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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

T.108/84

426

THE QUEEN

v.

JOHN EDWARD YOUNG

Hearing: 3, 4, 5, 6, 7 and 17 December, 1984.

Counsel: D. Percy for Crown.
G. Jenkins for Accused.

Judgment: 17 December, 1984.

JUDGMENT OF VAUTIER, J.

This is a trial before a Judge alone of an indictment presented against the accused John Edward Young. At the close of the case for the prosecution the accused remained charged only on Counts 1, 2, 3, 4, 5, 6, 13, 14, 15, 16, 17, 28 and 29 of the indictment as presented, he having been discharged in terms of s.374(3) in respect of all the remaining counts. It should be mentioned also that Counts 3 and 4, 14 and 15, 16 and 17 and 28 and 29 were respectively presented by the Crown as in the alternative only.

The accused not having given evidence or called evidence the verdict in respect of the various charges requires a consideration of whether the prosecution by the evidence it has presented has discharged the burden of proof resting upon it to satisfy the Court beyond reasonable doubt that the charges or one or more of them each looked at individually in the light only of the evidence relevant to such charge have been established.

In considering the evidence it is necessary for me to take account of certain other matters of law, two of which matters it is convenient to mention at this stage. In respect of all the counts for consideration, apart from the first four, the Crown relies to a substantial extent upon the evidence of a witness, Charlie Tua, who was at material times either doing work on a voluntary basis in the funeral house operated by the accused through a company called Young's Funeral Services Limited, or was employed by that company. This witness in the course of his evidence admitted that he had under instructions from the accused adopted and put into effect practices of the same kind as those which are the subject of certain of the charges. The situation presented is such that whether or not in the particular circumstances this witness could actually be said to be particeps criminis, the Court should not in my view proceed on any other basis than that he is to be regarded as in the position of an accomplice and, of course, this aspect is exemplified in the fact that between the time of the giving of evidence in the District Court on the taking of depositions and the date of the trial, namely on 22 November, 1984, the witness in question has been granted an immunity from prosecution by the Solicitor-General in respect of any charge of committing or being a party to offences of the kind here charged upon the usual conditions of his giving truthful evidence on the matters before the Court and not refusing to answer any question concerned with them. The situation thus requires the Court to be particularly conscious of the danger of relying in any way upon the evidence of Mr Tua to found a conviction unless that evidence is corroborated in the sense which the law requires in such circumstances, even though the Court, if fully satisfied that his evidence is

reliable, may, without such corroboration, place reliance upon it. In addition, of course, the Court must clearly view the evidence of Tua with very great caution for the further reason that he is a person to whom immunity from prosecution has been granted.

I turn now to the individual charges: The first is that the accused on 13 November, 1983, wilfully attempted to pervert the course of justice by councealing records relating to his business at Young's Funeral Services Limited, 114 Church Street, Onehunga. I say at once that I am satisfied that the accused on that day took away the five large cartons of records from the premises in question and left them at the house in Mt. Albert. This indeed was not disputed on behalf of the accused. I am satisfied, also, from the evidence of Mr Porter that this was done in haste and that it was done following the accused having read the newspaper article referring to investigations by the police into allegations of the type of conduct referred to in some of the charges having occurred in Auckland. I find myself unable to accept as a reasonable hypothesis Mr Jenkins' suggestion that because of the evidence of the witness Forde as to the accused's proposed stay at this house and his taking a cockatoo there, the removal of these records could have been simply incidental to his taking up residence in the house in this way. I accept the evidence of Detective McSweeney as to the accused having admitted hiding the index book to the records under the seat of a hearse after reading the newspaper article referred to and as to his disposing of the records because he thought it would only be a matter of time before the police came to get them. Further, there is of course the evidence showing

that the accused falsely maintained that the records had all been destroyed. All these matters looked at cumulatively dispel completely in my view any reasonable possibility that there was no criminal intent involved in the removal and concealment of the records.

