IN THE SUPREME COURT OF NEW ZEALAND

SC 43/2009
[2009] NZSC 117

PETER DAVID BUDDLE

v

THE QUEEN

Hearing: 13 August 2009

Court: Elias CJ, Blanchard, Tipping, McGrath and Wilson JJ

Counsel: J Mather for Appellant
G H Allan for Crown

Judgment: 26 November 2009

JUDGMENT OF THE COURT

A The appeal is allowed.

B The six convictions entered on 9 May 2008 against the appellant, Peter David Buddle, in the District Court at Manukau in relation to the complainants K and N are each set aside.

C A new trial is ordered in relation to the three counts concerning the complainant N.

REASONS

Para No

ELIAS CJ

[1] Does a judge have the power to discharge a jury which has indicated it has reached unanimous verdicts on some counts because it has also indicated that it is unable to agree on alternative counts? The only suggested source of power to discharge the jury in such circumstances has been s 374 of the Crimes Act 1961, now repealed but re-enacted in substance in s 22 of the Juries Act 1981.[1] Both sections permit a judge to discharge the jury and postpone the trial where there is "any emergency or casualty rendering it in the opinion of the Court, highly expedient for the ends of justice"[2] to take the step. For the reasons discussed below, I am of the view that there was no such emergency or casualty by reason of the fact that the jury had indicated its disagreement on alternative charges. A judge cannot decline to take the verdicts upon which a jury has indicated it is unanimously agreed. That was not the course adopted in the present case. The Judge discharged the jury without taking its verdicts or indeed formally inquiring in open court whether the jury was in disagreement on the alternative counts, as had been informally communicated. At a subsequent trial the appellant was convicted in respect of the charges upon which the first jury had been able to deliver unanimous verdicts. The present appeal is against the convictions entered at the second trial. I have had the advantage of reading in draft the reasons given by Tipping J and do not rehearse the background which is fully set out by him. I agree with the conclusion that the Judge's failure to take the available verdicts was wrong and resulted in a miscarriage of justice when the appellant was convicted at the postponed trial. I agree that the convictions must be set aside. The error tainted unrelated charges in respect of which the convictions must also be quashed.

[2] The jury at the first trial, in an informal written communication with the Judge, disclosed that, although it was divided on alternative counts, it had unanimously agreed upon not guilty verdicts in respect of three counts. Such disclosure was unfortunate but is not in my view material to the result on the appeal. Similarly, I do not think it is necessary to rely upon the reasonable inference, available irrespective of the jury communication, that to reach the alternative counts

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1 By the Juries Amendment Act 2008.

2 Section 374(1) of the Crimes Act 1961 and s 22(3)(a) of the Juries Act 1981.

the jury at the first trial must have decided on acquittal of the appellant on the three charges on which they had verdicts. The conjecture that acquittal on the three charges would have resulted had the verdicts been taken adds to the appearance of injustice and is indicative of the mischief caused by such irregularity. But I am of the view that the failure to take the verdicts was a fundamental deficiency in any event, and that it was an abuse of process to retry the appellant on the same counts. I would quash the convictions not because of speculation that the appellant could well have been acquitted but because the Judge lacked the power to withdraw the charges from the jury without verdict, for the reasons given in paras [3] to [7]. It is not necessary in the present appeal to consider whether retrial on the counts on which the jury was thought to be in disagreement was appropriate. The additional counts were withdrawn at the second trial and did not result in convictions. I would however reserve my position on the point. I think it arguable that the failure of the Judge to inquire in open court whether the jury had been able to reach agreement was a further fundamental error. Without further argument I am not prepared to assume that the Judge was entitled to act on informal communication in this way or conclude that it caused no miscarriage of justice. The better course would have seen all counts put to the jury in open court: for verdict where the jury was unanimous or for confirmation that it could not agree. [3]

[3] The discretion to discharge a jury under s 374 where there is "any emergency or casualty making it highly expedient in the interests of justice" to do so, does not in my view serve in respect of the charges upon which the jury had indicated it had unanimous verdicts. It is not an "emergency" or "casualty" for a jury to agree on its verdict on one count and disagree on another. That is a common enough occurrence. If constituting an emergency or casualty, judges would in all such cases be entitled to discharge a jury without taking a verdict to enable all charges to be re-run together. Such a course is contrary to the fundamental point that each count is distinct for the purposes of trial.[4] The matter is no different where charges are laid in the alternative.

