



COURT OF APPEAL OF NEW ZEALAND

M (CA335/2011) v THE QUEEN

[2011] NZCA 303

CASE SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest

<http://www.courtsofnz.govt.nz/from/decisions/judgments.html>

In a judgment released on 9 August 2011, the Court of Appeal considered two appeals relating to the jurisdiction of trial courts to order pre-trial cross-examination of complainants.

The Crown Solicitor at Auckland has been concerned to reduce delay in getting child sex cases to trial. Delay can cause stress to complainants and, particularly where child complainants are concerned, they may forget details relevant to the alleged offending. The Crown Solicitor formed the view that the Evidence Act 2006 permitted cross-examination to be undertaken in advance of trial if there were good reasons for doing so. He has applied in numerous cases for order to that effect in the High Court and District Court, sometimes successfully.

The appeals were from two decisions on applications for pre-trial cross-examination orders. In one case the order was granted, in the other it was refused. The appeals were heard together because they were effectively test cases on whether trial courts have jurisdiction to make orders for pre-trial cross-examination and, if so, how that jurisdiction should be exercised.

The Court held that any evidence, including evidence given in cross-examination, may be given in an alternative way, including by a video record made before the hearing of the proceeding. That was clear on the plain wording of sections 103 and 105 of the Evidence Act 2006.

The Court noted that subsections (3) and (4) of s 103 give guidance as to how the power to order pre-trial cross-examination should be exercised. It declined to indicate how the factors listed in s 103(4) should be weighed, saying that if the statutory words require elucidation, that will have to come on a case by case basis.

However, the Court did find that certain considerations were obvious in the criminal context. First, s 367 of the Crimes Act will bear on the exercise of the power as part of the need to ensure that there is a fair trial.

Secondly, a judge should be very slow to order pre-trial cross-examination in the absence of clear evidence that full disclosure under the Criminal Disclosure Act 2008 has taken place.

Thirdly, the sole advantage of obtaining an order for pre-trial cross-examination is to avoid delay in completing the complainant's evidence. That must be weighed against the disadvantages, including overall increased use of court resources, higher legal fees (as counsel will need to prepare for trial twice) and, potentially, increased delay in resolution for the accused (as the rationale for giving priority to cases involving child complainants would no longer exist).

Fourthly, defence counsel would lose the ability to tailor his or her cross-examination depending on the jury's reaction to the evidence as it is being given.

Fifthly, it would become more difficult for the jury to ask questions of the witness, as he or she would have to be recalled.

Finally, complainants could end up giving evidence twice if new matters come to light shortly before trial.

In light of those considerations, the Court said that orders for pre-trial cross-examination will only be appropriate in rare circumstances. In general, completing cross-examination of child complainants in advance is not in itself the answer to the problem.

The Court considered both of the appeals and found that neither case was appropriate for an order for pre-trial cross-examination.