As is pointed out in Adams Criminal Law & Practice in New Zealand, s.117(d) of the Crimes Act is unique in the Act in that in s.117(a) and (b) and other sections referring to attempts the word is used in relation to acts which are themselves made penal. In dealing with an offence charged in words which were to just the same effect as s.117(d) the Court of Appeal in England held that the gist of the offence was conduct which was intended and had a tendency to lead to a miscarriage of justice regardless of whether or not a miscarriage of justice actually occurred. The law is stated also in these terms in Archbold Criminal Pleading Evidence and Practice, 41st Ed. at p.1858 where it is also mentioned that it has been held in a decision in England that before such a charge as this can be laid a course of justice must have been embarked upon in the sense that proceedings of some kind or investigations were in being. The case referred to is now reported - Selvage and Anor. [1982] 1 All ER 96.

I am satisfied that the elements which must thus I conclude be shown to exist were present here. The evidence of Mr McSweeney which was unchallenged in any way on this matter showed that the accused, when first interviewed with regard to the matters put to him regarding the bodies of the children referred to in the second and subsequent counts said:

"You try to prove that rubbish. There is no evidence... both the bodies and the records have been burnt."

I, as I have said, find the accused knew that there was a police investigation under way which involved him when he took the records away from the funeral house. I further conclude that the records were taken away with the intention on the part of the accused of preventing or at least impeding any proper investigation into individual cases with which the present charges are concerned. The remark to which I have just referred makes it clear that the accused was well aware of the importance as regards the proof of any charges against him of the records being able to be investigated and produced. The use made of these records in the course of the trial demonstrates their importance. On the day following that on which the accused claimed to have destroyed all the records, the records were produced by the accused but it is not necessary, as the case of R. v. Machin [1980] 3 All ER 151 shows, for it to be proved that the course of justice actually has been perverted or that the conduct relied upon should be assessed in terms of proximity to an ultimate offence. To this extent, as has been pointed out, the use of the word "attempt" in the section is somewhat misleading. There was here, I find, interference with the proper investigation of the matter and the initiation of proceedings in that the police were constrained, as they did, to charge the accused with destroying records and thereby attempting to pervert the course of justice and their investigation into the matters was delayed, albeit only for a short time. Immediate or very speedy investigation is of course in nearly all cases essential if all available evidence is to be obtained once the suspect is aware that he is likely to be charged.

Turning to the evidence relating to count 2, that of obtaining moneys by a false pretence, the Crown relies here upon the evidence of the father of the children and of Mrs Moran, together of course with all the evidence relating to or indicating what actually happened as regards the cremation of the bodies of these two children. Mrs MOran referred to the accused asking the father if he was going to be present at the funeral and getting a negative answer and to his assuring the father that his babies would get a proper funeral service. The father himself, of course, could not recall speaking to or seeing the accused at all either when he went to the funeral house to give instructions or when he returned two days or so later to pay the account.

For the prosecution it was submitted that Mrs Moran's evidence on this aspect should be accepted and the conflicting evidence of the father attributed to his natural state of distress at the time and his wish to be with his wife as quickly as possible because of her very upset state. For the accused it was suggested that Mrs Moran's evidence was deliberately fabricated insofar as she spoke of the accused taking part in the conversation and reference was made to the father referring to Mrs Moran as saying to him just what she said the accused had said to the father. It was suggested that she had a grudge against the accused because of her dismissal from her employment with the company.

I must say that Mrs MOran impressed me as being a truthful and reliable witness. I find insufficient grounds for rejecting any of her evidence in the fact of the incon-

