

RODNEY PAUL TANIWHA

v

THE QUEEN

Court: Elias CJ, Blanchard and Tipping JJ

Counsel: W C Pyke for Applicant  
N P Chisnall for Crown

Judgment: 12 May 2010

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JUDGMENT OF THE COURT

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

**REASONS**

[1] The applicant's appeal against conviction for sexual violation by rape was dismissed by the Court of Appeal.<sup>1</sup> His defence at trial was that he believed on reasonable grounds that the complainant was consenting. He has sought leave to appeal to this Court on the ground that the Judge misdirected the jury in relation to this defence. The Judge in fact gave a direction which followed the Court of Appeal's specimen direction in *R v Guatama*.<sup>2</sup> The jury was told that the Crown must prove beyond reasonable doubt that the accused did not have a reasonable

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<sup>1</sup> *R v Taniwha* [2010] NZCA 15.

<sup>2</sup> *R v Guatama* CA 275/01, 13 December 2001 at [39].

belief that the complainant was consenting and that one way that the Crown could do that would be to satisfy the jury “that no reasonable person in the accused’s shoes could have thought that the complainant was consenting”.

[2] It is said for the applicant that this way of putting the issue departs impermissibly from the wording of s 128 of the Crimes Act 1961. The argument appears to be that it excludes consideration of reasonable grounds based on the facts as the accused believed them to be, thereby distracting the jury from an evaluation of the applicant’s account of the relevant events.

[3] This Court has previously concluded, in refusing leave in *R v Can*,<sup>3</sup> that the issue sought to be raised is moot where there is no evidence upon which the proposed interpretation of the section might make a difference. So it is in this case. There is nothing suggested about the circumstances, or put forward concerning the characteristics of the applicant himself, which the jury might have omitted to take into account as a result of being directed as they were. There were no circumstances or characteristics of which it could be said that they might have peculiarly affected the perceptions of the applicant. A test of what a reasonable person “in his shoes”, that is, in the applicant’s circumstances, might believe on reasonable grounds therefore could not be said to have inappropriately diverged from the statutory test in this case.

Solicitors:  
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<sup>3</sup> *R v Can* [2007] NZSC 93 at [7].