IN THE DISTRICT COURT
AT BLENHEIM

CRI-2014-006-000997
[2016] NZDC 3882

THE QUEEN

v

DAWSON RODERICK

Date of Ruling: 10 March 2016

Appearances: M A O'Donoghue for the Crown
A J McKenzie and M Starling for the Defendant

Judgment: 10 March 2016

RULING 4 OF JUDGE A A ZOHRAB

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[1] The Crown are about to close their case and Mr O'Donoghue has made application to amend the charge list. More particularly, he proposes to amend charges 5 and 6 involving the allegation of attempted rape of Jessica Iti, and the alternative charge of indecency with a girl aged between 12 and 16, which is the alternative to the attempted rape charge. He also makes application to amend the charges alleging offending against Ms Gray. Those charges, in the current charge list, are charges 14 through 20. The application in relation to five and six, and 14 through 20, is made on the basis of s 136 Criminal Procedure Act 2011 which enables the Crown to make application for amendment during a trial. There was earlier similar ability under the Crimes Act 1961 to make such application, or in other related legislation. These applications are opposed by the defence.

[2] The basis of the Crown application is basically, in their submission, the amendments will make the charge fit with the proof now available by way of the evidence.

[3] With respect to charges 5 and 6, the Crown submission there is, basically, only as the evidence has been teased out, that we have clarification from the witness, given that we have now exhibit 7 which is the family photograph, which has enabled the date of the events covered by charges five and six to be firmed up, and that is supported by exhibit 46 which is the grandmother's death certificate. Now, what has become apparent on the evidence is that the complainant was older than she thought at the time that she gave her original DVD interview. So the dates alleged in the charge list, before the jury at present, is a timeframe 20 October 1975 to 19 October 1976. The Crown wish to amend those dates to be 20 October 1976 to 19 October 1977. That is the same range obviously as between the two charges, because charge 6 is an alternative. It is a reduced period but, in the Crown submission, more properly complies with the proof available, and it is as a simple consequence of the evidence being teased out and it now being realised that she was aged 12 at the time.

[4] As far as Ms Gray's charges are concerned, what is proposed by the Crown is that, as the evidence has been teased out and clarified, the complainant has confirmed that the alleged offending has occurred both at Kaikoura and also Christchurch. Previously the charge list was split on the following basis: charges 14 through 17 all being representative charges, alleged offending at [address 1 deleted], Christchurch; then 18 through 20 alleging offending at Kaikoura, at the [address 2 deleted] address, all being representative charges.

[5] What the Crown proposes is that, given the proof available, that charges 14 through 20 effectively be amended, so that they are still representative charges, but alleging offending at both Kaikoura and also Christchurch, and they say standing back and looking at both of the applications with respect to charges 5 and 6, and also the charges that relate to Ms Gray, their submission is that there is no real prejudice to the defence because it does not change the defence, given that the defence is that these things simply did not happen.

[6] Also the Crown submitted that such a proposal, more particularly I am talking about the Gray proposed amendments, would not offend against the decision of *C T v R* [2014] NZSC 155, [2015] 1 NZLR 465 or the *Gamble v R* [2012] NZCA 91 decision or the *Mason v R* [2010] NZSC 129, [2011] 1 NZLR 296 decision, and that it would be open for the jury to conclude that this offending happened on at least one occasion at one of those addresses or venues.

[7] The Crown's fallback position, as far as the Gray charges, would be to separate the allegations, and effectively increase the number of charges in the charge list so as to incorporate separate offending at Kaikoura and Christchurch, but they have been anxious to avoid increasing the number of charges which the defendant faced, and thought that the simplest and cleanest way of dealing with the evidence which was available was in the form proposed in the amended charge list.

[8] The defence opposed both applications, and though it was not explicitly addressed in the argument on this point, I understand from the defence perspective that obviously there is still a lingering concern about the fact that it was only the week before the trial effectively that we had the amendment to the original charge list, amending what was a charge of rape to attempted rape, with an alternative charge 5 of indecency with a girl 12 through 16. That was granted by myself. And then here we have, as a consequence of exploration by way of cross-examination, here we have, we have got the Crown now seeking once again to amend the charge list.

