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WELLINGTON

R v Kaitamaki

Court of Appeal Wellington
6 December 1979;19 March 1980
Richmond P, Woodhouse and Richardson JJ

Criminal law — Rape — Defence of consent — Relevant time for determining consent — At moment of penetration accused believed woman to be consenting, but after penetration he realised that she was not consenting, but he did not desist — Whether accused guilty of rape — Crimes Act 1961, ss 127 and 128.

On a charge of rape, the accused gave evidence that after he had penetrated the complainant he became aware that she was not consenting, but he did not desist. The trial Judge directed the jury that if part way through an act of intercourse, a man who had previously thought that the woman was willing, realises that she is unwilling but continues with the act of intercourse, it then becomes rape. The accused appealed against conviction on the ground that this was a misdirection.

Held (Woodhouse J dissenting): The direction given to the jury was correct:

1 Sexual intercourse is a continuing act which may become criminal during its progress as a result of a change in the accused's state of mind. The "act of a male person" referred to in s 128 of the Crimes Act 1961 is not just an act of intercourse. It is the composite act of having intercourse without the woman's consent. Accordingly, the conduct of a man who persists in sexual intercourse after he realises that the woman is no longer consenting (or has never consented) may fairly and naturally be described as the "act of a male person having sexual intercourse with a woman . . . without her consent" (see p 61 line 5).

2 The purpose of the definition in s 127 that "sexual intercourse is complete upon penetration" is to remove any doubts as to the minimum conduct on the part of an accused which the prosecution will have to establish in order to prove that he had sexual intercourse with the woman concerned. "Complete" is used in the sense of having come into existence rather than in the sense of being at an end. Accordingly, the question whether the woman was consenting (or whether the man honestly believed her to be consenting) is not to be determined solely as at the time of penetration (see p 62 line 34). Appeal dismissed.

Observations of Hanger CJ in *R v Mayberry* [1973] Qd R 211, 229 followed.

R v Salmon [1969] SASR 76 not followed.

Other cases mentioned in judgments

Fagan v Commissioner of Metropolitan Police [1969] 1 QB 439; [1968] 3 All ER 442.

R v Allen (1839) 9 Car & P 31; 173 ER 727.

R v Dehar [1969] NZLR 763.

R v Morgan [1976] AC 182; [1975] 1 All ER 8.

Note

Refer 4 Abridgement 362.

Appeal

This was an application for leave to appeal against conviction on a charge of rape under s 128 of the Crimes Act 1961, and of entering a building with intent to commit a crime therein under s 241(a), on the grounds that the trial Judge had misdirected the jury as to the law in his summing up.

B V MacLean for the appellant.

J H C Larsen for the Crown.

Cur adv vult

The joint judgment of Richmond P and Richardson J was delivered by

RICHMOND P. This is an appeal by Tamaitirua Kaitamaki against a jury verdict of guilty in respect of one count of rape and one count of burglary. There is no application for leave to appeal against sentence. The appeal turns on a question of law on which, in terms of s 398 of the Crimes Act 1961, the Court is of opinion that it would be convenient that separate judgments should be pronounced.

The Crown alleged that at some time in the early hours of Sunday, 19 November 1978, the appellant broke and entered a dwelling house in Balmoral, Auckland, with intent to commit a crime therein. It was further alleged that he then twice raped a young woman who was an occupier of the premises. There was no dispute at the trial that intercourse had taken place. The defence was that the woman consented, or at any rate that the appellant honestly believed that she was consenting.

In the course of giving evidence at the trial the appellant said that after he had penetrated the woman on the second occasion he became aware that she was not consenting. However he did not desist. After referring to a written statement which the appellant had made to the police the trial Judge, towards the end of his summing up, said this:

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

The main ground of appeal is that the Judge, in the foregoing passage, misdirected the jury. Mr MacLean submits that if a man penetrates a woman with her consent, or with an honest belief that she is consenting, then he cannot be guilty of the crime of rape by carrying on with that act of intercourse after a stage when he appreciates that she is not consenting. The question of honest belief enters into the matter because of the decision of the House of Lords in *Morgan* [1976] AC 182; [1975] 1 All ER 8.

