

**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 92/2007  
[2008] NZSC 25**

**COLIN TODD PARKER**

v

**THE QUEEN**

Court: Elias CJ, McGrath and Anderson JJ

Counsel: D J Boldt for Applicant  
M D Downs 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 from a decision of the Court of Appeal in respect of his conviction on one count of indecently assaulting a girl under 12. The girl was sleeping over in a bunk at the house where the applicant lived. She complained that the applicant entered the bedroom she was sharing with two other girls, reached under her blanket and handled her leg and, then, under her night attire but over her underpants, he touched her on the vagina for about 10 seconds. The applicant's version was that he had not expected anyone to be in the bunk and had accidentally touched the girl's leg whilst getting a blanket from her bed. So, in terms

of his explanation, the touching was accidental, fleeting and non-sexual; in terms of the girl's evidence the touching was deliberate, more than fleeting and indecent.

[2] It was put to the girl that her allegation was a lie. But there was no evidence specific to the particular girl to suggest why she might be lying. All the applicant could suggest, when interviewed, was that she was upset because he had sounded a bit grumpy when he found her in the bunk. This led the Crown, in closing, to ask rhetorically why the girl should make up such a story. The Judge's directions to the jury on that issue are the focus of this application for leave to appeal.

[3] The principal authorities on such directions<sup>1</sup> emphasise the necessity to direct that, regardless of the state of the evidence about motive, the onus of proof remains on the Crown through and it is not for an accused to prove motive.

[4] In this case the Judge directed in conformity with these authorities and included a warning that there may be some motive of which no evidence had emerged. If the Judge had gone no further, the directions would have been unimpeachable, as counsel for the applicant accepts. But the Judge went on to say:

In assessing her credibility whether you believe [her] or not, you are entitled to take into account any lack of evidence of a motive to be as a matter of common sense. You might think that a lack of evidence of a motive to make a false allegation enhances [her] credibility. That is a matter for you but what you must not do is jump to the conclusion that any lack of evidence of motive means that there was no motive nor must you think that there was any obligation on the accused to prove such evidence. There is no burden on him to prove anything.

[5] The case for the applicant is that the additional directions negated the substance and effect of the earlier, appropriate directions; or, at best, that this part of the summing up was contradictory and confusing, and that there was a real risk that these directions caused the jury to reason inappropriately. The Court of Appeal was not persuaded by that argument. It thought it would have been preferable if the Judge had not referred to "lack of evidence" of motive and had, instead, talked about the lack of motive itself. It also considered it preferable for the direction to have referred, more neutrally, to relevance to the *assessment* of credibility rather than

---

<sup>1</sup> *R v T* [1998] 2 NZLR 257; *R v E* [2007] NZCA 404.

*enhancement* of the complainant's credibility. Further, it would have been better if the Judge had said explicitly that it was for the jury to be satisfied that there was no motive. However, the Judge immediately reiterated that the jury could not conclude that lack of evidence of motive leads to a conclusion of lack of motive and that the accused did not have to prove anything. The Court of Appeal concluded that in light of that and the earlier stress placed by the Judge on the issue of onus of proof, the jury could not have been mistaken in its task.

[6] We would not go so far as even the mild criticisms expressed by the Court of Appeal. We think it was appropriate for the Judge to have referred to a lack of evidence of motive rather than a lack of motive, the latter being a factual issue for the jury. Further, while the absence of evidence of a motive to lie is "far from showing, conclusively, that the complainant's evidence was true"<sup>2</sup> it is difficult to understand how a jury might be satisfied, otherwise than speculatively, that there was no motive if there was just no evidence of motive. The apparent absence of motive is of course a matter which a jury may properly take into account when assessing a complainant's credibility but it is only one factor.

[7] The only point is whether the motive directions as a whole may have led to a miscarriage of justice because the Judge referred to enhancement of credibility rather than referring to questions of motive which the jury could take into account in assessing the credibility of the complainant. Having regard to the terms of the motive directions as a whole we think that the difference in terminology is largely a semantic quibble rather than a cause of possible injustice. In view of this the application for leave to appeal is dismissed.

Solicitors:  
Loughnans, Palmerston North for Applicant  
Crown Law Offices, Wellington

---

<sup>2</sup> *R v T* at p 266.