NZLR

NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
Order suppressing all names of parties and witnesses to ensure the effective protection of s 139 Criminal Justice Act 1985

T 54B/96

THE QUEEN

v

C

Hearing: 19 May 1997

Counsel: H D Lawry for Crown
B R Northwood for Accused

Judgment: 19 May 1997

ORAL JUDGMENT OF ROBERTSON J

Solicitors
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There are a series of interlocutory matters before the Court today relating to a trial which is scheduled to take place on Thursday next.

A brief chronology provides the necessary background.

Mr C was interviewed, arrested and made a first appearance in the District Court on 23 November 1995. The primary allegations against him related to sexual misconduct with his daughter. This included various offences including one as serious as rape.

There was a depositions hearing on 2 February 1996. Evidence was given by his daughter, her mother, a friend of hers W , a Doctor and a Police Officer.

At the first callover in the Auckland High Court in March 1996 the indictment presented contained four counts, all alleging activities relating to his daughter.

At a trial on 15 April 1996 there was a ruling that no evidence could be introduced concerning the allegations of misconduct towards W (the school friend of his daughter) which emerged in the

statement made Ms W The jury in that trial were unable to reach any verdicts.

To that point there had been a period of 4½ months from initial charge to trial. Such a commendable degree of despatch has through a variety of circumstances not been maintained.

Immediately after that first trial advice was given to the applicant's then counsel that the witness W now wished to make a complaint. On 16 May 1996 Mr C was arraigned on two charges relating to her.

It is now clear that it was within "official" knowledge by then that allegations of inappropriate conduct were also being made by another friend of his daughter, A Advice was given to Mr C s then counsel that at the hearing of the W charges, evidence would be led from Ms A of what was effectively similar fact material. There was no suggestion that A was then or ever would be a complainant.

There was an application for severance in respect of a cluster of offences relating to his daughter and what were then two offences relating to

Ms W That application was heard by me on 3 July 1996 and severance was granted.

Mr C faced a further trial with regard to the alleged offending against his daughter presided over by Hammond J in September 1996. That trial was aborted following a disclosure which breached the terms of orders about admissibility.

There was a further trial on 17 October 1996 before Morris J. The jury was unable to reach any verdicts in respect of the alleged offending relating to his daughter. In respect of those allegations a formal stay of proceedings was entered by the Solicitor-General in February 1997.

Meantime there was a trial before Temm J earlier in February 1997 into what had become one count concerning Ms W This trial was after the Solicitor-General had signed the stay on his daughter's charges but before its formal presentation. Evidence was led of similar fact activities with regard to Ms A That jury was unable to reach a verdict in respect of the complainant Ms W

There was then filed an application for discharge or stay of the W charge which was initially listed before me on 17 April 1997. A hearing

did not proceed that day because it had then emerged that there was a possibility that there would be a further charge laid against Mr C of indecent assault involving Ms A

There is before me today three separate applications. First an application filed by the Crown under s 345D for an order granting leave to file an amended indictment the effect of which would be to charge Mr C with one count of indecent assault against the complainant Ms W and one count of indecent assault with regard to the complainant Ms A

There is an application for discharge and/or stay in respect of any proceedings before the Court. Finally an application (as I suppose the final back-stop) for severance if there is more than one count before the Court.

As far as the application for leave to file the amended indictment is concerned, there is not vigorous opposition. I intend to grant it because it appears overwhelmingly clear that there is an urgent need to have before the Court all issues currently known to the authorities against Mr C and to have their future direction controlled. The simple reality is that if I refuse leave, it would be open to a prosecuting authority

to lay an information in the District Court on the basis of the available evidence concerning Ms A This long run of litigation will continue. In my judgment that is not in the interests of justice.

The issue is whether either or both of the counts now before the Court should be stayed. There can be no simple rules of thumb in this area because the interests of justice require individual assessments of individual cases. As far as the position of Ms W is concerned there has been one trial at which a jury was unable to reach a verdict. In the normal course of events one would anticipate that a retrial would be permitted. Mr N 's strong submission is that one has to look at the total reality of what has occurred here particularly the fact that Mr C has already faced four trials none of which has been conclusive.

The position with regard to Ms A 's allegation is that there has never been a trial in which a jury has been required to decide whether the allegation made against him is proved. This is a man who has consistently denied all allegations made against him. As far as Ms A is concerned the correspondence indicates (as was the initial position with Ms W) that she was willing to be a witness but did not wish to be a complainant. No reasons are proffered about the changing

perception of this woman. One would be naive not to suspect that this was at least influenced by the outcome or lack of outcome in respect of the daughter's allegations.

Mr Northwood submits that the Crown has known of the allegation of both of these women for a very substantial period of time. Counsel submits that it is for the Crown (not individual potential victims) to determine when and how proceedings should occur. He says that the cumulative effect of the time periods which have elapsed is that we have now reached the point where the Court should intervene. In my view the authorities are clear that stay is a step which the Court should take with great caution. There are many reasons why persons delay in making a complaint. The fundamental issue is always what the interests of justice require.

Mr Northwood's submission that I should look at the matter really in the round or from a distance has some attraction, but I am satisfied that the position of the complainants reveal some quite material differences.

Once the application for severance was granted in July 1996 (and bearing in mind the fact that the daughter's proceedings involved the more serious allegations) there was an inevitability, and in fact a logical

necessity, that there would be a period of delay in hearing the W charges. I do not see the delay up until April or May 1996 when the possibility of charges with the second complainant arose (and then formally emerged) as being sufficient to justify the Court's intervention. Therefore one assesses what is the effect of the subsequent period in which that charge (because in respect of Ms W it did go from two counts to one during the process) was effectively put on hold whilst the more serious matters were dealt with.

Ms A 's situation however is very different. What she was alleging and the possibility of it being a criminal activity was known, one assumes probably in November 1995, but certainly in the early parts of 1996.

By April 1996, if not before, Mr C knew what Ms A was saying. He knew that he was not facing any charge with respect to her complaint. When a man has already faced four trials and is about to face a fifth in respect of offending which is within the same general parameters, a real question mark must arise about the fact that the authorities for so long initiated no criminal action but now act differently.

The influences which there were on the Crown could have been many and various. However in my judgment where the authorities have

knowledge of activity which could justify a charge and an accused knows that the authorities have that information, there needs to be something which justifies in a real and compelling way a failure to act on that knowledge and information for a period which is well in excess of a year.

I do not overlook Mr Lawry's submission that Ms A possibly being involved only came into sharp focus after severance was granted. Allowing for the fact that the possibility of her being a complainant was alive before me on 17 April 1997 one can bring the period back to 9 months. In my judgment that also is too long. The possibility of injustice and an interference with the integrity of the system cannot be minimised.

I am however not persuaded that those same factors apply to the position of Ms W I am faced with submissions on each side which tell me that I should take the wide perspective and view the totality of what has occurred. I think to apply a broad brush would be to create injustice. I am unwilling to do so.

I am persuaded that the situations are different and should be viewed differently. It seems to me that despite the pressures which of course will have arisen from the number of trials that there have been, there was

a timely charging of this man in respect of the W complaint. The time which has passed is a necessary corollary of the severance which was sought and granted. There is nothing which would suggest that the Crown should not be permitted one further opportunity to prove that complaint.

But in respect of Ms A the decisions taken (and the effect of those upon the appellant) in the unique circumstances of this lengthy litigation saga are such that the interests of justice demand that the matter not proceed.

Accordingly having granted leave to file the amended indictment, I order a stay in respect of the proceeding relating to Ms A but I refuse the relief sought in respect of the complainant Ms W

J.