The point raised by Mr MacLean turns upon the true construction of ss 127 and 128 of the Crimes Act 1961. So far as is material those provisions are as follows:

"127. For the purposes of this Part of this Act, sexual intercourse is complete upon penetration"

"128. (1) Rape is the act of a male person having sexual intercourse with a woman or girl . . . without her consent".

The first question is whether, in its ordinary and natural meaning, the language of s 128 is apt to refer to a part only of what may be described as one continuous act of intercourse. The trial Judge in the present case obviously thought so, and we agree. The "act of a male person" referred to in s 128 is not just an act of intercourse. It is the composite act of having intercourse without the woman's consent. Accordingly the conduct of a man who persists in sexual intercourse after he realises that the woman is no longer consenting (or has never consented) may fairly and naturally be described as the "act of a male person having sexual intercourse with a woman without her consent". Sexual intercourse is obviously a continuing act and there is no novelty in the concept that a continuing act may become criminal during its progress as a result of a change in the state of mind of the defendant — see *Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439; [1968] 3 All ER 442. Indeed we did not understand Mr MacLean to argue to the contrary. He relied entirely upon the provisions of s 127, and to those provisions we shall now turn.

The effect of s 127 is that, for the purposes of the definition of rape contained in s 128, "sexual intercourse is complete upon penetration". Mr MacLean submits that the result of s 127 is to limit the ordinary meaning of "sexual intercourse" in such a way, for the purposes of the definition of rape, that only the act of penetration is relevant. Accordingly, he says, the question whether the woman was consenting, or alternatively whether the man honestly believed her to be consenting, has to be determined solely as at the time of penetration. He relies on a decision of the Full Court of South Australia, namely *R v Salmon* [1969] SASR 76.

In that case the appellant was charged with rape. He said in evidence that intercourse had commenced with the consent of the prosecutrix, that during the intercourse the prosecutrix screamed, and that he then hit her twice while continuing with the sexual act. Section 73 of the Criminal Law Consolidation Act 1935-1966 was as follows:

> "Whenever upon a trial for any offence punishable under this Act, it is necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only."

The trial Judge directed the jury that if they believed the appellant's story, or had a reasonable doubt about its truth, they could not convict him of rape but could convict him of indecent assault. The jury did convict him of indecent assault, and it was from that conviction that he appealed to the Full Court. It was contended that, for technical reasons, he could not on an indictment for rape be convicted of an indecent assault in respect of his conduct in having intercourse after the prosecutrix objected. Most of the judgment is concerned with this argument but it does appear that the Court agreed with the direction given by the trial Judge to the effect that, on the basis of his own story, the appellant could not be convicted of rape. After setting out the provisions of s 73 of the Act the Court said:

> "We will have to discuss that section later for a different purpose, but we will not anticipate the authorities and arguments to which reference will then be made. It is sufficient to say that in our view for the purpose of the crime of rape, of which carnal knowledge is an essential element, the carnal knowledge involved is by virtue of the section deemed complete upon proof of penetration. If the facts are that there was penetration with consent, then in our view, no matter what happens after that, there can be no rape until there is a further act of penetration" (ibid 78).

Later the following relevant passage also occurs:

"It follows, we think, as we have said, that for the purposes of a trial for rape, where it is necessary to prove carnal knowledge, the relevant carnal knowledge is for the purpose of that charge artificially but conclusively deemed to be complete on penetration" (ibid, 82).

Section 73 of the South Australian Act is a descendant of the Imperial statute 9 Geo IV c 31, s 18, the text and purpose of which will be found referred to by Tindal CJ in *R v Allen* (1839) 9 Car & P 31; 173 ER 727.

