

**IN THE DISTRICT COURT
AT BLENHEIM**

**CRI-2014-006-000997
[2016] NZDC 3631**

THE QUEEN

v

DAWSON RODERICK

Date of Ruling: 7 March 2016

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

Judgment: 7 March 2016

RULING 2 OF JUDGE A A ZOHRAB

[1] At the completion of Ms Archer's evidence, the defence have asked me to discharge the defendant in relation to the charges he faces with respect to Ms Archer, more particularly those are charges 11 through 13 of the charge list. The basis for that application is that Ms Archer has confirmed in her evidence that the wedding game, which forms the basis for the allegations against the defendant, took place, as best she can recollect and using a particular dress which she remembers, between the ages of seven through nine, which is her best guess. The significance of that is, given that her birth date is [date deleted] 1963, given that that means that she turned seven in 1970, eight in 1971 and nine in 1972, those dates are significant, also in that the defendant was born [date deleted] of 1955, and therefore turned 17 on [date deleted] 1972. The charges in the charge list allege offending between 20 May 1972 and 31 December 1972.

[2] The reason why the charge list has set the date for the offending between those dates is as a consequence of an earlier pre-trial decision of mine from 6 March 2015. The defence, in the course of that application, raised the issue with respect to a stay in terms of s 322 Children, Young Persons, and Their Families Act 1989. There are a number of other interrelated legal issues and, long story short, basically I decided that the defendant should not face criminal liability for any alleged criminal offending prior to the age of 17, but that conduct of alleged sexual behaviour could be led as propensity evidence.

[3] So, against the background of my earlier pre-trial ruling, the Crown have set the dates for the offending alleged with respect to Ms Archer. The difficulty then, of course, is that given Ms Archer's clear evidence that it happened between seven through nine, the defence submission is that it would not be possible for a jury properly directed to find that those alleged offences happened when he was 17 or older. And so, against that background, they ask that he be discharged on those matters.

[4] Mr O'Donoghue initially sought to oppose the application but, having thought about the state of the evidence, he accepted that a jury would have to take a punt, or a guess basically, to find that any one of those offences happened after his 17th birthday, given the range of ages that was offered by Ms Archer. And so, against that background, he acknowledged that a discharge was appropriate, but urged me to consider keeping the evidence as propensity evidence.

[5] As a corollary of any decision to discharge, the defence also submitted it would be inappropriate for Ms Day to give evidence because Ms Archer did not mention ever disclosing to her and also, in any event, what is effectively submitted is that it was not recent disclosure in any event, a recent complaint, and also the defence perspective is that it should go in any event because the charges are going to go as well.

[6] Mr O'Donoghue acknowledged that there were some difficulties in leading her evidence, given that if the charges were gone also that it could not really fall within the realms of recent complaint, and also that she did not raise it herself in her

evidence, but then offered the submission that perhaps it could still be properly introduced as evidence before the jury because the defendant mentions Ms Day in his DVD interview.

[7] Then, leading on from those submissions, the defence also submitted that I should give serious consideration to staying or discharging the defendant with respect to the charges that he faces in relation to Ms Carl, more particularly her credibility and reliability were an issue. There was no credible narrative to go before the jury in relation to any of the alleged incidents, and given that she was, my words not his words, “All over the shop,” with respect to when and where, that this opened the door in terms of the *C T v R* [2014] NZSC 155, [2015] 1 NZLR 465 decision as to whether or not it would be appropriate to stay the allegations.

[8] More particularly he reminded me about how, in terms of cross-examination and also in evidence-in-chief, there had been a seeming acceptance on her part that all of the offending happened during a holiday break, more likely than not the August holidays, in one week of the holidays, with the “bathroom incident”, the “fist in the vagina incident” and then the “penis in the mouth incident”, and then, having clarified that as being the scope of the alleged offending, then she was suggesting that, then if I could use reference to the “*Carrie* incident”, the incident involving the blood being smeared all over her body was not part of that week, in fact was a totally different week which seemed to be somewhat at odds with her recount.

[9] Also further factors to be considered in relation to that submission are what is submitted by the defence to be the total incompatibility of her evidence with the evidence of Ms Iti and Ms Gray with respect to the three of them allegedly being in bed together, and with the defendant offending against the person closest, and with neither Ms Iti or Ms Gray making any mention of that and then that is without even considering her general credibility, when one considers the deceptive conduct she engaged in with the former boyfriend in bringing him over from New York on false pretences.

[10] The Crown, by way of response, submitted that it was not appropriate to take away those charges from the jury. It would be constitutionally wrong, in the

Crown's submission, to discharge the defendant on those charges. He acknowledged that it would not be easy for a jury to get a clear picture of what had gone on but, in his submission, that there was still a credible narrative that could be put before the jury, that the misunderstandings that she offered to the jury in the witness box for being unclear could be explained by way of submission, and the issue about the alleged incompatibility between her evidence and that of Ms Iti and Ms Gray were really matters of submission. The jury would be told it would go to issues of weight, credibility and reliability, and it would be wrong to remove those matters from the jury.

