NAME SUPPRESSION

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

27/10

T 44/94

MEDIUM PRIORITY

1428

IN THE MATTER of the Crimes Act 1908

AND

IN THE MATTER of charges brought against J alleging offences against Section 212 of the Crimes Act 1908

BETWEEN J

Applicant

AND THE NEW ZEALAND POLICE

Respondent

Hearing: 8 September 1995

Counsel: H H Roose for the Applicant
R G Douch for the Respondent

Judgment: 11 October 1995

Reserved decision delivered 10-10 95

M.G. CROSS

RESERVED JUDGMENT OF HAMMOND J

2/12.

SOLICITORS:

Boot & Roose (Hamilton) for the Applicant
Crown Solicitor (Hamilton) for the Respondent

INTRODUCTION

This is an application for a stay of criminal proceedings on the grounds of abuse of process. The accused ("J") is 79 years of age. His wife ("W") is now 81. J is charged with nine counts of rape against four adopted daughters, they being the children of the first marriage of his wife. Some of the counts extend as far back as 1 January 1948, now nearly 50 years ago. So far as counsel's researches extend, this may be a somewhat dubious "record" for longevity of charges of this kind in this country. The application has, however, unusual features and can only be determined on the facts of this particular case.

FACTS

The complainants are the natural daughters of W by her first marriage. J and W married in April 1948. At that time W and the four complainants came to J's home to live with him. The eldest girl would then have been ten; the youngest six; the other two between those ages. J has been predominantly engaged in farming or related activities in one form or another in and around the Te Awamutu and Cambridge areas during his working life.

The Crown case is that between 1 January 1948 and 31 December 1961 J systematically preyed on the four complainants - all now, of course, are middle-aged women - and had sexual intercourse with all of them in varying circumstances over a period of years.

J first appeared in the Hamilton District Court on 1 July 1994. He was remanded on bail for depositions on 1 August 1994. At that time he faced four charges of rape - one with respect to each girl. Presumably at that stage all were really of a representative character.

J's counsel applied to the District Court for a stay of proceedings as long ago now as 15 August 1994. By consent, that application was left over until after depositions. There then followed some interlocutory skirmishing, apparently over rights of cross-examination at depositions. A September 1994 hearing on that issue resulted in a reserved judgment which was not delivered by a District Court Judge until 1 December 1994. On that date also the depositions proceeded by hand-up depositions. J was committed to this Court for trial. The draft indictment alleges nine counts of rape laid under s 212 of the Crimes Act 1908. As a matter of convenience, the draft indictment is annexed to this judgment as Schedule A.

In March 1995 a fresh application for a stay was lodged in this Court, supported by an affidavit to which I will shortly return. That application was, according to the Court file, listed for hearing on 28 June 1995 before Penlington J. But for some reason that hearing went off. Whatever the reason was, the delay has been unfortunate. Given the history of this matter, to have a stay application on the grounds of abuse of process in effect lying fallow in this Registry for a period of six months is something that should not, with respect, be allowed to reoccur. That matter has been drawn to the attention of the Executive Judge.

In any event, I return to the facts. This is a case in which there is a compelling Crown case (of at least unlawful sexual connection) against the accused. Quite apart from the depositions evidence of the four complainants, on 29 June 1994 the accused gave a statement at the Cambridge Police Station. At the middle of p 6 of such he was asked:

> Q. In your words, Mr John, what acts did you carry out with your four daughters?
> A. What are the allegations?
> Q. Each of the four women has stated that you have engaged in full sexual intercourse, with each of them, over a prolonged period of time.
> A. That is correct.
> Q. What do you understand by the term sexual intercourse?
> A. There is really only one way to have intercourse isn't there.

Q. Which way is that?
A. Between a male and a female, the male organ penetrating the female.

And at p 7:

Q. Did you engage in sexual intercourse with your four stepdaughters?
A. Yes.

And at p 11:

Q. All of the girls are consistent in saying that they all resisted you and never had sex willingly. What do you say to that?
A. That is not entirely correct.
Q. What is correct?
A. None of them ever resisted me, if they had said no it probably wouldn't happen.
Q. They say that they did say no, every time.
A. That's not correct.

And at p 12:

Q. Why did you have sex with your wife's daughters?
A. That's something I can't answer. That's something I have regretted for a long time.