sistency as regards the father's evidence or the suggested enmity against the accused. It is clearly to be inferred in my view from the evidence that the father was told on his first visit what the cost of the funeral for the babies would be. The accused in my view must certainly, I conclude, have been brought into the matter at this stage for the purposes of fixing the charge to be made and letting the father know then and there what this was. All the evidence including the evidence which I accept as to the completion of the various documentation by the accused, as to his personally placing the bodies in the casket with the body of another deceased and taking this casket personally to the crematorium indicates his involvement at every stage with what was done as regards the bodies of the two infants. The inquiry as to the father's possible presence at the crematorium was clearly, I conclude, a safeguard against any question being directed by him to any person other than the accused at the crematorijm which might reveal to the father that the crematorium staff had been told nothing concerning these infants. There was, I find, a representation by the accused made to the father which amounts to a promise that there would be a proper funeral for the bodies of his babies which promise the accused did not intend to perform. There is the evidence as to the statement made to Detective McSweeney indicating the adoption by the accused of a practice of disposing of the bodies of infants where the circumstances were similar in the same way as all the evidence shows in my view was done as regards the childrens' bodies, the subject of this charge.

There is further evidence of a confirmatory nature in the evidence of the crematorium attendant as to his seeing a

child's body in a casket for which the accused was the funeral director. This is, in some degree, confirmatory of the practice of which the witness Tua also spoke and which accorded with what Mrs Moran said was done in the case of the two babies' bodies.

The money was certainly paid over I find to Mrs Moran to be treated in the same way as any other payment for the cost of a funeral. It is clear, I find, from the evidence of the clerk at the crematorium that the burial certificate which I accept was completed and signed by the accused, was falsified in that no service of any kind was held for these babies. The fact that a promise made is not fulfilled cannot, of course, be taken as evidence of an intention not to fulfil such promise. Here, however, everything points to an intention right from the outset to dispose of these bodies in this way and obtain by this artifice a fee for a funeral which did not take place and was never intended to take place.

The detailed particulars set forth in the charge, that is that there would be a simple service and a proper cremation, are, I think, properly to be inferred from all the evidence. The so-called arrangement sheets which were filled in to record the nature of the instructions received and the service to be performed clearly contemplate that the minimum by way of service in the sense of what is done immediately prior to a cremation is the pronouncement of words of committal of the human remains. The service overall provided by any funeral director in the absence of an officiating minister of religion would, I conclude, provide for at least that, as well of course as provision of a casket of some kind for the separate cremation

of the body and for the proper recording by the crematorium management of that having been done. It is clear here, of course, that none of these things was provided.

As to the obtaining of the money, I would accept that Mrs Moran acted solely as an employee and agent to receive the money and that it was handed over by her in accordance with the usual practice to the accused. That it was received on behalf of the company operated by the accused does not in my view in the circumstances here presented operate to relieve the accused from criminal responsibility. I reach this conclusion applying the principles laid down in R. v. Grubb [1915] 2 KB 683 which were adopted by our Court of Appeal in R. v. Prast [1975] 2 NZLR 248 at p.252.

I turn then to Counts 3 and 4. I accept the evidence indicating that the bodies here in question were simply put in the casket with one or other of the two bodies which the accused caused to be cremated on that same day, namely those of Kate Alexander Stacey and Albert Victor Lupton, and cremated with that body. That I think is the only logical inference that can be drawn from the evidence and I draw this inference.

The only question remaining as to Count 3 therefore, is as to whether this constituted offering an indignity to these human remains and so constituted an offence in terms of s.150(b) of the Crimes Act 1961. The President of the Funeral Directors' Association of New Zealand, when asked to comment on a practice such as that which I find was adopted in this instance said he would consider that unethical conduct of a high degree. The

accused himself, according to the evidence of Mr McSweeney, claimed that the practice was that commonly adopted by other funeral directing firms. There was no other evidence whatever which supported any such contention. Mr Jenkins for the accused pointed out that membership of the Association referred to is not obligatory in any way, that evidence was not provided by the prosecution as to the practice actually adopted by other firms in Auckland and that standards may differ in different parts of the country. The evidence of Mr Niness certainly does no more than provide an indication of the view of other funeral directors as to the propriety of what is here under consideration. The matter must clearly be treated by me as a question of fact for the Court's decision just as is the question of what is or is not indecent in relation to an assault on the person of another. I have no hesitation at all in saying that I conclude that to cremate a child's body along with that of some person unrelated in any way to the child by placing it in a casket containing such other human body is offering an indignity to the dead body of the child. The human race from the beginning of recorded history has generally been in the habit of treating the bodies of its dead with respect and reverence. Every religion, so far as I am aware, has over the centuries been concerned about such matters. Most people in this country today in my view would be shocked by such a practice and regard it with abhorrence or at least as quite unacceptable. I find it to constitute the offering of an indignity within the meaning of the statutory provision.

