IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 325/90

THE QUEEN

v.

LINDSAY KENNETH WATKINS

Coram:	Casey J (presiding) Thorp J Sir Gordon Bisson
Hearing:	8 April 1991
Counsel:	M J Levett for Applicant J C Pike for Crown
Judgment:	8 April 1991

ORAL JUDGMENT OF THE COURT DELIVERED BY CASEY J

Lindsay Kenneth Watkins faced four charges in the High Court at Auckland involving the same complainant. Counts 1 and 2 alleged rape and unlawful sexual connection (anal intercourse) respectively on 19 April 1990. Counts 3 and 4 alleged the same offences between 20 and 22 April of that year. The jury found him not guilty on counts 1 and 2, but guilty on 3 and 4. He seeks leave to appeal against conviction upon the grounds that the verdicts of guilty on the later counts are inconsistent with the not guilty verdicts on the first two.

The applicant was 45 years of age and on his own admission had considerable sexual experience. The

complainant was 25 and suffers from cerebral palsy and epilepsy, and it is obvious from her evidence that she is under a degree of mental retardation. She lived a sheltered life and had no previous sexual intercourse. She knew the applicant on a casual basis, and on Thursday 19 April he took her on his motorbike to a caravan where he was living. After they had had a meal and watched television he induced her to undress and go to bed where he joined her and she said he pushed his penis into her vagina. She protested and complained he was hurting her but he persisted. Then she said he had anal intercourse with her, again over her protests, and finally had vaginal intercourse again. At 5 a.m. the next morning he took her back to her flat where she said she had a shower and was feeling angry and upset. Then she went to her work as a horticulture trainee under the aegis of the Crippled Children's Society.

That evening, Friday 20 April, she said he came around on his motorbike again when she was planning to spend the weekend with friends, and she had her clothes packed for this purpose. He induced her to come with him, loading her gear on to his motorbike. She said she did not want to but felt scared and helpless. They reached the caravan about 6 p.m. and, according to her evidence, he took her to the bedroom (which was partitioned off from the remainder by a curtain) and told her to undress and get onto the bed. She did so because she knew he wanted to have sex with her, but she did not want it and said no. He had vaginal intercourse which

hurt and she complained about it and she said that over the next two days further vaginal and anal intercourse occurred without her consent.

During that weekend there were visitors to the caravan and some gave evidence describing her obvious difficulty in walking, confirming what she said about the painful nature of the intercourse. There was evidence from others that the applicant insisted on accompanying her to the camp toilet, and would not let her use the phone, and witnesses also described her general demeanour, one at least being very concerned about her condition.

The applicant gave evidence and also made a statement to the police. In his evidence he maintained he attempted but did not achieve full sexual intercourse; that if there was anal connection it was unintentional; that any sexual activity was with the complainant's full consent and, in any event, he reasonably believed she was consenting. However, the applicant conceded on one occasion during the weekend he continued with vaginal intercourse when he knew that consent had been withdrawn. Mr Levett accepted that admission would be sufficient to explain the differing verdicts on the rape counts, but not those on the anal intercourse, which the applicant denied intentionally performing. However, on this point it is instructive to look at his answer in cross-examination at p.117 of the case where, after describing the medical evidence about the condition of the

complainant's anus, Crown counsel put this to him:-

> The doctor told us also that what she observed of the condition of the anus it certainly again would be consistent with either penetration or attempted penetration. I'm suggesting to you that you did deliberately penetrate her anus? Not as far as I can remember, I don't know. I don't think so.

The jury might well have regarded this as mere equivocation.

Mr Levett submitted that the jury by their verdicts must have rejected the complainant as a credible witness of the events of 19 April, but accepted her as truthful in describing essentially the same sexual activities which took place over the following weekend. They were told by the Judge that they must look at the evidence on each count and consider it separately. Counsel accepted that this was not a case where all counts stood or fell together.

In considering this appeal the complainant's obvious intellectual handicap must not be forgotten. For that reason the jury may well have been reluctant to accept as proof beyond reasonable doubt her unsupported evidence about the events of the first night out of a sense of natural caution. But, as Mr Pike pointed out, the evidence about the weekend was in general of a better quality. The complainant gave a more detailed account of her reluctance to accompany the applicant on that occasion and there were witnesses who tended to confirm her story of intercourse against her will.

The jury might also have considered that over the extended period of that weekend her increasing physical distress and generally helpless demeanour must have become as obvious to the applicant as it was to the visitors who gave evidence about it. The jury may have been prepared to give him the benefit of the doubt in respect of the first night and accepted that she may not have made her lack of consent sufficiently clear; but they may well have concluded there could have been no such doubt in respect of the continuing acts of intercourse over the weekend until she was eventually taken away by friends.

For these reasons and in spite of Mr Levett's submissions to the contrary, we are satisfied there is no inconsistency between the not guilty verdicts on count 1 and 2 and the guilty verdicts on counts 3 and 4, and the application for leave to appeal is dismissed.

M E Casey J

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