

PARTIES: THE QUEEN

v

FERGUSON, Danny

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
TERRITORY EXERCISING
TERRITORY JURISDICTION

FILE NO: 21343913

DELIVERED: 4 June 2015

HEARING DATES: 1-4 June 2015

JUDGMENT OF: MILDREN AJ

CATCHWORDS:

CRIMINAL LAW – Procedure – Trials – Trials in absentia – Where defendant voluntarily absents himself after the commencement of trial – Considerations when exercising discretion to proceed with trial in defendant’s absence – Application of principles in *R v Hayward* [2001] QB 862

Criminal Code s 361(4)

R v Hayward [2001] QB 862; *R v Jones (Anthony)* [2003] 1 AC 1, followed

Kumar v R [2013] 3 NZLR 201, referred to

REPRESENTATION:

Counsel:

Plaintiff:	S Robson
Defendant:	T Collins

Solicitors:

Plaintiff:	Director of Public Prosecutions
Defendant:	Central Australian Aboriginal Legal Aid Service Inc

Judgment category classification:	A
Judgment ID Number:	Mil15535
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

R v Ferguson [2015] NTSC 35
No. 21343913

BETWEEN:

THE QUEEN
Plaintiff

AND:

DANNY FERGUSON
Defendant

CORAM: MILDREN AJ

EX TEMPORE
REASONS FOR RULING

(Delivered 4 June 2015)

- [1] This is an application by the Prosecution to proceed with the trial in the absence of the accused, pursuant to s 361(4) of the *Criminal Code*.
- [2] The accused is charged with two counts of sexual intercourse without consent, arising out of incidents that occurred at Finke on 2 and 3 October 2013. He was also charged with one count of unlawfully assaulting the same victim on the same occasion with circumstances of aggravation, to which he pleaded guilty. The trial proceeded on Monday 1 June 2015. The accused was present and represented by Ms Collins of the Central Australian Aboriginal Legal Aid Service.

- [3] The particulars of the offences which the Crown alleges are that the accused inserted a torch into the anus of the complainant without her consent, and then forced her to fellate him.
- [4] The complainant gave evidence and was cross examined, and witnesses were called. The Prosecution called Dr Katrina Lloyd, who examined the complainant; Kerry-Anne Lennon, Kevin Ferguson, and Cinthia Campbell, who were all involved in arranging for the complainant to get assistance from the Police and the local clinic; and Sergeant Michael Swain, who interviewed the complainant at the clinic for the purpose of finding out the details of the complaint and arranged for the matter to be investigated by the Alice Springs CIB. A number of photographs and other exhibits were tendered, and at the time of this application, the Crown case was virtually completed.
- [5] On the third day of the trial, the accused was called and did not appear. Extensive enquiries were made by both the Prosecution and Defence counsel as to his whereabouts. Ms Collins informed the Court that she was unable to contact her client because his phone was switched off. Ms Collins had also spoken to some of the accused's family in Finke and was told that there was some trouble with his car. Ms Collins also spoke to an uncle, who thought that the accused was on his way to Court or at the Court already. The matter was adjourned for a short time to enable further enquiries to take place. Upon resuming, Ms Collins informed me that she had spoken with Peter Ferguson, who was unable to contact the accused. Enquiries also revealed

the accused was not at the hospital; not in custody; and not in protective custody. I then issued a warrant for his arrest. The matter was adjourned until 2:00pm to see whether any new information would come to light. Nothing new arose and the matter was adjourned to the next morning.

- [6] I have now heard evidence from Detective Senior Constable Tim Easthope as to what further enquiries have been made. Without going into details – the enquiries have been extensive – the accused could not be located in or around Alice Springs, nor could he be located elsewhere. Mr Robson also provided information from the bar table that yesterday the accused withdrew \$200 cash from a relative’s bank account.
- [7] In light of the information before me, I find beyond a reasonable doubt that the accused has absented himself and voluntarily decided not to attend the trial.
- [8] The question now arises as to whether I should exercise my discretion to proceed with the trial in the absence of the accused.
- [9] In answering this question, I bear in mind the matters discussed by Rose LJ in *R v Hayward*.¹ Rose LJ indicated that the following matters should be used to guide the Court in the exercise of its discretion:

- “i. The nature and circumstances of the defendant’s behaviour in absenting himself from the trial... [and] whether his behaviour was deliberate, voluntary, and as such plainly waived his right to appear;

¹ [2001] QB 862.

- ii. Whether an adjournment might result in the defendant being caught or attending voluntarily and/or not disrupting the proceedings;
- iii. The likely length of such an adjournment;
- iv. Whether the defendant, though absent, is, or wishes to be, legally represented at the trial or has, by his conduct, waived his right to representation;
- v. Whether the defendant's legal representatives are able to receive instructions from him during the trial and the extent to which they are able to present his defence;
- vi. The extent of the disadvantage to the defendant in not being able to give his account of events, having regard to the nature of the evidence against him;
- vii. The risk of the jury reaching an improper conclusion about the absence of the defendant;
- viii. The seriousness of the offence which affects the defendant, victim, and public;
- ix. The general public interest and the particular interest of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates;
- x. The effect of delay on the memories of witnesses..."²

[10] *Hayward* was a case that is somewhat different to the matter before me, as the trial had not begun and no witnesses had been called. Additionally, most of the cases discussing Rose LJ's findings in *Hayward* similarly involved

² *R v Hayward* [2001] QB 862, per Rose LJ at 873, [22]. The final consideration referred to by his Lordship is not relevant for my purposes, as it concerns trials of multiple defendants.

situations where the accused did not appear at all.³ Nevertheless, the matters that were referred to by Rose LJ are still of relevance. The question is the weight that is given to some of those matters, bearing in mind that this is a trial that has proceeded to the stage where the Prosecution case has almost concluded.