I do not therefore find it necessary to go on to consider the question as to neglect of a duty dealt with by

count 4 or any other aspect of that count. This is the count framed in terms of s.150(a) of the Crimes Act.

There are next to be considered the series of charges remaining which all relate to the alleged failure of the accused to replace human internal organs with the bodies from which they came for the purposes of the burial or cremation of such bodies or the placing in the caskets containing human bodies the internal organs of other persons placed in viscera bags in accordance with usual post-mortem examination practice.

As earlier mentioned, in relation to such charges the prosecution relies particularly as regards the identification of the particular human body referred to in the individual charge in each case with the actions alleged to have been committed by the accused as regards that body upon the evidence of the witness Mr Tua. Mr Jenkins on behalf of the accused has submitted that the evidence of this witness should be rejected by the Court entirely as unreliable and certainly as evidence of such a kind as could not be said to demonstrate beyond reasonable doubt that what he asserted in his evidence did in fact occur. He relied particularly on the contention that the evidence of the embalmer and funeral director from New Plymouth, Mr Head, showed the evidence of Mr Tua to be not simply mistaken but blatantly untrue as he, Mr Jenkins, expressed it. He referred to instances in which there had been demonstrated to be a variance between what the witness had said at the taking of depositions and what he said at the trial and in particular relied upon the explanation given by the witness as to one such variation that he had, to quote his words, "changed a few things

around" when giving evidence previously, "so that he would not be prosecuted, but now I have immunity I am able to say things as they really were."

In view of the position in which this witness stood I was of course particularly concerned with an appraisement of the reliability of his evidence as he was giving it and I have, on re-reading all the evidence during the adjournment, closely considered the matters of its reliability afresh. The fact of it being demonstrated that he has said something inconsistent when giving evidence previously on oath is a factor additional to those already referred to for consideration in assessing the extent to which his evidence can safely be treated as reliable.

It is necessary for me to remind myself that the evidence of this witness was directed to two different matters - the first that of the alleged leaving out from bodies when buried or cremated of the organs contained within a viscera bag and the placing of such organs in caskets containing the body of another person and, second, the identity of the persons in respect of whose bodies such things were allegedly done. As regards the first matter, there was I find evidence fulfilling the requirements of corroborative evidence, that is to say independent evidence tending to confirm that such things were done and that it was the accused who did them. That evidence in my view is properly to be regarded as corroborative evidence of the witness Tua and as corroborative evidence which may be taken into account in relation to his evidence as to these particular charges. There is in this category the evidence of the young trainee who did work in the funeral parlour between May, 1981

and January, 1983 who said that twice during the period of his employment he saw the accused fail to return viscera to the body from which the organs came and instead placed those organs in a bag into the casket of an unrelated person. He thought this occurred in mid-1982 which is quite close to the time when one of the instances to which Mr Tua specifically referred was said to have occurred. He also referred to precisely the same kind of practice as that to which Mr Tua referred, namely that of selecting for the purpose a casket with a body which was to go to the crematorium on the day in question. The evidence of this witness as to these matters was not challenged in any way on behalf of the accused.

Then there was the evidence of Mr Pukeroa who must, I conclude, be regarded also as an independent witness. Mr Jenkins certainly made no attempt to suggest otherwise. There was no evidence of his being involved personally in doing anything of the nature to which the charges refer. He also deposed to having seen the accused omit to replace organs into a body and place them in another casket that was going for cremation or burial. Again, his evidence went unchallenged. Not amounting to corroborative evidence, but consistent with the evidence to which I have been referring is the evidence of Detective Sergeant Byrne as to the statements he said were made by the accused to him. I refer to those relating to the "problems with viscera" and the statement, "I did nothing like that many."