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3 *R v Rose* [1982] 1 WLR 614 at p 621 (CA) per Lord Lane CJ.

4 *Latham v R* (1864) 5 B & S 635 at p 643 (KB) per Blackburn J; *R v Pickering* [1939] NZLR 316 at p 321 (CA) per Myers CJ and at p 323 per Ostler J; *R v Muling* [1951] NZLR 1022 at p 1028 (CA) per Fair ACJ. See also s 340 of the Crimes Act (Joinder of counts).

[4] Is the position any different because of the nature of the charges faced by the appellant? The appellant was charged with six counts of sexual offending in respect of the same complainant. Three counts alleged that the complainant was under the age of 12 years. The other three, in respect of the same indecencies, alleged that she was aged between 12 and 16 at the time. The alternative counts were laid because of doubt about the complainant's age and because, at the time of the alleged offending, the Crimes Act 1961 described separate offences of indecency with girls according to whether they were under the age of 12 years or aged between 12 and 16 years of age.[5] Since amendment in 2005 s 133 has been repealed and s 134 expanded to include all indecencies with young persons under the age of 16. The uncertainty as to age which caused the charges in the present case to be laid in the alternative is therefore no longer a difficulty for offending which has occurred since 2005.

[5] Under the legislation as it stood before 2005, the age of the complainant was an element of each distinct offence under ss 133 and 134. Like any essential element of an offence, it required proof beyond reasonable doubt to the satisfaction of a unanimous jury. It is not unusual in cases of historic sexual offending against young people for the age of the complainant at the time of the offending to be uncertain. In such cases under the law as it stood before 2005 the practice of charging alternative offences according to the age of the complainant was not uncommon. We are not asked in the present case to consider whether that practice was appropriate, and I express no view upon it. The fact that the jury was left with alternatives depending on proof of the age of the complainant was background to their discharge by the Judge and perhaps the motivation for the course he adopted,[6] although that is unclear on the information available.

[6] It is dangerous to speculate that the Crown might have been disadvantaged at a subsequent trial if the complainant were found by the second jury to have been within the age of the charge on which a verdict of not guilty had earlier been delivered. A likely verdict of not guilty on the under-12 charges (an inference open irrespective of the jury communication because the alternative charges were reached)

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5 Section 133 (Indecency with a girl under 12) and s 134 (Sexual intercourse or indecency with a girl between 12 and 16).

6 As Blanchard J considers to be the case.

does not mean that the only disagreement among the jurors was as to the age of the complainant: some jurors may have been of the view that the complainant was over the age of 12, others may have been of the view that the alleged indecencies had not occurred, whatever the age of the complainant.

[7] More importantly, since age is an essential ingredient of the charge, an acquittal based on lack of proof of the correct age is a proper disposition of the charge. A jury properly seized of the charge is obliged to deliver its verdict on that basis. If the jury at the first trial is able to deliver a unanimous verdict on the first count, the only basis for treating the available delivery of verdict as a "casualty", if on another alternative count it is unable to agree, is the view that the prosecution should be permitted to re-run its alternative cases to preserve all options. A discharge for this reason cannot be legitimate. It does not amount to an irregularity or mishap in the trial which makes it highly expedient in the interests of justice to discharge the jury. Indeed, such manipulation of the trial process would bring the administration of justice into disrepute. That is underscored in the present case by the fact that the alternative charges based on the complainant being over the age of 12 were withdrawn by the prosecution at the second trial. The background of charging in the alternative according to the age of the complainant could not in my view justify the discharge of the jury under s 374. The offences were distinct and required distinct verdicts.

