

IN THE COUNTY COURT OF VICTORIA  
AT MELBOURNE  
CRIMINAL DIVISION

Not Restricted

Case No. CR-06-01480

THE QUEEN

V

MICHAEL CHARLES LONG

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JUDGE: HER HONOUR JUDGE COHEN  
WHERE HELD: Melbourne  
DATE OF HEARING: 29 February, 2008 (and subsequent written submissions  
and responses)  
DATE OF DECISION: 10 June 2008  
CASE MAY BE CITED AS: R v Long  
MEDIUM NEUTRAL CITATION: [2008] VCC 595

REASONS FOR DECISION

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Catchwords: s464ZFB *Crimes Act* 1958; application for retention of forensic sample; Respondent found not guilty of “forensic sample offences” but guilty of one count of recklessly causing injury; whether “any other offence arising out of the same circumstances”; whether order justified.

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| <u>APPEARANCES:</u> | <u>Counsel</u> | <u>Solicitors</u>             |
|---------------------|----------------|-------------------------------|
| For the Crown       | Mr M. Stanton  | Office of Public Prosecutions |
| For the Accused     |                | Ms P. Samson                  |

HER HONOUR:

- 1 The respondent, Michael Long, stood trial in August 2007 on nine counts contained in presentment No.T02505214. By unanimous verdict of the jury, delivered on 9 August 2007, he was found guilty of only one count in the presentment, that being Count 2 of recklessly causing injury to Jeanette Long. He was found not guilty of all of the other counts, which had included one of unlawful imprisonment, and three of rape<sup>1</sup>, and others of threats to kill or to inflict serious injury.
- 2 On 16 August 2007 I sentenced Mr Long on the count of recklessly causing injury, to serve a Community-Based Order, with conviction. No further order was sought at that stage by the prosecution.
- 3 In February 2008 the prosecution applied for an order to be made under s.464ZFB(1) of the *Crimes Act* 1958 for retention of a forensic sample which had been taken from Mr Long in October 2005, with his consent, during the investigation of the offences with which he was ultimately charged. This application was made within the time limit of 6 months after expiry of relevant appeal periods. I queried why it had not been made at the time of the plea hearing or sentencing, and was candidly informed on behalf of the prosecution that it had not been perceived at that time as available to the prosecution because Mr Long was not convicted of any “forensic sample offence”.
- 4 The application is made in reliance on s.464ZFB(1)(b)(ii) on the basis that Mr Long is a person who has been found guilty of another offence arising out of the same circumstances in respect of which the forensic procedure was conducted.
- 5 I accept the submission of the prosecution that the expression “any other offence” should not be read as limited to only another “forensic sample

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<sup>1</sup> Each of those being a “forensic sample offence” contained in schedule 8 of the *Crimes Act* 1958

offence". Nevertheless, in my view it is relevant to consideration of whether the order should be granted, that the offence of which Mr Long was convicted, was not only not itself a "forensic sample offence" but was not an alternative count to a forensic sample offence. In this case it was an alternative to a count of intentionally causing injury, which itself is also not a forensic sample offence<sup>2</sup>.

6 In determining this application I must decide whether an order for retention of the forensic sample is justified. Relevant considerations include the circumstances of the offence and its seriousness.

7 The events giving rise to all of the charges took place over approximately two hours on the morning of 16 October 2005. In summary, the Crown case was that at approximately 7.30 that morning the respondent attended at his then sister-in-law's home where his wife had slept overnight. He demanded she accompany him, and once he had her in his vehicle, sitting in the middle of the front bench seat with items on the left hand seat which were blocking her access to the left hand door, he drove away and angrily questioned her. On his own evidence, as he drove away, in response to her initial answers to his questions, he slapped her with his left hand making contact with her cheek, and said: "Now tell the truth". As he kept driving, he demanded further answers from her and then slapped her again in a similar manner saying: "You whore". He continued to drive for some kilometres, during the course of which she alleged (but he denied) that he refused to stop at a service station at her request. He eventually parked in a quiet court where there was further talk between them and over the time they were there, being approximately an hour, they had sexual intercourse. The Crown alleged that he raped her by penetrating her in three different ways; he denied one manner of penetration completely and said the other two were consensual. There were also alleged threats that gave rise to other counts.

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<sup>2</sup> There was no suggestion that the events could give rise to a charge of intentionally causing serious injury which would have been a forensic sample offence.

