NOTE: PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA814/2013
[2014] NZCA 385

BETWEEN	A (CA814/2013) Appellant
AND	THE QUEEN Respondent

Hearing: 21 July 2014

Court: O'Regan P, Goddard and Andrews JJ

Counsel: E J Forster for Appellant
A Markham for Respondent

Judgment: 12 August 2014 at 4 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Goddard J)

[1] The appellant was convicted by a jury on one charge of assault with intent to rape and sentenced to a term of imprisonment of two years and three months.[1] He appeals against conviction only, on the ground that the trial Judge, Judge Down, erred in directing the jury that an intent to have sex without consent was not a requirement of the offence.

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1 *R v [A]* DC Napier CRI-2013-020-0533, 3 December 2013.

Background facts

[2] The offence occurred on the day that the 21 year old complainant commenced a new job sorting vegetables in a food processing factory. She spent the early part of the morning working on the factory floor and shortly before lunch was put to work on a conveyor belt opposite the appellant, whom she had never previously met. Both were wearing protective overalls and headpieces (similar to balaclavas), as well as headphones to protect their ears from the noise of the machinery. Conversation was apparently not possible, but the complainant said the appellant began making eyes at her across the conveyor belt, raising his eyebrows at her and whistling. She tried to ignore his overtures and said she found them "creepy". At one stage a colleague, D, came and checked on the complainant while she was working on the grading line. D said the complainant was giving her eye contact although she could not understand what the complainant was trying to convey to her. The complainant was looking across at the appellant, then back at D, then looking at the appellant again and then looking back at D. D got the impression the complainant was trying to say something to her but was not sure what it was. She signalled to the complainant "are you okay" by giving a thumbs up and the complainant nodded.

[3] At lunchtime, the complainant removed her protective head covering and headphones and tied the top half of her overalls around her waist. She went to the lunch room where the appellant was sitting at a table with other men. They were speaking in Samoan and appeared to laugh at her. As she left the room, the appellant approached and said something to her in Samoan, which she did not understand. The appellant is Samoan and speaks no English.

[4] The complainant went downstairs, into the women's bathroom and into one of the cubicles. When she emerged from the cubicle she found the appellant standing in the open doorway of the bathroom. The complainant said to the appellant, "this isn't the women's toilet," accidentally getting her words mixed up (she intended to say, "this isn't the men's toilet"). She then went to a basin and washed her hands. When she turned around the appellant was standing inside the door, which was closed. The complainant walked towards the door in order to leave but as she reached for the doorknob, the appellant grabbed her from behind in a bear

hug and pinioned her arms so that she could not move. She said she could feel "his penis behind me ramming me from the back". She tried unsuccessfully to break free of him. He then grabbed at the waist of her overalls and tried to pull them down, releasing one of her arms in the process. She managed to hit him with her free arm, then grasped the doorknob and ran from the room. She ran upstairs to get her things, and said she wanted to go home. D, the colleague from earlier in the day, gave evidence that the complainant was extremely distressed. The complainant left her employ at the food processing factory the next day.

[5] The appellant was interviewed two days later at Hastings Police Station by a detective, with the assistance of an interpreter. The appellant was at the time 19 years of age.

[6] The detective asked the appellant to describe what had happened at work two days earlier and the appellant replied:

> A … um, just a, you know, a, a signal to her with a, you know, we can have a quickie, ah, then – you know, well, that's what, you know, what basically happened and then, you know, she, she, she agrees.

[7] When asked to elaborate and describe the alleged signals between the appellant and the complainant, he said:

> A … the signals were, ah, winking of the eye, ah, and, ah, also, ah, you know, signalling me body language, you know, to meet inside the bathroom.
>
> Q So who was winking?
>
> A Both of us.
>
> Q … explain to me the body language for meeting inside the bathroom?
>
> A (demonstrates) Ah, it's the movement of our fingers, ah, you know, and her fingers, pointing towards the, ah, you know, bathroom. In our – during smoko time.
>
> …
>
> Q … the girl kept pointing to the toilet?
>
> A Yes.
>
> …

Q What did she say?