[9] The real concern with respect to the proposal to amend charges 5 and 6 is that the matters from the complainant's perspective have allegedly crystallised as a consequence of cross-examination, and her being able to use the family photograph, the four generation photograph, which is exhibit 7, as being a date and then being able to use that and by way of reference to the grandmother's death, which can be confirmed through exhibit 46, and then we have got, only as a result of this cross-examination have we got this fine-tuning as it were of when this event happened. So through cross-examination the defence have been placed in a more difficult position because now we have got the Crown, as it were, effectively in the defence submission seeking to shore up its case by realising that it is not possible for

them to be able to prove that it happened at a particular time, more especially when we are looking about charges where we have got someone, one of the ingredients that have to be proven is that a complainant was under 12, and then we have got them seeking effectively as it were to shore up their case by amending the charges.

[10] The defence are also in this horrible situation, in Mr Starling's submission, of the fact that as far as the attempted rape is concerned there is this concern about consent being an issue with respect to that, and that is obviously an issue.

[11] As I pointed out to Mr Starling, though, it does not matter whether or not I granted the amendment because consent is always going to be an issue, and honest belief in consent, because it does not matter what the age of the complainant is, it is not age-specific, and what I mean by that is that it does not matter how old a complainant is you still have to prove, as it was in those days, an attempt to, that the person tried to have sexual intercourse, they intended to have sexual intercourse, that the complainant was not consenting, and that the defendant did not have an honest belief in consent. Theoretically, well, the cases do not quite put it like that, an under 12 can consent.

[12] In any event, the key thing from the defence perspective is that as a result of its hard work and diligence and careful cross-examination, they have been able to establish, for example, that she was, based on her evidence, 12 at the time, not under 12, so the defence oppose the Crown being able to shore up its case at this late stage in the proceedings. It should be left, in the defence submission, in its current form, charges 5 through 6.

[13] As far as Ms Gray's charges are concerned, the defence have been alive to the issues which have led to the Crown seeking the amendment, and the focus in their cross-examination has been on the address where things happened because, from the defence perspective, the way the charge list was originally structured with respect to Ms Gray, the Crown case simply did not make sense.

[14] So what has happened now, as a result of careful cross-examination, bearing in mind that it is always different to prove a negative when you are trying to

establish that something did not happen, and I am not saying that there is any onus or obligation on the defence to prove the negative, but when you are trying to establish that something just did not happen, and you are trying to work out from your client's perspective where these things are alleged to have happened, once again it is one of those situations whereas the sand shifts the Crown are attempting, in the defence submission, effectively to shore up its case. And so if the amendment were to be allowed, the defence would have to give serious consideration as to whether or not they would want to potentially cross-examine this witness again, and also, thinking aloud, there is potentially, if I were to allow the amendment in relation to five and six, potential further cross-examination of the complainant there because, as Mr Starling said, the Crown have put the line in the sand as it were. The defence had attempted to demonstrate that that could not be so, and then what the Crown are effectively asking to do is for the line in the sand to be shifted, and then defence perspective is, from the defence perspective, "Well, if they are going to move the line in the sand again, shouldn't we be given an opportunity to demonstrate that that may also not be the right position for the line in the sand?"

[15] Particularly, and coming back to the photograph of the four generations, and I am talking about exhibit 7 and reflecting upon that, Mr Starling's point is that obviously no one appreciated the real significance of that photo at the time it was being proposed to be introduced as an exhibit. It seemingly was just a moment in time showing what someone looked like at that particular time, to put a face to the name in that particular time, but it has assumed a real significance, the photo of that event. And so then, from the defence perspective, there is further prejudice with respect to that because, although it is a long, long time ago, if they had been aware of the significance of that photo in terms of fixing a point in time with respect to charges 5 and 6, it might have been a situation where the defence may have made greater attempts to talk with people who were present at that time, that particular special moment as it were, to be able to determine people's whereabouts and the opportunity, for example, that the defendant might have had to do the things alleged by Ms Iti.

[16] So the defence oppose the application, and say it would be grossly unfair to the defendant to allow changes at this late stage.

[17] Mr O'Donoghue's simple response to the matter, as far as Ms Iti was concerned, was that she made a simple mistake about her age. It has been able to be fine-tuned as a result of questioning and we have now had the date clarified through the photograph and also through the death of the grandparent, and it is a simple situation, not unlike any other trial, where we have got dates clarified and then the Crown are just simply seeking to amend the charges to confirm to the proof available.

