IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2020-404-454
[2023] NZHC 707

THE KING

v

NAPIER

Hearing: 30 March 2023

Appearances: S Teppett for the Crown
F Pilditch KC for Mr Napier

Judgment: 31 March 2023

JUDGMENT OF ROBINSON J

This judgment was delivered by me on 31 March 2023 at 4:00 pm.

AH ~~Registrar~~/ Deputy Registrar

A. Hodgson
Deputy Registrar
High Court

Solicitors/counsel:
Meredith Connell, Auckland
F Pilditch KC, Auckland

[1] On 24 August 2022 Mr Napier was convicted of 45 dishonesty charges under the Crimes Act 1961.[1] On 23 November 2022 he was sentenced to four years and 10 months' imprisonment.[2]

[2] Mr Napier continues to face one charge of perjury.[3] The Crown applies pursuant to s 146 of the Criminal Procedure Act 2011 (CPA) for leave to withdraw the charge. It says that in light of Mr Napier's convictions and sentence on the other dishonesty charges the public interest no longer favours prosecution.

[3] Mr Napier opposes the application; because withdrawal of a charge under s 146 is not a bar to any other proceeding in the same matter.[4] On his behalf Mr Pilditch KC submits that in the circumstances it is in the interests of justice that Mr Napier has finality, and that the charge should be dismissed.

Procedural history

[4] The charge of perjury arises out of statements made by Mr Napier during the course of a civil proceeding against him in 2015 alleging that he had misappropriated funds from Torbay Rest Home Limited.[5] Judgment was entered against Mr Napier in those proceedings. The criminal charges of which Mr Napier has been convicted arose out of the same matters canvassed in the civil trial.

[5] The Crown issued the Crown Charge Notice in July 2019. On 2 October 2019 Mr Napier applied under s 147 of the CPA for the perjury charge to be dismissed, or alternatively to be severed. Whata J declined to dismiss the application under s 147, holding that there was sufficient evidence upon which a properly directed jury could reasonably convict Mr Napier.[6] However, Whata J severed the charge and directed it be tried separately. The Crown issued a Charge Notice in respect of the severed perjury charge on 29 October 2020.

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1. *R v N* [2022] NZHC 2115 at [1].
2. *R v N* [2022] NZHC 3072.
3. Crimes Act 1961, ss 108 and 109(1). Maximum penalty seven years' imprisonment.
4. Criminal Procedure Act 2011, s 146(2).
5. *Torbay Holdings Ltd v Napier* [2015] NZHC 2477, [2015] NZAR 1839.
6. *R v N* [2020] NZHC 2439.

[6] The Crown now says that it has reassessed the public interest in light of the convictions entered and the custodial sentence imposed on Mr Napier for the dishonesty charges. The Crown has determined that the public interest does not currently favour prosecution of the perjury charge. Counsel for the Crown submits that it is in the interests of justice in this case to withdraw that charge without bar to future prosecutions.

[7] Counsel refer me to various cases in which this Court has granted the Crown leave to withdraw charges under s 146, thereby leaving open the possibility of the defendant being charged again in the future.[7] In each of those cases the Crown sought leave to withdraw because, for various reasons, there was insufficient evidence for it to proceed with the prosecution at that time. In *R v Dronsfield*, Dunningham J considered that:[8]

> … [i]t is in the interest of justice for the Crown to have the opportunity to reconsider whether it is appropriate to charge Mr Dronsfield following trial, and in light of the totality of evidence which has emerged at that time.

[8] *X v District Court at Auckland* was a judicial review of the District Court's decision to grant the Crown leave to withdraw the charge in circumstances where young complainants of alleged sexual offending did not wish to give evidence. Davison J held that:[9]

> In my view, having regard to the young ages of the complainants and the reasons they had given for not wishing to be involved in the trial process because of the associated anxiety and trauma, the Judge quite properly recognised and gave significant weight to their interests by granting the application to withdraw the charges under s 146 and thereby leaving open the possibility of the charges being re-laid in the future. In doing so the Judge preserved the complainants' access to justice, without extinguishing or prejudicing the applicant's fair trial and other rights affirmed in the [New Zealand Bill of Rights Act 1990].

[9] In *R v AB* Simon France J granted the Crown's application in circumstances where there was an ongoing investigation with known other offenders yet to be identified or charged.[10] While all cases turn on their own facts, Simon France J

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[7] *R v AB* [2021] NZHC 3524, [2022] 2 NZLR 687; *R v Dronsfield* [2021] NZHC 2561; *R v Edmonds (No 1)* [2016] NZHC 2908; *X v District Court at Auckland* [2020] NZHC 2952.

[8] *R v Dronsfield*, above n 7, at [17].

[9] *X v District Court at Auckland*, above n 7, at [49].

[10] *R v AB*, above n 7.

compiled a list of "potentially relevant considerations, no doubt no exhaustive" drawing on earlier decisions. These are:[11]

> (a) the likelihood of further evidence emerging;
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> (b) the impact of the charges on the defendant. This includes matters such as the length of the period, what processes have happened such as a trial, whether there has been time in custody, and generally the effect of what has happened to date on the defendant;
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> (c) the reason for the evidential insufficiency arising;
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> (d) the seriousness of the charge;
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> (e) the existence of an ongoing investigation;
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> (f) the weight to be placed on the retrial provisions. This is twofold in the sense that they have the potential to impede further investigation but also can be seen as defining the circumstances in which there should be such an investigation; and
>
> (g) the fact that a dismissal is the orthodox response.

Discussion

[10] It is apparent from Simon France J's list that, as I have noted, all the earlier cases arise out of some evidential insufficiency constraining the Crown's ability to prosecute the charge at the time of the Crown's application for leave to withdraw it. That is not the case here. On the contrary, Whata J has already determined that there is sufficient evidence upon which Mr Napier could reasonably be convicted. There is no ongoing investigation in the face of evidential insufficiency. Nor are there issues concerning access to justice for complainants currently unwilling to give evidence.

[11] As matters stand there is no reason why the Crown cannot proceed against Mr Napier. Instead, it has determined that it is not in the public interest to do so, given Mr Napier's recent convictions and imprisonment. No issue is taken with the Crown's reassessment of the public interest; unsurprisingly Mr Pilditch agrees with it. During the course of the hearing Mr Teppett helpfully confirmed the Crown would not proceed to prosecute Mr Napier on that charge in the event the current application was dismissed.

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[11] At [13].

[12] I agree with Mr Pilditch that all parties including Mr Napier are entitled to finality. I accept his submission that it is not in the interests of justice for Damocles' sword to remain over Mr Napier's head with no realistic prospect he will ever be tried. In circumstances where the Crown is otherwise able to proceed that would seem contrary to Mr Napier's right to be tried without undue delay.[12]

[13] For these reasons I decline the Crown's application under s 146 to withdraw the charge of perjury.

[14] Mr Pilditch pointed out that if this had been an application to withdraw the single charge pursuant to s 192(2) of the CPA then, pursuant to s 192(3)(b) of the CPA the Court could either grant leave or dismiss the charge under s 147. However, this is an application under s 146, and Mr Pilditch confirmed that there is currently no application under s 147. If there was, I would have granted it.

Result

[15] The Crown's application for leave to withdraw the perjury charge pursuant to s 146 of the CPA is dismissed.

[16] Leave is reserved for the parties to apply further.

Robinson J

[12] New Zealand Bill of Rights Act 1990, s 25(b).