ORDER PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS (INCLUDING THE RESULT) IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF RETRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF THE COMPLAINANT PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA281/2017
[2017] NZCA 492

BETWEEN	MIKIO FILITONGA Appellant
AND	THE QUEEN Respondent

Hearing:	17 October 2017
Court:	Kós P, Harrison and Gilbert JJ
Counsel:	P L Borich QC and J D Munro for Appellant M J Lillico for Respondent
Judgment:	19 October 2017 at 11.00 am
Reasons:	31 October 2017

JUDGMENT OF THE COURT

A The appeal is allowed.

B The convictions are set aside.

C A retrial is ordered.

D The first strike warning given on 24 March 2017 is cancelled.

E Any question of bail is to be dealt with in the District Court.

F Order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of retrial. Publication in law report or law digest permitted.

G Order prohibiting publication of name, address, occupation or identifying particulars of the complainant pursuant to s 202 of the Criminal Procedure Act 2011.

REASONS OF THE COURT

(Given by Gilbert J)

Introduction

[1] Following a trial by jury in the District Court at Auckland, Mr Filitonga was found guilty and convicted of causing grievous bodily harm to the complainant with reckless disregard for his safety contrary to s 188(2) of the Crimes Act 1961. The Crown case was that Mr Filitonga, knowing that he had Human Immunodeficiency Virus (HIV) and without disclosing this, had unprotected sex with the complainant and infected him with the virus. Mr Filitonga was also convicted of criminal nuisance contrary to s 145 of the Crimes Act by having unprotected sex with the complainant knowing that this would endanger the complainant's life, safety or health. Both charges related to the period between 1 February and 31 October 2014 when Mr Filitonga and the complainant were in a relationship.

[2] We concluded there was a risk of a miscarriage of justice and that neither conviction could stand. We therefore issued a results judgment promptly after the hearing setting aside both convictions and ordering a retrial.[1] These are our reasons for doing so.

[3] The first problem is that the charges were not laid in the alternative. Because of the rule against double jeopardy, Mr Filitonga could not be convicted on both

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1 *Filitonga v R* [2017] NZCA 478.

charges if they arose out of the same act of unprotected sex.[2] To the extent that the convictions could relate to separate acts of unprotected sex, to sustain both convictions the Crown would need to prove beyond reasonable doubt that the act giving rise to the criminal nuisance charge occurred prior to the act causing grievous bodily harm by transmitting HIV. There was no evidence that by engaging in unprotected sex after the complainant was infected with HIV, Mr Filitonga was exposing the complainant to further danger. Because the Crown could not prove precisely when the complainant contracted HIV, the charges therefore needed to be laid in the alternative.

[4] The second problem is that the Judge wrongly directed the jury that they were required to find that infection with HIV amounts to grievous bodily harm. This was a matter for the jury and should have been left to them to determine on the evidence.

First issue: charges not laid in the alternative

The charges

[5] Following amendment at trial, charge 1 read as follows:

> That MIKIO FILITONGA between 1 February 2014 and 31 October 2014, at Auckland, with reckless disregard for the safety of [the complainant] caused grievous bodily harm to [the complainant].

[6] Also following amendment at trial, charge 2 read as follows:

> That MIKIO FILITONGA between 1 February 2014 and 31 October 2014, at Auckland, committed a criminal nuisance by doing an unlawful act namely failing to take reasonable precaution of a dangerous thing, namely HIV virus knowing that such act would endanger the life, safety or health of [the complainant].

[7] As noted, these charges were not laid in the alternative. Charge 2 was not a representative charge but nor did it relate to a single offence. Although ultimate responsibility lies with the Crown, the trial record does not indicate that defence counsel challenged the Crown's failure to separate the charges.

Crown case

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2 Criminal Procedure Act 2011, s 46.

[8] A number of important facts were agreed. Mr Filitonga tested positive for HIV on 27 February 2013. The complainant contracted HIV between 15 August 2013, when he tested negative for the virus, and 23 December 2014, when he tested positive (the contraction period). Mr Filitonga met the complainant and commenced a sexual relationship with him in February 2014. The relationship ended in October 2014 and the last incident of unprotected sex occurred between them that month. Because the complainant only tested positive for HIV after the relationship ended, the date range for the charges could not be narrowed beyond the period of the relationship.

