IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

T 89/93

HIGH PRIORITY

THE QUEEN

v

P

Hearing: 14 May 1993

Counsel: K Raftery for the Crown
G N Bradford for the Accused

Judgment: 24 May 1993

RESERVED JUDGMENT OF HAMMOND J

INTRODUCTION

This application raises one short point of some practical importance: is the accused entitled to a trial before a Judge without a jury with respect to an offence of sexual violation? Because Mr Bradford was taken by surprise when the point was raised by the Crown, I gave both counsel seven days to file any further submissions they wished to make in writing. I said I would then dispose of the point. This I now proceed to do.

THE PROCEDURAL BACKGROUND

The accused is charged with sexual violation by unlawful sexual connection. He was committed, after depositions, for trial in this Court. On the 26th March 1993 Mr Bradford wrote to the Registrar at the High Court indicating that it was his understanding that the matter had been included for the criminal callover in the Auckland High Court on the 15th April 1993. Mr Bradford went on to say: "Pursuant to s.361B of the Crimes Act 1961 please take notice that the accused wishes to be tried before a Judge of the High Court without a jury."

The charge is a "middle band" one. On the 19th April 1993 Smellie J, having considered the file, ordered that the proceedings be transferred to the District Court at Auckland, pursuant to s.16A(a) of the Summary Proceedings Act 1957.

When the matter was called before Judge Kerr in the District Court at a callover in that Court on the 28th April 1993, the learned District Court Judge was advised that a trial by a Judge alone had been elected prior to the order for transfer. He then suggested to counsel that application would have to be made to the High Court to determine the Judge alone application.

On that same day Mr Bradford prepared and filed the relevant application for trial before a Judge without jury, stating as the grounds "that the accused has the right to be tried by a Judge without a jury pursuant to s.361B of the Crimes Act 1961." That is the formal application now before me.

I should mention that in argument I asked Mr Raftery whether any point was being taken by him that, the matter having been transferred to the District Court, I am now without jurisdiction to hear the present application. Mr Raftery expressly

did not take this objection. I think he was right not to do so. The transfer took place, inadvertently, before the right to a trial before a Judge without a jury had been considered. I have not considered whether I have power to vacate the transfer order, and if necessary, to make a further order after determining this matter. I heard no argument on that point, and did not request it. The learned District Court Judge clearly is of the view that there was a prior matter - that is, prior to the transfer to his jurisdiction - which should have been determined in this Court. Where something is not expressly covered by statute, a court has an inherent jurisdiction to regulate its own procedure. If need be, I rely upon that inherent jurisdiction to deal with the application I now have in front of me.

THE INSTANT PROBLEM

Section 361B(5) of the Crimes Act 1961 provides: "No-one shall be entitled to apply to be tried by a Judge without a jury if he is charged with an offence for which the maximum penalty is imprisonment for life or imprisonment for a term of 14 years or more." Under s.128B(1) of the same statute, "Everyone who commits sexual violation is liable to imprisonment for a term not exceeding 14 years."

Mr Raftery's point is that a Judge could, lawfully, impose a sentence of precisely 14 years on Mr Perks, if convicted. If so, he says that would fall squarely within s.361B(5) as being a term of "14 years".

It is very unlikely that such a sentence would be imposed. I have difficulty recalling having ever seen the maximum period imposed for sexual violation. But that of course is not the point. The point is a jurisdictional one and if Mr Raftery's point is well taken, it is fatal to the application now before me.

In the course of argument, I asked counsel to check whether there was anything in the Acts Interpretation Act 1924, or other enactments in New Zealand, which might bear on the definition of a "year".

Mr Bradford has properly drawn my attention to ***Police v Maindonald*** [1971] NZLR 417. The term "month" *is* defined in the Acts Interpretation Act as meaning "a calendar month" (s.4), and MacArthur J held that to mean that period "[ending] at midnight on the day in the ensuing month immediately preceding the day numerically corresponding to the commencing day" (citing ***Migotti v Colvill*** (1879) 2 CPD 233)(p.419, line 34). At common law, a month meant a "lunar month", though there are now many statutory and other exceptions. Indeed, I suspect (though a list was not compiled) that this is an instance of the exceptions swallowing the rule.