[8] In dismissing the appeal, the Court of Appeal[7] referred to the decision of the English Court of Appeal in *R v Robinson*[8] where a jury had been discharged after indicating it was able to deliver a verdict on one count. In that respect *Robinson* is similar to the present case. But *Robinson* was an appeal against a refusal at retrial of a plea of autrefois acquit or autrefois convict. Both pleas were raised because the jury at the first trial was discharged without giving its verdict, on indication that it had reached a decision in relation to the appellant on one count only out of nine. The transcript disclosed that counsel had suggested, rather faintly, that the verdict should be taken on the single count on which the jury was agreed. The trial Judge however

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7 [2009] NZCA 184 (Robertson, Chisholm and Gendall JJ).
8 [1975] 1 QB 508.

expressed the view that "the best thing is for the matter to be dealt with again".[9]

[9] The Court of Appeal in *Robinson*, in an ex tempore judgment delivered by James LJ, held that the pleas were not available where a verdict had not been delivered. James LJ expressly did not approve the course of action taken by the trial Judge. His full reasoning for the Court was narrowly expressed:[10]

> In this particular case the jury were discharged at what must be the very last moment of time at which the judge had discretion in the exercise of which he could discharge them. All that remained to be done, if he had not discharged them, was to ask them what their verdict was. It is not for us to speculate what operated upon the mind of Judge Clarke in deciding to discharge the jury. The exercise of that discretion calls in all the circumstances for great care to ensure that fairness is done, and when we say fairness, we mean fairness to the Crown and to the defence. *It is not for us to say whether he was right or wrong. We have to say, as a matter of law, was there a conviction or an acquittal in the trial before Judge Clarke which could be a bar to the proceedings before Judge King-Hamilton?* We find there was no verdict given to the court. There being no verdict given to the court, there was no conviction and no acquittal, and the defendant could properly be put in charge of a second jury for the same offences.
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> For those reasons, without embarking upon any review of the many authorities that have dealt with the problems in this field but not on the precise issue, this appeal must be dismissed.

[10] I consider that *Robinson* is of limited assistance in the present appeal for three reasons. First, it is a sparsely reasoned and technical application of a technical plea which does not meet the claim here that the second trial is unfair and was an abuse of process. *Robinson* is based on the pleas of autrefois convict and acquit rather than the more general principle of abuse of process in issue here.[11] Such abuse of process in the present case may also arise out of a wider application of the maxim nemo debet bis vexari (which underlies the pleas), but in my view results more directly from the division of responsibility between judge and jury in our criminal justice system and the judge's limited jurisdiction to discharge the jury under s 374(1). Secondly, the discretion to discharge a jury under s 374(1) of the Crimes Act, unlike the common law discretion in issue in *Robinson*, is available only where the statutory criteria are met. For the reasons given shortly above and more

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9 At p 511.

10 At p 516 (emphasis added).

11 The power to stop proceedings as an abuse of process going beyond the doctrine of autrefois acquit and convict is affirmed as a flexible remedy in *Connelly v Director of Public Prosecutions* [1964] AC 1254 at p 1358 per Lord Devlin and at p 1364 per Lord Pearce.

fully explained by Tipping J, the occasion for exercise of the discretion did not arise here and the Judge accordingly lacked jurisdiction to discharge the jury and postpone the trial. Thirdly, the Court of Appeal in *Robinson* was not concerned with whether the Judge who discharged the jury was right or wrong as a matter of substantive fairness, as James LJ explicitly acknowledged.[12] Whether that approach would still be maintained after enactment of the Human Rights Act 1998 (UK) may be questioned. But in any event, the obligations imposed under s 25 of the New Zealand Bill of Rights Act 1990 do not permit such indifference in considering whether the postponed trial was fair or an abuse of process.

[11] I would allow the appeal. I concur in the making of the orders proposed by Tipping J as to disposition.

BLANCHARD J

[12] I do not share the opinion of the majority whose reasons are principally given by Tipping J. I would dismiss the appeal.

[13] In my view the decision of Judge Epati to discharge the jury after it indicated that it was agreed upon its verdicts on counts one, three and five, but was otherwise unable to agree, was open to him under s 374(1) of the Crimes Act 1961 on the basis that there was a casualty. That being so, he had the necessary jurisdiction to order a discharge and although he may have purported to exercise it on a different basis, under subs (2), his exercise of the discretion cannot be reviewed, because that is forbidden by subs (8).

[14] A "casualty" in this context simply means a chance occurrence of an unfortunate kind, or a mishap: see the Shorter Oxford definition: "a chance occurrence; an accident, mishap or disaster."