[9] The Crown case was that the complainant must have contracted HIV from Mr Filitonga. This was based on the complainant's evidence that the only other sexual partners he had during the contraction period (L, T and H) all tested negative for the virus following the expiry of that period.

Defence case

[10] The defence case was that the complainant's evidence could not be relied on to support a conviction on either charge. Amongst other things, the defence contended that the complainant was an unreliable witness, he was more promiscuous than he had acknowledged in evidence, and the Crown had failed to exclude the reasonable possibility that during the contraction period the complainant could have been infected with HIV through having unprotected sex with someone else. The Crown therefore could not establish beyond reasonable doubt that it was Mr Filitonga who infected the complainant with HIV.

The evidence on unprotected sex

[11] It was an agreed fact that the "[l]ast incident of unprotected sex" between Mr Filitonga and the complainant occurred in October 2014. The complainant also gave evidence indicating that they had anal sex "at least four or five times" before the complainant visited the Philippines in April 2014. In response to a question from Mr Burns, defence counsel at trial, the complainant said this sex was unprotected:

> Q. And that prior to your departure for the Philippines the only anal sex that you have was protected? In other words, he used a condom?

A. No, we never, he never.

[12] While discussing the form of the question trail, Mr Burns disputed that the Crown had proved they engaged in *unprotected* anal sex during the period of their relationship. The Crown then applied to recall the complainant to clarify this issue, but the Judge declined the application because the Crown had already closed its case.[3] However, in the light of the agreed fact that the "last incident of unprotected sex" between Mr Filitonga and the complainant occurred in October 2014, the only available inference was that there was at least one earlier such incident of unprotected sex.[4]

Sequencing issue

[13] Even if the Crown was able to exclude the reasonable possibility that the complainant contracted HIV from someone else, it still faced the difficulty that it could not prove which of the incidents of unprotected sex with Mr Filitonga caused the transmission of HIV. Because the asserted danger to life, safety and health was the risk of contracting HIV, the jury would need to be satisfied that the act supporting charge 2 occurred before the act founding charge 1. The contraction of HIV removes the risk of contracting it.

Double jeopardy

[14] If there was a reasonable possibility that transmission of HIV occurred on the first act of unprotected sex between Mr Filitonga and the complainant, Mr Filitonga could not be convicted of both charges. This is because both offences would have arisen from the same facts and convictions on both would therefore contravene the rule against double jeopardy reflected in s 46 of the Criminal Procedure Act 2011:

> **46 Previous conviction**
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> (1) If a plea of previous conviction is entered in relation to a charge, the court must dismiss the charge under section 147 if the court is satisfied that the defendant has been convicted of—

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3 *R v Filitonga* [2017] NZDC 6078.

4 We note the agreed facts refer to "unprotected sex" rather than "unprotected anal sex". We do not consider this distinction is material to our analysis.

(a) the same offence as the offence currently charged, arising from the same facts; or

(b) any other offence arising from those facts.

(2) Subsection (1) does not apply if—

(a) the defendant was convicted of an offence and is currently charged with a more serious offence arising from the same facts; and

(b) the court is satisfied that the evidence of the more serious offence was not readily available at the time the charging document for the previous offence was filed.

[15] As this Court concluded in *Rangitonga v Parker*, the test applicable to special pleas changed with the enactment of the Criminal Procedure Act.[5] Rather than undertaking a close comparison between the elements of the charges as had previously been required, the attention has now shifted to the facts giving rise to the charges:[6]

> We agree that the reference to offences "arising from the same facts" in s 47 is intended to apply to cases where there is a common punishable act central to both the previous and new charge. We would add that the same approach should apply to a common punishable omission. The new section focuses on the substance of the facts giving rise to the previous and new charges rather than a fine-grained comparison of each element of the charges.

[16] Although *Rangitonga* was concerned with a special plea of previous acquittal for the purposes of s 47, the same language is used for a previous conviction in terms of s 46 and the same analysis applies. The line of authority relied on by Mr Lillico commencing with *Smith v Hickson* focused on the previously applicable enquiry as to whether the same *offence* was being prosecuted twice.[7] These cases must now be read with care in the light of the different approach mandated under ss 46 and 47.

