NOTE: PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985.

IN THE SUPREME COURT OF NEW ZEALAND

SC 61/2015
[2015] NZSC 143

	BETWEEN	JUSTIN AMES JOHNSTON Applicant
	AND	THE QUEEN Respondent

Court: William Young, Glazebrook and Arnold JJ

Counsel: R M Lithgow QC for Applicant
A Markham for Respondent

Judgment: 15 October 2015

JUDGMENT OF THE COURT

A The application for leave to appeal is granted (*Johnston v R* [2015] NZCA 162).

B The approved question is whether the trial Judge was wrong to conclude that the actions of the applicant on the night of the alleged offending were sufficiently proximate to constitute the actus reus of an attempt.

REASONS

[1] At around 7.30 pm on 19 July 2010, the applicant was found on a back section, crouching near a sleep out in which a 16 year old girl was present. He was wearing dark clothing, a beanie and gloves and carrying a torch. On the evidence, it was open to inference that he had armed himself with a garden fork. His car was nearby and one of the back seats was folded down. The background material referred to in the Crown's submissions shows that he had had the property under

observation for some time, possibly as long as six weeks. For much of that time (five weeks) the complainant had not been sleeping in the sleep out. She resumed sleeping there on 12 July. On 19 July, the applicant's car arrived in the area at around 6.30 pm. The complainant left the house to go to the sleep out shortly after 7.00 pm. At this stage the applicant was presumably on the driveway, as six cigarettes butts which he had smoked were located there. It thus appears that he went onto the property and towards the sleep out only after the complainant went there.

[2] On the basis of what the jury plainly saw as cogent propensity evidence, the applicant was found guilty of attempted rape and his appeal against conviction was dismissed.[1] This was on the basis that his actions as just described were sufficiently proximate to the complete offence of rape to amount to an attempt providing the jury was satisfied that it was his intention to commit a rape that night.

[3] This approach taken as to proximity was based on *R v Harpur*[2] which we discussed in *Ah-Chong v R*.[3] It is accepted by the Crown that we should grant leave to appeal in respect of it. The applicant, however, also seeks leave to appeal in relation to two other issues.

[4] The applicant had been found guilty at a first trial at which the Judge had left the case to the jury on a basis which did not depend on the applicant having an intention to commit a rape that night. His appeal was allowed on that ground[4] and consistently with the Court of Appeal's decision, the trial Judge at the second trial told the jury that they could only find the applicant guilty if he intended to rape the complainant that night. At the second trial, the applicant did not run a "not on that night defence". Instead, the defence seems to have been that what he had in mind was burglary.

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1 *Johnston v R* [2015] NZCA 162.
2 *R v Harpur* [2010] NZCA 319, (2010) 24 CRNZ 909.
3 *Ah-Chong v R* [2015] NZSC 83.
4 *Johnston v R* [2012] NZCA 559, [2013] 2 NZLR 19.

[5] The applicant wishes to argue that the Judge should have summed up along these lines:

> (a) [D]id the accused intend to commit sexual violation that night; and (b) … – do you the jury consider that he was in the process of an actual attempt?

[6] Such an approach would result in an indeterminate question as to proximity (was this "an actual attempt") which the statute leaves to the Judge,[5] being left to the jury. All that was required was that the Judge identify actions sufficiently proximate to the crime to amount to an offence and then to leave it to the jury to decide whether the applicant carried out those actions with the intention of committing the offence of rape that night. This is what the Judge did.

[7] The other and closely related point is whether there was a rational basis for concluding that the applicant intended to rape the complainant that night.

[8] Before moving onto the property, the applicant been watching the house for at least an hour. He would appear to have gone onto the property only after the complainant left the main house. He had gloves (unnecessary for a scoping exercise) and wore a beanie. As noted, it was open to inference that he had armed himself with a garden fork. It was open to the jury to conclude that his actions were consistent only with an intention to commit an offence. If that offence was not burglary (as the jury must have concluded), it could only logically have been rape.

[9] We therefore grant leave to appeal only on the proximity question.

Solicitors:
Crown Law Office, Wellington for Respondent

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5 Crimes Act 1961, s 72(2).