

BRENDON CLIVE DORN

v

THE QUEEN

Court: Elias CJ, Blanchard and William Young JJ

Counsel: G J King for Applicant
F Sinclair for Respondent

Judgment: 14 February 2011

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

[1] The applicant seeks leave to appeal a judgment of the Court of Appeal dismissing his appeal against conviction on a charge of indecent assault under s 135 of the Crimes Act 1961.¹ The charge entailed an allegation that the applicant, a masseur, had touched the complainant under her underpants about the pubic area, in the course of giving her a stomach massage. It was acknowledged by the applicant that there was no occasion to touch the complainant in that way for the purposes of the massage treatment. His explanation to the police was that any such touching could only have been accidental because the pubic area was not part of the treatment and was avoided by masseurs. Expert evidence at the trial proceeded on the basis of inadvertent touching and did not provide any basis for therapeutic purpose in intentional massage of the pubic area. The jury verdict necessarily entailed rejection

¹ *Dorn v The Queen* [2010] NZCA 461.

of the defence of accidental touching. The applicant seeks leave to appeal on the basis that the trial Judge materially misdirected the jury on the element of belief in consent, which the Crown must exclude before a conviction can be entered for indecent assault under s 135 of the Crimes Act 1961.

[2] It was accepted in the Court of Appeal that the Judge's directions on belief in consent were wrong. As a result, the applicant's conviction on a second count of indecent touching of the complainant's breasts (where some therapeutic basis for the touching was available) was quashed. The Court of Appeal took the view in respect of that charge that the misdirection gave rise to a miscarriage of justice because it was not possible to exclude the reasonable possibility that a not guilty verdict would have been reached if a proper direction had been given. It did not order a retrial because it was thought "pointless" in respect of one count only.²

[3] In relation to the charge the subject of the present application, the Court of Appeal took the view that the acknowledged misdirection in relation to belief in consent had no material bearing on the conviction. The defence run at trial had been that any touching in the pubic area could only have been non-intentional. Such defence (and the evidence at trial that there was no therapeutic purpose in intentional touching in the course of massage) was treated by the Court as inconsistent with any intentional but consensual touching, such as would have made the issue of consent a live one at trial. It therefore dismissed the appeal, in application of s 385(1)(c) of the Crimes Act, on the basis that no miscarriage of justice had been occasioned by the misdirection.

[4] In submissions seeking leave, counsel for the applicant stressed that absence of belief in consent is an element of the offence contained in s 135 of the Crimes Act and accordingly the jury had to be satisfied that it had been excluded, irrespective of the explanation of accidental touching put forward by the defence. On that basis, he submitted that the error in the direction as to belief in consent could not be said to be immaterial and resulted in a miscarriage of justice.

² At [33].

[5] The evidence and the defence case were inconsistent with intentional but apparently consensual touching, the only basis on which the misdirection could have been material. The evidence, including the acknowledgements made by the applicant, excluded any possibility that there was any therapeutic justification for the touching. Accordingly, there was no evidential foundation on which belief in consent to intentional touching was a live issue at the trial. The Court of Appeal was correct to conclude that the error in the direction was immaterial to the count of indecent assault by touching of the pubic area. We are satisfied that there has been no miscarriage of justice and that leave to appeal must be declined.

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