IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI 2019-004-1413
[2020] NZHC 565

THE QUEEN

v

DON IOSEFA EKEROMA
BENNY PENI FATU

Hearing: 19 March 2020

Appearances: B D Tantrum and S S McMullan for the Crown
L B Cordwell for Mr Ekeroma
G J Newell and DMM Dickinson for Mr Fatu

Date of judgment: 19 March 2020

ORAL JUDGMENT (NO 2) OF JAGOSE J
[Discharge of jury]

Solicitors/Counsel:
Meredith Connell, Crown Solicitor, Auckland
L B Cordwell Barrister, Auckland
E I Haronga Barrister, Auckland
G J Newell Barrister, Auckland
D M Dickinson Barrister, Auckland

[1] Principally on the strength of the Chief Justice's advice yesterday "all new jury trials will be suspended for two months" by reason of the COVID-19 pandemic, Mr Ekeroma's counsel, Lester Cordwell, made urgent renewed oral application for the jury – presently in deliberation since about 10.30 yesterday morning, and from its question later yesterday afternoon observably making progress – to be discharged.

Background

[2] I dismissed a similar application on 17 March 2020, with reasons given in a judgment earlier today (which should be read in conjunction with this judgment).[1] The renewed application focuses on the contended "new circumstances" of the Chief Justice's advice as confirming the requisite "emergency" to engage my opinion if discharge was "highly expedient for the ends of justice" under s 22(3)(a) of the Juries Act 1981.

Discussion

[3] In the circumstances, I disregard if the Chief Justice's advice truly is a 'new' circumstance permitting me to re-enter my earlier decision. A more conservative view is only it chooses "out of an abundance of caution" to suspend new jury trials, and expressly "does not affect jury trials already in progress". Thus it would not qualify on its own to justify revisitation of the application I already have dismissed.

[4] Also, in these circumstances, I am prepared to accept uncritically the present environment may constitute an 'emergency' for the purposes of s 22(3)(a). Mr Cordwell drew my attention to the definition of 'emergency' in s 4 of the Civil Defence Emergency Management Act 2002, as relevantly meaning:

> … the result of any happening … including, without limitation, any … plague, epidemic, failure of or disruption to an emergency service… [that] causes or may cause loss of life or injury or illness or distress or in any way endangers the safety of the public or property in New Zealand or any part of New Zealand".[2]

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1 *R v Ekeroma & Fatu* [2020] NZHC 562.

2 But the definition continues also to require the result "cannot be dealt with by emergency services, or otherwise requires a significant and co-ordinated response under this Act", neither of which I presently understand to be the case.

[5] Mr Cordwell made every argument reasonably available I should be of the opinion the jury's discharge is highly expedient for the ends of justice. He observed it was probable, if not certain, jurors meeting this morning would have heard and be discussing the publicity surrounding the Chief Justice's advice. He emphasised the Chief Justice herself noted "maintaining prudent hygiene precautions in the environment of a jury trial is unrealistic", which must have impact on jurors' assessments of their personal safety retained in the jury room. Far less important events, with much lesser risk to either the interests of justice or Mr Ekeroma's trial rights, were being cancelled up and down the country. No enquiry could responsibly be made of jurors without influencing them to offer the answer they perceived might be sought. The previously-argued risk of a "rush to justice" was amplified by current publicity. And it was not a situation in which discharge of the jury had any impact on Mr Ekeroma's liberty, given his aggravated robbery conviction.

[6] I do not doubt publicity of the Chief Justice's advice is a topic of jurors' discussion. I should note the Chief Justice's observation of courtroom hygiene is about 'maintaining' those precautions; it is necessarily forward looking, rather than any condemnation of the present. I understand cancellation of larger community events is to diminish the risk of community spread, which is not yet understood to have occurred. I already have invited jurors to advise me if the developing COVID-19 situation gives them any concern for their ability to adhere to their oaths.[3] I am not minded to make any more direct enquiry of them during their present deliberations. To repeat my earlier judgment,[4] I require but do not have evidence any 'emergency' has the necessary immediacy to qualify for the jury's discharge. Finally, Mr Cordwell raised issues about any appeal necessitating queries of individual jurors. I do not comment on that, which I do not understand to have been advanced *in terrorem* and otherwise does not concern me.

[7] For completeness, I note Mr Newell's instruction from Mr Fatu was to seek to proceed to verdict, and the Crown opposed Mr Cordwell's application. Mr Newell, in particular, emphasised the jury was not in a vacuum; there was no evidence of

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3 That was only two days ago, and I have no reason to think the jurors would consider the invitation expired.

4 *R v Ekeroma & Fatu*, above n 1, at [9].

community spread; and “the least possible interference” with a deliberating jury was the preferred approach. I agree.

Result

[8] I therefore dismiss the application.

—Jagose J