Privy Council Appeal No. 38 of 1983

Tamaitirua Kaitamaki *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST MAY 1984

Present at the Hearing:

LORD SCARMAN
LORD ELWYN-JONES
LORD BRANDON OF OAKBROOK
LORD BRIGHTMAN
SIR GEORGE BAKER

*[Delivered by **Lord Scarman**]*

This appeal is in truth two appeals. The appellant appeals, by special leave, against two decisions of the Court of Appeal of New Zealand. In the first he appeals against the decision by a majority of the Court (Richmond P. and Richardson J., Woodhouse J. dissenting) dismissing his appeal from a conviction of rape. In the second he appeals against a refusal of the Court of Appeal (Richardson, McMullin and Barker JJ.) to grant him legal aid to prosecute his appeal to the Judicial Committee of the Privy Council in the rape case.

The Rape Appeal

In the early hours of 19th November 1978 the appellant broke and entered a dwelling-house. The Crown's case was that he then twice raped a young woman who was an occupier of the premises. There was no dispute that intercourse had taken place on the two occasions. The defence was that the woman consented (or that the appellant honestly believed that she was consenting).

But when the appellant came to give evidence, his case as to the second occasion was that after he had penetrated the woman for the second time he became

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aware that she was not consenting; he admitted, however, that he did not desist from intercourse. In summing up this part of the case the trial judge said to the jury:-

> "I tell you, as a matter of law,... that if, having realised she is not willing, he continues with the act of intercourse, it then becomes rape...."

It is said that this direction was wrong in law. The appellant's counsel submits that by the criminal law of New Zealand if a man penetrates a woman with her consent he cannot become guilty of rape by continuing the intercourse after a stage when he realises that she is no longer consenting.

The submission raises a question as to the true construction of sections 127 and 128 of the Crimes Act 1961. Section 127 defines sexual intercourse and is in these terms:-

> "For the purposes of this Part of this Act, sexual intercourse is complete upon penetration; and there shall be no presumption of law that any person is by reason of his age incapable of such intercourse."

Section 128 defines rape and, so far as is material, is in these terms:-

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

Counsel for the appellant took one point only; but he submitted that it was all he needed. He relied on the definition in section 127 to establish the proposition that rape is penetration without consent: once penetration is complete the act of rape is concluded. Intercourse, if it continues, is not rape, because for the purposes of the Act it is complete upon penetration.

The Court of Appeal by a majority rejected the submission, expressing the opinion that the purpose of section 127 was to remove any doubts as to the minimum conduct needed to prove the fact of sexual intercourse. "Complete" is used in the statutory definition in the sense of having come into existence, but not in the sense of being at an end. Sexual intercourse is a continuing act which only ends with withdrawal. And the offence of rape is defined in section 128 as that of "having" intercourse without consent.

Their Lordships agree with the majority decision of the Court of Appeal, and with the reasons which they gave for rejecting the appellant's submission and for construing the two sections in the way in which they

did. As Lord Brightman observed in the course of argument before the Board section 127 says "complete", not "completed". The Board was referred not only to the two Australian cases discussed by the Court of Appeal but to a third one, *Richardson v. The Queen* [1978] Tas.S.R. 178. None of these cases is directly in point because each is concerned with statutory provisions which differ from the two sections of the New Zealand statute with which this appeal is concerned. Their Lordships rest their view upon the true construction, as they see it, of the two sections already quoted of the Crimes Act 1961.

Their Lordships were, however, disturbed by the course taken by the Crown at the trial. The indictment charged one offence of rape. The prosecution case was that there were two rapes. In the event, as could have been anticipated, there developed two different defences. To the first allegation the defence was consent: to the second the defence was that she consented to penetration but not to the subsequent intercourse, which, however, was not sexual intercourse for the purposes of the Act (see section 127). The Crown well knew that its case was that there were two rapes. In fairness to the accused each should have been separately charged. The Board is, however, satisfied that in the present case there has been no miscarriage of justice. Their Lordships, therefore, will humbly advise Her Majesty that this appeal should be dismissed.

The Legal Aid Appeal

The Court of Appeal rejected the appellant's application for legal aid to prosecute an appeal to the Judicial Committee of the Privy Council on the ground that the Court had no jurisdiction under the Offenders Legal Aid Act 1954 ("the Act") to grant it. The Board, finding itself in complete agreement with the judgment of the Court of Appeal delivered by Richardson J., will deal with this appeal very briefly.

The statute law of New Zealand confers no right of appeal from the Court of Appeal in criminal proceedings. But Her Majesty can, by the exercise of Her prerogative, grant special leave to appeal. The jurisdiction to grant legal aid in criminal proceedings is conferred by s.2(1) of the Act, which is in these terms:-

> "Any Court having jurisdiction in 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 interests of justice to do so."

Section 3(1) provides as follows:-

> "The Governor-General may from time to time, by Order in Council, make such regulations as may in his opinion be necessary or expedient for giving full effect to the provisions of this Act."

The appellant submits that section 2(1) is to be construed as empowering the Court of Appeal to grant legal aid so as to enable a person to petition for special leave and to prosecute an appeal to the Judicial Committee. Their Lordships reject the submission upon two grounds. The first is that, having disposed finally of the criminal proceeding before it by dismissing the appeal, the Court no longer has any jurisdiction in the matter of that criminal proceeding. The second is that the scheme of the Act is that regulations are to be made as may in the opinion of the Governor-General be necessary and expedient for giving full effect to the Act. Detailed regulations were made first in 1956: the current regulations were made in 1972. They make no provision for legal aid to prosecute an appeal to the Judicial Committee. Since it is clear from section 2(1) and section 3(1) that regulations are necessary for giving effect to the Act, the absence of any provision in the regulations dealing with legal aid in the Privy Council is fatal to the appellant's submission: for the power to grant legal aid has to be exercised "in accordance with this Act".

Their Lordships will, therefore, humbly advise Her Majesty that this appeal should be dismissed.

Each appeal being conducted on behalf of the appellant "as a poor person", there will be no order as to costs.