[15] The chance occurrence or mishap arose in the following way when the jury indicated the position which it had reached and it became apparent that this would be its final position. At the time of the events to which the charges related, the sections

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[12] At p 516.

of the Crimes Act creating the offence of indecency with a girl under the age of 12 years (s 133) and indecency with a girl between 12 and 16 (s 134(2)) were worded so that the offences did not overlap. It was necessary for the Crown to prove that the girl was under 12 or prove she was over 12 but under 16. If it charged that she was over 12 and under 16 and the jury concluded that she was actually under 12, then, even though the jury may have concluded that the other ingredients of the charge were proved – the act of indecency had occurred – it was not possible for the jury to find the accused guilty in relation to that indecent act in the absence of an alternative charge under s 133. In other words, ss 133 and 134(2) were mutually exclusive, unlike the present sections 132 [sexual conduct with child under 12] and 134 [sexual conduct with young person under 16] where a "young person" in the latter is defined so as to include a "child" in the former.

[16] Contrary to the view of the majority, I see no reason why there cannot prospectively be a case of casualty once it is apparent that, if the jury is not discharged, matters are likely to go awry as a consequence of taking a verdict. The situation faced by Judge Epati was that in all likelihood the jury was in disagreement on whether the indecencies had occurred but agreed that, if they had, the complainant was 12 or over at the time. That would substantially disadvantage the Crown at a second trial if the complainant maintained that she was under 12 and was believed both as to that and as to the occurrence of the indecencies. The interests of justice would not be served by such an outcome if it were only the unavailability of the alternative charges relating to the same alleged physical acts which prevented a conviction at a second trial. Where the exact age was in issue and evidence might be given at the re-trial that the complainant was under 12 it was "highly expedient for the ends of justice", to quote s 374(1), that both counts be re-tried together.

[17] It might be necessary to take a more restrictive approach to s 374(1) on the facts of this case if, before the matter was dealt with by statute, a Judge would have been obliged to take the verdicts. That was not the case. At common law a trial judge may discharge a jury without taking a verdict that the jury has indicated it has reached. In *R v Robinson (Adeline)* the defendant had been retried and convicted on all charges she had faced at her first trial. The Judge at that trial had discharged the jury on all counts despite their indicating that they had reached a verdict on one of

them. The Court of Appeal of England and Wales dismissed her appeal, saying that in order to sustain a plea of autrefois convict or autrefois acquit the accused must show that there has been on a former occasion a verdict of the jury which is given to the Court:[13]

> A conviction or acquittal arises at the proper conclusion of the matter, and there is no conclusion of the matter until the verdict is given to the court. This is more than a matter of form. It is a matter of substance. The jury cannot send a message to the judge in his room saying what they have decided upon and what they have agreed. They have to come back into court formally and their verdict has to be given formally in the presence of the accused person, unless for some reason he decides to absent himself from being present. So it is a matter of substance.
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> In this particular case the jury were discharged at what must be the very last moment of time at which the judge had discretion in the exercise of which he could discharge them.

[18] I cannot see that it should make a difference that the note from the jury has revealed its intended verdict. In my view, if s 374(1) is otherwise satisfied, the Judge has an unreviewable discretion to discharge the jury until a verdict is announced in open court. Apposite, too, is the remark in *Robinson* that the exercise of that discretion "calls in all the circumstances for great care to ensure that fairness is done, and when we say fairness, we mean fairness to the Crown and to the defence".[14]

[19] As the Judge's decision was open to him when made, the position is unaffected by the Crown's subsequent election not to pursue at the second trial the charges under s 134.

[20] As the majority does not accept the foregoing view, I should add that I agree with them on all consequential points. If, contrary to my view, the verdicts should have been taken, then the appellant was deprived of the opportunity of pleading autrefois acquit at his second trial. That would be an abuse of process, and although the second trial was not a nullity, a substantial miscarriage of justice would have occurred.

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13 At p 516.
14 At p 516.

[21] However, taking the view that Judge Epati was entitled to discharge the jury in relation to all counts, I would, as I have indicated, have dismissed the appeal.

