evidence.

[24] Put another way, though Mr George for the accused said the Summaries of Fact are challenged, it remains the case that Ngatamariki Katuke has been sentenced on the basis of the Summary of Facts and is accordingly bound by its terms. Toumiti Katuke has not as yet been sentenced but she has pleaded guilty on the basis of the Summary of Facts and must accordingly be taken as accepting its terms.

[25] To refuse the Crown's application - so that the Crown must effectively retry the assault matters against both accused - risks the circumstances of those offences diverting the jury's attention from the current charges, and it is against the interest of justice for persons who have been convicted on the basis of agreed Summaries of Fact then to challenge their convictions other than by means specifically directed to that end. Further, allowing this

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[5] This was the Crown's speculation as to the likely defences, speculation which was largely confirmed during this hearing.

evidence in may be seen as not against the accuseds' interests since effectively re-trying the earlier incidents risks the possibility of worse circumstances than those in the Summarties of Facts being disclosed.

[26] The Crown's applications are accordingly granted with the evidence either to be given by the officer in charge of the case as part of his evidence-in-chief or read (and the exhibit produced) by the Registrar or, if the trial judge so directs, being given by way of evidence in rebuttal following the Defence case. The former is probably preferable as minimising the impact of the production of the certificate of conviction and Summaries of Fact and as enabling those convictions to be put in cross-examination to the accused who have indicated an intention to give evidence. Despite this decision, a final decision is, however, a matter for the trial judge.

Complainant's evidence

[27] As a result of discussion at the hearing it was largely agreed that, given the complainant's illiteracy and almost total functional blindness, the preferable course to put the complainant's evidence-in-chief before the jury is for the Registrar to read the transcripts of each of his two video-taped interviews to the jury and for the complainant to confirm the same[6]. The transcripts are going to be read in Maori and English.

[28] The evidence of the complainant and the accused will need translation from the Atiuan dialect into English (or into Manihikian for Toumiti Katuke). It is agreed that the Deputy Registrar should fill the role of translator.

[29] To protect against questions being asked which the complainant will have difficulty understanding or which are too complex or too technical, it is agreed that both counsel will question or pose their questions in English and that, before the question is translated, there will be a sufficient pause for the opposing counsel to object if they consider the form of the question unfair and for the Judge, if necessary, to rule. This will have the unfortunate effect of lengthening the trial but there seems no other way to ensuring that the evidence which is

[6] That is subject to one agreed excision in the second transcript where the interviewing officer speaks with the support person.

put before the jury enables the complainant to give the evidence which will be most helpful to the jury in reaching its verdicts.

[30] There may be difficulties in asking the complainant to look at documents or photographs but this is a matter which can be dealt with during the trial.

[31] Unless any juror prefers them to be in Cook Islands Maori, the opening and closing addresses and the summing up will not need translation.

[32] The Crown suggested that, before the trial, the translator should be able to discuss her evidence with the ophthalmologist so he can explain technical terms to the jury.

[33] The application is refused. This is no different from any other technical evidence given to the jury; it is the role of counsel to ensure that technical terms are explained, whether by a translator or direct, in a way which assists the jury to understand.

[34] The Crown proposed that a support person sit with the complainant whilst giving his evidence and suggested his aunt with whom he lives, Teina Windy, fulfil that role.

[35] There was objection on the basis that there was animosity between the support person and the accused and that it would be put to her that it was she who suggested much of the complainant's evidence to him.

[36] As the support person, the aunt must, of course, be advised that she is to play no part during the complainant's evidence beyond sitting alongside him.

[37] This is a case which is likely to depend on credibility and there are likely to be orders for exclusion of the witnesses. The difficult position in which the aunt would otherwise be put is resolved by accepting the Crown's proposal that the aunt be the Crown's first witness.

Other matters

[38] The Defence indicated it may consult a local doctor to give evidence on whether or not the complainant's injuries are likely to be accidental. Any report from the doctor must be given to the Crown in sufficient time to enable them to consult another doctor for comment.

[39] As noted, the accused's current instructions to counsel are that both of them will give evidence.

[40] Mr George advised that he has information that the complainant has a history of smoking cannabis. He intends to put that to the witness. Its relevance is that some of the complainant's accidents occurred when he was "high" on the drug. On that basis, the questions can be put, though the complainant needs to be warned as to this likely line of cross-examination.

[41] The Crown will endeavour to obtain the complainant's complete medical records and disclose those as soon as possible to the defence.

Hugh Williams, CJ