

2047

NOT
RECOMMENDED

THE QUEEN

v.

TIKITU TE POONO
CEDRIC MATHEW PAUL HAPAKUKU
JOSEPH CHASE

Coram: Cooke P.
Somers J.
Casey J.

Hearing: 21 November 1986

Counsel: M.J. Knowles for Te Poono and Hapakuku
S.C. Barker for Chase
R.B. Squire for Crown

Judgment: 19 December 1986

JUDGMENT OF THE COURT DELIVERED BY SOMERS J.

During the night of 31 January/1 February 1986 a number of gang members or their associates raped or attempted to rape or sexually violate a girl, then aged 14 years, in the back of a van. Four of them were tried in the High Court over four days in July. One of the men, Cedric Mathew Paul Hapakuku was found guilty of rape on 31 January, and two, Tikitū Te Poono and Joseph Chase, were found guilty of an attempt to sexually violate the girl by raping her on 1 February. Each of the three has applied for leave to

appeal against his conviction. The fourth man Terry Paul Taituha was found guilty on one count of rape and one of sodomy on 31 January and on a count of sexual violation by rape on 1 February. He has not sought to appeal against his convictions.

The differing counts of rape on 31 January and sexual violation on 1st February result from the fact that s.1(2) of the Crimes Amendment Act (No.3) 1985 provides that it shall come into force on 1 February 1986 and the effect of s.11 of the Acts Interpretation Act is that it was deemed to come into operation immediately on the expiry of the previous day. That Act repealed s.128 and 129 of the Crimes Act 1961 which created the offences of rape and attempted rape and substituted new offences of sexual violation and attempted sexual violation.

Up until midnight on 31 January 1986 the elements of the crime of rape under s.128 of the Crimes Act 1961 were intercourse with a woman without her consent or with consent extorted or obtained in any of the ways set out in s.128(1)(b) to (e) and an intent by the accused to have non consensual intercourse or to have it whether or not consent was given. An accused who had an honest, although mistaken, belief that the complainant consented lacked the necessary intent and could not be convicted. He would be acquitted if the jury found such a belief or was in doubt as to its existence. The objective reasonableness of the grounds for

such a belief could only be material as evidence of whether the belief was or might have been held. See R. v. Morgan [1976] A.C. 182; R. v. Barlow (unreported C.A. 169/85; judgment 19 June 1986).

The effect of the new s.128, for present purposes, is that an honest belief in consent is not sufficient by itself. It must be a belief held on reasonable grounds. An accused who honestly believes the complainant is consenting will be guilty if the jury is satisfied there were no reasonable grounds for such belief. There are other matters going to proof of want of consent in the new s.128A which it is not necessary to mention.

The new crime is therefore materially different from that which it replaced and whether an offence was committed before or after midnight was critical to its elements.

If the date of the commission of any of the offences is doubtful - if it was not open to the jury on the evidence to be satisfied on which side of midnight they occurred - the question arises as to whether an acquittal must be directed or whether the verdicts can be upheld. Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence this Court has power under s.386(2) of the Crimes Act to substitute a verdict of guilty of that other

offence where it appears that the jury must have been satisfied of facts which proved guilt on that other offence. No substitution of a verdict of rape under the old s.128 in place of a verdict of sexual violation under the new s.128 could be made in the case of Te Poono and Chase for the jury demonstrated by its verdict that it was satisfied that the offences of sexual violation took place on 1 February.

But under the proviso to s.385(1) of the Crimes Act the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred. The established test is whether a reasonable jury properly directed would on the evidence properly admitted without doubt convict. See e.g. Stirland v. Director of Public Prosecutions [1944] A.C. 315, 321; R. v. Windsor [1953] N.Z.L.R. 83, 91. In the cases of Te Poono and Chase who were found guilty of sexual violation because their offences occurred on 1 February it would be possible to apply the proviso if the evidence was not sufficient to establish that date provided that the Court was satisfied the jury must have found that they had no genuine belief that the girl was consenting. If the verdict is open to the conclusion that the jury may have thought the accused had a genuine belief but without reasonable grounds for it the proviso could not apply for in that case if the offence occurred on 31 January they would be entitled to an acquittal.

The reverse case, that of Hapakuku, stands differently. He was found guilty of rape on 31 January. The provisions of s.386(2) about substitution of verdict cannot apply because of the finding as to the date of the offence. But a verdict of guilty of rape under the replaced s.128 negatives honest belief. Accordingly had the jury thought the offence occurred on 1 February the existence of reasonable grounds for a belief would not have been material. They must on that view of the date of the act have found him guilty of sexual violation under the new provisions. In short the proviso may be applied to Hapakuku's case.

There is of course a logical difficulty in the proposition that a jury must be satisfied of the date of the offence but that on appeal that which they could not find may become immaterial if there is no substantial miscarriage of justice. But in this unusual, indeed 'one-off', case a finding of no miscarriage of justice is equivalent to saying that it is beyond doubt that the acts of the applicant concerned were contrary to the law on whatever day they occurred and in the accepted sense of the words 'no substantial miscarriage of justice' such a result is inevitable.

The counts against the three applicants were laid by the Crown in the alternative, one alleging rape on

31 January and one alleging sexual violation by rape on 1 February. We think this course was entirely justified. It rightly left to the jury a matter of fact to be proved by the Crown. But one criticism of the indictment was properly made. On each of the alternative counts the date was laid as 'on or about' the particular day namely 31 January or 1 February. There was never any doubt that the Crown case was rape on 31 January or sexual violation on 1 February. The date ought to have been laid as 'on' the particular day. This point has no significance provided the jury were properly directed and the evidence sufficiently clear.

