IN THE SUPREME COURT OF NEW ZEALAND

SC 54/2007
[2007] NZSC 93

MUSTAFA CAN

v

THE QUEEN

Court: Elias CJ, Blanchard and Anderson JJ

Counsel: C R Carruthers QC and D A Ewen for Applicant
M E Ball for Crown

Judgment: 27 November 2007

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted of rape in respect of two complainants, one a 16 year old girl and the other a middle aged intellectually impaired woman. The Court of Appeal having dismissed his appeal against conviction he now applies to this Court for leave.

[2] There are two principal grounds of appeal. One relates to the evidence for the Crown by a psychologist who expressed an opinion about the intellectual disability and mental age of the woman.

[3] The applicant complains that this witness was not qualified in terms of the now repealed s 23G of the Evidence Act 1908. Also, that it was not competent evidence in respect of the issue for which it was tendered, namely whether the complainant was not capable of and therefore did not consent. The argument is untenable. Section 23G was not a code for the tendering of evidence of the nature given by the psychologist. The qualifications in s 23G relate to children, not adults. It cannot be the case that the only way evidence may be led as to the mental age of an adult complainant is by way of a psychologist or psychiatrist with experience in the professional treatment of sexually abused children.

[4] The applicant submits that the terms of a jury question suggest the jury misunderstood an aspect of the psychologist's evidence as to the intellectual age range of the woman complainant.

[5] None of the matters referred to in paras [3] and [4] involve matters of general or public importance, nor indicate that a substantial miscarriage of justice may have occurred.

[6] The other principal ground of appeal concerns the trial Judge's direction on the meaning of s 128(2)(b) of the Crimes Act which relates to absence of belief on reasonable grounds that a complainant was consenting. The direction, consistent with the Court of Appeal's reasons for judgment in such cases as *R v Gutuama*[1] and *R v Clarke*[2] expounded an objective test. That test hypothesizes a reasonable person in the accused's shoes, and refutes a reading down of the section to, for example, a consideration of what might be reasonable in the circumstances as an accused believed them to be.

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1 CA 275/01, 13 December 2001.
2 [1992] 1 NZLR 147.

[7] The conventional test excludes consideration of subjective characteristics which, it is argued, ought to be taken into account. The applicant asks this Court to reconsider the received principles. However, in this case, the issue is moot because there are no circumstances or characteristics that could properly be regarded as capable of rendering subjectively reasonable an objectively unreasonable belief. In short, even if s 128(2)(b) were to be reinterpreted so as to make allowance for subjective aspects of an accused's belief, an appeal by this applicant could not succeed.

[8] For these reasons the application is dismissed.

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