A Ah, first she winked her eye, you know, to me and then, ah, I ask her whether, you know, she likes me and then, ah, you know, she actually, you know, give me the impression that, you know, she like me.

[8] The appellant also claimed to have spoken to the complainant in broken English while they were sitting at the grading line and said that in the lunch room he had given her a signal to proceed to the women's bathroom, which she did, and he had followed her closely.

[9] The appellant's version of what occurred when they were inside the toilet area was that he touched her hand and she withdrew. He said he conveyed to her what they were going to do in the following way:

A … I only used my eyes. I only used my eyes and my body language, ah, you know, indicating that I wanna, I wanna get it done and, ah, you know, and she resist.

…

A … I was expecting her to understand, ah, you know, what I mean by, you know, "lets get it done."

…

Q So [the appellant] is saying that he wanted to have sex with the girl and he did this by his body language and his eye contact?

A Yes

Q … he went to touch her hand and she didn't want to, …

A … she actually pushed my hand away.

…

A Then nothing happened.

[10] The complainant, when cross-examined, denied having given the appellant any encouragement while she was working opposite him, including any hand signals such as a thumbs up. She said she had watched him working in order to learn what she should be doing but that was the extent of her observations of him. She had tried to ignore his efforts to make eye contact with her. She denied that she had given any signal to the appellant while in the lunch room or indicated to him that she was going to the women's bathroom. She also told defence counsel that she was only able to

break free from the appellant's grasp in the bathroom when he let go of her with one hand and grabbed at her overalls. She said, "He doesn't have two hands around me while he's pulling my trousers down. He's got one. That's when I reach for the door and get out". She further said, "He grabbed my overalls with his hand. I can feel his hand on my back pulling down my overalls".

[11] The appellant did not give evidence at trial but called a colleague as a witness. The colleague, who is also Samoan, was with the appellant in the lunch room when the complainant went into the room briefly before going down to the women's toilets. The colleague's evidence was that the appellant said that he was going to "meet with a girl, you know, at the restroom". The appellant did not tell the colleague who the girl was or anything about his relationship with her.

The charge

[12] The single charge in the indictment was assault with intent to commit sexual violation under s 129(2) of the Crimes Act 1961. Section 129 provides for two separate offences: attempted sexual violation under s 129(1) and assault with intent to commit sexual violation under s 129(2), as follows:

> **129 Attempted sexual violation and assault with intent to commit sexual violation**
>
> (1) Every one who attempts to commit sexual violation is liable to imprisonment for a term not exceeding 10 years.
>
> (2) Every one who assaults another person with intent to commit sexual violation of the other person is liable to imprisonment for a term not exceeding 10 years.

How the case was put to the jury

[13] The prosecutor opened to the jury on the following basis:

> … the Crown is saying that this accused has assaulted the complainant who is a young woman … and at the time that he assaulted her, he intended to sexually violate her or rape her, which is sex without her consent and without him reasonably believing that she was consenting to that conduct. So the Crown isn't saying that he's actually had sex with her or sexually violated her, merely that at the time that he assaulted her, that was his intent.

[14] Mr Forster for the defence opened to the jury on the following basis:

> What this case is going to come down to in some respects may be complex because what you're going to have to do is to consider what he was thinking at the time. It will be the defence case to you when I close that he wasn't there to have sex without consent.
>
> …
>
> It will be conceded that there was some touching as a prelude to a hoped sexual encounter. As I say, the issue will fairly and squarely be whether he intended to have sex without consent and it is the defence position that he wasn't there for that.