Counsel were not able to produce any common law authority as to the meaning of the term "year"; and the Acts Interpretation Act does not define the term. I have to say the lack of common law authority rather surprised me, but in the time available to me I have not really been able to go much beyond the researches of counsel, this being a relatively urgent application.

I did note ***Bishop of Petersborough v Catesby*** (1608) Cro Jac 166, which, as cited in Jowitts Dictionary of English Law (2nd ed Burke), apparently holds that "generally when a statute speaks of a year it must be considered as twelve calendar and not lunar months." (Vol 2, 1919). And, in ***R v Wormingall*** (6 M & S 350) Lord Ellenborough apparently held (in relation to a statute) that "a year is the time wherein the sun goes around his compass through the twelve signs, viz. 365 days and about 6 hours." (Cited in Strouds Judicial Dictionary, 5th ed, Vol 5, 2905).

And, "in each year" in a covenant has been held to mean in each calendar year: ***IRC v Hobhouse*** [1956] 1 WLR 1393.

The Shorter Oxford Dictionary, Vol 11, 2587, adopts as the primary meaning of the term, "the time occupied by the sun in its apparent passage through the signs of the zodiac; the period of the suns revolution round the sun, forming a natural unit of time (nearly = 365¼ days."

Mr Bradford's argument in this case was really by analogy: that in this case the term 14 years cannot mean more than 13 years 11 months plus the number of days in the month ending at midnight on the last day of that month. I decline to adopt the analogy to the "month" situation in face of the foregoing authorities.

As to previous authority under s.361B of the Crimes Act, the point was not squarely dealt with in ***R v Narain*** [1988] 1 NZLR 580. In that case an accused faced counts of kidnapping, injuring with intent, assault, and cruelty to a child. The accused applied for a hearing before a Judge without a jury in respect of those counts other than kidnapping (which carries a possible maximum of 14 years). Heron J said, "application is made to have all those counts where the maximum penalty is less than 14 years imprisonment heard before a Judge without a jury pursuant to s.361B." (p.581, line 45). But it is clear that it was accepted by the (senior) counsel in that case, and the Judge, that the result here contended for by the Crown must follow: Heron J said, "The eight kidnapping charges *must* go to a jury." (p.589, line 5)(my italics).

There is an oral ruling of Williams J in ***R v Maguire*** (High Court, Auckland, T 267/90, 8 December 1992) in which the learned Judge accepted the proposition contended for by the Crown in this case. He said: "It is plain that

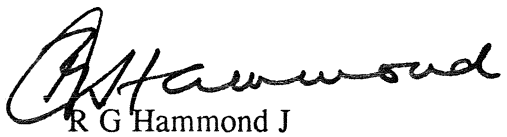
Parliament has decreed that in charges at a higher level of seriousness such as sexual violation there must be a trial by jury. Doubtless this is because the jury system has the advantage of bringing into the courtroom representatives of the community and the belief is that that is the best way to ensure justice is done in relation to the most serious offences." (p.3).

Williams J noted that he did not accept there would be bias or preconception in a jury trial, but that if able to do so, he would have granted an order "simply to meet the defendant's preference."

As to the doctrinal point, I share the (implicit) view of Heron J, and the (explicit) views of Williams J. There is no jurisdiction to grant a trial before a Judge without a jury with respect to a charge of sexual violation. The result of the juxtaposition ss.128B(1) and 361B(5) is unequivocal.

As to the policy point, I also share Williams J's viewpoint. It may be that the right of an accused to select the mode of trial ought to be wider in relation to this (and perhaps other) offences. And there is much to be said for the notion that an accused should have the fundamental right to be tried in that forum which fits her sense of where justice to her will best be done. However, that is a matter which is foreclosed by the present terms of the Crimes Act. It is a matter which could usefully be debated on a review of the statute.

The application for a trial before a Judge without a jury is dismissed.



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