In his affidavit in the application now before me, J has deposed:

> In my statement to the Police I admitted that I had sex with each of the girls over a period of time. I did not have sex with them all at the same time and due to the length of time since it all happened I cannot remember the specific details of the occasions when I am said to have had sex with the girls. It may have started when they were each about 13 of 14 or it may have been later than that. Having read each of the girls statements there are a number of incidents which each of them refer to separately which I cannot remember and some which I definitely deny. I deny that I ever threatened any of the girls at any time when I had sex with them and I deny that the girls resisted me. They never cried or seemed upset when we did it. (p 7, para 29).

I interpolate here to say that even if the accused's statements to the police were not admissible against him - and he now apparently has some complaints about the police method of proceeding - para 29 is freely attested to and sworn to in the proceedings now before me. Clearly that affidavit would be admissible evidence against him at his trial. The hard fact of this matter is therefore that J has admitted - on oath - to (unlawful) sex with each of the complainants when they

were very young. But in the present application he has - given his affidavit - thrown himself on the mercy of this Court and seeks to have any proceedings against him stayed in their entirety solely on the ground of the elapse of time.

APPLICABLE LEGAL PRINCIPLES AS TO STAY

The law on this subject has been canvassed in a number of judgments of the Court of Appeal, and this Court. There is no statutory limitation period in proceedings of this kind. The doctrine of abuse of process is one invoked by our Courts only to protect the integrity of the Court's own processes. The modern doctrine had its genesis as long ago as the judgment of Lord Devlin in ***Connelly v DPP*** [1964] 2 All ER 401. His Lordship there said:

> Have [the Courts] not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The Courts cannot contemplate for a moment the transference to the executive of the responsibility for seeing that the process of law is not abused. (p 442).

But that is not to say that abuse of process is some vague "fairness" principle: in the context of applications such as the present there is now a well defined corpus of jurisprudence. Such was recently summarised by Fisher J in ***R v Doe*** (High Court, Auckland, T 79/95, 31 August 1995) as follows:

> The Court has both inherent (***Moevao v Department of Labour*** [1980] 1 NZLR 464, 481, 482 (CA); ***Department of Social Welfare v Stewart*** [1990] 1 NZLR 697, 702) and statutory (s 347 of the Crimes Act) powers to discharge an accused where delay has been such that proceedings would amount to an abuse of process or would preclude a fair trial. Abuse of process is limited to inexcusable delay by authorities once a complaint has been brought to their attention as distinct from delay by a complainant: *ibid*, ***S v R*** (T 6/93) (1994) 12 CRNZ 78. Where abuse of process in that form is established, the fact that the prosecution may have a strong case and that there is evidence of an admission by the defence will not preclude a stay: ***C v R*** [1994] 2 NZLR 621, 628. But if the ground upon which the defence relies is that the total lapse of time between the alleged offence and the trial will or might be prejudicial to the defence, and will thus preclude a fair trial, the apparent merits of the prosecution and defence cases may be taken into consideration: ***R v Accused (CA 260/92)*** [1993] 2 NZLR 286, 287, 288 (CA); ***S v R*** at p 81. In the latter situation the Court can have regard to such factors as the length of the delay, the justification for the delay, the strength and nature of the evidence for each party, the clarity and credibility of the complainant's evidence,

> whether there is an unequivocal denial from the accused and the nature and extent of the prejudice caused to the accused by the lapse of time. In some cases the delay may be so great that it will be reasonable to infer prejudice without proof of specific prejudice but this must depend on the particular circumstances of each case: ***R v Accused (CA 260/92)***. (p 2).

I am content to adopt that summary. I would add only this, in relation to "explanations" by complainants. Some Judges appear to have begun to utilise the language of civil limitation statutes in the context of these kinds of issues. For instance, in ***R v S*** (High Court, Christchurch, T 6/93, 15 April 1994) Holland J spoke of the delay of a complainant in making her complaint as being "inordinate and inexcusable". With respect, to pursue that language may well be to erect the very thing Parliament eschewed adopting: a limitations regime. That is not to say that the reasons for delay may not be relevant; but if it is to be suggested that there is some sort of burden on the complainant which has to be overcome, and that the test is anything like that noted, I would have respectfully to disagree.

COUNSEL'S ARGUMENTS IN THE INSTANT CASE

Mr Douch drew my attention to ***R v Accused*** [1993] 2 NZLR 286, and in particular to a passage at p 288 in the judgment of the President:

> Both the New Zealand Court of Appeal case and the English Divisional Court case recognise or are consistent with the view that where the period of delay is long, it can be legitimate for the Court to infer prejudice without proof of specific prejudice. Whether that inference should be drawn, or whether in all the circumstances of a particular case it is unfair to place the accused on trial, must depend on the particular circumstances.

