EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

NOTE: PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS, OF COMPLAINANT(S) PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE DISTRICT COURT
AT WHANGAREI

CRI-2015-088-003482
[2017] NZDC 18885

THE QUEEN

v

[SYING KAO]

Date of Hearing:	24 August 2017
Appearances:	M Smith for the Crown M Kan for the Defendant
Judgment:	28 August 2017

ORAL JUDGMENT OF JUDGE D G HARVEY

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[1] The defendant, [Sying Kao], has been charged with sexual violation by rape.

[2] The defendant has, by application dated 3 August 2017, applied for a stay on the grounds of undue delay.

[3] To put everything in perspective it is necessary for me to traverse the alleged facts. It is said that the defendant and complainant were both [details deleted].

[4] In [date deleted] 2015 the defendant moved into the same address that the complainant shared with [number deleted] other [people] and he slept variously in the

lounge, a flatmate's room and in the victim's bedroom. For practical reasons it is said they shared a bed from time to time.

At approximately 3.00 am on [date deleted] the complainant and a flatmate arrived back in Whangarei from Auckland and upon arrival spent some time talking to the defendant before the complainant had one drink and then went to bed.

Some time later when the complainant was asleep it seems the defendant went into her room and got into her bed.

The complainant awoke feeling a pain in her vagina and she realised that the defendant had put his penis inside her. She protested without success and so she pretended she was asleep.

A little later the complainant got up, had a shower and went into her flatmate's room and there was then an exchange of messages as the complainant was concerned that the defendant may have ejaculated. After some prevarication the defendant claimed he had not ejaculated and suggested that the complainant go to the hospital if she did not believe him. A complaint was made to the police and the complainant underwent a medical examination.

[5] As a first step, it is important to set out a timeline and I respectfully adopt the timeline prepared by the Crown simply on the basis that it itemised everything that has occurred from the date of the alleged offence:

Date	**Event**
[date deleted] 2015	– Alleged offending. – Reported to police by complainant. – DSAC examination of complainant.
[date deleted] 2015	– DVD interview with complainant and interpreter.
3 December 2015	– Defendant spoken to by police, Bill of Rights and caution given and allegations explained. Defendant elected not to make a statement. – Defendant released without charge.

Date	Event
15 December 2015	– Defendant arrested. Defendant again elected not to make a statement. – First appearance at Court. Remand on bail.
6 January 2016	– Second appearance at Court. – Not guilty plea entered. – Trial by jury elected. – Remand on bail to case review hearing on 14 March 2016.
29 January 2016	– First Court appearance by Crown on this matter. The defendant had been arrested for breach of bail. The breach was admitted and the defendant was re-admitted to bail. He was remanded to appear at case review hearing on 14 March 2016.
14 March 2016	– Case review hearing administratively adjourned to trial callover on 3 June 2016.
27 April 2016	– Formal written statements filed.
3 June 2016	– First trial callover. Remanded to further callover on 17 August 2016.
17 August 2016	– Callover. Pre-trial date set to determine Crown application for mode of evidence orders. Remand to 7 December 2016.
7 December 2016	– Pre-trial hearing adjourned to callover 17 February 2017.
17 February 2017	– Joint memorandum of counsel signed and filed 16 February 2017. – Appearance administratively adjourned to pre-trial date 29 March 2017.
29 March 2017	– Pre-trial to determine Crown application for mode of evidence orders and directions for remote participation. – Pre-trial decision reserved. – Firm fixture date 7 August 2017 set.

Date	Event
9 June 2017	– Reserved decision on mode of evidence orders and remote participation received.
27 July 2017	– Pre-trial hearing regarding editing of the complainant's DVD interview.
3 August 2017	– Pre-trial telephone conference with trial Judge. – AVL arrangements for complainant unsatisfactory. Crown applied for adjournment of trial. Adjournment granted. – Defendant filed application for stay of proceeding.

[6] It appears to be accepted by everyone that the complainant of her own volition returned to [country deleted] at the end of 2015. Her intention was to return to continue [details deleted]. However, upon arriving in [country deleted] it would seem she changed her mind and she decided to remain in [country deleted] and not return to her New Zealand [details deleted]. Exactly when this was confirmed is uncertain but at the latest it was in June 2016.

