MEDIUM PRIORITY

NZLR

3/9

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

T. 12/92

Name Suppressed

1432

QUEEN

v

M

Hearing: 3 August 1993

Counsel: Mr R. Kee for Applicant
Mr M. Woolford for Crown

Judgment: 10 August 1993.

JUDGMENT OF BLANCHARD J.

I heard this application for a permanent stay of proceedings, or alternatively a discharge under s.347 of the Crimes Act 1961, on the afternoon prior to the day fixed for commencement of Mr Mead's retrial. I made an order that the charge against the applicant be permanently stayed and indicated that I would shortly give my reasons in writing, which I now do.

The applicant was charged with raping a niece of his wife as long ago as 22 January 1977. The complainant, who was 13 in 1977, did not go to the police until almost 14 years after the alleged rape. The applicant was not interviewed until 31 May 1991. The original information was sworn on 4 July 1991. No application of the present kind having been made, a High Court trial took place on 18 June 1992 when the applicant was found guilty of the rape by a jury. His appeal to the Court of Appeal was initially heard on 24 November 1992. It was then adjourned to 16 February 1993 for further evidence and judgment of that Court allowing the appeal, setting aside the conviction and sentence and ordering a new trial, was delivered on 26 May of this year. If the retrial had proceeded on 4 August it would have been some 16 years 7 months after the date of the alleged offence. It is worth emphasising that the Crown alleged a single offence. Unlike many of the relatively numerous cases of sexual offending committed long ago against young relatives and now emerging before the Courts, there has been no suggestion of continuing offending of which the charge brought is merely a specimen.

Evidence was given at the first trial of complaint being made by the complainant to certain of her relatives not long after the alleged incident but, as I have indicated, the matter was not then put in the hands of the police. The defence contends that the whole story is a fabrication and that there has been a vendetta against the applicant and his immediate family by some of their relatives who were the witnesses for the prosecution.

The application is made on two bases. First, it relies upon the inherent jurisdiction of the Court to grant relief where its processes are being abused by the bringing or continuance of a prosecution. Secondly,

the applicant seeks an order under s.347. Mr Kee agreed, when I put it to him, that it seemed most unlikely that there would be circumstances in which the Court, having found that there was no abuse of process, would nevertheless, upon essentially the same material and same grounds, make an order for discharge under s.347, particularly as an order under the section is not appealable. Furthermore, a determination by the Court that there has been an abuse of process simply means that there cannot, for some reason, be a fair trial, or that the administration of justice may be brought into disrepute if the prosecution is to proceed. The determination is not one of guilt or innocence, as is made when a Court considers that a properly directed jury could not convict. An order under s.347(3) is then appropriate. A discharge under that provision is deemed to be an acquittal: s.347(4). In contrast, in the present case, I have made no decision about whether a jury at the retrial might convict or acquit the applicant on the basis of the evidence to be put before it. My determination is that there cannot in the circumstances be a fair retrial.

The jurisdiction which I have exercised in this case is one reserved for exceptional circumstances where the applicant is able to show on the balance of probabilities that owing to delay he or she will suffer serious prejudice to the extent that no fair trial can be held: dictum of Lord Lane CJ in ***Attorney General's Reference (No. 1 of 1990)*** [1992] QB 630, 644, approved by the Privy Council in ***Attorney General of Hong Kong v Wai-bun*** [1993] 3 WLR 242, 246. The jurisdiction must be exercised with great caution because it involves intrusion by the judiciary into a decision making process reserved for the executive branch of government. Brennan J. said ***Jago v District Court of New South Wales*** (1989) 168 CLR 23, 39 that "the clear division between the executive power to present an indictment and the

judicial power to hear and determine proceedings founded on the indictment" must be preserved. He went on:

> "That division is of great constitutional importance. It ensures that the function of bringing alleged offenders to justice is reposed entirely in the hands of the executive branch of government who must answer politically for the decisions which they make - not only decisions to prosecute in particular cases but decisions relating to the commitment of resources to the detection, investigation and prosecution of crime generally. These are decisions which courts are ill-equipped to make and, so far as they relate to the commitment of resources, powerless to enforce. The division of powers in the administration of the criminal law between the executive and judicial branches of government also ensures that the courts do not become concerned by matters extraneous to the fair determination of the issues arising on the indictment and are thus left free to hear and determine charges of criminal offences impartially."