[17] Accordingly, if the jury had concluded that both charges arose out of the same act of unprotected sex between Mr Filitonga and the complainant, it would not have been open for the Court to enter convictions on both charges without infringing the rule against double jeopardy. In those circumstances, both offences would have arisen

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5 *Rangitonga v Parker* [2016] NZCA 166, [2016] NZAR 768.

6 At [41].

7 *Smith v Hickson* [1930] NZLR 43 (SC); *Ministry of Transport v Hyndman* [1990] 3 NZLR 480 (HC); *R v Brightwell* [1995] 2 NZLR 435 (CA); and *Connolly v R* [2010] NZCA 129. See also *R v Morgan (Thomas)* [2005] 1 NZLR 791 (CA).

from the same facts. Applying the formulation in *Rangitonga*, a common punishable act was central to both charges. The common punishable act is having unprotected sex, while knowingly HIV-positive, being reckless as to the consequences. This common act founds both the grievous bodily harm charge (where, additionally, HIV is transmitted) and the criminal nuisance charge (where the transmission of HIV is the danger). It follows that a conviction on one of these offences would preclude the proper entry of a conviction on the other.

Implications for the jury

[18] Putting aside the mens rea elements and whether the contraction of HIV amounted to grievous bodily harm, there were three possible outcomes a properly directed jury could reach on the agreed facts. All depended on the jury's assessment of the complainant's credibility as to his other sexual partners during the contraction period. The three outcomes open on the evidence were:

(a) There was a reasonable possibility that the complainant contracted HIV from someone else between the commencement of the contraction period (15 August 2013) and the first incident of unprotected sex with Mr Filitonga (some time after February 2014).

(b) There was a reasonable possibility that the complainant contracted HIV from someone else after the first incident of unprotected sex with Mr Filitonga. This could have been during or after the relationship (which ended in October 2014) up to the time the complainant tested positive for HIV (23 December 2014).

(c) There was no reasonable possibility that the complainant contracted HIV from anyone other than Mr Filitonga.

[19] The jury's attention needed to be drawn to these possibilities, including through the questions in the question trail and the directions in the Judge's summing-up. If the jury considered that outcome (a) was a reasonable possibility, no conviction on either charge could be sustained. If the jury considered that outcome (b)

was a reasonable possibility, the jury could not properly find Mr Filitonga guilty on the grievous bodily harm charge. However, it would be open to the jury to find Mr Filitonga guilty on the criminal nuisance charge (subject to the other elements being proved). This is because in that scenario there must have been unprotected sex between the complainant and Mr Filitonga before the complainant contracted HIV. Finally, if the jury was satisfied as to outcome (c), it would be open to the jury to find Mr Filitonga guilty on the grievous bodily harm charge (again, subject to the other elements being proved). However, it would not be open to the jury to find Mr Filitonga guilty on the criminal nuisance charge because of the sequencing issue we have already identified.

Conclusion

[20] For these reasons, we are satisfied that charges 1 and 2 should have been laid in the alternative. That is the only way of overcoming the difficulty that the Crown could not prove the correct sequence.

[21] No one identified this issue at trial. As a result, the jury received no assistance on the three possible outcomes listed above. This should have been addressed by counsel in their closing addresses. The question trail could also have been drafted to help focus the jury's attention on these possible factual outcomes. Counsel and the Judge should have assisted the jury by marshalling the relevant evidence on each of these issues.

[22] We are satisfied that there is a risk that justice has miscarried and that the conviction on the criminal nuisance charge is unsafe.

Second issue: grievous bodily harm not left to the jury

[23] In the context of settling the form of the question trail with counsel, the Judge advised that she intended to direct the jury that transmission of HIV constitutes causing

grievous bodily harm. While rejecting Crown counsel's submission that it was a question of law, the Judge decided that she should nevertheless direct the jury to answer this question "yes":[8]

> [1] During the discussion of the question trail, Mr Burns has raised the fact that he considers it is for the jury to determine whether in this case transmission of the HIV virus from the defendant to the complainant, should the jury consider it proven beyond reasonable doubt, is the causing of grievous bodily harm is for it and not for the Court to determine.
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> [2] There has been discussion between the Court and counsel about this issue. Ms Murdoch, for the Crown, considers that it is a legal issue as to whether or not transmission of the HIV virus does constitute causing grievous bodily harm. I have already ruled in a s 147 application judgment that it does constitute grievous bodily harm and I consider that I should direct the jury accordingly. So whilst it is a question for them to answer, if I direct them that they should answer "yes" because it does constitute grievous bodily harm, then I consider that is the legal duty of the Court discharged.
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> [3] Mr Burns, for the defence, reserves his position, which is that it is not a legal matter but rather a jury matter but elects, given the direction that I have indicated I will give the jury, not to address them on it.