The only other authority of which we are aware and which has any direct relevance to the present case is *R v Mayberry* [1973] Qd R 211, a decision of the Court of Criminal Appeal of Queensland. One question which arose was whether a man called Goodall could be properly convicted as a party to a rape on the basis of assistance given to the principal offender at a stage well after the latter had penetrated the prosecutrix but when he was still continuing to have intercourse with her. Goodall could not, of course, be so convicted if at the time when he gave assistance the crime of rape was complete, in the sense of terminated. *R v Salmon* was not referred to by the Court. Skerman J (at p 286) regarded s 6 of the Queensland Code (corresponding to s 73 of the South Australian Act) as making the carnal knowledge element of the crime of rape complete upon penetration. In other words he took a similar view to that adopted in South Australia. Hanger CJ however took a different view. He said (at p 229):

"Rape is defined by s 347 as the having, by a man, of carnal knowledge of a woman or girl without her consent etc. When s 6 is read with this definition, it is not meant that at the instant of time when penetration takes place, what takes place thereafter eg ejaculation, is not part of the act of rape. I am quite unable to understand that a man, having effected penetration, ceases to be having carnal knowledge of a woman at that instant of time, though he remains to complete the act of sexual intercourse for some time thereafter, the normal reason for his attack."

Hart J expressed himself as in general agreement with the Chief Justice.

There are considerable differences between the Australian and New Zealand legislation. In particular s 127 of the Crimes Act 1961 is not a "deeming" section, and it uses the readily understandable expression "sexual intercourse" rather than the somewhat antiquated expression "carnal knowledge". Whatever may be the position in Australia we are of opinion, with respect, that the approach which found favour with Hanger CJ is more appropriate to the interpretation of the New Zealand section. In our view the purpose of s 127 is to remove any doubts 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. We are quite unable to accept that its purpose or effect is to remove from the scope of the definition of rape (in s 128) all acts by the accused, subsequent to penetration, which would in ordinary language be described as having sexual intercourse.

Our conclusions may be put in another way by saying that we understand the word "complete", as it appears in s 127, to have been used by Parliament in the sense of having come into existence rather than in the sense of being at an end. It is to be remembered that s 127 applies to various crimes other than rape. For example, it applies to incest (s 130) sexual intercourse with girls under care or protection (s 131) and sexual intercourse with girls under twelve (s 132). In such cases it is no defence that the girls consented and we can see no reason why Parliament should have wished artificially to limit the ordinary meaning of sexual intercourse by restricting it to an act of penetration.

We appreciate that the view which we have adopted might, at least in theory, lead to certain results which we would regard as unsatisfactory. We have in mind, for example, a woman suddenly wishing a man to desist at a late stage of intercourse or the failure of a man to fulfil a promise to desist before reaching a climax. At the

other end of the scale the view urged upon us by Mr MacLean would lead to equally unsatisfactory results. It must be noted that the slightest degree of penetration is sufficient to bring a case within the s 127 definition of sexual intercourse. If Mr MacLean is correct then a girl who had been seduced into permitting a slight degree of penetration could not cry rape if she were then fully and by violence forced against her obvious wishes and subjected to a complete act of intercourse. Nor could a man be guilty of rape who began to have intercourse in the belief that the woman consented but carried on after he realised that she was not and never had been a consenting party. Some members of the community may take the view that no man should be held guilty of rape unless his initial penetration of the woman's body was without her consent, and unless he knew that such was the case, or was indifferent. Woodhouse J, in the judgment which he is about to deliver, vigorously puts forward that point of view. Others may think it as much a violation of a woman's right to the privacy of her own body if a man continues to have intercourse with her when he knows full well that she desperately wants him to desist. In an area where opinions can differ widely as to what may be just or unjust we are not persuaded that sufficient reason exists for us to depart from what we believe to be the ordinary and natural meaning of the language which Parliament has chosen to define the statutory crime of rape. That language, rather than any popular conception of what is involved in rape, must be decisive of the question which we are called upon to determine.

We are accordingly of opinion that the direction given to the jury in the present case was correct and that the first, and main, ground of appeal must fail accordingly.