Nevertheless, in this country as well as in other parts of the Commonwealth, it is well established that a Court may occasionally intervene to protect the integrity of its own processes. The New Zealand Court of Appeal has played an important role in the recognition of the jurisdiction, particularly in the judgments delivered in ***Moevao v Department of Labour*** [1980] 1 NZLR 464. At p.481 in that case Richardson J. said:

> "It is not the purpose of the criminal law to punish the guilty at all costs. It is not that that end may justify whatever means may have been adopted. There are two related aspects of the public interest which bear on this. The first is that the public interest in the due administration of justice necessarily extends to ensuring that the court's processes are used fairly by State and citizen alike. And the due administration of justice is a continuous process, not confined to the determination of the particular case. It follows that in exercising its inherent jurisdiction the Court is protecting its ability to function as a Court of law in the future as in the case before it. This leads on to the second aspect of the public interest which is in the maintenance of public confidence in the administration of justice. It is contrary to the public interst to allow that confidence to be eroded by a concern that the Court's processes may lend themselves to oppression and injustice."

And at p.482 the learned Judge also remarked:

> "The justification for staying a prosecution is that the court is obliged to take that extreme step in order to protect its own processes from abuse. It does so in order to prevent the criminal processes from being used for purposes alien to the administration of criminal justice under law. It may intervene in this way if it concludes from the conduct of the prosecutor in relation to the prosecution that the Court processes are being employed for ulterior purposes or in such a way (for

> example, through multiple or successive proceedings) as to cause improper vexation and oppression. The yardstick is not simply fairness to the particular accused. It is not whether the initiation and continuation of the particular process seems in the circumstances to be unfair to him. That may be an important consideration. But the focus is on the misuse of the Court process by those responsible for law enforcement. It is whether the continuation of the prosecution is inconsistent with the recognised purposes of the administration of criminal justice and so constitutes an abuse of the process of the Court."

Moevao was not, however, a case involving delay in the reporting of an alleged offence to a law enforcement agency. Where the unfairness arises from delay on the part of the complainant the focus must be on that factor rather than on the conduct of the prosecutor. But the unfairness to the accused, arising from the complainant's delay, still must be such as to be inconsistent with the processes of justice.

It should be stressed that the concern of the Court is not with delay alone, no matter how long that delay may have been and no matter whether it is delay on the part of the complainant or delay on the part of the prosecutor, or a combination of both. The common law has never provided a guarantee of speedy trial, as is demonstrated in the judgments of the members of the High Court of Australia in ***Jago***, holding that there is no right at common law to a speedy trial separate from a right to a fair trial. No such guarantee of a speedy trial is to be derived from the statement in Magna Carta that "[w]e will sell to no man, we will not deny or defer to any man either justice or right." (25 Edward 1 (1297) c29, preserved as part of New Zealand law by the First Schedule to the Imperial Laws Application Act 1988.) The dictum to the contrary in ***Watson v Clarke*** (1988) [1990] 1 NZLR 715, 722 was written without benefit of the research done by the members of the High Court of Australia.

Of recent origin there is s.25(b) of the New Zealand Bill of Rights Act 1990, conferring on everyone who is *charged* with an offence, the minimum right to be tried "without undue delay". However, the delay there being referred to would seem to be restricted to delay following the bringing of a charge. In the present case there has been no unfair, or even unusual, delay by the prosecution. The first trial took place only a little more than a year and a half after the complaint and at a time when the Courts were struggling to keep up with the influx of criminal work. As will be seen, the need for a retrial has nothing to do with the conduct of the prosecution at the first trial. Nor is any delay in the determination of the appeal something to be laid at the door of the prosecution. It is most unfortunate that the applicant was in custody for nearly a year but that circumstance cannot constitute unfairness of the kind with which this judgment is concerned, namely unfairness at trial.

In his judgment in ***R v Pullin*** (unreported, Whangarei Registry, 24 June 1991, T.38/90), from which I have derived much assistance, Tompkins J. points out that the Crimes Act 1961 provides no time limitation for the commencement of indictable proceedings:

> "So the legislature has, presumably deliberately and as a matter of policy, determined that the passing of no specific period of time shall itself be a bar to the proceedings. This really emphasizes that the effect of delay and whether it is of sufficient significance to justify the Court's intervention, must be assessed in the light of the circumstances of the case, and in particular the nature of the charges, the nature of the evidence relied upon, the length of the delay and the situation of the accused. In the end, the Court will need to determine, after consideration of these and any other relevant factors, whether the effect of the delay is such as to prevent, or at least prejudice, the possibility of a fair trial."