In that situation I return to consider the evidence upon which Mr Jenkins particularly relied, related to Count 13 and identification by Mr Tua of the casket containing the body

of that deceased as the one into which two viscera bags containing organs of other persons were placed.

After full consideration I find myself unable to conclude that the evidence of Mr Head demonstrated that the evidence of Mr Tua was false. Although the certificate described the polythene enclosing the body as sealed, it was made plain that the lid itself could be readily removed. The sealed on paper covering underneath the lid could equally of course be readily removed, as Mr Head agreed, as could also some of sawdust used for packing. Mr Head, when asked about the practicality of placing two viscera bags with the body of a deceased in an average sized casket confirmed that it could be done by anyone minded to do so. I find myself unable to attach any great significance to the fact that Mr Tua was in error in referring to the casket as lined with white material. The form of his answer indicated that he was really unsure on the point and, of course, it has to be remembered that the situation was one in which even a person engaged in the undertaking business might well avert his eyes as much as possible from the inside of this particular coffin. The witness in question at one point said, "I wasn't looking that hard."

I am mindful here, too, of the fact that in other instances where circumstances were brought to this witness's attention which made it appear that he might be connecting a particular incident with the wrong deceased, he readily admitted this and where he was not quite sure that he had the right name in the first place he said so at once. My assessment of him in the witnessbox was that he was at all times endeavouring to

give his evidence fairly and truthfully. I certainly detected no indication whatever of enmity towards the accused. On the contrary he impressed me as being a reluctant witness for the prosecution.

Bearing in mind all the factors to which I have referred, my conclusion is I should accept and act upon this witness's evidence in those cases where he evinced no doubt as to what he was saying being correct. This is, I find, the position as regards Count 13 already referred to and Counts 5 and 6 (viscera bag not replaced). I do not think there was any inconsistency here as regards a previous statement. Many witnesses in my experience will not volunteer information where no question has been put to them on the point and here, of course, the particular circumstances have to be kept in mind. This is also so, I find, the position as regards Count 14. As regards Counts 16 and 17 there is, I conclude a small element of doubt in that the viscera described as left out, although this appears unlikely, may have been those from another body. I must give the accused the benefit of this doubt.

As regards the final two Counts, 28 and 29, I am again left with a doubt by reason that the answer of the witness Tua to a question, although this may well not have been what he intended to convey, left a doubt as to whether he was conceding that nothing in fact had been done about removal of the internal organs in this case.

I say finally that it is my conclusion, for reasons to which I have already adverted, that it constituted the offer

of an indignity to a dead human body, both to bury or cremate that body with bodily organs thereof not replaced and to bury or include in the casket with that body the bodily organs of another person. Dr Tie referred to instances of which he was aware where the organs had been left out and the body simply packed with material. I conclude that he was here clearly referring only to the situation where organs are retained for medical or scientific purposes. This, of course, is expressly covered by the Human Tissue Act 1964 whereunder portions of bodies of deceased persons may be removed for anatomical examination for therapeutic purposes or for the purposes of medical education or research, subject of course to the conditions which are laid down in that statute.

The accused is accordingly found guilty by this Court in respect of Counts 1, 2 and 3 of the indictment. No verdict is necessary in respect of Count 4. He is found guilty on Count 5 and no verdict is necessary in respect of Count 6. He is found guilty on Counts 13 and 14. No verdict is necessary as regards Count 15. He is acquitted in respect of Counts 16 and 17 and also in respect of Counts 28 and 29. All counts of this indictment have now been dealt with by the Court.

The accused is accordingly convicted upon those counts upon which the Court has found him guilty, that is Counts 1, 2, 3, 5, 13 and 14. He is discharged in respect of those counts upon which he has now been acquitted, viz., Counts 16 and 17 and Counts 28 and 29.