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v

CLARKE-IN-CHARGE TOU

Hearing date: 7 March 2022
Appearances: Ms A Maxwell-Scott and Ms J Crawford for the Crown
Mr N George for defendant
Judgment: 7 March 2022

JUDGMENT OF HUGH WILLIAMS, CJ

[11:41:20]

[1] This judgment deals with a number of pre-trial issues raised in the trial of Clarke-in-Charge Tou which is at the point where the jury has been empanelled and sent away for the commencement of the trial proper tomorrow morning.

[2] Mr Tou faces four counts of indecent assault, three of inducing an indecent act, and two of sexual intercourse with a girl aged between 12 and 16.

[3] There are a number of technical issues to begin with. There will be leave granted to amend the charges to the form to which Mr Tou pleaded not guilty earlier in the day, and there will be leave given to formally withdraw the original holding charge.

[4] There are a number of child witnesses. The mode of evidence of some has already been dealt with by way of consent, and the evidence can be given in the courtroom but screened from the defendant. That order will be extended to all child witnesses. They may also have a support person with them should they require one.

[5] Mr George, counsel for the defence, speculates that members of the jury may not be fluent in English and accordingly asks that an interpreter be engaged to translate the evidence as it goes. At the present time that is speculative but, as is commonplace in jury trials in the Cook Islands, in the opening remarks to the jury they will be asked to indicate if they are having difficulty in understanding the evidence, which will be given in English, particularly the evidence by the complainant.

[6] The principal matter to be dealt with in this ruling is the question of the evidence of what used to be called 'recent complaint' i.e. evidence in which the complainant made statements concerning what she says occurred to her at the hands of the accused, to friends and later to officials.

[7] The complainant first told a Ms Tua on 9 April 2021, a friend of hers, concerning the matters which she said had been done to her by the accused including sexual offending back to January 2021, some four months previously. She complained those issues were rape but gave no specifics.

[8] Ms Tua then told another friend, a Ms Oliver, she told her mother and Ms Oliver contacted the girls' school a few days later and a counsellor and social worker were organised for the complainant.

[9] On 15 April 2021 a social worker, Ms Porio, took a preliminary statement concerning the details of the night of 8 and 9 April 2021, including allegations of oral intercourse and further offending since that time. That was passed onto the Police and the official investigation resulted.

[10] There are two aspects to this evidence. The first is whether it is admissible as what, in the past, was called 'recent complaint' evidence, and the second is statements that the complainant made in her statement to Ms Porio, and apparently also made to a Dr Cumming, concerning previous intercourse in which she had engaged with a young man in Manihiki, the island from which she comes.

[11] Dealing with the complaint evidence first, it is well-settled that complaint evidences, as quoted from Cross on Evidence¹:

Complaint evidence is not to be taken as proving the acts complained of but only as a matter to be borne in mind by the Tribunal of Fact in considering the consistency and therefore the credibility of the complainant's story.

and again², the observation is made that the:

“requirement is fundamental, the rationale being that prompt spontaneous complaint is likely to be true but the longer the delay the less the justification for such an assumption. And the mere factor that a complaint might have been made to others before it was made to the witness who narrates it in court, does not prevent it from being received in evidence”.

[12] The main authority cited in Cross is *R v M*³, in which the evidence concerned alleged offending which had occurred some years previously and the Court of Appeal observed:

“The real question is whether evidence of her confiding in her friend ought to be admitted to demonstrate consistency of conduct or to rebut any suggestion which is wrongly constructing a story against her father.”

...

“The manner in which the conversation took place on the face of the deposition evidence is consistent with an inference but although unready to make a complaint against her father, the complainant was making an allegation which was consistent with those made formally six or seven years later to the Police.”

[13] In this case Mr George makes the point that there were at least two other persons – an aunt and her Mama – to whom a complaint might have been made before she spoke to Ms Tua and the other witness. That may be the case and it can be put to the complainant in evidence that she might have made these assertions earlier, but that does not mean that the evidence of the statements to Ms Tua and to Ms Oliver are inadmissible.

[14] Accordingly their evidence on the topic as to what they were told by the complainant is admissible and any issues of credibility can emerge from cross-examination.

¹ Cross on Evidence, 8th NZ Edition, Mathieson, (2005) at para 930, p260.

² At para 932.

³ CA 132/97, 26 June 1997 which relied on *R v Nazir* [1987] 2 NZLR 122.125.

[15] As to Ms Porio, it is true that the revelations to her are somewhat more delayed than those to her school friends. But, again, that is part of the official investigation into the matter. It had to proceed by way of officials such as Ms Porio questioning the complainant about the information they then had in their possession and accordingly that evidence too can be given and is of course subject to cross-examination.

[16] The second issue arises concerning the statements that the complainant apparently made to the Police and to a Dr Cummings as to whether or not she had had previous intercourse with a young man in Manihiki.

