Supreme Court of New Zealand
Te Kōti Mana Nui

3 July 2019

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

H (SC 97/2018) v THE QUEEN

(SC 97/2018) [2019] NZSC 69

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

Suppression

This judgment is subject to a suppression order under s 203 of the Criminal Procedure Act 2011. The publication of the names, addresses, occupations or identifying particulars of the complainants is therefore prohibited. The appellant's name is not suppressed. However, the Court refers to him as Mr H in this press release and in the judgment because otherwise, given their relationship to Mr H, the complainants could be identified.

Introduction

Mr H was convicted in 2017, after a jury trial, of eight charges of sexual offending against his sister "Dianna" and his daughter "Emily" (not their real names). The offending is historic and took place over a period of two decades. The earliest offending, a rape of Dianna, occurred between 1 December 1955 and 21 July 1959. At the time of the rape, Mr H was aged between 16 and a half and 20 years old and Dianna between four and eight years old.

At issue in this appeal is whether the charge of rape should have been dismissed under s 322 of the Oranga Tamariki Act 1989 because it may

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have been committed when Mr H was a "young person" (for these purposes a person aged between 14 and 17).

In summary, s 322 provides that a charge against a young person may be dismissed if the time that has elapsed between the date of the commission of the alleged offence and the hearing has been unnecessarily or unduly protracted.

Both prior to trial in the High Court and at the end of the Crown case, Mr H applied for a stay of proceedings and a dismissal of the charges under s 147 of the Criminal Procedure Act because of the delay in bringing the charges. The High Court declined both applications.

The Court of Appeal dismissed Mr H's appeal against his subsequent convictions. In particular, the Court of Appeal held that the charge of rape should not have been dismissed under s 322 of the Oranga Tamariki Act as that provision did not apply to Mr H because he was charged as an adult. It said that s 322 applied only to cases before the Youth Court. Even if it did apply, s 322 would have little bearing on the case because Mr H had long been a mature adult. Finally, there were no other factors that could not be considered under the stay or s 147 dismissal procedures.

The Supreme Court has unanimously dismissed Mr H's appeal against the Court of Appeal's decision.

The Supreme Court's decision

The Crown and Mr H both accepted before the Supreme Court that s 322 applied to Mr H because ss 2(2)(d) and 2(3) of the Oranga Tamariki Act provide that s 322, with all necessary modifications, applies to persons charged as adults with an offence committed as a young person. The Supreme Court agreed.

The Crown and Mr H both submitted that there would have to be an element of fault (usually on the part of the Crown) for proceedings to be "unnecessarily protracted", but this did not apply to the phrase "unduly protracted". The Supreme Court accepted this was the case. It found that in Mr H's case, while there was no question of fault on the part of the Crown, the proceedings had been unduly protracted in terms of s 322.

Mr H argued that s 322 should have been considered by the High Court when deciding whether to stay the proceeding or dismiss it under s 147 of the Criminal Procedure Act.

The Court did not accept this submission. While there could be common factors to be considered under s 322 of the Oranga Tamariki Act and under applications for stay or dismissal under s 147 of the Criminal Procedure Act, s 322 should be exercised independently.

The Supreme Court held that s 322 should be applied consistently with those youth justice principles still applicable to accused persons who are over the age of 17 at the time they are charged.

The Court accepted Mr H's submission that the general object set out in s 4(f)(ii) of the Oranga Tamariki Act is still relevant to those charged as adults. This provides that, where children or young persons commit offences, they are dealt with in a way that gives them the opportunity to develop in responsible, beneficial, and socially acceptable ways.

The reasons behind the principle contained in s 5(f) of the Oranga Tamariki Act, (that decisions should be made in a timeframe appropriate to a child's or young person's sense of time), will also still be relevant to those charged as adults. One important reason for the s 5(f) principle is to enable rehabilitation to occur in line with the general object in s 4(f)(ii). It also recognises that there are particular factors related to the stage of development that may have contributed to the offending of the child and young person which may be seen as reducing or explaining culpability and also as meaning rehabilitation is more likely.

The Court, however, refused to exercise the s 322 discretion to dismiss the charges against Mr H because the charge in question was very serious, Mr H was not very young at the time of the offending, being at least 16 and a half, and because he had continued to offend in a similar manner for an extended period after the rape of Dianna, showing that rehabilitation had not occurred.

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