TIPPING, McGRATH AND WILSON JJ

(Given by Tipping J)

Introduction

[22] The principal issue in this appeal concerns the validity of an order made by the trial Judge (Judge Epati) discharging the jury from giving verdicts on all counts in the indictment which had been presented against the appellant, Peter Buddle. The Judge ordered a retrial and Mr Buddle was convicted on the charges he then faced. His appeal against those convictions was dismissed by the Court of Appeal.[15]

[23] At the first trial the indictment contained nine counts involving two complainants, K and N. All counts were of a sexual nature. In the case of K, there were three pairs of counts, one being alternative to the other in each pair. In the case of N, two of the three counts were representative and one was for a single offence. After the jury in the first trial had been deliberating for some time, they indicated that they were having difficulty reaching unanimous verdicts. The Judge gave them further directions which should have been but were not recorded. Nothing, however, turns on that. About 45 minutes after receiving the further directions, the jury sent the Judge a written message in which they listed the counts. Alongside each count the jury had placed a note. In respect of counts 1, 3 and 5 the jury had written "not guilty". In respect of the remaining counts the jury indicated continuing lack of unanimity, and provided the numbers voting for guilty and not guilty in respect of each count.[16] The message ended: "No chance of a change of vote".

[24] The Judge nevertheless proceeded to give the jury the standard disagreement directions. About half an hour later the jury sent another message to the Judge, indicating there was no change from the earlier position and that all jury members were "adamant" they would not change their vote. The Judge then discharged the

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15 [2009] NZCA 184 (Robertson, Chisholm and Gendall JJ).

16 Despite the fact that the Judge had requested them not to disclose this information.

jury without taking any verdicts. What is in issue is his decision to discharge the jury without taking their verdicts in respect of counts 1, 3 and 5 on which they had indicated they were unanimously agreed the appellant was not guilty. There is, appropriately, no challenge to the discharge on the counts upon which the jury indicated continuing disagreement.

[25] On the retrial the indictment ultimately contained three counts pertaining to K and three pertaining to N. The three counts pertaining to K were in exactly the same terms as the counts in respect of which the first jury had signalled unanimous not guilty verdicts. In the indictment for the retrial, the Crown had originally included charges corresponding to the alternatives which had accompanied counts 1, 3 and 5 in the first indictment. Those alternatives, which were ultimately dropped, were based on a distinction in relation to K's age at the time of the alleged offending. In the indictment at the first trial, because of the uncertainty of K's evidence as to the time when the offending was alleged to have occurred, the charges were laid on the basis that the offending took place either (counts 1, 3 and 5) when K was under 12 or (counts 2, 4 and 6) when she was over 12 but under 16. The first jury's foreshadowed not guilty verdicts were in respect of the charges alleging the offending took place when K was under 12. In the second trial the Crown, for reasons which will be addressed later, nevertheless ultimately confined itself to the under 12 allegations. The three counts concerning N in the second trial do not need discussion at this point.

[26] The second jury found Mr Buddle guilty on each of the three counts he faced regarding K and also on each of the three counts which concerned N. He appealed to the Court of Appeal from those convictions on several grounds. The only one in contention in this Court is the ground challenging the validity of the Judge's global order for discharge at the first trial, on which was built the proposition that the verdicts of guilty on the three counts concerning K at the second trial represented a miscarriage of justice. Mr Buddle also contends that because the counts concerning N at the second trial were contained in the same indictment as counts concerning K, which should not have been included, the convictions relating to N were thereby contaminated and should also be set aside.

[27] The Court of Appeal held that the communication from the jury did not provide a "plausible foundation" [17] for the proposition advanced by Mr Buddle that the Judge was obliged to accept verdicts on counts 1, 3 and 5. We find ourselves unable to agree with that proposition for the reasons we will now give. In the course of doing so, we will examine the reasons of the Court of Appeal and the submissions of counsel in this Court, to the extent necessary.

Criteria for discharge of jury

[28] Once a criminal trial has commenced before a Judge and jury, there are only two ways in which the trial can properly come to an end. The first is by verdict; the second is by valid discharge of the jury without delivering a verdict on the count or counts concerned. Although the relevant section governing discharge of a jury is now s 22 of the Juries Act 1981, during Mr Buddle's first trial in 2007, s 374 of the Crimes Act applied and relevantly provided:[18]

> **374 Discharge of jury**
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> (1) Subject to the provisions of this section, the Court may in its discretion, in the case of any emergency or casualty rendering it, in the opinion of the Court, highly expedient for the ends of justice to do so, discharge the jury without their giving a verdict.
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> (2) Without limiting subsection (1) of this section, where a jury has remained in deliberation for such period as the Judge thinks reasonable, being not less than 4 hours, and does not agree on the verdict to be given, the Judge may discharge the jury without their giving a verdict.
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> …
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> (6) Where the Court discharges a jury under this section, it shall either direct that a new jury be empanelled during the sitting of the Court, or postpone the trial on such terms as justice requires.
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> …
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> (8) No Court may review the exercise of any discretion under this section.