[15] In closing to the jury, the prosecutor advised:

> The issues in this trial are actually going to be pretty narrow. I suggest that it's really going to come down to one key question and that's going to be, "Did the accused, at the time of the assault, believe that [the complainant] was consenting? Did he really believe that she was consenting to have sex with him at the time that he grabbed her, and if you accept that he did believe that she was consenting, was that believe [sic] in his mind based on reasonable grounds?"
>
> …
>
> … it's not enough for the accused to believe that [the complainant] may have been consenting to this sex or even that she was probably consenting to sex. It's also not okay that the accused simply didn't turn his mind to the issue of consent, that he was reckless as to whether or not she consented.
>
> …
>
> … He had assaulted her intending to have sex with her, knowing that she did not consent, knowing that there was no reasonable basis for any belief in her consent. He assaulted her intending to have sex with her without her consent, that is what happened and that is a crime.

[16] Mr Forster closed to the jury on the following basis:

> … you can see perhaps, in my submission to you, a man who has tried his luck. He has been repulsed or rebuked by her immediately and stops fairly quick. If he had been an individual who didn't care about raping a colleague at work in the bathroom would she have had the physical strength to stop him? No its not really plausible (a) that he would do that because of the immense risk taking where people know him; secondly, that she would be able to resist him and open the door and flee. I suggest to you that shows what was really happening.
>
> …

> He grabs her. I suggest to you that maybe at that point he was just trying his luck. … [The complainant]'s perception of things could be more sinister than what there was but the reality was he is not walking into that bathroom and acting like someone when he's in the bathroom, someone who is determined to sexually violate, that is have sex without consent, …
>
> …
>
> … When she resisted and repulsed him it stopped and that's what happened. We completely agree that [the complainant] did not consent at any stage to sexual activity but that's not the end of it because throughout the ages both men and women have tried to take their chances, including a physical touching or a grabbing but that does not make them a rapist or an attempted rapist. You would have to be satisfied that he intended to have penetrative sex with her without her consent. We say it wasn't the case because although mistakenly, it seems, he believed she was consenting.
>
> … people do make mistakes about other people's intentions. … Sadly he got it completely wrong but he wasn't the first and he won't be the last. …

The summing-up

[17] In summing up, the Judge directed the jury on the elements of the charge they had to find proven. He said:[2]

> [12] … The Crown has to prove, beyond reasonable doubt … Firstly, that the defendant assaulted the complainant intending to sexually violate her by rape; and secondly, at the time that he did so the defendant intended to have sexual intercourse with the complainant where she did not consent and he had no belief on reasonable grounds that the complainant consented to the intended sexual intercourse.
>
> …
>
> [14] There are four questions that need to be answered.
>
> (a) Did the defendant assault [the complainant]?
>
> (b) At the time did he intend to have sexual intercourse with her?
>
> (c) Did she give true consent?
>
> (d) Did he have reasonable grounds to believe that she was consenting?

[18] The Judge then referred to the live issues in the trial and the evidence relevant to those by reference to a question trail provided to the jury after discussion with counsel.[3]

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2 *R v [A]* DC Napier CRI-2013-020-0533, 23 August 2013.

3 Mr Forster told us he did not agree with the form of the question trail, however.

[19] In relation to whether an assault had occurred, the first question in the question trail asked whether the jury was satisfied the appellant had "grabbed [the complainant] from behind, pressing himself against her and preventing her from leaving". In the summing-up, the Judge directed as follows:

> [16] Now although taking someone by the hand and pulling them towards you is technically an assault and you heard counsel explain what an assault is. It is not what is alleged here. What is alleged here is what the complainant says happened, the bear hug, the thrusting, the pressing and the preventing her from leaving.
>
> [17] Only if you are satisfied beyond reasonable doubt that he assaulted [the complainant] in the way she alleges could you answer [the first] question "yes". … You can only answer that "yes" if you are satisfied beyond reasonable doubt that he assaulted [the complainant] in the way that she alleges.

[20] Turning to the second element, the question trail asked whether the jury was satisfied the appellant intended to have penetrative sexual intercourse with the complainant. In the summing-up, the Judge directed as follows:

> [18] The second question – at the time did he intend to have sexual intercourse with her is not in fact in dispute. It is clear from the evidence and it was conceded by counsel, Mr Forster, in his closing address, that that was his intention to have sexual intercourse with her.
>
> [19] Although it is not in dispute you still need to be satisfied beyond reasonable doubt that that was his intention.

