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LOW PRIORITY

IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 488/96

THE QUEEN

v

C

Coram: Eichelbaum CJ
McKay J
Tipping J

Hearing: 24 February 1997 (at Wellington)

Counsel: M J Behrens for Appellant
S P France for Crown

Judgment: 24 February 1997

JUDGMENT OF THE COURT DELIVERED BY McKAY J

The appellant was found guilty after trial by jury on one count of having sexual intercourse with a girl aged between 12 and 16 years, and one charge of permitting the same girl to do an indecent act on him. He was discharged on one other count of sexual intercourse, and was found not guilty on a further three such charges. He was found not guilty on one further charge of committing indecency, and on one charge of indecent assault. He appeals against his convictions on the ground that they are unreasonable and cannot be supported having regard to the evidence.

All the charges related to the same girl, who was aged 15 years at the relevant times. The offences charged were with two exceptions alleged to have occurred at huts in the Ruahine Ranges on occasions when the appellant was in

charge of a party of venturer scouts which included the complainant. The complainant gave evidence of sexual intercourse and of oral sex. The Crown also called evidence from other members of the scout parties involved. The appellant gave evidence denying that any acts of intercourse or indecency took place.

In support of the appeal, counsel submitted first that the evidence of the complainant was insufficient, and secondly that the verdict of guilty on the sexual intercourse count was inconsistent with the not guilty verdict on another count relating to the same time and place.

On the sexual intercourse count, the complainant gave direct evidence that she and the appellant had sexual intercourse at Stanfield Hut near Dannevirke. Mr Behrens, for the appellant, argued that her evidence was insufficient to establish that penetration had occurred of her vagina by his penis. The complainant was not asked to explain what she meant by sexual intercourse. Nor did she give explicit evidence of penetration.

Counsel referred to s127 of the Crimes Act 1961 by which penetration is made an essential element of sexual intercourse. He accepted that the ordinary meaning of sexual intercourse certainly includes penetration, but he submitted that the jury was not entitled to speculate as to what the complainant meant by the words "sexual intercourse". The evidence had to be sufficiently explicit to prove penetration before the offence could be found proved. In this case, the appellant was not asked what she meant by sexual intercourse. It was not suggested to her, however, that she might have any different understanding of what is meant by that phrase. There was no evidence which might suggest that she did not understand the normal meaning. She was 16 years of age when she gave her evidence.

Mr France, for the Crown, pointed out that it was not suggested that the Judge had inadequately directed the jury on the elements of the offence. The phrase "sexual intercourse" was used by defence counsel in cross-examination of the complainant, without there being any suggestion of doubt or confusion as to its

meaning. The complainant first referred to intercourse in giving evidence on an earlier count in the indictment, and she spoke in respect of that occasion of going to a doctor afterwards to obtain a "morning after" pill. A letter was produced from the doctor confirming this. This, said Mr France, was some indication of her understanding of the term "sexual intercourse".

In addition, there was produced in evidence a letter written by the appellant to the complainant. In that letter he expressed his feelings for the complainant, and said he was not sure that what he was doing was what he really should be doing. He said he knew that the world would put "dirty old men like him" behind bars. The letter goes on to refer to the complainant and her genitalia in terms consistent with intercourse. Mr Behrens suggested that the letter was equally consistent with the following count of indecent assault at the Stanfield Hut on the same occasion involving contact between his mouth and her genitalia, on which he was acquitted. There is nothing in the letter to suggest any such contact. The letter is consistent with and suggestive of sexual intercourse, and to that extent corroborative of her evidence on the count on which he was convicted.

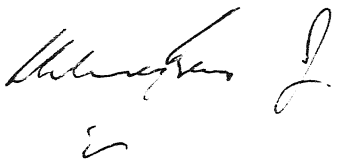
Mr Behrens submitted that the verdict of guilty of sexual intercourse was inconsistent with the verdict of not guilty on the count of oral sex on the same occasion. We see no inconsistency. The verdicts rather show the approach of a careful jury, which was reluctant to convict where the only evidence was that of the complainant, but was satisfied it could rely on her evidence in those cases where there was other corroborative evidence.

The other count on which the appellant was convicted was in respect of oral sex at Sunrise Hut near Whakarara. In her evidence she said she gave him oral sex, she performed oral sex on him. Mr Behrens submitted that these words were not sufficiently explicit to prove that what had physically happened between them was sufficient to constitute the offence. The possibility that by oral sex she meant something less than the ordinary meaning of the phrase must be looked at in the light of her evidence of another occasion when she had appeared to be choking. In

cross-examination she said she was choking because she was going to try oral sex on another of the venturer group, and was just choking. The intended recipient of that attention also gave evidence. He confirmed the incident as one involving "a blow job". He also gave evidence of her performing oral sex on the appellant on the occasion at Sunrise Hut. He described what he saw and heard, and his evidence supported that of the complainant.

We are satisfied that in respect of both counts on which the appellant was convicted there was ample evidence to support the verdicts. There is no inconsistency between the verdicts on these counts and the verdicts of not guilty on the other counts relating to the same occasions. The jury was not being inconsistent in giving the appellant the benefit of the doubt where there was no corroborative evidence.

The appeals against conviction are dismissed.



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