[17] In effect Mr George this morning was making an application under s 20A of the Evidence Act 1968, which reads:

20A. Evidence of complainant in rape cases – (1) In this section -

"Complainant" means a woman or girl upon or in respect of whom it is alleged that a rape offence was committed;

"Rape" has the same meaning as in section 141 of the Crimes act 1969;

"Rape offence" means any of the following offences:

- (a) Rape;
- (b) Attempted rape;
- (c) Assault with intent to commit rape;
- (d) Aiding, abetting, inciting, counselling, or procuring the commission of any offence referred to in paragraphs (a) to (c) of this definition;
- (e) Conspiring with any person to commit any such offence.

(2) In any criminal proceeding in which a person is charged with a rape offence or is to be sentenced for a rape offence, no evidence shall be given, and no question shall be put to a witness, relating to-

- (a) The sexual experience of the complainant with any person other than the accused;
or
- (b) The reputation of the complainant in sexual matters, except by leave of the Judge.

(3) The Judge shall not grant leave under subsection (2) of this section, unless he is satisfied that the evidence to be given or the question to be put is of such direct relevance to -

- (a) Facts in issue in the proceeding; or
- (b) The issue of the appropriate sentence, as the case may require, that to exclude it would be contrary to the interests of justice.

Provided that any such evidence or question shall not be regarded as being of such direct relevance by reason only of any inference it may raise as to the general disposition or propensity of the complainant in sexual matters.

[18] As far as Dr Cummings is concerned, the brief which the Crown has produced is only to the effect of her having examined the young woman on 20 April 2021 as a result of which a medical report was produced which, in accordance with the deposition, is to be produced as an exhibit. The medical report follows the common form for such documents but includes two sentences that the “complainant denied any previous sexual intercourse and/or having a partner/boyfriend” and that she “voiced she missed her period for the last three months and never been on any family planning methods and/or had previous sexually transmitted infections”.

[19] That meshes with the victim’s statement that the complainant made in the presence of her temporary caregiver on 22 April 2021, where at its commencement she was asked to tell the interviewer “if you’ve had sexual intercourse with anyone before this incident with your uncle happened” and then gave a fairly comprehensive answer concerning the Manihiki incident up until January 2020.

[20] It is to be noted that s 20A prohibits the asking of certain questions in any criminal proceeding in which a person is charged with a rape offence. Not all the charges Mr Tou faces come within the definition of rape offences.

[21] Secondly, the admissibility of such evidence, or more properly the question as to whether leave should be granted to allow it to be given, applies to any evidence, whether given for the prosecution or the defence. The prohibition is even-handed and absolute, subject to leave: “No evidence shall be given”.

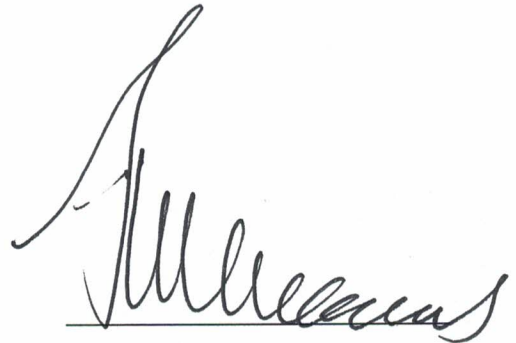
[22] Accordingly, the statement Dr Cummings has recorded in her medical report previously cited also comes within the prohibition in s 20A. So, as far as the medical report is concerned, those two sentences need to be excised. That is particularly the case because, as has been emphasised many, many times over the years, the fact, if true, that a young woman in a case had had sexual intercourse with a man other than the accused is irrelevant and illogically inconsistent with whether or not she was the victim of a rape offence or the other offences charged against Mr Tou. So there is no basis, in logic or in law, for the granting of leave for the two sentences cited from Dr Cummings report to be included in the material that goes to the jury.

[23] Similarly it follows that the complainant cannot be asked to give evidence or be cross-examined concerning the passages in her victim statement of 22 April 2021 as to her sexual intercourse with the young man in Manihiki.

[24] The two aspects of the complainant's sexual history – that in Manihiki and that alleged against Mr Tou – run in parallel and there is no particular connection between them. A well-established principle, it is not a question of credibility as to whether a person had sexual intercourse with A when the allegation is whether or not they had sexual intercourse, or there were other sexual offences incurred against them, in relation to B.

[25] Accordingly there will be no leave granted for the giving in evidence of either the passages in the medical report or for the complainant to give in evidence or be cross-examined on the passages outlined in her victim statement of 22 April 2021.

[26] Bail is to continue on the same conditions.

A handwritten signature in black ink, appearing to read 'Hugh Williams', written in a cursive style. The signature is positioned above a horizontal line.

Hugh Williams, CJ