R v HOGAN [1999] NTSC 7

PARTIES:	THE QUEEN
	v
	HOGAN, Ian Grant
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	SCC/9712980
DELIVERED:	5 February 1999
HEARING DATES:	3 February 1999
JUDGMENT OF:	MARTIN CJ.

REPRESENTATION:

Counsel:

Applicant:	S Cox
Respondent:	David Ross QC

Solicitors:

Applicant:	NTLAC
Respondent:	DPP

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mar99002
IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

R v HOGAN [1999] NTSC 7
No. SCC/9712980

BETWEEN:

THE QUEEN
Applicant

AND:

IAN GRANT HOGAN
Respondent

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 5 February 1999)

[1] At the commencement of the day set aside as the first day of sitting for an anticipated trial of four men, including the accused Hogan, on a number of charges arising from alleged assaults upon a female, counsel, instructed by the Director of Public Prosecutions, applied for leave to add a charge against Hogan of sexual intercourse without consent. I refused that application for the reasons which follow.

[2] The alleged offences occurred on 31 May 1997. Following committal proceedings, during which there was no evidence of any such intercourse on the part of the accused Hogan, the DPP presented an indictment which in so far as it concerned him alleged that he had committed an act of gross

indecency upon her and other offences. The trial of all accused was set to commence on 14 April 1998. Justice Mildren convened conferences between the DPP and representatives of all accused with the clear objective of ensuring that the trial would then proceed. A period of four weeks had been set aside. Having discussed a number of matters and given directions, attention was given to the indictment. Counsel for one of the accused then appearing requested his Honour to give a "cut-off date for serving any proposed amended indictment". Counsel then appearing for the DPP said that: "he did not have any trouble with the cut off date for the indictment". He indicated one area of possible change, but nominated 14 January 1998 as the date. His Honour noted that and said, "Thereafter, only by leave".

[3] Further directions were given as to possible applications by some of the accused, such as objections as to evidence, separate trials and witnesses to be called. Note was made of matters to be discussed between the DPP and the various accused, and it was anticipated that a further directions hearing would be conducted. His Honour's plain intention was to ensure that all parties had directed their attention to matters which would need to be put in train and resolved to ensure that the trial commenced as planned and ran smoothly. Finalising the charges to be brought was clearly of utmost importance to that process.

[4] On 30 January 1998 a new indictment was filed in which the charge concerning the accused Hogan was one of assault accompanied by

circumstances of gross indecency only. In February, the allegation was reduced to one of a simple indecent assault.

[5] The trial dates fixed for April 1998 were abandoned (for reasons other than presently under consideration) and the new date was confirmed on 1 June 1998.

[6] The parties were before the Court on 7 December 1998 to confirm readiness for trial. There was no indication that the DPP was not prepared.

[7] Counsel for the accused informed the Court that given the charge of indecent assault and the nature of the charges against the others, it had been intended to apply for a separate trial. In that context she had confirmed on 22 January 1999 that the indecent assault charge was all that it was intended to be preferred against him. A draft of a fresh indictment was supplied that day alleging only the indecent assault and particulars were separately given alleging the accused had touched the woman's breasts and vagina.

[8] At 4pm on 29 January, counsel for the accused was advised that the DPP proposed to seek leave to add a further charge to the indictment, that is, of rape involving digital penetration of the vagina in the course of the assault. Counsel for the Crown informed me that the allegation of penetration had only arisen during the course of the proofing of the woman shortly before that time.

[9] It is not necessary to go into the law regarding indictments for these purposes, (see generally Div2 of Pt IX of the *Criminal Code*). This is not a case where the evidence at committal was such that the accused could be charged with some further or other offence (s299), nor was it put that it fell within the provisions of s311 or s312. It was simply a case in which the DPP sought to add a fresh charge upon information conveyed to his officers by the woman at virtually the last minute prior to trial. The Crown accepted that no amendments should be made without the leave of Court.

[10] In considering the application I took into account the following matters:

1. As then structured, the trial was to be a joint trial of the four accused. An application on the part of the accused had been foreshadowed with a view to securing a separate trial as to the indecent assault.

2. The prevailing charge against Hogan was of long standing, and lately confirmed.

3. There was no reason for him to suspect that a charge of rape might be brought, his counsel's preparations for trial were directed accordingly. It had not been thought that senior counsel should be retained.

4. No legible proof of the woman's statement regarding the new allegation had been provided, although, to be fair it was in the course of preparation at the time the application was heard and would have been available

within a matter of hours. Counsel for the accused, Hogan, took no exception on this basis.

5. At the very least it would have been necessary for arrangements to be made for the woman to give evidence about the matter after delivery of her statement and to give counsel for the accused the opportunity to assess her evidence and to cross-examine. That evidence would probably need to be critically examined against much of the evidence previously provided. The effect of that evidence, so far as the other three accused was concerned, was unpredictable.

