R v HPL [2007] NTSC 53

PARTIES:	THE QUEEN
	v
	HPL
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction ALICE SPRINGS
FILE NO:	(20522295)
DELIVERED:	18 October 2007
HEARING DATES:	18 October 2007
JUDGMENT OF:	OLSSON AJ

CATCHWORDS:

Criminal Law – trial – stay of proceedings – the advanced age of the accused – the nature of the accused's present medical condition – the lengthy delay in complaint and charging – issues as to what is said to be the unsatisfactory evidence relied upon – application dismissed.

Jago v The District Court of New South Wales and Others (1989) 168 CLR 23; *Patterson v The Queen* [2005] NTSC 83; *Subramaniam v R* (2004) 211 ALR 1, cited.

REPRESENTATION:

Counsel:	
Crown/Respondent:	M Heffernan
Defence/Applicant:	M Johnson
Solicitors:	
Crown/Respondent	Office of the Director of Public Prosecutions
Defence/Applicant:	Central Australian Aboriginal Legal Aid Service Inc
Judgment category classification:	C
Judgment ID Number:	OLS0701
Number of pages:	13

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

R v HPL [2007] NTSC 53
No. (20522295)

BETWEEN:

THE QUEEN

AND:

HPL

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 18 October 2007)

[1] On 2 April 2007, the accused, HPL, was committed for trial on a variety of charges related to sexual offences said to have been committed by him on his daughter ML between 1970 and 1982. He first appeared before this Court on 23 April 2007, but was not formally arraigned until 29 May 2007.

[2] On the last-mentioned date, the accused was arraigned on an indictment dated 16 April 2007, which charged him with a single count asserting that, between 1 January 1982 and 28 February 1982 at Alice Springs, he raped ML. That charge was preferred pursuant to s 60 of the Criminal Law Consolidation Act and Ordinance in force at the date of the alleged offence.

[3] The accused pleaded not guilty to the charge and was remanded on bail to await trial.

[4] The matter was listed for trial during the present sittings. On 15 October 2007, the Crown presented a fresh indictment that averred the same offence, but stipulated that it had been committed at Alice Springs between 4 October 1981 and 4 October 1982.

[5] This indictment appears, at least in part, to be a reflection of the fact that ML, having been diagnosed as pregnant in mid March 1982, underwent a termination of pregnancy on or about 2 April 1982. The Crown case is that the accused was responsible for her pregnancy. It is said that it was actually the accused who took ML to Adelaide for the termination.

[6] The discrete incident specified by the Crown as constituting the rape charged against the accused is that described by ML in the course of her evidence as recorded at pages 23-25 of the committal transcript. It is asserted that, at a time not long before ML was found to be pregnant, the accused forcibly had penile/vaginal intercourse with her without her consent in the locked bathroom of the then family home. She had, on the Crown case, not had sexual intercourse with anyone else, to lead to her pregnancy.

[7] ML was born on 4 October 1965. The Crown asserts that the offence charged occurred in the context of a lengthy period of sexual abuse of her by the accused from a time when she was about five years of age, up until she was about 17 or 18 years of age.

[8] When this matter was called on for mention at the present sittings, it was foreshadowed that application would be made, on behalf of the accused, for a permanent stay of proceedings on the Crown indictment. That was followed by a formal application for such an order, which, in effect, relies upon the grounds of:

(1) the advanced age of the accused;

(2) the nature of the accused's present medical condition;

(3) the lengthy delay in complaint and charging; and

(4) what is said to be the unsatisfactory state of the evidence relied upon by the Crown, including the potential prejudicial absence of some relevant documentary material that would have been available at an earlier point in time.

[9] When the application was called on, the parties were content to proffer their submissions on the basis of the committal evidence transcript, the reports of two psychologists, Drs Banks and Lennings, and certain witness statements placed before me.

[10] For the purposes of the application, the Crown prosecutor indicated that the Crown was prepared to concede that the accused is presently unfit to stand trial, by reason of his mental health state, and that it is unlikely that he will become fit to stand trial in the foreseeable future.

[11] These reasons express my outline conclusions as to the issues debated by counsel on the stay application.

Relevant evidentiary aspects

[12] The complainant ML is now 42 years of age. She first made an approach to the police on 30 November 2004 to formally report having been sexually assaulted by the accused. After several cancelled appointments, due to what were said to be stress or health problems experienced by her, ML gave her first detailed statement to the police over two days on 22 and 23 January 2005.

[13] Her committal evidence was to the effect that the incident of rape charged took place in the context of what had been a long, ongoing course of sexual abuse of her by HPL, commencing when she was about four and a half or five years of age.

[14] ML says that she made certain complaints, as to the accused's conduct, to her mother over time and, when she was about 13, said to her "*Why are you letting this happened to me?*". She also gave evidence that, on one occasion, HPL threatened to kill her mother if she told her or another family member what was happening. She testified that, when she was taken to the doctor in relation to her possible pregnancy in mid March 1982, the accused instructed her to say that a 17-year-old boy had been responsible for her condition.

