IN THE HIGH COURT OF NEW ZEALAND
TIMARU REGISTRY

CIV 2009-476-000063

BETWEEN	SHANE FREDERICK CROTON Applicant
AND	MINISTRY OF JUSTICE First Respondent
AND	ATTORNEY-GENERAL OF NEW ZEALAND Second Respondent

Hearing: 20 February 2009
(Heard at Christchurch)

Counsel: G P Tyrrell and D Brown for Applicant
No appearance for First Respondent
A M Powell for Second Respondent

Judgment: 20 February 2009

JUDGMENT OF FOGARTY J

At the end of the hearing this morning I dismissed this application for review, with no order for costs. My reasons to follow.

Introduction

[1] Two years ago on 31 January 2007 Mr Croton was driving a car on the Main North Road, just north of the Rakaia Bridge. There were two other passengers. The car left the road. One of the passengers, Ms Melissa Brown, was thrown from the vehicle landing in an irrigation ditch where she drowned. Mr Croton and his passenger were picked up by passing motorists. Mr Croton was concussed. He refused to give a blood sample.

[2] After police investigation, on 2 April, the police laid indictable charges of aggravated careless use causing death and injury and secondly, failing to ascertain the fate of Ms Brown.

[3] On the statutory time limit for laying summary charges the Crown Solicitor laid summary charges of careless use causing injury and careless use causing death. These were remanded by the Registrar to 3 and 4 September to coincide with the indictable charges. On 12 and 13 September depositions were heard. At the conclusion of the depositions hearing the summary charges were directed to run alongside the trial matters. On 23 October an indictment was filed which did not include the original driving culpability charges. It contained two counts: one of failing to stop and ascertain injury; and, second, failing to render all practical assistance. The second count was discharged on 25 January 2008 and the trial was set on the other charge for 30 June 2008. Mr Croton was found not guilty by the jury.

[4] Up to this point in time no steps had been taken to arrange for trial of the summary charges. That process began following the verdict of the jury.

[5] There was a status hearing the Christchurch District Court on 29 July when Judge Doherty was concerned to see if the issues in evidence could be narrowed. There was a second status hearing in Ashburton on 11 August when Judge Holderness recorded that a three to four day fixture was definitely required.

[6] According to Mr Tyrrell for the applicant this was because the then counsel for the Crown, Mr O'Connor, considered it necessary to call a large number of witnesses on facts unrelated to the careless use but related to the indisputable facts of the death of Ms Brown. There was a third status hearing on 21 October when the case was set down for two days beginning Monday, 24 February.

[7] In the intervening time Mr Croton has suffered a number of consequences. He was originally bailed with a residential condition, forbidden to drive a motor vehicle and placed on a curfew from 10 pm to 6 am. These bail conditions remained in place from February until September 2007 when the driving restriction and curfew

were removed. He had a job at the time he was first charged but as it required him to have a driving licence he lost his job immediately. There was a lot of publicity about the accident and death of Ms Melissa Brown. He has been subjected to a lot of ill feeling from the community and was beaten up on January 2008, his spleen was ruptured and had to be removed. He believes this was related to the accident and has made no complaint to the police about it. He has not had a job since the accident. He cannot leave the district because he is on bail and required to attend the trial. He has not been out to a pub or a social event since the accident. He has been selling surplus belongings to support himself to top up the unemployment benefit. In addition to this his mental health has suffered. The records of his doctor record attendances from February 2007 through to 15 February 2008. They record suicidal feelings and depression following the accident and corroborate his affidavit of social ostracisation and abuse from strangers.

[8] On 29 January Judge Farish declined to stay the proceedings. She was not satisfied that the delay here is such that a stay should be ordered. She considered she had to balance society's interest in the trial and the defendant's interest.

[9] These proceedings are by way of judicial review. There is no right of appeal against a refusal of stay. To succeed the applicant must show an error of law or serious unreasonableness and persuade the High Court in its residual jurisdiction to intervene.