There were two further submissions made by Mr MacLean. The first related to the Judge's direction to the jury regarding the belief of the appellant as to whether or not the complainant was consenting. The Judge gave a full direction on this point in the light of *Morgan's* case but he did not specifically direct the jury to have regard to the evidence concerning the amount of alcohol which the appellant had consumed during the evening. The appellant had made no point of this when giving his evidence in chief but the matter did arise to some extent in cross-examination. The matter was not referred to by Mr MacLean either in his opening or his final address to the jury. In these circumstances it is understandable that the Judge made no specific reference to the question of intoxication. We appreciate that a Judge may in appropriate circumstances be under a duty to point out to the jury some matter raised by the evidence, which they ought to consider, notwithstanding the failure of counsel to refer to it. The fact that no emphasis is put on a particular topic by counsel at the trial will often be an indication to this Court that in the actual atmosphere of the trial the evidence was of little significance. However that may be, the Judge in the present case specifically referred to the question of possible intoxication when directing the jury on the burglary count. This was in the context whether or not the appellant had the necessary intent to commit a crime at the time of breaking and entering the premises. The Judge also stressed to the jury, in relation to the rape count, that they should reach a decision as to the state of mind of the appellant having regard to all the circumstances of the case. There was nothing in the summing-up to suggest that the jury could not have regard to the fact that the appellant had been drinking. In the circumstances of this particular case we are satisfied that the jury would have well understood that they should take the evidence concerning the amount of alcohol consumed by the appellant into account along with all the other circumstances.

Finally, Mr MacLean contended that this was a case where the Judge was required to give a direction to the jury as to the use which they could make of lies told by the appellant: see *R v Dehar* [1969] NZLR 763. As appears from the judgment of this Court in that case such a direction is only necessary where lies or evasions on the part of an accused person constitute an important element in the chain of proof put forward by the Crown. We are not satisfied that such a situation existed in the present case. All that happened was that the Crown suggested that the jury should reject the appellant's evidence in so far as it conflicted with the written statement which he had given to the police.

For the reasons which we have given we would dismiss the appeal
In accordance with the views of the majority the appeal is dismissed.

WOODHOUSE J. In essence the jury was directed that a man could become guilty of raping a woman during the one act of intercourse to which she had given her prior consent. It means that after he had entered her with consent she could transform his innocent and acceptable conduct into criminal activity of the most serious kind should he fail to meet her sudden indication that he must leave her. It is not explained just how rapidly he would need to act upon that indication to avoid becoming a rapist. But the position certainly must be, if the direction is correct, that in the event of such an indication then the single continuing occasion of intercourse could properly be described as being undertaken both with and without the consent of the woman concerned. If that is correct then with respect I think it is a remarkable extension of what has been the common understanding of this crime for generations.

Early writers spoke of rape in terms of forcible intercourse. Coke, for example, states that "Rape is when a man hath carnal knowledge of a woman against her will". It is, of course, a most serious crime of aggression, connoting the subjection of the resistance and will of the woman. In New Zealand the crime is not defined by reference to force or an act done against the will of the complainant. The statutory test of rape is "the act of a male person having sexual intercourse with a woman or girl . . . *without her consent*". But the use in that definition of the very practical test of consent as the precondition if the intercourse is to be lawful is simply designed to ensure the inclusion as criminal of those situations where the male has obtained the woman's submission by threats or where there has been no real consent at all. In any event the crime has always been concerned with the criminal invasion of a woman's body by a male; and for my part I cannot understand how any woman could reasonably complain that she had been violated in the gross sense of being raped if she had agreed that her partner could enter her. It may be that after a consensual act of intercourse had commenced physical discomfort or pain could induce a change of mind by the woman concerned or there could be sudden repentance on the part of a young girl that she had yielded to seduction. But surely nothing of this kind could provide the setting for *rape* whatever other offence might then seem to have been committed. And, certainly whatever may be the moral implications, seduction ought never to be confused with rape. It follows, too, that because a man cannot be guilty of the crime unless he is shown to have *intended* intercourse without the woman's consent all these considerations must apply where he has honestly but mistakenly believed that she was willing.