[15] The complainant further gave evidence that, on commencing a relationship with the witness David Renehan in late 1984 when she was about the age of 18, she told him that her father had been mucking around with her.

According to Mr Renehan, about a week later, ML told him about her abortion and said that the accused had been responsible for her pregnancy.

[16] The evidence indicated that, as a consequence of her first intimation to Mr Renehan, he told her to go and collect her stuff from the family home and leave. He assisted her to do so. The two of them went to his cousin's sister's place. In giving evidence at the committal, Mr Renehan said that the accused came to where they were later the same night. An altercation occurred, during the course of which the accused yelled out "*What did you have to go and tell him for?*".

[17] ML testified that she had received counselling from about the age of 24.

[18] It is not clear, at this stage, why it was that she ultimately went to the police when she did.

[19] The accused is now a man aged 80 years or thereabouts. The psychological reports placed before me indicate that the accused's present cognitive ability condition is impaired to the point that he is in the borderline mentally retarded region. He has severe problems in short-term memory and executive functioning and there is also a general diminution in cognitive ability including general and verbal intelligence, speed of thinking and attention. It may be moot as to whether he has an actual dementia process, although this is possible. A complicating factor is the occurrence of a recent stroke. Doctor Lennings is of the opinion that there may be some

degree of "*catch up*" of the accused's earlier heavy alcohol use, accelerating normal age decline in cognitive ability, as opposed to dementia.

[20] Whilst it appears that the accused is able, with some general oversight, to still live independently and to attend to basic business needs including the use of an ATM, it is common ground that he would be unable to follow the course of any trial proceedings, give instructions to his legal counsel or be able to understand the substantial effect of any evidence that may be given in support of the prosecution. He therefore falls within the criteria established by s 43J of the Criminal Code as to unfitness to stand trial.

[21] It is to be noted that the reports of the psychologists indicate that the accused's historical memory does not vary greatly from that of his general age peers. However, his main problem is his inability to process immediate cognitive requirements.

The principles applicable

[22] The legal principles applicable to an application for a permanent stay derive from the reasoning of the High Court in *Jago v The District Court of New South Wales and Others* (1989) 168 CLR 23. The court there considered the nature and extent of the inherent power of courts to prevent abuses of their process.

[23] As Mason CJ there pointed out, in essence, the power to prevent an abuse of process is derived from the public interest, first that trials and the processes

preceding them are conducted fairly and, secondly, that, so far as possible, persons charged with criminal offences are both tried and tried without reasonable delay.

[24] He emphasised that the power is discretionary, to be exercised in a principled way and that it will be used only in the most exceptional circumstances to order that a criminal prosecution be stayed.

[25] The learned Chief Justice further stressed that the test of fairness that has to be applied involves a balancing process. The interests of the accused cannot be considered in isolation, without regard to the community's right to expect that persons charged with criminal offences are brought to trial.

[26] He expressed the view that, to justify a permanent stay of criminal proceedings, there must be a fundamental defect that goes to the root of the trial of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences. It follows that the making of a stay order on the basis of delay alone will be very rare.

[27] It was said in *Jago* that it is impossible to define unfairness in criminal proceedings in a way that will cover every case. Each situation must be assessed in light of the individual circumstances. Where delay is a predominant factor, an important consideration will be the existence or otherwise of significant associated prejudice that is incapable of remedy by any direction that a trial judge might give.

[28] Mental or physical health considerations apropos an accused may, in some instances, enliven the "*common humanity*" concept adverted to by the High Court in *Subramaniam v R* (2004) 211 ALR 1, either because such a consideration might prevent the accused from being able to give reliable testimony, or the proposed trial could result in a serious worsening of that condition.(cf *Patterson v The Queen* [2005] NTSC 83*).*

[29] It is to be noted that *Subramaniam* was a case in which the accused was unfit to stand trial by reason of a mental health condition and that the relevant statute provided for the conduct of a special hearing conceptually similar to the scheme envisaged by Part 11A of the Criminal Code. As to this, the joint judgment reflected:

> "One important purpose of the Act is an ameliorating one, to give a person unfit to be tried in an orthodox way, an opportunity of being acquitted in a special hearing so that any possibility of legal proceedings against the accused of any kind may be brought to an end. It is also no doubt another purpose of the Act that a special hearing actually take place, and that victims be afforded an opportunity to see that a form of justice, as necessarily imperfect as it may be in the circumstances, has been done. This purposes secured not only by the holding of the special hearing, but also, in an appropriate case, by the pronouncement of a "limiting term" of imprisonment that would have to be served if the person had been tried in the normal way. It is self-evident that a special hearing in which an accused is disabled from instructing his or her lawyers or in other ways from full participation in the proceedings, will have its deficiencies. But no system of justice is perfect. Neither the deficiencies of a special hearing under the Act, nor the other matter which was referred to in submissions, that the Act reposes expansive and wide discretions in the State Attorney General, provides reason to construe and apply the Act otherwise than according to its tenor.
>
> The main difficulty for the appellant is that the Act assumes, as the basis for its application to her, the very matter upon which she would

seek to rely to escape its application, her current mental infirmity and all that it involves."

