IN THE SUPREME COURT OF NEW ZEALAND

SC 78/2007
[2008] NZSC 27

W

v

THE QUEEN

Court: Blanchard, Tipping and Anderson JJ

Counsel: N J Sainsbury for Applicant
F E Guy Kidd for Crown

Judgment: 15 April 2008

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant seeks leave to appeal against the dismissal by the Court of Appeal of his appeal against conviction on representative counts of sexual violation by rape and unlawful sexual connection. The complainant was his daughter.

[2] The grounds of appeal encompass two aspects of the trial. The first relates to the circumstances in which the medical practitioner who had examined the complainant was recalled after counsel's closing submissions and just before the Judge summed up. In his closing address, defence counsel, who had not cross-examined the complainant concerning any use of tampons, suggested to the jury that

a tear to the complainant's hymen, which was a significant matter supporting the complaints made by her against her father, could possibly have been caused by the insertion of a tampon. The prosecution then made an application to recall the medical practitioner who briefly gave further evidence in which she was asked about that possibility and was further asked one question about the possibility that the tear in the hymen could have been caused by the complainant inserting her own finger into her vagina. The medical practitioner responded that there was a small possibility that the insertion of a tampon could cause a hymenal transection although it was not a high probability and the practitioner had never seen a hymenal transection in a tampon user who was not sexually active. Of the possibility that the injury had been caused by the complainant's own finger, the practitioner said that that kind of injury would not usually be caused by a person putting their own finger into their vagina because that would be a painful process and "most people do not do that sort of thing". Once the evidence on recall was completed the District Court Judge proceeded with his summing up.

[3] Various complaints are now sought to be made about this matter. The applicant wishes to put forward the view that trial counsel fell into error in allowing the situation to develop because he had failed to cross-examine on the point. The obvious answer to that assertion is that the complainant would almost certainly have denied having caused pain to herself in either of the ways suggested. It is conceded, as it was in the Court of Appeal, that in fact the medical practitioner's additional evidence was quite favourable to the defence since she accepted two ways in which it was possible that the injury may have been caused. It is certainly true that counsel did not further address the jury in light of what the medical practitioner had said, but there is nothing to indicate that defence counsel sought such an opportunity and it is hard to see that counsel could have drawn the jury's attention to any matter which would not have been quite obvious to it from the brief additional evidence. Furthermore, the trial Judge drew attention to the additional evidence in summing up. There is nothing in this first point.

[4] The second matter sought to be raised relates to a portion of the Judge's summing up in which he was suggesting how the jury might consider defence criticism of the lack of detail in the complainant's account of what happened to her

and criticism of the credibility of her description of the alleged sexual intercourse. The Judge unfortunately personalised the questions he suggested the jury consider by asking it to consider them on the assumption that the alleged sexual contact between the accused and her father had in fact taken place. However, in our view there is no danger that the jury would have taken the Judge to be giving any indication that it had in fact done so. The jury would have understood the Judge, as is quite plain, to be indicating that it should consider how the complainant is said to have reacted and how she gave her account as part of its consideration of whether the alleged acts had in fact been committed. The Judge made it quite clear to the jury that he did not think that his questions should lead to any particular conclusions and that he did not pretend to know the answers to them. He left it open to the jury to adopt his approach or not.

[5] The Judge's approach may have been a little clumsy. It would have been better if he had depersonalised the questions which he suggested the jury might consider. But in our view the jury would certainly have understood that he was suggesting hypothetical questions. And, contrary to the submissions for the applicant, there is no basis for suggesting that the Judge had somehow reversed the onus of proof.

[6] In agreement with the Court of Appeal, we are not persuaded that there has been any miscarriage of justice. The matters sought to be raised do not give rise to any question of general or public importance which would justify leave to appeal.

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