DISTRICT COURT OF QUEENSLAND

CITATION:	R v H [2007] QDC 013
PARTIES:	**R** **v** **H**
FILE NO/S:	Indictment No 358 of 2006
DIVISION:	Criminal Jurisdiction
PROCEEDING:	Application for Stay of Charges on Indictment and
ORIGINATING COURT:	District Court, Ipswich
DELIVERED ON:	21 February 2007
DELIVERED AT:	District Court, Ipswich
HEARING DATE:	19 February 2007
JUDGE:	Kingham DCJ
ORDERS:	**1. The application to stay counts 1 and 4 and the application to rule as inadmissible evidence of uncharged acts are both declined.**
CATCHWORDS:	CRIMINAL LAW – TRIAL – Jury discharged without verdict – Retrial – Where application to reopen the rulings of the amendment of the indictment and admission of evidence in relation to uncharged acts made during the course of the trial. CRIMINAL LAW - TRIAL – Stay of indictment – Amendment to wording of charges in Indictment – Where dates of maintaining period and indecent treatment amended – Exercise of discretionary power – Where alibi notice contended as reason for amendment to dates – Where original indictment did not reflect the evidence of complainant – Where unlikely the defendant would suffer any prejudice upon retrial. CRIMINAL LAW – TRIAL – Uncharged acts – Relationship evidence – Where probative value outweighs potential prejudicial effect. *Jury Act 1995* (Qld) *R v A* [2001] QCA 516 - applied *R v BCC* [2006] QCA 435 - cited *R v Cossey* (1991) 1 NZLR 566 - cited *R v Jacobs* (1991) QCA 47 - cited *R v Sheehy* (2005) 1 QdR 418 - applied *R v Smith; ex-parte Attorney General* [2000] QCA 443 - applied

R v Tully [2006] HCA 56 - cited

R v WO [2006] QCA 21 - applied

R v ZSK [2006] QDC 016 - cited

Wilson v The Queen (1970) 123 CLR 334 – applied

COUNSEL: T. Ryan for the Defendant

R. Carlos for the Crown

SOLICITORS: Chris Wlodarczyk & Co for the Defendant

Office of the Director of Public Prosecutions (Queensland) for the Crown

HER HONOUR: Thank you. This is my decision in relation to an application made on behalf of the Defendant under section 590AA.

The Defendant faces a retrial on a four-count indictment. Count one alleges he maintained an unlawful sexual relationship with the complainant from March 1992 until the 1st of February 2000. Counts two to four allege three unlawful and indecent assaults, two in March of 1992 and one in a period between December 1999 and the 1st of February 2000.

The jury empanelled in October 2006 to try the charges was discharged after the complainant gave evidence. The defendant has applied, in effect, to reopen two rulings made by the learned trial Judge who presided at the trial. The rulings were: one, to amend the indictment to change the date in counts one and four from the 2nd of January to the 1st of February 2000; and two, to allow the reception of relationship evidence from the complainant.

These rulings were made in the course of the trial, not pursuant to section 590AA. The test imposed by section 590AA(3), that there is a special reason to reopen the ruling, therefore does not apply.

Nevertheless, when a jury is discharged without a verdict, the trial is adjourned (S62 of the *Jury Act 1995*; *R v Sheehy*).

Even if there is, strictly speaking, no issue estoppel on the retrial, the test or threshold requirement in section 590AA(3) would seem to be an appropriate one to apply where the ruling was made during the course of the trial (*R v Cossey*).

I would have to be persuaded the original ruling was wrong before ruling differently. The first ruling the defendant seeks to revisit, that is, the amendments, is complicated by the nature of the decision. Leave was granted to amend the indictment, and it has been amended. I am asked to reconsider that decision, and this, in effect, places me in the position of an appellate court. That is not appropriate. Moreso, given the decision under S572 to amend the indictment is an exercise of a discretionary power.

The relief sought by the defendant is to stay the prosecution on counts one and four to the extent that it relates to the period after 2 January 2000. This, it is said, would allow the

Crown to enter a Nolle Prosequi on those counts, and to present a new indictment on those counts in their original form.

I am not convinced that this is an appropriate use of the power to stay proceedings. I have not been referred to any authority that such a course is open to me.

In any case, granting a stay is exceptional, and the power should be exercised rarely (*R v Smith; ex-parte Attorney General*).

The defendant's submission is that the Crown sought the amendment in response to the defendant's alibi notice for the period originally charged. This is the same point that was raised at the trial.

The defendant argues that in exercising the discretion in favour of the Crown, the learned trial Judge did not give proper regard to the prosecution's obligation to have settled the indictment before trial.

It is also now clear, as it was not to His Honour when he made his decision, that the complainant was aware that there was an important issue about whether the defendant was at her house during the dates alleged in count four. The inference the defendant draws is that she changed her story to defeat the alibi. I am not satisfied that this is so.

I was referred to a decision by His Honour Judge McGill SC in *R v ZSK*, when a stay was granted because his Honour was persuaded that the indictment was amended to defeat the alibi and was, as such, an abuse of process.