In that case there had been delay in relation to the various complaints of between 10 and 20 years. Of particular significance was material deterioration in the 12 months prior to the application in the

accused's medical condition because of brain damage. His memory was possibly impaired, significantly affecting his ability to defend the charges. There were also other factors, not of relevance here, which I do not mention. Tompkins J. stressed that no one factor would have led to a real risk that the fairness of the accused's trial would be impaired - not even the exceptionally long period of 20 years in relation to one of the complainants. But when all the factors were considered together, the learned Judge felt it was inescapable that a fair trial might have been impaired. A stay was entered on all charges.

In ***R v Mason*** (unreported, Christchurch Registry, 24 May 1991, T.16/91) Fraser J. said:

> "Delay on the part of a complainant may be an abuse of process but I do not think it is merely a matter of the length of time involved. All the circumstances require to be considered including the nature of the charges, the age of the complainant, the reasons for not acting earlier, the nature of the defence, the extent and degree of any prejudice which does or might result from the length of time and any particular prejudice which might arise in other respects. The essence of an abuse of process is that the procedure of the Court is itself being wrongfully made use of. To succeed in an argument in that respect it seems to me to be necessary to go beyond the proposition that because of the passage of time witnesses' memories will have dimmed and evidence as to particular acts and events will be unreliable. That seems to me in most circumstances at least, to be a question for the tribunal of fact."

Five specific matters of prejudice were put forward by the present applicant. The first was "presumptive prejudice", by which was meant prejudice resulting merely from the admission of evidence. It was said that the delay was so long that the applicant "cannot confidently know how prejudiced by delay he truly is". Although the Court of Appeal has said that it is possible that there could be a case in which allegations of sexual misconduct are so vague or relate to a time so long ago, without justification for the delay, that it would be unfair to place an accused on trial

upon them (***R v Accused*** (CA160/92)) [1993] 1 NZLR 385), the evidence given against the accused at the first trial was (as in that case and in ***R v Accused*** (CA260/92) [1993] 2 NZLR 286) quite vivid and detailed and tied in to a specific event - a family wedding - so that the accused could be expected to have a fair idea about the circumstances in which it is said he raped his niece. A specific date is given in the indictment. Counsel could be expected to draw to the attention of the jury the probability that the memories of witnesses will to some extent have been clouded by the passage of time and in this way, in the ordinary processes of trial, any presumptive prejudice could be taken into account.

The second matter relates to the unavailability of two witnesses. It is said for the applicant that a Mr Hopkins, now deceased, could have given evidence relating to the applicant's vehicle, in which the rape is alleged to have occurred, that would have significantly undermined the prosecution evidence. It is said that he could have given evidence that the vehicle was not driveable on the day of the alleged offence. Mr Hopkins was a workmate of the applicant who had towed the car home for him a day or so before the date of the alleged offence and would have known that the radiator of the vehicle had been damaged in an accident.

The other unavailable witness would have been a Mr Richards, then a Ministry of Transport officer, who was boarding with the applicant and his wife at the time of the alleged offence. Affidavit evidence has been given of attempts to find Mr Richards, including advertisements in the New Zealand Herald. It is submitted that Mr Richards could have given evidence that the complainant, contrary to her story, did not stay with the applicant and his family on the weekend in question and could also have confirmed

that the applicant's car was not driven until the day following the alleged rape. He could also, it is said, have given evidence contradicting certain statements by other prosecution witnesses.

It obviously is a matter of speculation whether these witnesses, if they were available, could recollect the weekend in question and whether, in that event, their evidence would have come out in the way now suggested. All that can be said is that there is a possibility that evidence from these people might have raised a reasonable doubt in the minds of the jury about the applicant's guilt.

The next matter is the one which, in the circumstances, carries, I think, the most weight. It is necessary at this point to explain why the Court of Appeal overturned the result of the first trial. It did so because it felt there was a credible claim that, because of deficiencies in the way in which the defence was conducted on behalf of the applicant, there had been a miscarriage of justice in that the accused was deprived of the opportunity of having his only substantial defence put to the jury. The defence is, in essence, that the claim of rape is a fabrication invented long after 1977, being part of a series of lying allegations brought against the applicant by his wife's family. The major perpetrator has been named as being the wife's sister, the complainant's foster mother, who was a prosecution witness at the first trial. The defence at the retrial would want to put forward evidence about this family feud and to attack the prosecution witnesses as liars. But the applicant has a prior conviction for rape in 1981. The Court of Appeal commented:

> "Hence any attack on the complainant's character implicit in the suggestion that she had fabricated her story as part of the family feud would almost certainly lead

> to the accused having to disclose that conviction, should he give evidence. That problem would not arise, however, if only the appellant's wife gave evidence about the feud."