8 It is necessary to examine whether the offence of which Mr Long was found guilty arose “out of the same circumstances” as the offences for which the forensic sample was taken. The jury verdict on Count 2 must mean that the jury accepted that one or both of the two acts of slapping his wife on the cheek amounted to recklessly causing her injury. Those circumstances certainly are the same as the circumstances which gave rise to the alternative count of intentionally causing her injury, but that would not have been a forensic sample offence either. Although there was a continuum of events and behaviour over a period of approximately two hours, while the two of them were in company and disagreement in his car that morning, in my view there needs to be a degree of proximity between the actions for which he was convicted and those giving rise to the taking of the forensic sample. In my view the slappings were too far removed in time and nature from the acts of alleged rape to justify the description “arising out of the same circumstances”.

9 I have also considered whether the offence of which he was convicted arose out of the same circumstances as the alleged unlawful imprisonment, which was a forensic sample offence, of which he was also found not guilty. She conceded that she agreed to go with him in his car so as not to disrupt her sister’s household further. The alleged unlawful imprisonment was, as the jury was instructed, capable of being found either in relation to the allegation that he refused to stop at a service station when she requested that, a factual allegation he denied, or as his keeping her against her will in the car as he continued to drive, being while he demanded she answer questions, insulted and indeed slapped her. In other words, it could be said that during the first ten minutes or so of the alleged unlawful imprisonment he was also slapping her so that the count of which he was found guilty arose out of the same circumstances.

10 In my view there was sufficient proximity in time and events to find that the offence of which he was convicted arose out of the same circumstances as

one view of the circumstances giving rise to the charge of unlawful imprisonment.

- 11 However, the count on which the jury found Mr Long guilty was very much less serious than the nature of the offences designated as forensic samples offences. It is not a charge which is likely to have prompted the taking of a forensic sample during the investigative process had it not been amongst several alleged more serious offences. Further, in light of the jury's finding that the injury was caused recklessly rather than intentionally – the view of the facts which I must apply - the injury was inflicted when Mr Long was tired, and after a night of alcohol consumption, and in a jealous mood, and consisted of causing her pain, slight bruising to the side of her face, and possibly a small cut inside her mouth from her teeth. Without in any way condoning violence by a husband towards his wife, the circumstances of this offence as distilled from the jury's verdict are not at a higher level of seriousness for this offence.
- 12 The issue is whether the order is justified, and that must include consideration of the seriousness of the circumstances of the offence of which the person has been convicted<sup>3</sup>. Further, notwithstanding that there has been a conviction, that seriousness should be considered in the context that the provisions constitute a significant invasion of a person's privacy and must be approached accordingly<sup>4</sup>.
- 13 I made comments in my sentencing remarks that I did not regard the offence of which Mr Long was convicted as minimal, but I take into account the much more serious nature of the categories of offences which justify the taking of forensic samples during the investigative procedures as occurred here. In my view, Mr Long was found guilty by the jury of the most minor of the nine counts brought against him; it being an offence of violence but with minimal

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<sup>3</sup> s 464ZFB(2)

<sup>4</sup> Nettle J in *Pavic v Magistrates' Court of Victoria* [2003] VSC 99; adopted by Whelan J in *R v Heriban* [2005] VSC 76

consequences, and much less serious than most of the other counts of which he was found not guilty by the jury. In the circumstances of this case I do not consider the making of an order to retain his forensic sample as justified by the nature of the offending of which he was actually found guilty.

14 In my view another matter relevant to whether the order is to be made is its potential purpose as a means of identifying (or excluding) the respondent in relation to possible future offences. Mr Long's criminal history includes two previous episodes of violence, and I dealt with the concerning features of these in my sentencing remarks. As with the events giving rise to all charges in this proceeding, they were not events where there was any question as to the identity of the offender. All have been offences or alleged offences in relation to those with whom he had enjoyed close personal relationships or connections. For this reason in my view the need to have Mr Long's DNA details on the state's data base as a means of identifying him as a possible offender in the future is low.

15 In the course of written submissions, an issue was raised on behalf of the respondent concerning the Charter of Human Rights. I had my preliminary views notified to both parties with a request for any further submissions on them, and no such submissions were forthcoming. I have not changed my preliminary views as then set out, except to note that although this matter bears a 2006 file number, the presentment was not in fact filed until July 2007. However, as that date, and indeed the whole of the trial, the jury verdict and the sentencing, occurred prior to the commencement of the Charter of Human Rights, the same reasoning applies and I am not satisfied that it has any application in this proceeding. The merits of the substantive argument can be left for another case.

16 The prosecution's application for a retention of the forensic sample taken from Mr Long in October 2005 is refused.