[21] On the third issue, the question trail asked if the jury was satisfied that the complainant "did not consent to sexual intercourse with [the appellant]". The Judge acknowledged that the defence conceded the complainant was not in fact consenting.[4]

[22] The Judge then turned to the fourth element. The question trail asked if the jury was satisfied that the appellant had no reasonable grounds to believe the complainant was consenting. In the summing-up, the Judge said:[5]

> … if you accept [the complainant's] account of the assault it would be difficult to conclude that [the appellant] had a reasonable basis to believe that she was consenting. However, if it is reasonably possible that his account of taking her hand and pulling her towards him and immediately

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4 At [20].
5 At [22]–[23].

> stopping when she struggled and said, "No", if that is true, if you find that it is true you almost certainly could not be satisfied beyond reasonable doubt that he did not realise she was not consenting and that he had a reasonable basis up to that point for believing that she did consent.
>
> … If you accept as a reasonable possibility that he desisted, that he stopped as soon as she struggled and said, "No" you could conclude that he no longer, at the relevant time, had the intent to have sexual intercourse with her. As Mr Forster submits to you, the timing of the event and the fluid developing situation is potentially very important here.

[23] In addition to setting out the questions noted above, the question trail encapsulated the evidence relevant to each question and summarised the case for both Crown and defence in relation to each question.

The argument on appeal

[24] Mr Forster submitted that the defence case at trial was that, once the appellant realised the complainant was not consenting, he desisted and hence the applications of force had only been in the hope of eliciting consent from the complainant to sexual intercourse. The question he raised on appeal was whether the Judge had been correct to direct the jury, both in his summing-up and in the question trail, on the mens rea elements which the Crown is required to prove in a charge of attempted sexual violation, as opposed to a charge of assault with intent to commit sexual violation. The directions given by the Judge were in line with the decision of the Supreme Court in *R v L,* in which that Court considered that the elements of attempted sexual violation included proof that an accused did not believe on reasonable grounds that the complainant consented to the intended penetration.[6]

[25] Mr Forster's submission was that it was necessary for the Crown to prove as an essential element of assault with intent to commit sexual violation that the assault was "for the purpose of overcoming the free will of the complainant" and that the accused had a "fixed" intention to achieve such a result. Otherwise, he contended, an accused may be found guilty notwithstanding that at the time of the assault he did not intend to have non-consensual sexual intercourse but instead had an honest albeit unreasonable belief that consent could be elicited, a belief from which he would have resiled once apprehending his error.

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6 *R v L* [2006] NZSC 18, [2006] 3 NZLR 291 at [21].

[26] In support of this contention he referred to and relied upon the following passage in *Adams on Criminal Law*:[7]

> Difficulties may arise with assaults that occur in the course of activities undertaken in the hope of inducing the complainant to consent to sexual connection. In the absence of any fixed intention to complete the act if that hope fails, such assaults would not amount to offences under this section. In such situations liability, if any, will only be for assault or indecent assault.

[27] On the basis of that statement and because proof of assault with intent to commit sexual violation does not require evidence of a proximate penetrative sexual act, Mr Forster suggested the element of assault could be "detached from a penetrative sexual act" requiring the jury to be satisfied that at the time of assault the accused had a "fixed" (that is, immutable) intention to sexually violate from which he did not resile. For that reason, Mr Forster submitted the offences are distinguishable and need not incorporate the same mens rea requirements.

[28] Mr Forster's argument therefore is that the jury ought to have been directed that culpability could be found only if the jury was satisfied beyond reasonable doubt that at the time of the assault the appellant had a fixed intent to have penetrative sex with the complainant regardless of whether or not she consented. He submitted the direction given to the jury had included culpability that went beyond the proper "catchment" of the offence and was likely to have led to a miscarriage of justice. He pointed out that the third and fourth questions in the question trail did not specify the time at which the assessment of consent and reasonable belief in consent were to be assessed.

