

15/84

O N A P P E A L

FROM THE COURT OF APPEAL OF NEW ZEALAND

B E T W E E N :

TAMAITIRUA KAITAMAKI

Appellant

- and -

THE QUEEN

Respondent

CASE FOR THE RESPONDENT

RECORD

- 10 1. This is an Appeal by Tamaitirua Kaitamaki ("the Appellant") from two Judgments of the Court of Appeal of New Zealand given on 19th March 1980 and 23rd October 1981, special leave to appeal in forma pauperis having been granted on 22nd December 1982.
- pp.61-67
pp.68-69
p.70
2. This Appeal raises two separate issues:
- (a) whether a man is guilty of the offence of rape if, after penetration, he continues sexual intercourse after

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realising that consent was either never given or has been withdrawn;

- (b) whether the Court of Appeal of New Zealand is empowered to grant legal aid for the purposes of petitioning Her Majesty in Council for leave to appeal against conviction.

p.59 3. The Appellant was convicted by a jury in the Supreme Court of New Zealand at Auckland on 15th March 1979 of two offences, 10 namely that on 19th November 1978 he broke and entered the dwellinghouse of Margaret Rose Fox in Balmoral, Auckland, and that he did rape the said Miss Fox therein.

4. The prosecution case

(a) The prosecution alleged that the Appellant, who had been drinking, wandered into the unlocked flat where Miss Fox was sleeping with her baby, took a knife from the kitchen and forced her to have sexual intercourse against 20 her will on two separate occasions.

p.2 (b) Miss Fox, who was not known to the Appellant, claimed that the knife had been held to her

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throat, and that she had cried and objected pp.4,9
throughout. She made a recent complaint p.6
to a neighbour and to the police, and two
to three weeks later identified the Appellant p.7
in the street.

(c) The Appellant made a verbal admission
to the police, namely "I did it", and made p.28
a written statement admitting that Miss Fox p.57
had objected before the second act of
sexual intercourse: "She objected that p.58
time. But I couldn't wait, so I got back
on top of her anyway. She said to me that
I was hurting her. I just ignored her.....
The girl was crying during the second
time, I think I was hurting her".

5. The defence case

(a) The Appellant admitted entering the flat, p.32
alleged at first that sexual intercourse had pp.33-35
taken place on both occasions with consent,
and denied the use of the knife. He alleged
that the admissions to the police were made p.40
under duress.

(b) At the end of his evidence the Appellant
said that Miss Fox objected to sexual intercourse
on the second occasion "When I was inside pp.42-43
her....Put it this way. On penetration".

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6. The summing-up

The trial judge directed the jury on the charge of rape in the alternative:

p.54 (1) The Appellant was guilty of rape "if
either of those acts [of sexual
intercourse] was against the girl's
p.53 consent, and he knew it," but "if a
person makes a mistake and thinks
she is willing, he is not guilty of
rape".

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p.55 (2) Alternatively, if after penetration,
"having realised she is not willing,
he continued with the act of
intercourse it then becomes rape,
because rape is the act of a person
having sexual intercourse without her
consent".

7. The Court of Appeal of New Zealand

(a) On the Appellant's submission that the alternative direction of the trial judge was a misdirection, the majority of the Court of Appeal (Richmond P. and Richardson J.) upheld the direction of the trial judge on the grounds that:-

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(i) the definition of rape in section 128 of the Crimes Act 1961 referred to "the composite act of having intercourse without the woman's consent" and that sexual intercourse is a continuing act;

p.63

(ii) the purpose of Section 127 of the Crimes Act 1961 in defining sexual intercourse as being complete upon penetration was to remove any doubt as to "the minimum conduct on the part of an accused person which the prosecution will have to establish in order to prove that he had sexual intercourse with the woman concerned" and that the word "complete" is used "in the sense of having come into existence rather than in the sense of being at an end".

p.64

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8. Legal Aid

p.68 (a) The Appellant applied to the Court of Appeal of New Zealand under the Offenders Legal Aid Act 1954 (New Zealand) for the grant of legal aid for the purposes of petitioning Her Majesty in Council for leave to appeal against the Court of Appeal's refusal to quash the Appellant's conviction for rape.

p.69 (b) In refusing the Appellant's application 10 the Court of Appeal of New Zealand held that Section 2 of the Offenders Legal Aid Act 1954 did not empower the Court to grant legal aid as requested. The Court of Appeal further held that the detailed provisions of the Offenders Legal Aid Regulations 1972 did not "in their terms extend to criminal matters before the Judicial Committee".

p.70 9. On 22nd December 1982 Her Majesty in Council granted the Appellant leave to 20 appeal against the two said Judgments of the Court of Appeal of New Zealand.

10. The Respondent's Contentions

A. Rape

(1) A man is guilty of the offence of rape if he has sexual intercourse with a woman

without her consent and knowing that she does not consent. A man becomes guilty of the offence of rape if, after penetration, he continues sexual intercourse after realising that consent was either never given or has been withdrawn.

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(2) Section 127 of the Crimes Act 1961 (New Zealand) should not be interpreted as meaning that sexual intercourse has concluded upon penetration. The section merely declares the minimum requirement of proof of the actus reus of rape. Accordingly, where sexual intercourse is not in dispute, Section 127 has no relevance to the question of consent.

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(3) Alternatively, penetration is an act continuing throughout sexual intercourse. It is not necessary for the mens rea of rape to be present at the initial penetration; it can be superimposed at any time during sexual intercourse. (See Fagan v. Metropolitan Police Commissioner (1969) 1 QB 439).

(4) If (contrary to the Respondent's contentions) the trial judge's alternative direction was a misdirection, a new trial should

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properly be ordered.

B. Legal Aid

(1) Section 2 of the Offenders Legal Aid Act 1954 (New Zealand) does not empower the Court of Appeal of New Zealand to grant legal aid for petitions to the Judicial Committee of the Privy Council.

(2) Under Section 2 the power to grant legal aid is vested in and limited to the Court which is at the time seized of the proceedings. 10

(3) The Offenders Legal Aid Regulations 1972, made under Section 3 of the Offenders Legal Aid Act 1954, make no provision for appeals to the Judicial Committee of the Privy Council.

11. And the Respondent respectfully submits that the decisions of the Court of Appeal should be confirmed and the appeals of the Appellant dismissed for the following (among other) 20

REASONS

(1) That the trial judge's alternative direction on the offence of rape was correct in law.

(2) That on a proper construction of Sections 127 and 128 of the Crimes Act 1961 a man commits rape if, after penetration, he continues sexual intercourse after realising that consent was either never given or has been withdrawn.

10 (3) That Section 2 of the Offenders Legal Aid Act 1954 does not empower the Court of Appeal to grant legal aid for petitions for leave to appeal or appeals to the Judicial Committee of the Privy Council.

PETER THORNTON

ROBERT FARDELL

No. 38 of 1983

IN THE PRIVY COUNCIL

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