I have referred to the need for consent as the precondition of intercourse if it is to be lawful, because from the nature of the offence itself it follows that if consent could properly be relied upon by the male it must precede the act of intercourse. It also follows from the effect of the provisions of s 127 whereby intercourse is deemed to be complete at the moment of slightest penetration. At the latest the woman must have signified her consent (or he must honestly have believed that she has consented) by that critical moment. And all this carries with it an important corollary. As a matter of common sense the ambit and effect of the relevant consent must be consent to no more but also to no less than what is intended to follow: a normal act of intercourse. This matter has never been blurred by unreal or legalistic suggestions that there could be, for the purposes of the law concerning rape, forms of qualified consent to sexual intercourse which might make it necessary to ask whether a willing woman had intended her consent to be limited in some unlikely way so that it might not extend for example to cover the whole act of intercourse until it had been normally completed. Furthermore, as a matter of statutory construction, once a woman had consented to penetration which then took place how could the same occasion of intercourse be described in terms of s 128 as "the act of a male person having sexual intercourse . . . without her consent"? The initiation of intercourse by penetration done with her consent is, in my opinion physically, or

legally in terms of the statute itself, quite incapable of separation from the rest of the same uninterrupted occasion of intercourse until withdrawal. It must be important, too, when considering such issues to remember the kind of mens rea that is involved and to which I have already referred. Before a man can be found guilty of rape there must be proof that in advance he had formed the criminal intention of having sexual intercourse without her consent and to be guilty that he thereupon gave effect to that criminal intention.

The fact that s 127 defines the act of sexual intercourse as complete upon penetration carries the consequence that a man will be guilty of rape who penetrates a woman, no matter how slightly, if he does so without her consent. Intercourse to that degree is to be regarded as sufficient, even though she might seem to consent after he had entered her. But the present extraordinary case is concerned with the converse situation. And the Judge's direction to the jury means, as I have said, that any man who had become engaged in a single act of intercourse with a willing woman could find himself almost on the instant guilty of conduct of the most criminal nature. In a valuable article entitled "What is non-consent (in Rape)?" which appears in (1970) *2 Australian Journal of Forensic Sciences* 103, H A Snelling QC, then Solicitor-General of New South Wales, drew attention (at p 103) to the necessity for proof of the absence of consent at the time of penetration. He said:

> "One of the essential elements of this crime is non-consent to the act of penetration. The moment of penetration is, of course, legally critical, as by this time the woman may have changed her initial intention to object — on the other hand, a woman may be prepared to consent to conduct short of actual penetration, but not to that."

In that statement the author was concerned not with the sufficiency of the act of the accused in order to satisfy proof of sexual intercourse but with the state of mind of the woman complainant. And in that regard he considered that to be relevant the issue of non-consent must be determined by reference to the "legally critical" moment of penetration. With respect I agree.

Of course, in the present case it happens that the woman concerned denied in evidence that she had been willing to have intercourse on either of the two occasions. It may be that the jury believed her. But the direction was given to the jury on the contrary and alternative basis that they might decide that on both occasions she was or may have been willing; or at the least that the appellant believed she was willing. It is only against that kind of background that the direction could have any relevance. Thus, to consider it, there must be an assumption in his favour accordingly. And when the issue is examined in that way the argument against the appellant is that after an initial occasion of consensual intercourse, following which the complainant left but then returned to the room where he had remained, and after he had commenced the second act of consensual intercourse with her his conduct (on this second occasion) ended in rape simply because he remained with her for longer than she had wished. In my opinion the consent already given on the second occasion and in such circumstances would make nonsense of such a complaint. As a precedent consent to the very act of intercourse, I am satisfied that in terms of s 128 of the Crimes Act it should and would provide a complete defence.

For the reasons indicated I would allow the appeal against conviction but as there is ample evidence for consideration of a jury apart from the evidence related to this part of the summing up there should be a new trial.

Appeal dismissed.

Solicitors for the appellant: *Davenports* (Auckland).
Solicitors for the Crown: *Crown Law Office* (Wellington).