[29] In his written submissions, Mr Forster suggested that, in the circumstances, the jury could have been directed to return a lesser verdict of indecent assault as included in the offence of assault with intent to commit sexual violation.

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[7] Bruce Robertson (ed) *Adams on Criminal Law* (online looseleaf ed, Brookers) at [CA129.03].

Discussion

[30] Ms Markham directed the Court's attention to the decision of this Court in *R v Hassan*, in which the differences between the two offences in s 129 were discussed as follows:[8]

> We accept that the two offences are separately defined under s 129 and do not necessarily contain the same elements. Frequently however they will overlap in their factual content, and what is important is for the circumstances of the particular offending to be properly analysed in the context of the particular charge. An assault with intent may fall short of an attempt, and an attempt does not necessarily involve an assault – hence the different offences, albeit with a common maximum penalty.

[31] As the Supreme Court observed in *R v L*, in relation to attempted sexual violation:[9]

> … the difference between an attempt and the full offence of sexual violation lies solely in the fact that the accused has tried to fulfil the first element of the completed offence but has not achieved his or her objective. … The legislative policy, introduced in 1985, that any belief in consent on the part of the accused must be on reasonable grounds is maintained for the attempt consistently with what is required for the completed offence.[10]
>
> … Using a conventional case of attempted sexual violation by rape as an example, the Crown must prove: (1) that the accused tried to penetrate the complainant's genitalia with his penis; (2) that the complainant did not consent to the intended penetration; and (3) that the accused did not believe on reasonable grounds that the complainant consented to the intended penetration.

[32] Where sexual violation is an ingredient of any alleged offence, it is necessary to prove lack of consent on the intended victim's part, coupled with lack of any reasonable belief on the perpetrator's part that the victim consents. Consequentially, assault with intent to commit sexual violation necessarily incorporates the probative elements relevant to the intent required to establish a charge of sexual violation. In a charge of assault with intent to commit sexual violation, intent to sexually violate is a live issue at the time the assault is committed, not afterwards.

[33] The correct charge was preferred in this case. The nature of the assault and the circumstances in which it occurred spoke for themselves and the jury found

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8 *R v Hassan* [1999] 1 NZLR 14 (CA) at 16.

9 *R v L*, above n 6, at [24] and [25].

10 See s 2 of the Crimes Amendment Act (No 3) 1985.

accordingly. The defence conceded at trial, as it had to, that the appellant's intention at the operative time was to have sexual intercourse with the victim, as he had admitted this in his police interview. The defence further conceded there was a lack of consent on the victim's part, it being plain from her evidence and from the evidence of her distressed state immediately after the event that she was not consenting to any form of intimacy with the appellant.

[34] Mr Forster's statements in his closing address and again in his argument on appeal overlook the fact that the offence as charged is complete upon the commission of the assault with the necessary intent and absent any reasonable belief in consent. Therefore, his statements to the jury that the appellant had stopped when "repulsed or rebuked" by the victim and that at the time he touched her it was "a prelude to a hoped sexual encounter" and that "maybe at that point he was just trying his luck" overlook the fact the offence had been completed at the time the assault occurred.

[35] Nor do we have any concern that the question trail did not specify that consent must be assessed at the time of the assault. As can be seen from the directions quoted at [20] and [22] above, this was made abundantly clear in the summing-up.

[36] Most significantly, the argument pursued on appeal has no grounding in the facts of the case. The different accounts of the appellant and the complainant were clearly put to the jury. As is clear from the account at [19] and [22] above, the jury was told if the appellant's account of what happened (a touching amounting to a technical assault in the hope of persuading the complainant to have consensual sex that was discontinued as soon as he realised she did not want to) was accepted as a reasonable possibility, then he should be acquitted. That rules out the concern expressed in *Adams*[11] and reiterated by Mr Forster.

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[11] See above at [26].

Result

[37] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent