IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 232/84

THE QUEEN

v.

[redacted]

518

[redacted] HUNT

Coram: Cooke J. (presiding)
Richardson J.
Thorp J.

Hearing: 6 June 1985

Counsel: Miss Patricia Mills for Appellant
C.J. Thompson for Crown

Judgment: 6 June 1985

JUDGMENT OF THE COURT DELIVERED BY COOKE J.

[redacted] an appeal against a conviction for rape. The incident occurred at Rototuna late at night on 1 October 1983 in the grounds of a house where a party had been going on since early in the afternoon. There were many people at the party, much consumption of alcohol and some smoking of cannabis. There was at the trial and is little or no dispute that the complainant was raped, the real issue being identity. The trial Judge directed the jury that there was no corroboration of the complaint's identification of the accused. He was not a person known to her, at least not before that night. She testified that her attacker had a knife and there is evidence that the accused had one at the party. Also some evidence regarding pubic hairs is consistent with the accused having been the rapist; but the

matters just mentioned are far from conclusive and were not put by the Judge to the jury as high as being capable of affording corroboration. In these circumstances it is obvious that the complainant's evidence as to identification of the accused and the summing up in that regard were of vital importance.

The complainant identified the accused at the trial in August 1984 and no doubt at the lower court hearing in April 1984 which led to the trial. She also identified him at another depositions hearing in March 1984; we shall return to this. In January 1984 she picked his photograph out of a group of photographs of eight young men shown her by the police, although she went no further then than saying that he was the most likely person. We think that the Judge dealt adequately with this identification in his summing up.

As to the other depositions hearing, the accused attended then to face other rape charges, although this was naturally not revealed to the jury in the present case. The police had taken the complainant to the courtroom and had indicated to her that at some stage the man they suspected of raping her would come in. There is evidence that she did identify him almost as soon as he came in and reacted with a distress suggesting the reliability of that identification. It was difficult, however, for counsel for the defence in cross-examining the complainant and the police officer concerned to bring out that the accused may well on that

occasion have been in a position of obvious prominence in the courtroom or for some other reason may have stood out as a man on whom her attention would naturally tend to focus. Indeed it is not inconceivable that she knew that he was appearing on other rape charges. The evidence in chief and cross-examination, as recorded, do not in fact convey in any effective way the risk that the identification was not made in neutral conditions.

In this case it was particularly incumbent on the trial Judge to give a warning complying fully in substance with s.344D of the Crimes Act 1961, a section inserted in 1982. As the section itself states, the warning need not be in particular words. But it must among other things alert the jury to the possibility that a mistaken witness may be convincing. In the course of his summing up the Judge mentioned that the defence said that the girl was not lying but mistaken and that it was also contended that the situation was one in which an error could very easily be made. He referred in that connection to 'the way the identification had really been set up by the police' - but all this was put as a summary of the defence submissions and not with any hint of endorsement or explanation from the Judge himself. He went on to say:

> So there you have it, Mr Foreman and members of the jury. There is no corroboration at all on the question of identification and it all turns on what you make of [the complainant]. If you are satisfied beyond reasonable

> doubt that she is a reliable, truthful witness as to identification, then your duty is plain. If you have any doubts, any doubts, as to her reliability in that direction, equally your duty is plain and you find the accused not guilty.

There and earlier in the summing up the Judge spoke forcefully of the need to be satisfied of truthfulness and reliability. But to speak in terms of truthfulness and reliability may not be enough to bring home to a jury the possibility that an apparently completely reliable and truthful witness could be mistaken. The risk that this was not brought home to this jury was compounded by the tenor of the summing up, which left little doubt that the Judge himself would have accepted the complainant's evidence.

Further, this particular case called for a careful warning dealing expressly with the other depositions hearing identification. The jury should have been reminded that the police evidence was that she had been told that the person the officer believed to have raped her was going to be at the court that morning. It would have been desirable also to say words to the effect that the evidence did not exclude the possibility that the accused came in at a time or in circumstances where her attention was naturally attracted to him; and that they should bear this in mind in deciding whether or not to accept that identification, while fully entitled to give weight to her apparently strong and immediate reaction. Unfortunately the Judge did not say anything to that effect; but he did say:

> But there is no evidence to suggest that he was pointed out to her or that any suggestions were made about what he might be wearing or what he might look like. On that occasion she picks him out when he, at that time, had a beard, whereas on the night she said he was clean shaven.

We cannot avoid the impression that this reference to no evidence suggesting that he was pointed out to her would have tended to divert the jury from the dangers of the courtroom identification, rather than putting them on guard.

For these reasons we are compelled to hold that the summing up did not comply in spirit with s.344D and to quash the conviction on that ground. It becomes unnecessary to consider the other matters raised or touched on in the argument of Miss Mills or to hear the application for leave to appeal against sentence.

The appeal against conviction will be allowed, the conviction quashed and there will be an order for a new trial.

Solicitors:
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