Mr Douch said this is not a case of alleged fabrication. Sex with each complainant is admitted and there are representative charges. As to admissions, he drew my attention to a passage in the judgment of Holland J in ***R v S*** (*supra*) at p 6 in which His Honour stated that "if there was evidence of a clear admission fairly obtained I have difficulty in seeing how the extent of the delay without any other aggravating feature or complicity by the prosecution could result in a finding

of abuse of process, quite apart from the exercise of the discretion following such a finding." Mr Douch argued that in this case the only issue could be that of consent and, he said, that is always a credibility issue as between the complainants and the accused. He said such an issue does not have anything to do with fair trial issues.

As to why the matter had not been advanced, Mr Douch suggested such to be irrelevant in this case: as he put it, the Court just does not know (because it has no evidence at all on this) whether the complainants could just not be bothered; or whether they had "smouldered" (to use Mr Douch's term) for a long period of time. I note there is a suggestion in the affidavit of J that there had been a recent falling out between the accused and one of the complainants, and that these proceedings had then followed.

Mr Roose argued that there must be a point of time at which the justice system draws the line. He said there is a need for individualised justice and that these prosecutions relate to things "which were just too long ago". He argued that the lack of an indication as to the reasons for delay is highly relevant in this case. He said that "each complainant entered adulthood electing to remain silent" and that there is little or no information before the Court as to why they were silent.

He acknowledged that his client is in difficulty on the allegations that sex had occurred. He properly acknowledged that there were frank admissions. But he argued that there can be prejudice within an allegation even when the substance of the allegation - the sex - has been admitted. How, said Mr Roose, is the consent issue to be determined when the events are almost 50 years ago in some cases?

Mr Roose endeavoured to persuade me that this is a case in which - even if it is permitted to proceed further - the case against the accused should be restricted

to charges of unlawful sexual intercourse with each of the young complainants. Mr Roose did not specify precisely what charges he thought should be advanced, but argued that they should not be charges of rape.

THE RELEVANT LAW AS TO THE ALLEGED OFFENCES

Given that the proposed counts are under s 211 of the Crimes Act 1908, it is necessary to say something here about the law which would cover those counts, although no submissions were made to the Court on these matters.

The draft indictment alleges rape with respect to D between 1 January 1948 and 31 December 1954 - that is, a period when that complainant would have been just ten, through to about the age of sixteen years. The time-frame with respect to Je is 1 January 1948 to 31 December 1959 - thus when she was approximately eight to eighteen years of age. With respect to B, between 1 January 1951 and 31 December 1957 - approximately twelve and eighteen years of age. And with respect to R, between 1 January 1952 and 31 December 1961 - approximately ten and nineteen years of age.

On the law as it then stood, rape consisted in having carnal knowledge of a girl or woman without her consent. Consent (by the female) in that respect had the same meaning it has under the current statutory provisions relating to rape. But if the situation was such that the man believed that the girl consented then that would not be rape. The law on this latter point is now different: the accused's belief must now be based on reasonable grounds. Under s 212 of the Crimes Act 1908, everyone who commits rape is liable to imprisonment for life. Indeed, it was only under s 3(2) of the Crimes Amendment Act 1941 that a person committing this crime could avoid the possibility of being flogged or whipped once, twice or thrice

(depending on his age); and imprisonment "with hard labour" for this offence was not formally set aside until the passage of s 40(1) of the Criminal Justice Act 1954.

As to sexual charges less than rape, carnal knowledge of any girl under the age of ten years also attracted the possibility of imprisonment for life, consent being no defence. Carnal knowledge of any girl over twelve years and under the age of sixteen years rendered an accused liable to five years imprisonment. Significantly, subs (3) of s 216 provided that no prosecution for an offence under s 216 (defiling girls between twelve and sixteen) could be commenced more than twelve months after the commission of the offence. Indecent assault had no limitation period, but although the point was not raised or argued before me, this Court and the Court of Appeal appear not to have allowed charged of indecent assault to be laid where that assault consisted of an act of intercourse: ***R v Blight*** (1903) 22 NZLR 837 (CA); ***R v Potter*** (High Court, Auckland, T 234/91, 28 October 1992, Blanchard J); ***R v Hopkirk*** (High Court, Hamilton, T 49/92, 27 November 1992, Penlington J).