[18] And just while I am thinking about it, there is one other matter that I just wanted to touch on generally in terms of the Gray proposed amendments. Mr Starling helpfully referred me to the *Gamble* decision and the body of case law mentioned in that case, and with respect to the proposed amendments in relation to Ms Gray, putting to one side the matters that I have raised about fairness and the like, the defence submission is that the proposed amendment that is alleging offending in both Kaikoura in Christchurch would offend against the Criminal Procedure Act, also the principles outlined in the *Gamble* decision and also the principles outlined in the *Mason* decision where you have got offending alleged in two disparate venues.

[19] It is not simply a situation like I was talking about, for example, of alleged offending say at the [address 3 deleted] property where you might have a downstairs flat and an upstairs flat, and the person could not remember whether it happened upstairs or downstairs in [address 3 deleted]. Rather, we have got a situation where we have got offending alleged in Christchurch and offending alleged in Kaikoura, completely different venues, separated in time and place, and one would get into this terrible situation if, for example, how would a jury work out whether or not, for example, and we have got one particular charge where they are expected to be unanimous, the jury would have to be sure that it happened on at least one occasion between the dates alleged, and you could end up with a situation, for example, where a jury could conclude that, well, six of them might think that it happened on at least one occasion in Kaikoura, and then six might think it happened on at least one occasion in Christchurch. Totally unsatisfactory, and very difficult for sentencing.

[20] So I now turn to deal with the application as far as amendments to charges 5 and 6. Obviously I can see, from the defence perspective, the concern that shortly before the trial we have the rape charge being amended to attempted rape and the introduction of the alternative charge. Now we have the proposed amendment because of the crystallisation of the date based on the photograph and also based on the death certificate and the complainant's evidence and, from the defence perspective, it has really come about from careful cross-examination and fine-tuning matters.

[21] So the issue then is whether or not it would be in the interests of justice, and also unfair to a defendant, to grant the application to amend the charge. I bear in mind, of course, that the defence has always been that these things never happened. There is a total denial by the defendant in his DVD interview of any contact of a sexual nature between him and any of the complainants. So, from the Crown perspective, they say, well, nothing has changed, but from the defence perspective they are trying to counteract, as it were, allegations of sexual conduct between, as it currently stands, 20 October 1976 and 19 October 1977 so it is a long, long time ago.

[22] It appears to me, though, I am in a situation where, as I say, as far as the rape is concerned, consent and honest belief in consent, this is the attempted rape, are issues that I am going to have to direct a jury on. It seems to me that it is appropriate to grant the amendment as far as five and six is concerned, because it will make the charge fit with the proof. It is not a situation where the Crown can be criticised, or the complainant can be criticised, because it is as a consequence of discussion in Court and it is really effectively what we are looking to do is, from the Crown perspective, make the charge fit with the proof.

[23] So, in my view, it is in the interests of justice to do so. But, having said that, I am going to be giving a very strong s 122 direction, and I am going to incorporate into it some of the difficulties that the defence have had in trying to respond to the allegations, and I will discuss that with counsel before, obviously in Court in chambers with the defendant present, and I will go through with the lawyers my proposed direction on that. And one of the matters that I am going to address is the difficulty that the defence have in trying to deal with allegations of offending such a

long time ago and, more particularly, when the sand is shifting and I am going to give this as an example of one of the difficulties that is posed for the defence. I am not going to be critical of anybody about that, but I am going to do more than be signalling a need for caution, I am going to be giving this as one of the examples of the difficulties that a defendant has in facing allegations from such a long time ago.

[24] Then, if we move into the proposal with respect to the amendment of the charges 14 through 20. In my view it would be inappropriate to grant the amendment in the form currently proposed alleging offending at both Kaikoura in Christchurch in the one representative charge. In my view it offends against the decision of *Gamble* and effectively *Mason* as well, and also I do not think it is appropriate. There is an insufficient particularisation and it creates all sorts of problems for a jury and a Judge.

[25] What I would propose to do is allow the Crown to amend the charges and add extra charges in alleging offending at both Kaikoura and Christchurch as well. Once again, though, when I give my reliability direction, and when I deal with the difficulties that the defence have in trying to combat allegations of alleged offending, this will be a further example of the difficulties, and once again it is going to be done in a way where I am not critical of the Crown because they present the case as best they can, but I need to give a direction about the need for caution in relation to dealing with allegations from such a long period of time ago and the difficulties from a defence perspective if the line in the sand shifts.

[26] So that is the basis on which I am proposing to deal with matters.

AA Zohrab
District Court Judge