

**IN THE DISTRICT COURT
AT NELSON**

**I TE KŌTI-Ā-ROHE
KI WHAKATŪ**

**CRI-2019-042-000173
[2020] NZDC 484**

THE QUEEN

v

BENJAMIN EDWARD SCHRODER

Date of Ruling: 15 January 2020

Appearances: A R Goodison for the Crown
K W Jones and P A S Morrison for the Defendant

Judgment: 15 January 2020

PRE-TRIAL RULING OF JUDGE P A H HOBBS

[1] On the morning defendant's trial was due to get underway the Crown drew to my attention a joinder notice under s 138 Criminal Procedure Act 2011 in respect of two charges of wilfully attempting to pervert the course of justice. As I understand it the notice was filed on 10 January with the trial due to start on 13 January. It was not possible to deal with the notice filed by the Crown prior to the morning of the trial for logistical reasons.

[2] I granted the Crown leave to join the two new charges of attempting to pervert the course of justice to the existing charges and then declined Mr Jones' application for severance. I indicated at the time that my reasons for doing so would follow and I now provide those reasons.

[3] It is important to record some of the background to this matter. On becoming aware of the two new charges I enquired of Mr Jones whether the defendant was in a position to enter a plea to the two new charges, having received initial disclosure. Mr Jones indicated that he was and through counsel the defendant pleaded not guilty to the new charges and elected to be tried by a jury.

[4] Bearing in mind the fact that the defendant is in custody, and that this was a second attempt at trial, I asked counsel whether they were in a position to deal with the issue of severance or whether or not they needed further time to consider the issue. Both Ms Goodison for the Crown and Mr Jones for the defendant indicated they were ready to proceed and needed no further time.

Crown Submissions

[5] Ms Goodison for the Crown, referred to the principles set out in *Churchis v R*.¹ Ms Goodison submitted that the wilfully perverting the course of justice charges were interconnected in terms of their circumstance with the current charges. Ms Goodison submitted if all the charges were not dealt with together it would mean the complainant would have to give evidence twice. Ms Goodison accepted that there would be prejudice to the defendant if the charges were heard together but submitted that the prejudice was not unfair or illegitimate.

[6] Ms Goodison also noted that the defence intended to lead evidence of emails sent by the complainant in which she recants her allegations, an email now the complainant says by way of further statement was untrue and completed to derail the prosecution. Ms Goodison also submitted that if there were to be separate trials the jury would inevitably know of these events as a whole.

Defence Submissions

[7] Mr Jones advanced four submissions in support of severance.

¹ *Churchis v R* [2014] NZCA 281.

- (a) Mr Jones says he only heard of the new charges last week and had limited time to take instructions from the defendant. Mr Jones described it as trial by ambush.
- (b) The charges are unrelated in time and circumstance. In particular Mr Jones noted that the alleged assaults occurred on 23 January 2019 and that the two charges alleging wilful attempts to pervert the course of justice spanned a period of 24 January 2019 to 18 November 2019 and the other is said to have occurred on 10 February 2019.
- (c) If joined Mr Jones submitted that other trials scheduled for the week would be delayed because this trial would inevitably take longer.
- (d) Mr Jones submitted that if the new charges of attempting to pervert the course of justice were not severed from the charges of violence it would result in unfair prejudice to the defendant. Mr Jones submitted that if the jury heard of the allegations of attempting to pervert the course of justice it would prejudice the jury against the defendant in relation to the current charges.

Analysis

[8] The relevant principles are set out in *R v Churchis* as follows:²

- (a) Offending that is unrelated in time or circumstance should not be tried together unless the evidence of one incident is relevant to another to an extent that its probative value outweighs its prejudicial effect. That relevance may arise in a variety of circumstances, such as where the facts are so similar or the allegations interconnected to a point that it would be artificial to present them separately.
- (b) Joinder may be granted if evidence relevant to one charge is also relevant to one or more other charges.
- (c) The practicalities of the criminal process may be taken into account including the degree of connection between the charges; the impact of successive trials on the accused and witnesses; and the likely effect of publicity of the first and subsequent trials.

² At [28].

- (d) Prejudice to the accused is a factor to be taken into account. The fact that the accused may be obliged to give evidence is a relevant but not a decisive consideration.
- (e) The discretion is wide. In the end, what is required is a balancing between the legitimate interests of an accused and the public interest in the fair and efficient despatch of the Court's business.

[9] I deal first with Mr Jones' submission that he had only just heard of the charges and was facing trial by ambush. That submission does not go directly to the principles set out in *R v Churchis* and whether or not severance should be granted. I made it clear to Mr Jones that if severance were declined the start of the trial could be delayed until later in the week or alternatively the trial adjourned. Notwithstanding that Mr Jones indicated he was in a position to proceed immediately if the charges were not severed.

[10] With respect to Mr Jones' concern that the other two trials scheduled for the week will be delayed or adjourned, again that is not strictly relevant to the issue of severance. I would note that the defendants in the other two trials scheduled are both on bail, one of the trials is a back-up trial. Because this is the second attempt at the trial of these matters and because the defendant is in custody this trial would obviously have priority and whether or not those other trials were delayed as a result of severance not being granted is irrelevant to the issue of whether severance should be granted.

[11] This brings me to Mr Jones' remaining two submissions. The perverting the course of justice charges are not closely connected in time, but that is inevitable if they follow the alleged assaults. They are however relatively closely connected in time. As I have said it is inevitable that they are not necessarily closely connected in time due to the nature of the charges and the history of these allegations which has contributed to these new charges coming to light at a later date.

[12] However, in my view the charges are inextricably linked in terms of circumstance. The perverting the course of justice charges are directly related to the allegations of violence. Without the allegations of violence there would be no attempt to pervert the course of justice charges. They go hand-in-hand. It would in my view be artificial to present them in separate trials. The perverting the course of justice

charges also have some relevance in terms of whether or not the violence in question happened at all.

[13] As Ms Goodison has noted, the defence intended to lead an email in which the complainant attempts to recant her initial allegations which is relevant to the perverting the course of justice charges. If there were to be separate trials it would also require the complainant to give evidence twice which is obviously undesirable in a case such as this and also taking into account the procedural history of this matter. There will be prejudice to the defendant if the attempting to pervert the course of justice charges were to be joined, however, it is not illegitimate or unfair prejudice.

[14] I was satisfied in the circumstances of this case that it would be an affront to common sense if the charges were not heard together. I was also satisfied that it was in the interests of justice that the charges were heard together and as I have noted I therefore granted the Crown leave to file the joinder notice and joined the perverting the course of justice charges to the existing charges and declined Mr Jones' application for severance for the reasons outlined.

P A H Hobbs
District Court Judge