It is subss (1) and (2) of this section which require consideration in the present case. The subsections deal with the two circumstances in which discharge is possible.

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17 At para [63].

18 There is no material difference between ss 22 and 374.

They can be described, for short, as (1) casualty/emergency; and (2) inability to agree.[19] The Crown rightly did not seek to invoke subs (8). An appellate Court can examine whether the circumstances of a particular case amount to an emergency or casualty. Only if that is so does the unreviewable discretion to discharge the jury arise.[20]

Inability to agree

[29] In the present case the trial Judge appears, by his reference to "the hung jury aspect of it"[21] to have been purporting to act under subs (2). That is the view the Court of Appeal took. It held that:[22]

> … given that more than four hours had passed and, importantly, that counsel for the appellant had asked the Judge to discharge the jury, it was within the Judge's discretion to discharge the jury on the basis that it could not agree on the verdicts to be given.

That conclusion seems to have been based on two earlier statements made by the Court. The first was that "there can be no obligation on a Judge to accept a verdict which has not been formally announced by the jury".[23] The second was that the communication from the jury indicating not guilty in relation to counts 1, 3 and 5 "did not, and could not, equate with a verdict on those three counts".[24]

[30] The reasoning inherent in those statements does not accurately address what subs (2) of s 374 envisages. Clearly it does not envisage a formal verdict because, if that were the case, there would, of necessity, be no question of discharging the jury without their giving a verdict. Subsection (2) involves simply that "the jurors do not agree". If the jurors appear to agree on the verdict to be given, there is no power to invoke subs (2) in respect of the count or counts on which there is that apparent agreement. In a doubtful situation the Judge should make an appropriately worded inquiry of the jury. It was common ground between the parties and, rightly,[25] that

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19 For completeness we add that when an accused person is discharged under s 347 of the Crimes Act, the jury is necessarily discharged from giving a verdict on the count or counts concerned.
20 See *R v Rajamani* [2008] 1 NZLR 723 (SC).
21 *R v Buddle* (District Court, Manukau, CRI-2006-057-001233, 5 October 2007) at p 6.
22 At para [64].
23 At para [61].
24 At para [63].
25 See *R v Lualua* [2007] NZCA 114.

questions of the present kind should be looked at on a count by count basis. As separate verdicts are required on each count,[26] so must the Judge consider whether "the jurors do not agree" on each count separately.

[31] The jurors' message to the Judge fell a long way short of indicating that they did not agree on counts 1, 3 and 5. Indeed it showed the exact opposite. There was therefore no basis for the Judge to invoke subs (2) as giving him the power to discharge the jury from giving verdicts on counts 1, 3 and 5. He should have taken the foreshadowed verdicts on those counts and discharged the jury from giving verdicts on the alternative counts regarding K and all counts regarding N. Quite properly, Mr Allan for the Crown did not seek to uphold what the Judge had done on the basis of subs (2). With respect, the Court of Appeal was wrong to regard that subsection as giving the Judge the power to do what he did.

[32] For completeness, we should add that the Court of Appeal was also in error in treating it as important that defence counsel had asked the Judge to discharge the jury. In the first place, jurisdiction which does not otherwise exist cannot be conferred by consent. In the second, we do not consider from a perusal of the record of the proceedings in the District Court that it can be said that defence counsel asked the Judge to discharge the jury on counts 1, 3 and 5. In context, his request can only be construed as a request for a discharge on the other counts. The Judge must have misunderstood counsel if he thought the request applied to all counts. That would have been a most unlikely request for counsel to have made in these circumstances and we do not consider it right to attribute it to him.

Casualty

[33] While accepting that subs (2) did not apply, Mr Allan argued that, despite his not appearing to invoke it, the Judge did have power to discharge the jury under subs (1), the casualty/emergency ground, and what had happened could be justified on that basis. Mr Mather disputed that proposition and submitted that what happened here was neither a casualty nor an emergency. The Crown accepted that it was not an emergency, so it is necessary to deal only with the casualty issue.

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[26] Unless a guilty verdict on one count renders a verdict on an alternative count unnecessary.