[10] The application for a stay before the District Court was based not on the common law but on breach of the defendant's rights under s 25(b) of the New Zealand Bill of Rights Act 1990 which provides:

> **25 Minimum standards of criminal procedure**
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> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
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> …
>
> (b) The right to be tried without undue delay:
>
> …

[11] In the course of her reasoning Judge Farish said:

> [14] At first blush a delay of 654 days may appear to be "undue". However, one needs to consider the context of the delay. In the present case the delay has come about partially because the defendant faced indictably laid charges as well as summary charges. With the consent of the defence those summary charges ran alongside the indictable charges.
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> [15] Mr Tyrrell, on behalf of the defendant, submits that there has been negligence on behalf of the Crown in a failure to prosecute those charges. On the other hand, Mr McRae submits that there has been an implied waiver on behalf of the defendant in not having those charges dealt with before trial.
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> [16] When I challenged Mr Tyrrell as to whether any thought had been given to having the summary charges heard prior to the trial Mr Tyrrell indicated that he actually had not turned his mind to that issue.
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> [17] What appears from the record and from my discussions with counsel is that at the end of the depositions hearing the summary matters were simply left to follow on with the trial matters, all parties being of the view that if the defendant had been convicted of the more serious indictable matters then some resolution would have been reached without the necessity of a hearing in relation to the summary charges. This is also consistent with discussions that were had between the defence and the Crown prior to trial in relation to resolution of the trial matters.
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> [18] I do not accept the defence argument that the sole responsibility of bringing the matters to the Court and prosecuting the matter rests with the police. Here there were a number of adjournments at the request of the defence which appear to be on the basis that the summary charges could just simply lie until the indictable matters had been dealt with.
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> [19] In relation to that issue as well I am firmly of the view that it would have been untenable for the summary matters to have been dealt with prior to trial. This was a case that had a great deal of publicity both in the Timaru and Ashburton area and also within the Christchurch area. I note that there were reports both in the "Press" and also on the internet following the defendant's acquittal. Even with blanket suppression orders in the summary jurisdiction (which would have been unusual) the traversing of the evidence in relation to the summary matters was so intrinsically linked with the trial matters that this would have been prejudicial to the defendant. This hearing may have involved Mr Croton having to give evidence in his defence. If that had occurred he would have had to have a warning against self incrimination. Anything he would have said would have been available to the Crown to either produce at trial or use in cross-examination.

[12] Before me Mr Tyrrell submitted that there was an error of law in this reasoning, particularly in paragraph [18], which also had the consequence of the Judge applying irrelevant considerations.

[13] He submitted that there can be no obligation placed on the defence to promote prosecution. The defence counsel must of course assist a Court when proceedings are under way but are not obliged to actively promote the prosecution of their client. To suggest otherwise is plainly wrong.

[14] He disputed, as a matter of fact, the suggestion that the defence were instrumental in the summary charges simply waiting until the indictable matters had been dealt with. He said this was a decision of the police.

[15] Paragraph [18] is problematic, partly because of the general character of the finding of fact in the second sentence. I agree with Mr Tyrrell that there is no obligation on the defence to promote the prosecution of a charge. Equally, however, if the defence agrees for tactical reasons that the prosecution of charges should be deferred then that is a factor which can be taken into account when considering the merit of the stay application.

[16] I have sufficient doubt about paragraph [18] to proceed on a precautionary basis that it may reveal an error of law in the thinking of the District Court Judge. Accordingly, I move on to consider two issues: whether there has in fact been undue delay; and, two, whether there should be a stay following undue delay.

[17] I accept Mr Powell's submissions that with the benefit of hindsight it can be seen readily now that the process for bringing the summary charges to trial could have been better managed and the delay shortened.

[18] In the course of the argument I struggled to understand the decision making of the police generating two criminal trials arising out of essentially one incident. To be sure, that incident can be broken down into three time periods: the accident; the fact that the surviving passengers did not look for the deceased; and the refusal to provide a blood sample.

