NOT RECOMMENDED

N2LR

IN THE COURT OF APPEAL OF NEW ZEALAND 18/9 C.A. 145/92

THE QUEEN

1721

v.

HOW

Coram: Casey J
Holland J
Thorp J

Hearing: 8 September 1992

Counsel: J.C. Pike for Crown
P. Dacre for Appellant

Judgment: 8 September 1992

JUDGMENT OF THE COURT DELIVERED BY THORP J

This is an appeal against conviction on one charge of sodomy and against the sentence of 4 years imprisonment which followed that conviction. The grounds of the appeal against conviction are:

1. That the conviction was inconsistent with the appellant's acquittals by the same jury on a charge of kidnapping and a second charge of sodomy:
2. That there was a misdirection as to consent: and
3. That there was overall unfairness arising from the matters underlying the first two grounds of appeal.

The single ground of appeal against sentence was that it was manifestly excessive. No submissions were tendered on this aspect of the appeal.

The account given to the jury by the complainant was that she had come into Auckland City on the night in question to meet her boyfriend. He did not turn up. She played with some space machines until the premises shut and was walking down Queen Street at about 12.40am when she met the appellant. She said he hit her with some unidentifiable object on the top of the head, stupefying her, and bundled her into his car. Her next recollection, which she placed at about 20 to 4, was of seeing a series of large buckets above the car. The place was later identified as the overhead tramway at Meremere. She then said that the appellant told her he was going to rape her, removed her trousers and underpants and stuck his penis in her bottom. When asked what happened then she said, "He just started all over again." Asked then, "What do you mean?" she said, "He just done it again. He just do it again when its finished. He just left it in there and do it again."

She said she persuaded him after some time to give her back her clothes, that they returned to Auckland, she spoke to a friend and the following day she and a social worker went to the Police. She was examined by a doctor who took vaginal and rectal swabs. Seminal fluid was found on the rectal but not the vaginal swabs.

The appellant, who gave evidence, told a quite different account of events. He said he had driven from Gisborne to Auckland arriving from about midnight and had gone to Queen Street to watch the buskers and get something to eat. He said he was sitting in his car eating when he was

approached by the complainant who asked if she could share the food he was eating and got into his car on her own initiative. He said it was agreed they would spend the night together at the beach and that he drove out to Mission Bay. They left there because of bottle throwing and he decided to go to the Meremere Drag Strip to see if there was any life there. At Meremere he said they engaged in consensual sexual intercourse. He denied having anal sex. Afterwards they went to sleep and in the morning he returned her to Auckland where she asked him for money. He gave her the small amount of change he had with him.

No direct evidence was led about the mental capacity of the complainant. She said in evidence that she was 23 years of age and mentally handicapped but could read and write a little and had been to a special school. The jury was advised by the judge to have regard to the fact that she was "somewhat abnormal" and said it was a matter for them to decide how they took that factor into account. The contention in the Notice of Appeal that the jury was unfairly deprived of guidance about the complainant's mental capacity was not pursued at this hearing. The jury saw and heard the complainant for not less than two hours. In our view they would have been reasonably able to judge the significance of her problems, and we see nothing unfair in the manner in which this aspect of the trial proceeded.

Nor does it appear to us that there is any merit in the first stated ground of appeal, that of inconsistency between the three verdicts. It was plainly open to the jury to have doubts about the claimed blow to the head and the complainant being rendered unconscious by it. As the defence emphasised at trial, this was not mentioned to the doctor, nor did he see any relevant injury. It was also plainly open to the jury to have doubts

about whether the complainant had been shown to have been taken from Queen Street against her will without that doubt determining the quite separate issue whether she might later have agreed to sodomy.

Nor is the acquittal on one charge of sodomy and conviction on the other difficult to understand. The complainant's description of the critical events in the car, which has already been read, makes it less than clear whether there were two separate acts.

The remaining ground of appeal arising from the directions as to consent requires more detailed consideration.

Consent was seen by the trial judge as "the real issue" in the case and he had a great deal to say about it. Thus the jury was told:

1. Consent means a true consent given by a person in a position to make a rational decision:
2. That a true consent given reluctantly and later regretted but given without fear of or as the result of action or threatened force would remain a sufficient consent: and
3. That submission did not equal consent, on which aspect of the topic they were read the statutory provisions about the effect of any absence of protest and about matters which do not constitute consent.

Those factors, they were told, should be taken into account in deciding "whether or not there was consent. That is a matter of fact for you to decide".

To that point the advice given the jury was in our view quite unexceptionable and there really only remained to describe how the onus of proof rules should be applied to consent issues. On this they were advised:

(i) "Now if you are satisfied beyond reasonable doubt that the complainant did give her consent to the sexual connection, that is to sodomy, then of course that will be the end of it. You will stop there and that is the end of the case of course."

(ii) "If, however, you decide that she did not consent, what she did she did unwillingly and simply acquiesced for the reasons that you have heard her tell you about in evidence, if you decide that then that is not the end of it.

You then have to go on and say well now she did not consent, did however he think she consented? Did he believe she consented? Did he believe she consented on reasonable grounds? Now that simply means this. It is then in that event for the Crown to prove that the accused did not believe on reasonable grounds that she had consented."

After further developing the second leg of the basic consent issues the judge wound up his advice in the following manner:

> "So to sum it up, you have this approach. Firstly, did she consent? If she did, that is the end of it, go no further, you would acquit. If, however, you decide she did not consent you then have to decide whether, nevertheless, from his point of view did he believe she was consenting and if he was, do you think that belief was reasonable? If you think it was reasonable in the circumstances you would acquit. If you thought he did not believe it at all or that even though he believed it, it was an unreasonable thing to believe, you would not accept it and again then you would convict."

The summing up included in its opening stages brief but accurate general advice about the onus and standard of proof. The only other references to either topic, apart from those just noted, which specifically related to the consent issues, were two brief statements that the jury should be satisfied beyond reasonable doubt that the Crown's version of events

was correct. This was put as if it were simply a matter of choosing between one of two alternatives.

We do not believe that either the early instructions or the two later comments are likely to have corrected any misunderstanding which the jury may have gained about the manner in which onus and standard of proof rules applied to the consent issues from the advice given them on that topic.

We agree with counsel for the appellant that the invitations to the jury firstly to consider whether they were "satisfied beyond reasonable doubt" that the complainant did give her consent, and secondly, to proceed to consider the issue of mistaken belief "if you decide that she did not consent", failed to convey to the jury the obligation on the Crown to negative consent beyond a reasonable doubt. Indeed the first may have carried the inference that it was for the accused to prove consent by and a reasonable doubt. We accept that it is totally improbable that any such inference was intended, but as consent was the central issue at trial, the verdict reached can only be seen as unsafe. For that reason the appeal must be allowed.

The verdict of guilty is set aside. The sentence following it is quashed. There will be an order for a new trial.

Solicitors:
Crown Solicitor, Wellington for Crown
P.E. Dacre, Barrister, Auckland, for Appellant