[7] On 17 August 2016 the defendant advised the Court he intended to defend the mode application which was, at that time, simply an application for the complainant to give evidence via CCTV. The hearing of that objection was to have been 7 December 2016. That hearing was adjourned.

[8] Then by application dated 16 February 2017 the Crown gave notice of its application for a mode of evidence direction requesting that the complainant be able to give her evidence by way of a video link from [location deleted]. Attached to that application was a job sheet that clearly set out that the complainant no longer had a visa for New Zealand and did not intend to return to [details deleted]. In addition there is at least some suggestion in that job sheet that the defendant may have offered the complainant money. That, however, is at best second-hand hearsay and I put that matter to one side.

[9] Faced with that information the defendant obviously instructed his counsel to oppose that application as well. Given that opposition there was no purpose in setting a firm fixture date. Whether or not there would a trial depended on the outcome of that application. Nevertheless, given the defendant's instructions to oppose the application there was a considerable delay due solely to pressure of work in the registry. That application was not heard until 29 March 2017 and it was on that date that a firm fixture for trial was set.

[10] It is apparent from the email trail provided to the Court by Mr Kan that the registry began to make initial enquiries as to what arrangements could be made if the complainant was required to give evidence in [country deleted]. Obviously, nothing could be determined finally until the mode application was determined.

[11] The Crown's application was granted and then there was a further pre-trial hearing on 27 July to discuss the editing of the complainant's DVD interview.

[12] As a result of Judge de Ridder's decision it was determined that the complainant would give evidence via AVL from [country deleted] and that her DVD interview was to be played as part of her evidence-in-chief. The AVL arrangements were made through the Court registry.

[13] Perhaps not surprisingly there were difficulties in establishing an effective line of communication with the complainant in [country deleted] and ultimately the Crown were left in a position where they were forced to make an application for an adjournment when it became clear that that the arrangements for the complainant to give evidence via AVL were not satisfactory.

[14] At a conference in my chambers with Mr Kan appearing by telephone the application was discussed. Given the manner in which it was proposed that the complainant give evidence (ie, in a room on her own having all exhibits being emailed to her) I determined that the arrangements were not satisfactory and I granted the application for an adjournment.

[15] I do not accept, as stated by Mr Kan in his submissions, that I did so, "…on the condition that the applicant was afforded an opportunity to make submissions on whether the Crown may continue with the proceedings." There was no such condition. I simply indicated to Mr Kan that if he wished to file an application for a stay he was free to do so.

[16] Mr Kan filed his application. I have read his submissions and heard argument and in summary his submissions are:

(a) That although pre-trial issues were only resolved recently the delay has been no fault of the defendant.

(b) That the delay has been unduly extended by, "The complainant's voluntary departure and unanticipated remain overseas; poor communication between the respondent and all other parties; and inadequate and untimely AVL arrangements organised by the respondent."

(c) That the actions and inactions of the respondent and complainant amount to a breach of the applicant's right to be tried without undue delay which is guaranteed under s 25(b) New Zealand Bill of Rights Act 1990.

(d) The delay has had a significantly detrimental impact on the applicant's family.

(e) That the delay also impacts on the applicant's rights to a fair trial, pursuant to s 25(a) New Zealand Bill of Rights Act 1990 as it has an inclination to fade witnesses' memories and recall ability. It is argued this negatively erodes the circumstances required to communicate a sound defence.

(f) The present arrangements breach the applicant's right to a fair trial. They preclude the threat of sanction against perjury and effectively

deny the applicant the opportunity to cross-examine in accordance with the law of New Zealand.

(g) Mr Kan further argues that, "Both the respondent and the Court has deemed the current arrangements as unsatisfactory."

[17] It is submitted to me that there are three essential questions as set out in *Williams v R*[1] namely:

(a) Was there an undue or unjustified delay in bringing the matter to trial?

(b) If so, has the undue delay resulted in a breach of the rights to a fair trial?