[19] Given Mr Croton's indisputably concussed state following the accident his culpability were he to be found guilty of failing to look for Ms Brown and render her assistance was going to be the lower register. After the decision by the Crown that

there was no case for aggravated careless driving one wonders why efforts were not taken to try all matters summarily in one trial. Alternatively, since it seems apparent that the police were determined to try the applicant for careless use whatever the outcome of the jury trial, I do not understand why no steps were taken to arrange a hearing for that matter. I was not impressed by Mr Powell's argument that it would be an inefficient commitment of judicial resources to set up a second trial in case the first trial did not proceed. This was an argument he built around paragraph [19] of Judge Farish's decision.

[20] However, I accept Mr Powell's submission that there is a difference between judgments being made by police officers and Crown prosecutors over a period of time and an evaluation of the consequences of their judgments now looking back over 25 months.

[21] The delay that occurred was avoidable and was regrettable. I do not find it necessary to decide whether it is "*undue*" delay. That finding is akin to a finding of breach of s 25(b). In hindsight the decision making of the police and Crown prosecutors could have been much improved, but it does not follow that there was undue delay.

[22] Even if it were "*undue*" delay the most important decision to be made in this case is that of balancing society's interests in a trial to examine whether or not Mr Croton was culpable for the death of Ms Brown.

[23] There is judicial dicta in a number of the cases which suggests that where a breach of a provision of the New Zealand Bill of Rights Act is established that a remedy must be given. I do not agree. Individuals' rights as secured by the New Zealand Bill of Rights Act are stated in the context of the individuals' interaction with the State and there are public interests to be secured by that process which always have to be balanced with protection of individual rights. In *Howe v The Christchurch District Court* High Court Christchurch CIV 2006-409-003037 6 June 2007 I followed Winkelmann J:

> [20] There has been a recent analysis of this provision by Winkelmann J in the case of *Du v District Court at Auckland* [2006] NZAR 341. In that

judgment Winkelmann J referred to the recent decision of the House of Lords in *Attorney General's Reference (No 2 of 2001)* [2004] 2 AC 72 and cited with approval the following passage:

> [65] Lord Bingham concluded at p 89:
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> > The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established. If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail. It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant. The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances.

[24] Mr Tyrrell argued that in this case I should be the guided by the outcomes in cases subsequent to *Du* being: *Graham v District Court at Blenheim* [2007] NZAR 32 and *Davies v Police* [2008] 1 NZLR 638 and *R v Williams* High Court Auckland CRI 2007-404-0006,7, 10 August 2007, Asher J. I think all three cases are distinguishable on their facts. Both *Graham* and *Williams* were drug offending. In *Davies* it was unlawful downloading of music and pornography. In the case of the drug offending there was no direct victim as in this case, whose family have an expectation that the question of culpability for the death of their daughter and family member will come to trial. Similarly, there was no direct and immediate victim in *Davies*. For these reasons the Judges in those cases were not faced with the very real balancing exercise faced here.

[25] If these proceedings are stayed there will never be a trial as to whether or not Mr Croton carelessly caused the death of Ms Brown.

[26] There is no doubt that Mr Croton had suffered both significant constriction on his liberty for over six months, for reasons which are not apparent on the file, if there were any reasons justifying the curfew and the prohibition against driving. He has also clearly suffered serious social consequences from local community judgment blaming him for the death of Ms Brown. Those consequences will not be prolonged by the continuation of these proceedings because the trial will start next

Monday. However, this history will be relevant to assessing the sentence following upon any conviction. In that sense the delay should have a consequence.

[27] Although Judge Farish has not spelt out this balancing of interests in the way I have, I have no doubt that she took them into account, from her reference to the balancing exercise at the end of her judgment.

Conclusion

[28] I dismiss this application because whether or not there was an error of law in paragraph [18] of Judge Farish's decision it was not a material error. Whether or not she took into account some irrelevant facts it did not materially alter her judgment. That judgment has not been shown to be erroneous. Nor has the refusal to stay been shown to be unreasonable by any measure of unreasonableness.

Solicitors:
Saunders & Co, Christchurch, for Applicant
Crown Law, Wellington, for Second Respondent