[34] The leading case in the Court of Appeal on what amounts to a casualty, for present purposes, is *Tatana*.[27] In that case one witness for the Crown had failed to come up to brief and another had failed to attend the trial in response to a witness summons. The trial Judge discharged the jury on the basis that these circumstances amounted to a casualty. The accused was convicted on his retrial. He appealed against his conviction, arguing that the order for discharge and consequent order for retrial were made without jurisdiction and hence the retrial, with its resulting conviction, amounted to a miscarriage of justice. After a comprehensive survey of the previous case law, the Court of Appeal said:[28]

> Although we may not have exercised our discretion in the way that the trial Judge did, we are nevertheless satisfied that he had jurisdiction under the section to do so. The words "emergency" and "casualty" are common words. It would be difficult to conclude that the circumstances in this case amounted to an "emergency". "Casualty", however, is defined in the *New Shorter Oxford Dictionary* as being "a chance occurrence, an accident, a mishap, a disaster". The circumstances in which it may be desirable in the interests of justice to discharge a jury under s 374 are multifarious and possibly indefinable. We do not see any need to adopt a strained or limited interpretation of "casualty".
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> It is clear that at the time the first trial commenced the Crown was entitled to assume that O'Keefe would give evidence according to his brief and that Mrs Moana would properly respond to a witness summons or would in the time expected for presentation of the Crown case be brought to Court on a Bench warrant. We are satisfied that the failure of these expectations to be realised in the circumstances of this case could have been regarded by the Judge as an accident or chance occurrence from the point of view of both the prosecution and the trial, and accordingly, within the definition of "casualty".

[35] Understandably Mr Allan had some difficulty in pinpointing exactly what the casualty was on the facts of this case. He submitted that it was "highly expedient in the interests of justice" to discharge the jury; but that circumstance, if it existed, must have resulted from a casualty. It was not a justification for discharge on its own. Mr Allan also referred to concerns expressed by Judge Epati that the jury may not have understood or been following his directions on alternative counts; but again that, in itself, even if correct, cannot amount to a casualty. At most, it would require further directions. Overall Mr Allan contended that a discharge on all counts had been appropriate so that a new jury could examine the whole matter afresh without

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[27] (1994) 11 CRNZ 708.
[28] At pp 711–712.

the complication that might arise if the second jury was unable to consider whether the offending occurred while K was under 12.

[36] Of the dictionary definitions of casualty referred to in *Tatana*, the most apt, for present purposes, is mishap. Something must have gone wrong with or affecting the trial process. As was said in *Tatana*, the concept of casualty, and the same applies to the synonymous term mishap, should not be given a narrow or limited construction. Parliament has nevertheless clearly confined the power to discharge to circumstances in which it can be said that the ordinary processes of trial have been subject to an occurrence which can fairly be called a casualty or mishap.

[37] In this case nothing went wrong. There was no mishap. It seems clear that the first jury was unanimously of the view that the offending with which Mr Buddle was charged in relation to K, if it occurred at all, did not occur while she was under the age of 12. At least the jury was unanimously of the view that it had not been proved beyond reasonable doubt to have occurred when she was under 12. They could not, however, agree whether it had occurred when she was between 12 and 16.

[38] The normal consequence of this situation would be that, on any retrial, the charges relating to K would be confined to when she was between 12 and 16. This is because verdicts of not guilty would have been taken on the three under 12 counts. K's ultimate assertion at the second trial seems to have been that the offending occurred when she was under 12. But the jury at the first trial were obviously not satisfied of that. The fact that K's evidence, as ultimately presented at the second trial, would have made a retrial, based on the premise that the events occurred while K was between 12 and 16, impossible to pursue, was not a casualty or mishap which befell the first trial. It is the casualty that leads to the discharge of the jury, rather than the discharge leading to the casualty. The situation which arose was simply the product of the way the law was then framed and the charges were laid, the first jury's perception of K's evidence, and the inherent uncertainty of that evidence on timing issues. It might be said, with some justification, that the only mishap was that brought about by the Judge's decision to discharge the jury from giving verdicts on counts 1, 3 and 5. But that mishap was, of course, the result of the Judge's determination rather than justification for it.