(c) If so, what is the appropriate remedy?

[18] I am also referred to *Martin v Tauranga District Council*[2] but with the greatest of respect to Mr Kan, that decision is now more than 20 years old and given the decision in *Williams v R* needs to be treated with some care.

[19] After summarising the law it is submitted to me that a stay of these proceedings is the appropriate remedy because:

(a) The delay has been particularly long and has involved multiple adjournments through no fault of the applicant.

(b) The delay has induced significant emotional stress and toll on the applicant and his family as detailed in the applicant mother's affidavit.

(c) The delay has resulted from the complainant's unforeseen permanent departure from New Zealand, the poor monitoring and communication of developments regarding this salient fact by the respondent to all parties, and the incomplete and unconfirmed AVL arrangements made by the respondent despite significant time to do so.

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[1] *Williams v R* [2009] 2 NZLR 750 (SC).
[2] *Martin v Tauranga District Council* [1995] 2 NZLR 419.

[20] It is submitted to me that the public interest here is outweighed by the unfair prejudice to the applicant's right to be tried without undue delay and right to a fair trial and in the alternative the Court should exclude the complainant's evidence.

[21] The Crown submits that any delay in this matter is not undue or alternatively that even if the Court found the delay to be undue then a stay of proceedings is not the appropriate remedy for such a delay. The Crown also submits that for the Court to exclude the complainant's evidence would effectively result in the dismissal of the charge.

[22] The Crown submit that it is inappropriate to criticise the complainant for voluntarily leaving New Zealand or declining to return for the trial. The Crown submit that there was no obligation on the complainant to remain in New Zealand, nor an obligation to advise of her intention to remain in [country deleted] indefinitely. The Crown rejects that this has resulted in unfairness to the defendant.

[23] The Crown point to the fact that it was because the complainant has returned to [country deleted] that this Court made an order that she give her evidence via video link.

[24] The Crown rejects the criticism that there has been poor communication with the parties. The Crown point to the difficulties that the police had in establishing an effective line of communication. The Crown submits now that these difficulties have been overcome. The Crown submit that this issue in itself has not been the cause of a substantial delay.

[25] The Crown refer me to the communications between the Whangarei District Court and Detective [name deleted] and submit further that the practical arrangements for the video link were matters for the Court registry to arrange with assistance by the Crown.

[26] The Crown's position is that it took a responsible approach by applying for the adjournment when it realised that the arrangements that had been put into place were not satisfactory.

[27] Dealing with the law, the Crown submit that the Courts have been reluctant to define "undue delay" but it accepts that undue delay can be caused by the prosecution, judiciary, Court, defence or a combination thereof.

[28] The Crown submits to me that in the Supreme Court decision of *Williams v R* the delay to final disposition was five years. In that case the Court found the delay was undue but it declined to grant an application for stay of the proceedings, rather confirming the additional discount provided to the defendant on sentence. The Crown refer me in particular to paragraph [18] of that decision which states:

> The remedy for undue delay in an accused coming to trial must provide a reasonable and proportionate response to that delay. A stay is not a mandatory, or even a usual remedy. Staying the proceedings is likely to be the correct remedy only if the delay has been egregious, or there has been prosecutorial misconduct or a sanction is required against a prosecutor who does not proceed promptly to trial after being directed by a Court to do so. If an accused is convicted after being on bail pending trial, a reduction in the term of imprisonment is likely to be the appropriate remedy. If the accused has been in custody, that time will count towards service of the term of imprisonment. In an extreme case, the conviction may be set aside. Upon acquittal, monetary compensation may be justified. The seriousness of the offending will usually not be relevant to the nature of the remedy. If however the offending is well towards the lower end of the scale, that may be sufficient to tip the balance in favour of a stay.

[29] The Crown refer me to *Martin v Tauranga District Council* where there was a delay of 17 months from charge to trial. That case highlighted the fact that the delay was caused by the Crown vacating a trial date and that the unjustified action of the prosecutor amounted to undue delay. In that case the Crown unilaterally vacated a trial date rather than making an application to the Court. The Crown rejects any suggestion that their actions in this case are similar to *Martin*.

