

15/84

IN THE PRIVY COUNCIL

No. 38 of 1982

ON APPEAL FROM

THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

TAMAITIRUA KAITAMAKI

Appellant

AND

THE QUEEN

Respondent

10. CASE OF THE APPELLANT PURSUANT TO RULE 63
JUDICIAL COMMITTEE RULES 1957

"THE CIRCUMSTANCES OUT OF WHICH THE
APPEAL ARISES"

Record

- 1. This is an appeal from two Judgments of the Court of Appeal of New Zealand whereby on the 2nd of December 1982 the Appellant was granted special leave to appeal in Forma Pauperis.
- 20. 2. The Appellant was charged that sometime during the early hours of Sunday the 19th of November, 1978 the Appellant entered a flat in Balmoral, Auckland, New Zealand with the intent to commit a crime therein. Page 59
- 25. 3. The Appellant was further charged that on the same day he did rape Margaret Rose Fox. Page 59

4. The Crown alleged that the Appellant and Ms Fox engaged in two separate acts of sexual intercourse and that Ms Fox consented to neither.

5. That there was no dispute that the two acts of sexual intercourse had taken place, but your Appellant's defence was that Ms Fox had consented or at any rate your Appellant honestly believed that she had consented to both acts.

10. 6. That in the course of giving evidence at the trial the Appellant said that after penetrating the complainant on the second occasion he became aware that she objected to sexual intercourse, but that he could not stop. Part I
Page 43
Line 5

7. That the Learned Trial Judge in directing the jury in respect of the second act of sexual intercourse said :

20. "Today he has a different version and says that she only objected after he had penetrated her. You will remember that I thought it my duty to ask him was it only after penetration and part way through the second act of intercourse that he realised she was objecting. He said he did not stop, he carried on. Part I
pages 54-
55

30. "Now you might ask this question, and it really is a rather unusual one, what happens if part way through an act of intercourse a man who had previously thought that the girl was willing realises that she is unwilling and he continues? I tell you, as a matter of law, the answer to that is that if, having realised she is not willing, he continues with the act of intercourse, it then becomes rape, because rape is the act of a person having sexual intercourse without her consent. If there is an act of intercourse which takes perhaps some minutes, that is a genuine act of intercourse, they are still having intercourse are they not? So if part way through he realises that she is not willing and he continues, from that point on he is, to his knowledge, having intercourse with her without her consent. That then becomes rape although prior to that it might not have been because of his belief as to her attitude over the matter. Now that is important in this case because he says right at the end of his cross-examination this morning that she objected but that he did not stop. Well, if you take that on its

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49. face value, and that is what happened, that she was unwilling and he has realised it that is rape."

8. The Appellant's appeal to the Court of Appeal of New Zealand was on the basis that this portion of the trial Judge's summing-up amounted to a misdirection in that it is a defence to a charge of rape that at the time of penetration your Appellant had the consent of Ms Fox or at least your Appellant thought he had her consent.

10. 9. It was submitted on the Appellant's behalf that a subsequent withdrawal of consent after penetration does not turn lawful sexual intercourse into rape.

10. A majority of the Court of Appeal of New Zealand held that by its ordinary meaning the "act of a male person" referred to in S.128 Crimes Act 1961 (New Zealand) was a composite act of having sexual intercourse without the woman's consent. Part 2 page 64

20. 11. That the majority further held that the purpose of S.127 which defines 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." page 64

12. That Woodhouse J. in a dissenting Judgment held consent was a precondition to lawful intercourse and S.127 merely stipulated the latest point in time that a woman must have signified her consent - that is at penetration. page 66

30. 13. The Appellant made application to the Court of Appeal for legal aid under the Offenders Legal Aid Act 1954 (New Zealand) in order to bring his Petition against the decision of the majority of the Court of Appeal.

40. 14. The Appellant was invited to make submissions in respect of the application for aid. The submissions were heard on the 13th October, 1981. The Court of Appeal however, held that the provisions of the Act did not allow aid to be granted in respect of the Petition. The Court of Appeal held that it was a prerequisite to the granting of aid that the Court had jurisdiction and not a court page 69

"which has had jurisdiction or may in the future have that jurisdiction".

15. As a consequence of the Judgments of the Court of Appeal of New Zealand dated the 19th of March 1980 and the 23rd of October 1981, the Appellant petitioned for leave to appeal in Forma Pauperis, leave being granted on the 2nd December 1982.
- 47.

CONTENTIONS TO BE URGED BY THE APPELLANT
IN RESPECT OF THE APPEAL AGAINST CONVICTION
FOR RAPE

1. The Crimes Act 1961 S.127 states :
- SEXUAL INTERCOURSE DEFINED - For the purposes of this Part of this Act sexual intercourse is complete on penetration.
2. Rape is defined in S.128(1) as:
10. Rape is the act of a male person having sexual intercourse with a woman or girl -
- (a) Without her consent:
3. Providing penetration is consensual it is not a crime under S.128 to continue in an act of sexual intercourse even if that consent is withdrawn.
4. The trial Judge was accordingly wrong in his direction to the jury as set forth in paragraph 7 hereof.
5. That the trial Judge's misdirection was tantamount to directing the jury to convict on a count of rape.
6. That the conviction should be set aside.

20. CONTENTIONS TO BE URGED BY THE APPELLANT IN
RESPECT OF THE APPEAL AGAINST REFUSAL OF LEGAL AID

6. The Offenders Legal Aid Act 1954 (N.Z.) by its long title is:

An Act to make better provision for the grant of legal aid in criminal proceedings.

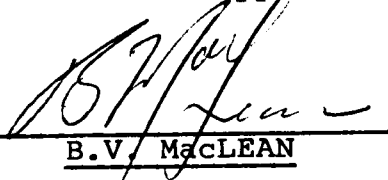
7. Offenders Legal Aid Act S.2 reads:

POWER OF COURT TO GRANT LEGAL AID TO
PERSONS CHARGED WITH OR CONVICTED OF OFFENCE

- (1) Any Court having jurisdiction in

20. criminal proceedings may, in respect of any stage of any criminal proceedings and in accordance with this Act, direct that legal aid be granted to any person charged with or convicted of any offence, if in its opinion it is desirable in the interest of justice to do so.
8. All Courts in New Zealand having criminal jurisdiction may under S.2 grant legal aid for any stage of criminal proceedings.
9. That Offenders Legal Aid Act S.2(2) stipulates the criteria a Court having criminal jurisdiction is required to take into account in considering whether to direct the grant of legal aid.
10. That the Appellant application for aid met all relevant criteria and that the Court of Appeal was accordingly wrong in law in refusing aid to appeal to the Judicial Committee.

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