

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CRI 2019-004-1413
[2020] NZHC 562**

THE QUEEN

v

**DON IOSEFA EKEROMA
BENNY PENI FATU**

Hearing: 17 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

**JUDGMENT OF JAGOSE J
[Discharge of jury]**

*This judgment was delivered by me on 19 March 2020 at 8.45am.
Pursuant to Rule 11.5 of the High Court Rules*

.....
Registrar/Deputy Registrar

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] On 17 March 2020, Mr Ekeroma’s counsel, Lester Cordwell, made urgent oral application for the jury, about to hear counsel’s closing arguments after a week of prosecution evidence in this murder trial, to be discharged in the interests of justice.

Background

[2] The application was based in emergent COVID-19 issues, particularly official advice over the weekend for social distancing and seclusion, which were argued to risk jurors’ “rush to justice” to escape the confines of their close hearing and deliberation spaces. I briefly reserved my decision and, after consideration, dismissed the application with reasons to follow. These are those reasons.

[3] Unknown to Mr Cordwell at the time he foreshadowed his application, but as then I apprised him, a juror had approached the registry the previous day, to advise of symptoms as harbinger of an on-coming cold. The juror had not travelled overseas recently, or been in known close contact with either any suspected COVID-19 sufferer or their close contacts. My initial view was, without fever symptoms, the juror could and should sit. But the Director-General of Health’s COVID-19 guidelines changed later that day, from fever “and” other symptoms to fever “or” other symptoms. On that basis, having at least one of those other symptoms, the juror’s afflicted presence in the jury risked imposing undue pressure on the other jurors, and I stood the juror down.

[4] Before Mr Cordwell argued his application, I spoke shortly to the remaining jurors in the crier’s company – to advise them of their reduced number, and the reason for it (as explained above) – and asked them to consider and advise me through their foreperson if they were comfortable the developing COVID-19 situation was not such as dissuaded them from their oaths. The crier later advised me, and I advised counsel, the jury was content to continue.

Applicable law

[5] Although initially depicted as an application to abandon trial, it became common ground the jury’s discharge was sought under s 22 of the Juries Act 1981:

22 Discharge of juror or jury

- (1) When this subsection applies, the court, having regard to the interests of justice, may either—
 - (a) discharge the jury without the jury giving a verdict (whether unanimous or majority); or
 - (b) discharge the juror or jurors concerned from the panel and jury and, subject to subsection (1A), proceed with the remaining jurors and take their verdict (whether unanimous or majority).
- ...
- (2) Subsection (1) applies if, and only if, before or after the jury is constituted but before the jury's verdict is taken, the court considers that—
 - (a) a juror is incapable of performing, or continuing to perform, the juror's duty as a juror in the case; or
 - (b) a juror is disqualified; or
 - (c) a juror's spouse, civil union partner, or de facto partner, member of the juror's family, or member of the family of the juror's spouse, civil union partner, or de facto partner, is ill or has died; or
 - (d) a juror is personally concerned in the facts of the case; or
 - (e) a juror is closely connected with a party or witness or prospective witness.
- (3) The court may also discharge the jury without it giving a verdict (whether unanimous or majority) if—
 - (a) a casualty or emergency makes it, in the court's opinion, highly expedient for the ends of justice to do so; or
 - (b) the jury has remained in deliberation for at least 4 hours and the jurors do not agree on the verdict (whether unanimous or majority) to be given, and the court thinks the period for which the jury has remained in deliberation is reasonable.
- ...
- (5) In this section and sections 22A and 22B, court includes, without limitation, a Judge of the court.

[6] Mr Cordwell's arguments relied in particular on s 22(2)(a) and (3)(a). He argued Mr Ekeroma's continued trial before a jury – in the current climate of increasing serious personal and family health risks from close contact with others, and official enjoinders for social distancing and other safety measures – was not in the interests of justice. Consciously or subconsciously, the fast-developing environment, and jurors' natural anxiety for personal and family safety and security, would curtail their focus on the important issues for their decision. The pressure on jurors was not open to being alleviated by any direction I may give they put those matters to one side.

Discussion

[7] Although s 22(2)(a)'s "a juror is incapable of performing" does not immediately commend itself as a basis for discharge in the circumstances on which Mr Cordwell relies, that threshold to discharge a juror is triggered if there is a real risk allowing a juror to continue would jeopardise the fairness of the trial to either side, or render the verdict seriously vulnerable:¹

"Incapable" must therefore include the case of a juror whose continued presence on the jury would jeopardise the fairness of the trial to either side, or make the verdict abortive or seriously vulnerable. It could hardly be said that a juror is "capable" of continuing to act if the inevitable result is a suspect trial.

Thus 'capability' anticipates a juror's proper participation in the trial and in subsequent jury deliberations.²

[8] I accept jurors so diverted by extraneous circumstances as to not be able properly to participate in trial and deliberations would be "incapable of performing" their duties as jurors. My discharge of the unwell juror precisely was to ensure that juror's presence was not of such diversionary quality as put the fairness of trial at risk or rendered its verdict doubtful. In that sense, I discharged the juror on s 22(2)(a)'s grounds.³ My enquiry subsequently of the remaining jurors satisfied me the more contextual risk presented by COVID-19 has not rendered any of those jurors incapable. That also is my observation of their engagement. And I should not "too readily ... discharge a jury that was expressing its willingness to continue".⁴

[9] That was the foundation for my dismissal of Mr Cordwell's application. For completeness, I doubted the contextual risk presented by COVID-19 yet met s 22(3)(a)'s "casualty or emergency", still less justified discharge of the jury on that basis. "Casualty" means 'mishap': "something [going] wrong with or affecting the trial process";⁵ none is argued or apparent. By parity of reasoning, "emergency" may mean something extrinsic to the trial process. Presently, I would require evidence

¹ *Poa v R* [2016] NZCA 222 at [37], citing *R v M* CA382/90, (1991) 7 CRNZ 439 at 442.

² *James v R* [2011] NZCA 219 at [22].

³ Although I may have inherent jurisdiction to achieve the same outcome: *R v Marshall* [2004] 1 NZLR 793 (CA) at [15], citing *R v Rongonui* [2000] 2 NZLR 385 (CA) at [23].

⁴ *Obiaga v R* [2016] NZCA 270 at [24].

⁵ *R v Hetherington* [2015] NZCA 248 at [39], citing *Buddle v R* [2009] NZSC 717 at [36].

COVID-19's 'emergency' has the necessary immediacy to make discharge "highly expedient for the ends of justice".⁶ But that is not to deny it may attain that quality, or that such may become self-evident. In those circumstances, I resist further definition.

Result

[10] The application was dismissed, for the foregoing reasons.

—Jagose J

⁶ *R v Henare* CA187/00, 26 July 2000 at [5].