For reasons explored in the Court of Appeal judgment neither the applicant nor his wife gave evidence at the first trial. In concluding that there might have been a miscarriage of justice the Court of Appeal said:

> "Although the complainant appears to have been a credible witness, these events happened some 15 years before trial. It must be realistically accepted that the appellant would have been disadvantaged by not giving evidence denying the rape; nevertheless, testimony from his wife about the antagonism between the two families and the harassment by the complainant's relations could have left the jury with a reasonable doubt."

However, it is unfortunately the case, according to affidavits from the wife, her general practitioner and a qualified psychiatrist, that the wife is now suffering from a psychiatric condition which would make it very difficult for her to give evidence at the retrial in any satisfactory way. The psychiatrist deposes that she suffers from -

> " a dissociative disorder which means she suffers from a disturbance or alteration in the normally integrated functions of identity, memory or consciousness. ... [S]he still disassociates when under stress. When this occurs she appears to "go blank" and/or have memory lapses (amnesic episodes) which are due not to any organic state. Under stress she simply cannot remember things that she would but for her condition."

In the opinion of the psychiatrist she is not capable of giving evidence in the High Court in relation to her husband's case. Grave concern is also expressed about the traumatic effect that being required to give evidence would have on her mental and physical wellbeing.

It appears that the applicant's wife might well have been able to give evidence at the time of the first trial but that her condition has deteriorated since then. She herself feels that the attacks made by her relatives have worn her down. In her affidavit she says that if she were

able to give evidence she would be able to say that the complainant did not come to the house on 22 January 1977 "nor on any other occasion in that period in time" and that her husband's car was undriveable on that day. She also says that her family have waged a vendetta against her and the applicant and that the likely evidence of the prosecution witnesses is false.

Mr Woolford, for the Crown, argued that since the deterioration in the wife's condition occurred after the first trial and the Crown has not been at fault in relation to the time which has elapsed since the first trial, it was inappropriate to treat the existence of the wife's medical condition as a matter giving rise to unfairness amounting to abuse of process. However, if the evidence concerning the wife's medical condition as set out in the affidavits is accepted, and it has not really been challenged by the Crown, there may well have been prejudice to the applicant caused by the very long delay before trial and especially by the delay on the part of the complainant. The particular difficulty would not, of course, been present until the applicant's earlier conviction occurred in 1981 but certainly between 1981 and the time of the first trial - a period of about 11 years - the wife would have been able to give evidence for the defence. About nine years elapsed between 1981 and the date on which the alleged rape of the complainant was reported by her to the police. There may have been good reason for her delay but, as matters have worked out, it has very likely resulted in abnormal prejudice to the applicant's defence case.

The applicant's counsel, as the next matter of prejudice, mentioned the fact that the applicant had been in custody for about a year and that "his loved ones had been subjected to a stressful trial". I do not see these factors as having any present relevance.

Lastly, prejudice was said to derive from the existence of the alleged vendetta being waged against the applicant and his wife by members of her family. It was said that with the lapse of time the adult members of the complainant's family have had the opportunity over many years to taint her attitude towards the applicant and her recollection of events. In support of this proposition an affidavit by the applicant's daughter has been filed. She says she has been aware for a number of years of hatred existing between her mother's brothers and sisters directed at her mother and father and she alleges that in 1990, totally without justification, they made a complaint to the Department of Social Welfare that her father had been sexually abusing her. On the contrary, she says, he has never touched her improperly. This may show that her mother's family are prepared to make unjustifiable allegations against the applicant, but what the daughter says in her affidavit is not, in my opinion, relevant to the question of whether or not there has been substantial prejudice caused by delay. Her evidence about the alleged vendetta is available.

After hearing argument I was, however, satisfied that the onset of the wife's psychiatric condition and the possibility that the applicant has been deprived of the opportunity of calling defence evidence from the two witnesses who are unavailable, have so added to the obvious problem that witnesses will be giving evidence about a matter which happened a very long time ago, that a further trial of the applicant upon the charge of rape would now be unfair. For the reasons mentioned, the applicant now may be unable to have a substantial defence considered by the jury.

I therefore have ordered that the charge against the accused be stayed. Publication of names or particulars of identity is prohibited in terms of s.139 of the Criminal Justice Act 1985.

Peter Barnett J.

Solicitors: D.C.S. Reid, Parnell, for Applicant
Crown Solicitor, Auckland for Crown

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