

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 WELLINGTON**

**I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA**

**CRI-2018-096-000124
[2020] NZDC 2336**

THE QUEEN

v

**KIRK DALE TERRIS
[STANLEY RICHARDS]**

Date of Ruling: 13 February 2020

Appearances: J O'Sullivan and K Kensington for the Crown
B Hunt and A Ongley for the Defendant Terris
C Gisler and S Pohiva for the Defendant [Richards]

Judgment: 13 February 2020

**RULING OF JUDGE P A H HOBBS
ON DISCHARGE APPLICATION**

[1] This is a ruling in relation to the defendant Mr [Richards'] application to be discharged under s 147 Criminal Procedure Act 2011.

[2] The defendant, Mr [Stanley Richards], is charged with sexual violation by rape, being a party to sexual violation by rape and being a party to sexual violation by unlawful sexual connection.

[3] Mr [Richards] has applied to be discharged under s 147 Criminal Procedure Act 2011 on the grounds that no properly directed jury could reasonably convict Mr

[Richards] and that any conviction would be unsafe. Mr [Richards]'s application is opposed by the Crown.

[4] The charges arise out of a single incident that is alleged to have occurred in [year deleted] when the complainant was [under the age of 20 years]. The complainant gave evidence that her partner, Mr Terris, Mr [Richards]' co-defendant, purchased drugs from a man who lived in [location A deleted]. It was her evidence that the man's name was [Stanley], a Māori man with dreadlocks. The complainant gave evidence that there were numerous times Mr Terris would come home and tell her that he owed money to [Stanley] for drugs. The complainant said she would on occasions scrape together a small amount of money from her earnings or borrow money from her mother to pay the debts in order to stay safe. It was the complainant's evidence that she had seen the man named [Stanley] three or four times or a maximum of five times over the period of a couple of months before the incident in question. The complainant gave evidence that she would either drive or walk with Mr Terris to where [Stanley] lived at [location A]. She never went inside the house but had spoken to [Stanley] on the footpath and Mr Terris had called him "[Stanley]" in front of her.

[5] On the day in question that gives rise the charges faced by Mr [Richards] the complainant says three men came to her house and told her that they were there to collect drug money. They told her that Mr Terris had offered her as payment for the unpaid drug debts. The complainant said they pushed the door open and then steered her into a bedroom and forced her onto the bed. The complainant gave evidence that she recognised one of the men to be the man she knew as [Stanley] through his association with Mr Terris that I have described. She did not know who the other two men were and they remain unidentified.

[6] The complainant gave evidence that one of the unidentified men raped her and the other unidentified man forced his penis into her mouth. The complainant said Mr Terris came into the room at some point but was not involved in the sexual assaults. At some point the complainant said the man she knew to be [Stanley] swapped with the other unidentified man that was raping her, because the next minute she looked down and [Stanley] was there having sex with her. The complainant described

[Stanley] as a familiar face and was focused on his dreadlocks. Eventually all three men left, shaking hands with Mr Terris as they did so, according to the complainant.

[7] The complainant did not make a complaint to the police until November 2017. In April 2018, [over 12] years after the incident, the complainant was shown a photo montage which included a photograph of Mr [Richards]. She failed to identify the photograph of Mr [Richards] as one of the men involved in the group rape incident. She did however recognise another man, not as being involved in the group rape incident but as somebody that may have associated with her partner, Mr Terris, at the time.

Defence Submissions

[8] Ms Gisler submits that no properly directed jury could reasonably convict Mr [Richards] and that any conviction would be unsafe, due to the unsatisfactory nature and quality of the complainant's identification of the man she knew to be [Stanley]. In support of that submission Ms Gisler made a number of other submissions:

- (a) The complainant's focus was not on the three men but rather her survival through this incident. Ms Gisler notes that the complainant conceded under cross-examination that her focus was not on the man she called [Stanley]'s face or what he looked like at the time.
- (b) Ms Gisler submits that that the photograph of Mr [Richards] in the photo montage, which is accepted to be a photo of Mr [Richards] around the relevant and material time, does not fit the description the complainant gave of the man she knew to be [Stanley], in particular in relation to the length and colour of Mr [Richards'] dreadlocks. Ms Gisler also submitted that the photograph indicated an odd or strange right eye that the complainant did not identify.
- (c) Ms Gisler submits that the complainant only saw the man she knew to be [Stanley] on a few occasions for short periods and never in close proximity.

- (d) Ms Gisler submits the general description the complainant gave of the man she knew to be [Stanley] could fit the description of any number of people.
- (e) The complainant accepted that Mr Terris may have owed a number of other people money for drug debts.
- (f) Ms Gisler submits that the complainant has assumed the person in the room was [Stanley] because he is the only person she had any dealings with over drugs with Mr Terris.
- (g) Ms Gisler notes that the complainant said “perhaps” when asked whether “[Stanley]” had stuck in her mind because it was an unusual name.
- (h) Ms Gisler notes that the complainant had repeatedly described [Stanley] as a familiar face and yet could not pick him out of the photo montage.

Crown Submissions

[9] Ms O’Sullivan submits that a properly directed jury could reasonably convict Mr [Richards]. Ms O’Sullivan emphasises that my job is not to predict what the jury is likely to do but rather what they could properly do.

[10] Ms O’Sullivan submits that it is important to remember that the complainant had recognised the man to be [Stanley] at the beginning of these events while at the door, before the sexual violence began. With that in mind, Ms O’Sullivan says, the complainant’s focus was not elsewhere or distracted at the material time when she recognised the man she named “[Stanley]”. Ms O’Sullivan emphasised the number of times the complainant had seen [Stanley] and the nature of those interactions before the incident in question.

