

SHANNON IAN CLIFFORD

v

THE QUEEN

Court: Blanchard, Tipping and William Young JJ

Counsel: G J King and Q C S Hix for Applicant  
M H Cooke for Crown

Judgment: 18 October 2011

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JUDGMENT OF THE COURT

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**The application for leave to appeal is dismissed.**

**REASONS**

[1] The applicant was convicted of sexual violation by rape. He had conceded at his trial that the complainant had not consented. His defence was that he had an honest and reasonable belief that there was consent.

[2] The Judge sentenced the applicant to imprisonment for five years. The Judge expressly gave him credit for the fact that there had been no violence used beyond that inherent in the act of rape. The sentencer also gave him credit for the fact that he had held an honest belief that there was consent.<sup>1</sup>

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<sup>1</sup> *R v Clifford* DC Ashburton CRI-2010-009-4143, 24 January 2011.

[3] On a Crown appeal, the Court of Appeal<sup>2</sup> increased the sentence to seven years. It correctly identified that the absence of additional violence is not a mitigating factor. It also considered, correctly, that s 9(3) of the Sentencing Act 2002 required that an intoxicated belief in consent was not to be treated as a mitigating factor. It said that the Judge had clearly attributed the applicant's belief in consent to his intoxication.

[4] The proposed ground of appeal is that the sentence imposed by the Court of Appeal is manifestly excessive because there were factors other than intoxication which contributed to inducing the applicant's mistaken and unreasonable belief in consent, and that s 9(3) does not preclude them from being taken into account by way of mitigation.

[5] Whilst we agree that s 9(3) allows any such operating features to be taken into account, it was fully open to the Court of Appeal to reach the view, as it did, that the Judge had sentenced the applicant on the basis that it was his state of intoxication and not other matters which caused him to believe, unreasonably, that the complainant was consenting.

[6] The proposed appeal therefore raises no question of public or general importance and there is no appearance of any substantial miscarriage of justice.

Solicitors:  
Quentin Hix Legal Limited, Timaru for Applicant  
Crown Law Office, Wellington

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<sup>2</sup> *R v Clifford* [2011] NZCA 360.