[30] The Crown submit that the delay in this case has not been caused by unilateral and unjustified actions by the Crown.

[31] The Crown submit to me that the defence submission that the current arrangements for AVL breach the defendant's right to a fair trial is not sustainable given the decision of de Ridder DCJ.

[32] The Crown submits that in this case the delay is not undue but even if it is, the appropriate remedy is not a stay. The Crown argue that the defence is unable to point to any specific prejudice caused by the delay that would affect the defendant's right to a fair trial other than the general submission that witnesses' memories may be affected.

The Crown also submit that what delay there has been has not in any way caused prejudice to the defendant's right to a fair trial. The Crown acknowledges that there may well be some personal difficulties but the defendant's ability to conduct a full and proper defence have not been affected in any way.

[33] The Crown submit that there are now arrangements in place which the Court can take some assurance from and that once a future trial date is set, appropriate arrangements can be put into place for the complainant to give evidence via AVL as directed by His Honour Judge de Ridder.

Discussion

[34] It is very clear that from the date of the alleged offending until the date of the defendant's first Court appearance the police acted with commendable speed.

[35] It is also clear from the timeline that once the charge was laid the matter proceeded smoothly through Court procedures until the defendant instructed his counsel to first oppose the Crown's initial application for the complainant to give her evidence via CCTV and then to oppose the Crown's application for her to give her evidence in [country deleted].

[36] The Crown's application was filed on 15 February 2017 but a date for the arguing of that application was not until 29 March 2017. Nothing could be done to put any arrangements in place until that decision was released on 9 June 2017.

The defendant had every right to oppose the Crown's application. But once that opposition was filed, everything came to a halt until the application could be determined.

[37] The Court acknowledges of course that it was the defendant's right to oppose both mode applications. However given the seriousness of the charge CCTV was likely to be ordered and once there was the very clear evidence that the complainant had returned to [country deleted] but was willing to give evidence, the chances of a successful opposition were at best remote. However, by choosing to exercise his rights delay was inevitable.

[38] I reject immediately the submission that this delay has in some way affected the defendant's right to a fair trial because of dimmed memories. This Court regularly conducts trials in circumstances where the alleged actions have occurred years and sometimes decades earlier. This has received approval from the higher Courts although certainly, if the allegations relate to incidents that occurred more than 10 years previously, the Court must give consideration to giving the jury a warning about the delay.

[39] Here, the allegation is very simple. The complainant says that whilst in bed the defendant has raped her. The defendant denies that. It is difficult to see that a delay of 21 months will make a great deal of difference to anyone's recollection of what occurred on that night, particularly as it does not seem to be suggested that anybody was drunk.

[40] I accept that by leaving New Zealand the complainant has caused a delay, but she was entitled to do so and there was no power on the part of the Crown or the police to prevent her from leaving the country. I do not accept that in this case the delay has been particularly long. Certainly, there have been multiple adjournments but I again make the point that some of the delay has been caused by the defendant's own actions. Whether or not he was exercising his rights is rather beside the point. He must accept that by so doing he has slowed down the procedure.

[41] I am not prepared to lay blame for the unsatisfactory arrangements for the complainant to give evidence. I accept the Crown through the police did their best, as did the Court registry. It was the Court who made the decision to grant the adjournment and the Crown's application was proper.

[42] I have formed the view that the passage referred to by the Crown in paragraph [33] of their submissions is apposite. The delay here has not been egregious. There has been no prosecutorial misconduct and I see no proper grounds for granting a stay in these proceedings.

[43] However, I do sound a warning that the Crown must ensure as far as it is able, that when this matter is next set for trial, proper arrangement are in place for the complainant to give her evidence. A further failure may well invite a further application from the defendant.

[44] In making this decision I do not overlook the hardships that are being suffered by the defendant and his family. Of course, they are to be regretted. However, even in the face of that information, the Court would not be justified in staying such a serious charge. The complainant, despite her decision to return to [country deleted], is entitled to have this matter put before a jury.

D G Harvey
District Court Judge