[39] The Court of Appeal, albeit in the different context of s 374(2), relied on the decision of the Court of Appeal for England and Wales in *Robinson*.[29] So does Blanchard J in this Court, albeit in the more appropriate context of s 374(1). We are, with respect, unable to place upon *Robinson* the reliance that they do. The decision in *Robinson* turned on the strict and rather technical rules relating to autrefois acquit and convict, and in particular what constitutes a verdict for the purposes of those rules. The case did not concern any question relating to the power of the Judge to discharge the jury without their having delivered a verdict. The Judge had exercised his general discretion at common law to discharge a jury. The present case and *Robinson* are therefore not on all fours. As James LJ made clear[30] there was no challenge in *Robinson* to the exercise by the Judge of his discretion to discharge the jury – the sole issue was autrefois acquit or convict – a matter quite different from whether there was a casualty for the purposes of s 374(1). That provision is materially different from the unfettered common law position. We do not therefore consider that *Robinson* can be regarded as informing what may amount to a casualty for the purposes of s 374(1).

[40] Mr Allan did his best in difficult circumstances but we are not persuaded that what occurred in this case was a casualty within the proper meaning of that word. The Judge should have taken verdicts on the counts on which the jury was agreed. Those verdicts would clearly have been ones of not guilty. That would have precluded any retrial on those counts. It was, in the circumstances, an abuse of process to try Mr Buddle again on the counts relating to K in respect of which not guilty verdicts should have been taken at his first trial. For these reasons a miscarriage of justice occurred when Mr Buddle was found guilty by the second jury on counts he should never have been facing. There can be no question of applying the proviso. Hence the convictions for the offending alleged against K must be set aside.

The convictions relating to N

[41] The remaining question is whether the presence of the counts relating to K in

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29 [1975] 1 QB 508.
30 At p 516.

the indictment at the second trial might have influenced the jury in its consideration of the counts relating to N, to the extent that the convictions on those three counts should also be set aside, with or without an order for retrial. Mr Mather submitted that the improper presence of the K counts must have "infected" the jury's consideration of the N counts. Mr Allan submitted that there was no such prejudice as to justify setting aside the convictions in respect of N. We are satisfied that Mr Mather's submissions should prevail. In his summing-up at the second trial, Judge Singh referred to the Crown's submission that there were "some similarities",[31] which he identified, between the allegations made by K and those made by N. That proposition, on which the Crown was obviously relying, would not have been available to it had the K counts not been included in the indictment at the retrial.

[42] Mr Allan sought to deflect the force of this argument by saying that the Crown could have retained in the indictment at the second trial the counts relating to K, which were equivalent to counts 2, 4 and 6 in the first indictment. But the Crown elected not to do so because it was satisfied there was now no evidence to support the conclusion that the offending took place while K was between 12 and 16. K was now asserting that the offending took place only while she was under 12.

[43] In this situation the Crown properly asked for a discharge under s 347 on the between 12 and 16 counts before they went to the jury. This is confirmed by a file note made by the Judge and dated 8 May 2008. In these circumstances the Crown cannot now seek to avoid the difficulty caused by the presence of the K counts in the second indictment by reference to what the Crown might have done but, in the light of the evidence available to it, properly decided not to do. It cannot be said that the presence of the K counts at the second trial was incapable of affecting the jury's conclusion on the N counts. The Court cannot be sure the jury would inevitably have convicted on the N counts had the K counts not been included. There is therefore a real risk of a miscarriage of justice from the improper presence of the K counts at the second trial. The convictions in relation to N should therefore be set aside, there being no basis for application of the proviso.

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[31] *R v Buddle* (District Court, Manukau, CRI-2006-057-001233, 9 May 2008) at para [35].

[44] The consequence is that there should be an order for retrial on the N counts. This would be the third trial on those counts. That is a most unfortunate outcome. We do not, however, consider that the point has been reached when the Court should decline to order a retrial. It is generally for the Crown to decide, in circumstances such as these, whether there should be a retrial. The situation in this case is not such that this Court should pre-empt that decision.

[45] The formal orders necessary to reflect the foregoing conclusions are:

(1) The appeal should be allowed.

(2) The six convictions entered on 9 May 2008 against the appellant, Peter David Buddle, in the District Court at Manukau in relation to the complainants K and N are each set aside.

(3) A new trial should be ordered in relation to the three counts concerning the complainant N.

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