[24] Accordingly the Judge directed the jury in her summing-up:

> [41] The last question for charge 1 is has the Crown proved beyond reasonable doubt that in infecting [the complainant] with the HIV virus Mr Filitonga caused grievous bodily harm to him. Well I am directing you that if you get to question 1.4 you must answer yes to that question, because as a matter of law to infect somebody with the HIV virus is in fact to cause grievous bodily harm to him. I am sure you will not have any difficulty with that in any event, because it is and can be a life altering medical status, notwithstanding that antiretroviral medication if taken regularly and continually will extend your lifespan to its normal length.

[25] Mr Lillico responsibly accepts that this was a misdirection. The Judge was clearly right to reject the s 147 application. She was also right to reject Crown counsel's submission that whether or not the infliction of HIV constitutes grievous bodily harm is not purely a question of law. In those circumstances, the Judge's duty was to leave it to the jury to determine that question. It was for them to decide, as with all questions of fact, whether the Crown had proved beyond reasonable doubt that by infecting the complainant with HIV, Mr Filitonga caused him grievous bodily harm.

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8 *R v Filitonga* DC Auckland CRI-2015-014-2837, 23 March 2017 (Minute No 2).

[26] Mr Lillico argues that even if there had been no such misdirection, a properly directed jury hearing the undisputed evidence of the effect of HIV in the present case would not have failed to find this element proved. For that reason, he submits that there is no risk that justice has miscarried.

[27] We disagree. This Court considered whether the transmission of HIV could constitute grievous bodily harm in *R v Mwai*.[9] In that case a medical expert witness gave evidence that contraction of the virus would cause a "steady relentless progression" leading to AIDS and then inevitably to death.[10] That was in 1995. Even then, this Court approved the trial judge's directions which left to the jury the question of whether HIV amounted to grievous bodily harm:[11]

> The Judge reminded the jury of the medical evidence that HIV "will sadly but inevitably lead to AIDS and to death" and directed them that it was a matter for them as to whether that was really serious harm (the synonym for grievous bodily harm: *R v Waters* [1979] 1 NZLR 375, 379). For the reasons we have given, that was a proper direction.

[28] Dr Simon Briggs, a specialist in infectious diseases including HIV, gave evidence at Mr Filitonga's trial that "over the last 10 to 15 years we have had very effective treatment become available". He explained that so as long as someone takes medication regularly, the virus is suppressed and they can be expected to live a normal life.

[29] Despite advances in treatment, we accept the Crown's submission that a properly directed jury is likely to have little difficulty in concluding that a viral infection that attacks the body's immune system constitutes really serious harm. However, that is a question of fact, not law, and is quintessentially a jury issue. In the light of medical advances we cannot safely exclude the possibility a jury might be persuaded that grievous bodily harm was not proved on the evidence. It follows that we are satisfied there is a risk that justice has miscarried as a result of the Judge effectively removing this issue from the jury by directing them to answer the relevant question "yes".

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9 *R v Mwai* [1995] 3 NZLR 149 (CA).
10 At 153.
11 At 153.

[30] Given our conclusions on the issues of double jeopardy and grievous bodily harm we do not consider it necessary to address the other grounds of appeal.

Result

[31] The appeal is allowed.

[32] The convictions are set aside.

[33] A retrial is ordered.

[34] The first strike warning given on 24 March 2017 is cancelled.

[35] Any question of bail is to be dealt with in the District Court.

[36] For fair trial reasons, we make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of retrial. Publication in law report or law digest permitted.

[37] We make a further order prohibiting publication of name, address, occupation or identifying particulars of the complainant pursuant to s 202 of the Criminal Procedure Act 2011.

Solicitors:
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