[11] **The First Consideration:** I have already found beyond a reasonable doubt that defendant's behaviour was deliberate, voluntary, and as such, he has plainly waived his right to appear.

[12] **The Second Consideration:** The matter has already been adjourned several times to allow for the defendant to be caught or present himself. This has not occurred.

[13] **The Third Consideration:** No doubt at some indeterminate future time there is the chance that he will be arrested on the warrant, but I cannot say when this will occur.

[14] **The Fourth Consideration:** The question of whether the defendant, though absent, still wishes to be legally represented or has waived his right to representation is something that I can only assume. I do not know whether he wishes to be legally represented. Ms Collins has told me that she has not been able to contact the defendant and that his phone goes to message bank. She has left messages with him and they have not been returned. The

³ See *Kumar v R* [2013] 3 NZLR 201; *R v Jones (Anthony)* [2003] 1 AC 1.

defendant has ceased to remain in contact with his counsel. I therefore find that the defendant has waived his right to representation.

[15] **The Fifth Consideration:** Ms Collins has not been able to contact the defendant, and the defendant has not contacted Ms Collins. She is unable to take instructions from him. Further, throughout the trial, it was apparent to me that the defence case was that neither of the allegations of sexual intercourse actually took place. I was informed that it was Ms Collins' intent to call the accused to give evidence in his defence. This will not be possible.

[16] **The Sixth Consideration:** The disadvantage to the defendant that flows from him not being able to present his defence and version of the events is of his own making. The defendant has chosen to absent himself and leave his barrister without further instructions. It is reasonable to assume that he knows or ought to know that the opportunity for giving his side of the story has been lost. There are, however, still matters that can be put in his defence. In relation to Count 1, I think it is quite open to the jury to reach a verdict of not guilty, and possibly not guilty on the alternative of attempting to engage in sexual intercourse without consent. I note, though, that I would have thought the alternative is a much stronger case than a not guilty verdict. Count 2 is different. There is evidence that has been led through Crown witnesses relating to whether it is contrary to Aboriginal customary law for a man to allow a woman to fellate him. This is a matter for the jury, but in my view the Crown case is strong. The complainant gave a very good account of the events and was not shaken in cross examination. There is

evidence that the complainant's version of events that she told at trial was consistent with her initial complaints to various other Crown witnesses. The only instance where this is not true is that she did not mention the fellatio to Sergeant Michael Swain – although this could be explained on the basis that he cut her off before he got the whole story. She did, however, mention the fellatio to Dr Lloyd. I do not think the extent of the disadvantage that the defendant is going to be faced with by not being able to give his account of the events is such that, having regard to his own behaviour, I should not proceed with the trial in his absence.

[17] **The Seventh Consideration:** The risk that the jury will reach an improper conclusion about the absence of the defendant can be dealt with by an appropriate instruction from me.

[18] **The Eighth Consideration:** The matter of the seriousness of the offence was deemed to not be a relevant consideration by the House of Lords in *R v Jones (Anthony)*.⁴ Lord Bingham considered that “the judge’s overriding concern will be to ensure that the trial, if conducted in the absence of the defendant, will be as fair as circumstances permit and lead to a just outcome. These objects are equally important, whether the offence charged be serious or relatively minor”.⁵ I agree. As such, I will not consider the seriousness of the offence in the exercise of my discretion.

⁴ *R v Jones (Anthony)* [2003] 1 AC 1.

⁵ *Ibid*, per Lord Bingham at 13, [14].

[19] **The Ninth Consideration:** The public interest and the particular interest of the victim and witnesses militate in favour of the trial continuing. The complainant has already given evidence. Unfortunately, her evidence was not recorded, contrary to a practice direction requiring it to be. The fault for this does not lie with the accused or the Crown, but with the Court. As such, if there has to be a retrial, the victim would be required to give evidence again. I have heard from Ms Sheridan Appel, who has spoken with the victim about this prospect. I am told that she is not keen to give evidence again, but she did not say that she would not. Nevertheless, it is very plain from Ms Appel's evidence that the complainant is afraid of the accused, and steps had to be taken to secure her during the course of the trial. She was nervous about coming in and has a young baby. While she was determined to come to Court on this occasion, I think I have to bear in mind that it would be a significantly anxious matter for her to give her evidence again. I also need to bear in mind that by giving her evidence a second time, this would give an advantage to the defendant in that the complainant would be cross examined once more, a forensic advantage which, in my view, the accused ought not to get. I must also consider that, in the event of a retrial, witnesses would need to be brought back to Court. Some would purportedly need to travel from South Australia. This would mean additional expense.

[20] **The Tenth Consideration:** If the trial needed to be run again, there is the possibility of a long delay. A week would need to be found for the trial to be re-listed. Witnesses would also need to be recalled. A delay to allow the

trial to be re-run means there is the possibility of the witnesses' memories being affected.

[21] In my view, the trial should proceed. I exercise my discretion to continue the trial in the absence of the accused.

[22] Throughout the trial, it was apparent to me that the defence case was that neither of the allegations of sexual intercourse actually took place. I was informed that it was Ms Collins' intent to call the accused to give evidence in his defence. I note that there would most likely have been a *Liberato* direction had that occurred. As the case now proceeds in his absence, such a direction will no longer be possible and the jury will now have to consider the case as if the defendant had chosen not to give evidence. In accordance with *R v Hayward*,⁶ I will warn the jury that the absence of the accused is not an admission of guilt and adds nothing to the Prosecution case.

⁶ [2001] QB 862 at 873, [22].