It is my appreciation that in the period covered by these charges it was also the practice to warn juries that it is dangerous to convict in cases of this kind upon the uncorroborated evidence of the complainant. Corroboration was evidence of some independent person swearing to some fact or facts which in a material degree confirmed the testimony requiring to be corroborated, and which indicates the commission of the crime alleged by the husband. Just how strict that requirement was can be appreciated from the decision of the Court of Appeal in ***R v Baynon & Pitama*** [1960] NZLR 1012, in which no less an authority on the criminal law than F B Adams J was held by the Court of Appeal to have erred and a new trial was ordered, *inter alia* on the grounds that: "Where corroboration of the complainant's story is required the jury should not only be told that there is corroboration but should have pointed out to them matters which might be regarded as corroboration." I have not turned my mind to whether in a trial today, a Judge

would be bound to apply the former corroboration rules - the now position is that under the Evidence Act 1908 (as amended) corroboration is not required.

Finally, the recognition of representative charges is a relatively recent matter: such would have been unheard of in the periods these offences are alleged to have been committed.

RESOLVING THE PRESENT APPLICATION

In a case such as the present there must be reluctance on the part of a court to allow an accused to escape criminal liability for recurring, admitted, acts of unlawful sexual intercourse with four young girls. The damage done to them and the extent to which their respective lives were blighted must be a matter of the utmost seriousness.

Notwithstanding those compelling concerns, I was initially attracted to Mr Roose's proposition that the justice of the case could be met by allowing lesser charges of unlawful sexual intercourse to be laid. Realistically, it appears that the bulk of the offending was between the time these complainants were ten and sixteen years of age. But during the course of argument neither counsel had drawn my attention to the time limitation for laying charges with respect to a girl between twelve and sixteen years. Such came to my attention only when I perused the legislation myself. And there are some alleged offences which may have fallen before a particular complainant was twelve and after the age of sixteen years. Indecency charges cannot be laid either. Thus, in hard practical terms, the choice facing the Court is between rape charges or no charges at all.

As to the alleged acts of intercourse, the deposition evidence of each of the complainants is quite specific; I have already set out the explicit admissions of the

accused. Of course, in the usual way a jury would have to be warned - very precisely in this case - that the jury could not treat the case on a "rolled up" basis: each count would have to be considered separately and on its own merits with respect to each complainant.

As to corroboration, if it was to be required, B claims to have seen J engaged in sexual intercourse with R near a swamp area. R claims that at one point of time she and Je discussed going to the Cambridge Police Station to tell the police what had been happening. She claims that the two girls "ran down to the home of two elderly sisters. We were going to ask them to take us into town. They refused to take us into town so we ran to a neighbour's place across the road. The family name there was Kelly. Mr Kelly did take us into town. We went to the Cambridge Police Station but no-one was there." She claimed they then went to see D, who was then working in a Cambridge milk bar. It is claimed that J then visited the girls and told them everything would be okay if they went home with him; they did so "but it was not the end of the abuse". It would be surprising if the "two elderly sisters" were still alive. There is nothing in the District Court depositions to indicate whether Mr Kelly is still alive. Whether an admission by an accused as to the act of sex amounted to, or could amount to, corroboration is not something on which I have any authority in front of me at this time.

In summary in this case, the length of the delay is as extreme as it would be possible to imagine; no justification for the delay is advanced; the fact of unlawful sex is admitted; the clarity and credibility of the complainants' evidence is solid; there are unequivocal admissions - on oath - of unlawful sex. The issue at trial would have to be whether a given complainant consented, or the accused honestly believed she consented, on the particular count. At the end of the day, that has to be a credibility issue. The passage of time of course has to have blunted both the complainant's recollection of the actual event, and her part in it. I have no

evidence from a qualified psychologist in front of me. Common sense suggests that the passage of so many, many years may well have reinforced in the complainants a view that none of the alleged events was in any wise of their making and that they did not consent. But there has to be force in Mr Douch's observation that at the end of the day those sorts of issues are jury issues, to be evaluated after hearing the complainants and, should he choose to give evidence, the accused.