[11] Ms O’Sullivan submits that any differences in the complainant’s description of [Stanley] and the photograph of Mr [Richards] in the photo montage are to be expected

and are not so material as to undermine the complainant's recognition evidence. Ms O'Sullivan also points out that the photograph in the photo montage was taken in April [year deleted], some months before the alleged incident [the following year]. Ms O'Sullivan submits that any reference to an odd right eye on the part of Mr [Richards] in the photograph is mere speculation and it appears to be nothing more than Mr [Richards] raising his eyebrows. Ms O'Sullivan submits that the fact that other people may have also sold drugs to Mr Terris is a neutral factor and does not detract in any material way from the complainant's recognition evidence. Ms O'Sullivan submits that it is not surprising that the complainant did not pick Mr [Richards] out of the photo montage [over 12] years after she had last seen him.

[12] Ms O'Sullivan submits that the focus must be on the circumstantial evidence that supports the complainant's recognition of the man she knew to be [Stanley] at the time of these events. Ultimately, Ms O'Sullivan submits that the matters raised by Ms Gisler are for the jury and that a properly directed jury could reasonably convict Mr [Richards] and any conviction would not be unsafe.

Decision

[13] The principles that apply to a dismissal application are well settled. In deciding whether or not to dismiss a charge I must have regard to the respective functions of the Judge and jury. It is for the jury to determine whether evidence is or is not sufficient to establish guilt. It is not for me to predict what the jury will find. Questions of credibility, reliability and weight are to be determined by the jury, and for the purposes of this application I must consider the Crown case at its highest.

[14] As the Court of Appeal said in *Parris v Attorney General*¹:

“If the evidence is sufficient in law, if accepted, to prove the case, the Judge should leave the case to the jury and not withdraw it on evidentiary grounds.”

[15] The Court of Appeal also noted that unless the case is clear-cut in favour of the defendant it should be left for the jury to decide.

¹ *Parris v Attorney-General* [2004] 1 NZLR 519 (CA) at [10]

[16] It is in my view important in making an assessment of the Crown's evidence, and in particular the evidence of the complainant, to consider the evidence in its entirety and not concentrate on or take parts of the evidence out of context or without reference to other evidence that might be relevant to any issue in question.

[17] I think that it is important to note that this is not a case of direct visual identification evidence. Rather, this is a case of recognition evidence, which is a subset or category of visual identification evidence.

[18] The admissibility of the complainant's recognition evidence was the subject of a pre-trial ruling by Judge Barry on 7 October 2019. The complainant does not directly identify the defendant, Mr [Richards], as the person in the room who raped her. The complainant says it was a man she knew to be [Stanley]. It is a subtle but, in my view, important distinction. The Crown's case of identity is effectively built on circumstantial evidence. That circumstantial evidence includes:

- (a) Evidence that the complainant's partner, Mr Terris, purchased drugs from a man named [Stanley]. That happens to be the defendant's name.
- (b) Evidence that the complainant saw the man named [Stanley] on several occasions, including going to his address in [location A]. There is no dispute in this case that at the material time the defendant, Mr [Richards], lived at the address identified by the complainant as, "[Stanley]'s address."
- (c) Evidence that [Stanley] was Māori with dreadlocks. There is no dispute that Mr [Richards] is a Māori and that at the relevant time he had dreadlocks.
- (d) Evidence that Mr Terris owed Mr [Richards] money for drugs. That being relevant because the three men who came to the house told the complainant Mr Terris had offered her up as payment for unpaid drug debts.

- (e) Evidence that the complainant almost immediately the three men came to the house and before the sexual violence began recognised one of the men to be the man she knew as [Stanley] with him she had interacted with prior to this incident.

[19] If all of those strands of circumstantial evidence are taken together then there is evidence upon which a properly directed jury could reasonably conclude that Mr [Richards] was one of the three men in the room. If the jury were then satisfied of what occurred in that room based on the evidence of the complainant, then there is evidence upon which a properly directed jury could convict Mr [Richards].

[20] I do not discount or ignore the submissions made by Ms Gisler, nor do I ignore what I would describe as the gains made by Ms Gisler in cross-examination to undermine the complainant's recognition evidence. In particular, I note the evidence about the complainant's failure to identify Mr [Richards] in the photograph montage. It is perhaps relevant to note that this procedure was unnecessary and should not have been followed by the police. There was clearly, as Judge Barry noted, good reason for not following that procedure. However it now forms part of the relevant evidence in this case to be considered by the jury.

[21] As the Crown submits, it is perhaps not surprising that [over 12] years after the incident, and having had nothing further to do with the man she knew to be [Stanley], the complainant could not identify Mr [Richards]'s photograph as being the man she knew as [Stanley]. I do however accept that this evidence, along with other gains made, as I have called them, by Ms Gisler in cross-examination, puts squarely in issue the reliability of the complainant's recognition evidence. However ultimately it is in my view a matter for the jury to determine whether or not the Crown's circumstantial case of identity is sufficient or whether, as no doubt Ms Gisler will submit, they should be left in some doubt about the reliability of the recognition evidence.

[22] For these reasons I am satisfied that ultimately this is a matter for the jury. Considering the Crown case at its highest, there is in my view evidence upon which a properly directed jury could reasonably convict Mr [Richards], and his application for the charges to be dismissed is declined.

P A H Hobbs
District Court Judge