6. There were other matters to be attended to before the trial proper could commence. The intervention of this additional factor would probably interfere with that process.

7. There was no explanation as to how it was that the proofing of the woman for trial came to be undertaken so late.

[11] These considerations alone may have persuaded me against allowing the amendment. However, there was another consideration which might not ordinarily have been dealt with in the usual course until the new indictment had been filed and a motion made to quash it or stay proceedings on it. There was no objection to my taking into account the arguments put by counsel for the accused in that regard on the application for leave. Mention has been made of the efforts of Justice Mildren to ensure that the trial would proceed smoothly in April 1998. It was broadly modelled on the procedures

implemented by Practice Direction No 1 of 1995 regarding criminal listings in Darwin. That Direction issued subsequent to wide ranging consultation with the DPP, representatives of legal aid officers and others regularly engaged in criminal proceedings. Those consultations followed considerable disquiet at the all too frequent disruptions of the orderly conduct of the business of the Court arising, for the most part, from what appeared to be failure on the part of all sides to made adequate preparation for trial, and explore the possibilities of an appropriate plea. Amongst those directions was that relating to callover trials on arraignment days to confirm "whether a voir dire or any other preliminary application is likely, with a view to it being dealt with well before the trial date fixed for the commencement of trial".

[12] What fell from the representative of the DPP before his Honour, and his subsequent confirmation of the charges to be presented against the accused, amounted to assurances and undertakings to both the Court and the accused that no substitute or additional charge would be sought. It was inherent in that that the DPP had properly prepared the case for trial and was ready to proceed as early as April 1998. That must have included having proofed the woman. If, as appears here, proper proofing of a witness was not undertaken till the last minute, before a long adjourned date for trial, the conclusion may be reached that the Crown's assurances prior to the date originally fixed for trial were not based on a firm foundation. Consequently, I am not satisfied that the processes of the Court were used

fairly by the Crown. Its processes were abused. It can not be said with any certainty that had the woman been properly proofed prior to the April date, she would or would not have raised the present allegation. The fact is there is nothing to show that any effort had been made to proof her at the time when the issue of finalising the charges was clearly raised by the Court. The inherent assurances then and until a few days ago were not made on a properly informed basis.

[13] The following passage from the judgment of King CJ. in *Rona v District Court of South Australia* (1994) 63 SASR 223, with respect, needs no elaboration from me.

> "The underlying principle was stated in wide terms in the joint judgment of Mason CJ, Dawson, Toohey and McHugh JJ in *Williams v Spautz* (1992) 174 CLR 509 at p520:
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> > "As Lord Scarman said in *R v Sang* [1980] AC 402 at 455, every court is 'in duty bound to protect itself' against an abuse of its process. In this respect there are two fundamental policy considerations which must be taken into account in dealing with abuse of process in the context of criminal proceedings. Richardson J referred to them in *Moevao v Department of Labour* [1980] 1 NZLR 464 at 481 in a passage which Mason CJ quoted in *Jago* (at 30). The first is that the public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability so to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice."
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> The remedy may be granted where "the prosecutor can be said to have manipulated or misused the rules of procedure": *R v Derby Crown Court; Ex parte Brooks* (1985) 80 Cr App R 164 at 168; *R v*

> *Horsham Justices; Ex parte Reeves* (1982) 75 Cr App R 236; *R v Brentford Justices; Ex parte Wong* [1981] QB 445.
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> Case management rules are now essential equipment for courts exercising criminal jurisdiction, just as they are for courts exercising civil jurisdiction.
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> …
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> The case management rules are designed to ensure, inter alia, that the cases for the prosecution and the defence are prepared, that all necessary amendments are made, that necessary notices are given and that statements of any additional prosecution witnesses are supplied to the defence, in good time before trial so that the trial will proceed on the day fixed and the time allocated for the trial will not be wasted. It is essential to the proper management of cases that both the DPP and the accused comply with the directions which are given, carry out undertakings made and adhere to assurances given, at the status conferences held in accordance with those Rules. Only in that way can a trial be accorded which is fair to both parties without waste of the limited public resources committed to the court system. The court must therefore insist on the parties including the DPP acting in that way. Only thus can the court "protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike" and prevent the "erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice": *Williams v Spautz* (at 520)."

[14] In coming to this decision I have borne in mind that the interest of justice requires taking into account the interests of fairness to the accused in having the basis upon which his trial was to take place adhered to, and the integrity of the case management system, as employed in this particular matter, with all that it implies to the efficient and just disposal of criminal business and "the community's expectation that persons who are charged with offences are properly brought to trial" *R v Mellifont* (1992) 64 A Crim R 75 at 80

(King CJ. in *Rona* at p230). See also the judgment of Olsson J. commencing at p230.