[11] And the defence also submitted that if Ms Archer's evidence is gone, if Ms Carl's evidence has gone, then there should be serious consideration given to whether or not it could still be maintained that Ms Rakena's evidence should be put before the jury, because with Ms Archer having gone, with Ms Carl having gone, then we have got a reduction in any alleged pattern. We have got a reduction in any of the probative aspects allegedly advanced, and an increase in the prejudice. He also reminded me that Ms Archer and Ms Rakena's evidence is important in terms of they both alleging offending or conduct in [location deleted], and so we have got, if one considers the basis on which the propensity evidence is allowed in because of its close connection in time, place and circumstance, we have got a reduction or a dilution of probative value, and an increase in prejudicial affect.

[12] The Crown, as I have already observed, maintain that Ms Carl's evidence should survive, that there are good submissions to be made from the defence perspective, but really those are jury issues, and the Crown will deal with them by way of submission. They still submit that Ms Rakena's evidence is still significant in terms of Ms Iti's evidence, in particular the attempted rape, and that has already been the topic of submission earlier in the case.

[13] And as far as charge 6 is concerned, the Crown would propose to, given that she has been, in the Crown submission, allegedly able to tie it to a relatively discrete timeframe, they would then seek to amend charge 6 to indecency with a girl aged between 12 and 16 with the appropriate other changes, but their submission is that

Ms Rakena's evidence should still survive, based on my earlier ruling and the Court of Appeal's views on matters.

[14] And then the defence submission is the logical extension of their argument, if we were to get to a situation where Ms Archer's evidence had gone, Ms Carl's evidence had gone, Ms Rakena's evidence had gone, then we are just left with Ms Iti and Ms Gray as being the remaining surviving complainants, and that would then give rise to fair trial considerations, given all of the other evidence that the jury would have heard, and it would be difficult for them to put all of that other prejudicial material to one side, no matter how carefully a jury were to be directed by a Judge, and then just to focus on the allegations of Ms Iti and Ms Gray. So broadly, in summary, they are the competing arguments.

[15] It is clear that the defendant will have to be discharged in relation to charges 11, 12 and 13, the allegations in relation to indecency with a girl under 12 as far as Ms Archer is concerned, because the only way he could be found guilty of any one of those charges is if a jury were to speculate wildly, and this is because, as I said, I have already decided he can only face criminal liability for offending from 17 onwards, and it just would not be possible, based on her narrative, for them to do so.

[16] The issue then is what to do in relation to Ms Archer's evidence. Are the jury told to completely disregard it, or does it survive as propensity evidence? I guess another way to then look at it is, given the way that the propensity matter was advanced, it is probably more appropriate to consider what to do with Ms Archer's evidence, after I deal with Ms Carl's evidence. Obviously her credibility and reliability are going to be very much a topic of submission because of the initial impact of the incident involving the former boyfriend and the deceptive conduct that she engaged in. But as far as the body of her evidence is concerned, in my view the Crown are still able to put a narrative which they could argue is still credible before a jury.

[17] I appreciate that Ms Iti and Ms Gray have not talked about the "three in the bed incident" and what is alleged to have happened there, and witnesses to it, and

obviously the defence, I can imagine a submission about what a significant sort of event that must have been and you would have thought, you know, notwithstanding the passage of time and all of those sorts of matters, if you have got three in the bed and it is alleged that this happened, then you would remember it and you would raise it. But in my view notwithstanding the difficulties with this one week in the August holidays and Christchurch seemingly to be when all the offending took place, it still seems open, in my view, to argue that there is a credible narrative, and that week can be separated out from another incident.

[18] So in my view, whilst obviously credibility and reliability are going to be at issue, and I am going to have to give some pretty strong directions about the passage of time and matters of that sort, it is still open for the Crown to close on the basis that there is a credible narrative, and I do not think it appropriate for me to intervene at this stage, and just say that it is all too difficult. That is something which I am sure the defence will be able to make much mileage out of, but I do not think it appropriate for me to remove it from the jury.

[19] As far as Ms Archer's evidence is concerned, in my view I think, reconsidering my earlier decision, and also the decision of the Court of Appeal, and what is basically alleged here, is that we have got alleged offending still occurring frequently throughout a significant period of time. The complainants, and if I allow Ms Archer and Ms Rakena to remain, are young female cousins or nieces. It has all occurred at various residences and places. It is alleged serious offending, and the pattern of behaviour is allegedly similar. It shows a tendency to act and think in a particular way. We have got a male relative, older than the complainants. So, once again, I see it still open to the Crown to argue that we have got mutually supporting evidence with a pattern, a tendency to act and think in a particular way, and then, of course, we have got the competing argument where there is no pattern because these things did not happen, so there is no tendency because these things did not happen, and look at the credibility and reliability of the various witnesses, and the time that has passed. So those are all matters of submission.

[20] So I propose to tell the jury, as far as Ms Archer's evidence is concerned, that he faces no criminal liability in relation to those, but the Crown will still seek to

argue that you can consider her evidence on the basis that it shows a tendency to act and think in a particular way, and it shows a pattern of behaviour. And the competing argument is that there is no tendency to act and think in a particular way, that there is no pattern, there is a total denial of that.

[21] So the end result basically is that he will be discharged on 11 through 13. The jury will be given some very brief directions, and they will be told that they will be given fuller directions at the end.

[22] Ms Carl's evidence remains, as does Ms Rakena's evidence as well.

[23] The Crown will be given leave to amend charge 6 to one of the offences involving 12 to 16, and Ms Day will not be called as a witness, but I am not sure what that means as far as the DVD interview for the defendant is concerned, and when we get to that, and whether or not the defence want it.

A A Zohrab
District Court Judge