It is not clear what evidence His Honour had before him as to the purpose behind the amendment, but there are important distinctions between that case and this one. Firstly, that case was an application to stay before a trial, not, as here, an application to revisit an amendment already made. Secondly, in that case, the Crown accepted the alibi was a sound one. In this case, the Crown's position is that the alibi evidence obtained in response to the notice is tenuous and that it covers both the period as originally charged and also that after amendment. So, to the extent the alibi is good, it is not defeated by the amendment.

Finally, in that case, His Honour accepted that the amendment was sought to defeat an alibi. Here, the Crown sought the amendment because of the complainant's statements as to when the offence occurred.

While His Honour did not have the benefit of having heard the evidence she later gave at trial when he made his ruling, he did carefully review the earlier statements she had made.

He considered - and with respect, I believe correctly - that the person who drafted the original charge did not accurately capture the timeframe the complainant had identified to police, which was, "Sometime near New Year's 1999 and into 2000, when I was 12."

That factor also distinguishes this case from *R v Jacobs* to which I was also referred. In that case the sworn evidence did not support the period particularised in the indictment, and that is not so here.

Returning to the ruling by His Honour at the trial, he accepted the purpose of the amendment was not to defeat a notice of alibi, but to bring the indictment into line with evidence expected to be given by the complainant at the trial.

I was referred to some of the disclosure provisions in the Criminal Code, and it is the evident purpose of those provisions that there should be timely disclosure by the Crown of the terms of the indictment that the defendant will face at trial.

That said, any prejudice the defendant may have suffered by their late amendment at trial has little if any relevance upon a retrial some months later.

Whilst the complainant gave evidence that she was aware of the issue raised by the alibi notice, her evidence about when the offence occurred was, in broad compass, consistent with her evidence at committal. At committal, she said that it occurred in December around Christmas time, or at the beginning of the next year. At the trial she said, "It would have been after Christmas, after New Year, but a couple of weeks before I was going back to start high school. And between a few days and a couple of weeks - two weeks; about two weeks before school started."

On the basis of that evidence from the complainant, I am not satisfied that the amendment is an abuse of the process of the Court. Even if I were persuaded that I could grant the relief sought, I do not, in the circumstances of this case, consider it appropriate to do so.

The other ruling sought to be disturbed relates to the admission of evidence of uncharged acts. Counsel for the defendant submitted that the evidence is so vague that it can only be met by general denial, and what probative value it has, if any, is outweighed by its prejudicial effect.

At trial, the complainant gave evidence that the defendant used to feel up her legs, grab her bottom, and digitally penetrate her vagina. She said he would do this during visits to her grandparents' place or when they visited her home. She could not recall how often it occurred each year, and said it was too often to count, but that it happened until she was about 12.

At trial, His Honour, who then did not have the benefit of knowing what her evidence would be, ruled such evidence to be directly admissible in relation to count one, the maintaining charge, and as relationship evidence in relation to the three remaining counts.

Whilst general evidence of uncharged acts is regularly received on trials of charges of a sexual nature, not all such evidence is admissible; only that from which a relevant inference may logically and reasonably be drawn (*Wilson v The Queen* per Barwick CJ).

The jury could regard the complainant's evidence as tending to show the nature of the relationship between the complainant and the defendant was sexual, and also that it was maintained over the alleged period (*R v WO* at [35]).

The period over which the relationship was maintained is of particular importance in this case. The acts charged by counts two to four span an eight-year period. The first two occurring in March 1992, and the third in late 1999 or early 2000. The uncharged acts provide an intelligible background to those charges (*R v A* at [31]).

This is not a case where the uncharged acts are equivocal, such as in the recent Court of Appeal decision of *R v BCC*. Rather, the complaint is that its prejudicial effect outweighs any probative value.

I was referred to the High Court decision of *R v Tully*, in particular to obiter of Justice Callinan at [145]. True it is that he expressed concerns about the reception of relationship evidence without a proper examination of the purpose for which it is received. It is worth noting, however, that he drew a distinction between a case where the defendant is charged with multiple recurrent counts of the same or similar offences over a considerable period, and a case where the defendant is charged with only one or a smaller number of offences, as here.

In the former, he questioned the justification for leading any relationship evidence. In the latter, he acknowledged that, without such evidence, the jury could derive the impression that the complainant is saying that the accused molested her out of the blue.

The justification put forward for reopening His Honour's ruling at trial is that it can be reconsidered with the benefit of knowing what the complainant's evidence of uncharged acts was at trial.

Whilst the test in section 590AA(3) does not apply, as I have said, I consider a similar approach is proper for this application. That is, I have to be persuaded that there is sufficient reason to disturb His Honour's ruling.

At trial, His Honour was taken to the complainant's statements and to her evidence at committal. Her evidence dealt with the nature of the incidents, the locations, or occasions for them, and their frequency. The only apparent difference between what she said at committal and what she later said at trial was that at committal she said the incidents occurred some three to 10 times a year, while at trial she said she could not recall how often they occurred, but that it was too often to count.

That difference is not, in my view, sufficient to persuade me to revisit His Honour's initial ruling on this point.

In any case, if I was persuaded to so do, I consider the evidence is admissible to provide an intelligible background to the charged acts and to counter the impression that might otherwise be conveyed, by the time between the first two offences charged and the third, that the complainant is alleging the defendant molested her out of the blue.
So the application to stay counts 1 and 4 and the application to rule as inadmissible evidence of uncharged acts are both declined.