Issues raised by the present application

[30] In prosecuting the present application Mr Johnson, of counsel for the accused, was constrained to concede that, taken individually, the four individual bases relied upon by him were insufficient to found a stay order. However, it was his submission that, taken in combination, they did warrant the making of such an order.

[31] He sought to argue that the prejudice to the accused arising from that combination of circumstances was such that it was incapable of remedy by any thing that the trial judge might do in an attempt to ameliorate the relevant problems. It would, he argued, be an affront to any notion of fair play and decency to permit the prosecution to take the course proposed in this case.

[32] At the risk of undue simplification his core arguments may be summarised thus:

(1) The accused is now 80 years of age and not in robust health;

(2) As already appears, his physical and mental health situation is such that he is unable to participate in the trial process in a meaningful fashion. It will not be possible for those representing him to gain effective instructions from him as any trial process proceeds and it is unlikely, given the state of his memory, that he will be able to

provide meaningful instructions as a basis for cross-examination of witnesses;

(3) There has now been a long delay of the order of 23 years between the time of any alleged offence and the present charge being brought. In this regard there will be obvious difficulties in proving what the accused asserts has been a loving caring relationship subsequent to 1982 as between ML and the accused. Whilst a few letters exist, other relevant documents are no longer extant. The accused's recollection as to detail is not good and records of his whereabouts at critical times no longer exist. It was said that this is a not unimportant aspect, because the accused was, at the time, absent working in the bush for long periods;

(4) It is said that the Crown case lacks strength because there is little or no potential corroboration of the story told by ML; her mother is a most important potential witness and her memory is obviously suspect as to critical detail; the committal evidence discloses inconsistencies between the evidence of ML and her siblings; no complaint was made by ML to her sister Coral with whom she stayed in Adelaide and who actually accompanied her to the hospital for the termination; a good deal of the evidence given by ML's general practitioner at the committal may well be inadmissible as hearsay; no forensic evidence as to paternity was secured at the time of the

termination; and such complaint evidence as exists is far from satisfactory.

[33] The riposte of the Crown Prosecutor is that an objective overview of all of the aspects identified by Mr Johnson immediately indicates that there is nothing so far out of the normal run of cases of this type, in the circumstances identified, as to warrant the extraordinary relief now sought by the accused.

[34] Mr Heffernan made the point that it is far from unusual for child sexual abuse cases to be the subject of charges brought many years after the event, at a time when the accused is elderly and in circumstances in which there are some obvious evidentiary problems.

[35] As to the first two points made, he stressed that the scheme established by Part 11A of the Criminal Code was specifically designed to cater for such situations - an aspect that was the subject of particular comment by the High Court in *Subramaniam*.

[36] In relation to the third point, he argued that not only was there no sufficient identification of truly critical evidence that was no longer available to the defence, but also that the absence of work records to identify when the accused might have been absent in the bush was largely irrelevant when it was borne in mind that the evidence clearly indicated that the accused was present outside the general practitioner's surgery when ML was diagnosed as pregnant and also actually took her to Adelaide for the termination.

[37] Mr Heffernan also contended that it was both inappropriate and impractical, in the context of applications such as this, to attempt an analysis of the strengths and weaknesses of the factual evidence when, at the end of the day, the points sought to be made by Mr Johnson were, in reality, typical issues for assessment by a jury in the normal course. Whilst he did not run away from the fact that some apparent inconsistencies arose and would need to be considered, he nevertheless argued that there was proper evidence fit to go before a jury which, if accepted by the jury, could properly substantiate the charge brought against the accused.

[38] There was, he submitted, nothing that had been raised on behalf of the accused that could not adequately be dealt with by proper directions from the trial judge concerning the obvious issues that would need to be considered in assessing the evidence.

[39] In short, he argued that the accused had not been able to demonstrate that the present case exhibited features amounting to the type of fundamental defect going to the root of the trial adverted to by Mason CJ in *Jago*.

Conclusion

[40] At the end of the day, I am compelled to the conclusion that the arguments advanced by Mr Heffernan must prevail.

[41] In my opinion the problems identified by Mr Johnson are by no means uncommon and are inherent in many sexual abuse cases of the present type.

In so far as they arise from evidentiary aspects, they are typical jury issues that frequently arise in such situations.

[42] As to the other matters, they are classic circumstances to which Part 11A directs its attention. In my view the features relied upon on behalf of the accused fall far short, both individually and in combination, of satisfying the relevant principles justifying the making of a permanent stay order.

[43] The accused's application must, accordingly, be dismissed.

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