If there had not been the kind of admissions there have been in this case, I would have had no hesitation in staying all of these counts. As it is, the matter has to give rise to extreme concern. But there is a middle ground which still protects the interests of both the accused and the complainants. That is the power which reposes in this Court under s 347 of the Crimes Act 1961 to take a case away from the jury. It may very well be that when all the evidence is in that this Court would take the view that there are a count or counts which, because of evidential difficulties, or of prejudice to the accused, should not go to the jury. The trial Judge will be in a much more satisfactory position to evaluate the matters then at issue than this Court presently is on the basis of the hand-up briefs advanced in the District Court.

In the result, I do not propose to stay these counts at this time. I think a wait-and-see approach is preferable.

It is for the Crown but, at least in the circumstances of this matter, the draft indictment may perhaps present something of overkill? Would it be sufficient to charge the initial act of alleged rape and perhaps one representative count thereafter with respect to each of the complainants? That may depend on whether there is any authority on the question of applying representative counts to very old causes.

It also has to be a matter of great concern that this trial has not advanced - admittedly because of the interlocutory matters - with anything like the dispatch it should have advanced. I propose to draw to the attention of the Executive Judge at Hamilton the unusual nature of this case and to urge that the earliest possible trial date be allocated. I apologise for my delay. I prepared a draft judgment shortly after the hearing. I felt it necessary to remind myself - at least in summary form - of the prior law; and had to find time to revisit such. I considered restoring the matter for further argument, but that also would have contributed further to the delays.

Application dismissed.

R G Hammond J

D R A F T

IN THE HIGH COURT AT HAMILTON

THE CROWN SOLICITOR AT HAMILTON CHARGES THAT:

Crimes Act 1908 S.212

(1) WALTER WILLIAM ANDREW JOHN between the 1st day of January 1948 and the 31st day of December 1954 at Rotorangi raped Dawn Patricia John also known as Dawn Patricia O'Connor. (Representative charge.)

THE SAID CROWN SOLICITOR FURTHER CHARGES THAT:

Crimes Act 1908 S.212

(2) WALTER WILLIAM ANDREW JOHN between the 1st day of January 1948 and the 31st day of December 1954 at Kairangi raped Dawn Patricia John also known as Dawn Patricia O'Connor.

THE SAID CROWN SOLICITOR FURTHER CHARGES THAT:

Crimes Act 1908 S.212

(3) WALTER WILLIAM ANDREW JOHN between the 1st day of January 1948 and the 31st day of December 1959 at Kairangi raped Jennifer Mary John also known as Jennifer Mary O'Connor. (Representative charge.)

THE SAID CROWN SOLICITOR FURTHER CHARGES THAT:

Crimes Act 1908 S.212

(4) WALTER WILLIAM ANDREW JOHN between the 1st day of January 1948 and the 31st day of December 1959 at Hautapu raped Jennifer Mary John also known as Jennifer Mary O'Connor. (Representative charge.)

THE SAID CROWN SOLICITOR FURTHER CHARGES THAT:

Crimes Act 1908 S.212

(5) WALTER WILLIAM ANDREW JOHN between the 1st day of January 1948 and the 31st day of December 1959 at Fencourt raped Jennifer Mary John also known as Jennifer Mary O'Connor. (Representative charge.)

THE SAID CROWN SOLICITOR FURTHER CHARGES THAT:

Crimes Act 1908 S.212

(6) WALTER WILLIAM ANDREW JOHN between the 1st day of January 1951 and the 31st day of December 1957 at Fencourt raped Beverly Frances John also known as Beverly Frances O'Connor. (Representative charge.)

THE SAID CROWN SOLICITOR FURTHER CHARGES THAT:

Crimes Act 1908 S.212

(7) WALTER WILLIAM ANDREW JOHN between the 1st day of January 1952 and the 31st day of December 1961 at Kairangi raped Rosalie Ann John also known as Rosalie Ann O'Connor. (Representative charge.)

THE SAID CROWN SOLICITOR FURTHER CHARGES THAT:

Crimes Act 1908 S.212

(8) WALTER WILLIAM ANDREW JOHN between the 1st day of January 1952 and the 31st day of December 1961 at Fencourt raped Rosalie Ann John also known as Rosalie Ann O'Connor. (Representative charge.)

THE SAID CROWN SOLICITOR FURTHER CHARGES THAT:

Crimes Act 1908 S.212

(9) WALTER WILLIAM ANDREW JOHN between the 1st day of January 1952 and the 31st day of December 1961 at Leamington raped Rosalie Ann John also known as Rosalie Ann O'Connor. (Representative charge.)