

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. SEE

<http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html>

**IN THE DISTRICT COURT
AT WHANGAREI**

**CRI-2017-088-001146
[2018] NZDC 1814**

THE QUEEN

v

HOHEPA STEWART

Hearing: 13 December 2017

Appearances: N Dore for the Crown
J Watson for the Defendant

Judgment: 5 February 2018

RESERVED JUDGMENT OF JUDGE D J McDONALD

Charges

[1] Mr [Stewart] faces trial in respect of three complainants, [victim 1], his step-daughter and her two children, [victim 2] and [victim 3], for alleged sexual offending.

Background

[2] On 26 July 2017, I ruled¹ that there should be one trial in respect of all three complainants. The Crown had applied to join [victim 1]’s trial to those of [victim 2] and [victim 3] her [children].

[3] On 12 September 2017 Judge Harvey² aborted the trial of the defendant due to what he saw as an “impasse [that he] could not see his way through.”

[4] Mr Watson sought to cross-examination [victim 2] and [victim 3] about what they saw or may have seen of their mother, [victim 1] engaging in sexual activity with a number of men. Mr Watson wanted to explore that with the young [children] to support a defence submission that they got their knowledge of sexual matters from observing their mother and not from what Mr [Stewart] did to them.

[5] Judge Harvey, in my view quite rightly, came to a view that permission under s 44(1) would be required in relation to questions put to [victim 2] and [victim 3] because [victim 1] their mother, was a complainant in the joined trial. Section 44A would need to be complied with. If she was not a complainant then he would not need leave as it would not be sexual experience of the [children] by what they observed, apparently, of their mother. Ms Dore in her submissions accepted that.

[6] In my decision of 26 July 2017, the argument was focused on whether the evidence of [victim 1] would be cross propensity evidence in respect of her [children]. While s 44 was raised in argument it did not form part of my reasoning in ordering joinder.

Application

[7] Mr Watson seeks to have the trial severed. If he had not I would of my own motion raised the issue. Ms Dore submitted the Crown cannot apply for severance, see s 38(4). The Crown oppose, if there remains one trial, permission being given under s 44 to question the [children] about their mother’s sexual behaviour.

¹ 2017 NZDC 16254

² 2017 NZDC 22757

Discussion

[8] I consider there should be severance of [victim 1]’s trial from those of her [children]. It would be in the interests of justice to do so.

[9] Mr Watson must be able to explore whether the [children], either one or both of them, saw their mother engage in sexual activity with someone other than the defendant Mr [Stewart]. There is no suggestion that Mr [Stewart] engaged in sexual activity with [victim 1] around the time it is alleged he did with her [children]. Permission would not be required under s 44 if [victim 1] was not a complainant in the trial.

[10] Mr Watson may also seek to ask [victim 1] if she was aware that her [children] did or might have seen her engage in sexual activity. She will be a witness in her [childrens] trial. If she is not a complainant leave would not be required. If she was, permission would be required. It is doubtful permission would be given as regards her as it would not be relevant nor in the interests of justice in respect of her complaint.

[11] I did not deal with that argument in my earlier decision. Had I done so I would have found that it is not in the interests of justice to order joinder as Mr [Stewart] would be or may be denied a legitimate line of cross-examination of the young [children] as to how they came to their knowledge of sexual matters which obviously they have. An alternative way, which the defence have put forward, seeing their mother, may provide that answer.

Result

[12] I order severance of [victim 1]’s trial from that of her [children].

[13] This has a trial date of 19 March 2018.

D J McDonald
District Court Judge