The complainant's evidence, apart from her estimates of time and whether she consented to what happened or by her conduct may have led the accused to a genuine belief that she consented, was not much disputed. She said she was willingly picked up in Cathedral Square, Christchurch, at about 9p.m. on 31 January by Taituha who was a complete stranger and patently a member of the Mongrel Mob. She and a number of men were driven to the Hornby Hotel. When the bar closed at 11p.m. (she wrongly thought it was 10p.m.) she was pushed into a van which drove off. Another girl called Melissa whom she had met at the hotel and knew to be a friend of some of the gang members was also in the van. The complainant was at once stripped of her clothing and Taituha raped and buggered her while the van was moving. Others also had intercourse. After the van had

travelled for what she estimated to be 10 or 15 minutes it stopped. She thought it was near a house for she could hear music. There were people outside the van drinking and shouting on the street.

The complainant estimated the van was stationary for about 20 minutes. During that time several men had intercourse with her and others required her to commit indecencies with them. The van then drove off and about 15 minutes later, according to her estimate, stopped at the house of the girl Melissa. During that trip another man had intercourse and she said Taituha made her give him oral sex. When the van stopped she said the girl Melissa told her to dress and she was taken into the house for a period of about 5 minutes. She was then dragged back to the van and driven off. Taituha again had intercourse with her as did the driver. When the van eventually stopped some 10 or 15 minutes later she was able to escape and make her way to a nearby house.

Apart from Taituha the complainant was not able to identify any of the persons who violated her. It is clear that some at least of her estimates of time were much understated. It was 4a.m. when she awoke the householders after her escape, that is to say some five hours after the hotel bar closed. The periods she spoke of cover no more than 1 hour and 20 minutes.

None of the accused gave evidence before the jury.

The Judge in summing up to the jury dealt first with the three charges against Taitahu. The elements of the charges on 31 January and 1 February were carefully explained to the jury. Then the Judge turned to the alternative charges against the applicant - the fourth and fifth against Hapakuku, the sixth and seventh against Te Poono, and the eighth and ninth against Chase. He said -

'The fourth and fifth counts in the indictment are counts of a type I have already explained. You will see the word "count" is used. It is just another word for "charge". Sometimes people refer to them as charges, sometimes as counts.

The sixth and seventh charges are ones where you will notice the word "attempt" is used. The sixth charge, that is the charge against the Accused Te Pooni, is one of attempted rape and to find the Accused guilty on that charge you have to be satisfied beyond reasonable doubt of two elements.

The meaning of attempt was then explained. The Judge continued -

The seventh count is one of attempted sexual violation and again in order to be satisfied in relation to this charge you would have to be satisfied beyond reasonable doubt of two elements.

The eighth and ninth counts in the indictment are in the same category as those that I have already discussed as counts six and seven.

There has been reference to the fact that some of the counts are alternative ones. "Alternative" meaning that a verdict is only asked from you on one of the two charges. The first, second and third counts are all separate ones and verdicts are required on each. The fourth and fifth counts are alternative. That means you consider the fourth first. I direct you if you are

satisfied beyond reasonable doubt that on the 31st January 1986 the Accused did rape Justine Kelly, then you should convict the Accused on that charge, and if you do then there is no need to consider the fifth. If you are not satisfied to the standard required then you must go on to consider the fifth count. If then you are satisfied beyond reasonable doubt that on the 1st February the Accused did sexually violate Justine Kelly by raping her, you should find the Accused guilty of that offence.

You could only find the Accused guilty of either the fourth or fifth count, that is, if you find him guilty at all. That is only one of those two, the fourth or fifth.

Similarly with counts six and seven. Te Pono may be found guilty of either the sixth or the seventh, if at all, and also in relation to the eighth and ninth counts, Chase may be found guilty of either the eighth or the ninth count if at all."

So far as they go these directions cannot be criticised and logically they cover the possibility that the jury might be left in doubt as to the day on which the acts took place. The Judge referred more specifically to this point when referring to Hapakuku's case. He said -

'For the defence Mr. Knowles put before you two matters. First of all he put before you a clever argument that if you find that you are in a state of confusion about exactly when it occurred then, of course, you should acquit the Accused Hapakuku. I have already indicated to you what you would have to be satisfied of in order to convict him in relation to the fourth count, and what you would have to be satisfied of in order to convict him in relation to the fifth count.'

The case against each accused must now be considered.

Hapakuku

In her evidence-in-chief the complainant said

Hapakuku was in the van when it left the hotel but in cross-examination said she was not sure at what stage he was there. She was not able to identify him as one who had intercourse with her. The evidence of that rested on Hapakuku's statement to the Police. In it he said -

She left the pub willingly with us. I left in another car - she was in the van. ...Not long after I left the pub I fucked her in the back of the van. I don't remember exactly where the van was parked... She was putting her clothes back on getting dressed...

It was the Crown case that as on his own admission intercourse occurred not long after Hapakuku left the hotel it must have taken place before midnight. The jury must have accepted Hapakuku's admissions thus far to find him guilty of rape - that is of non-consensual intercourse before midnight. If, as Hapakuku said, the van was parked, intercourse by him could not have occurred before the van first stopped. There is no basis on which the jury could accept that much of Hapakuku's statement and reject his further statement that intercourse took place when the complainant was getting dressed. The complainant said that when the van stopped for the first time, she used the words 'at that stage', she was trying to put her clothes on when two people came in and one had intercourse with her. The other occasions upon which she tried to put on her clothes were when the van left and when eventually the van stopped at the girl Melissa's house. Neither of these occasions matches Hapakuku's statement to the Police.

On the evidence we are of opinion that properly directed in the way mentioned a jury must have been satisfied that Hapakuku had intercourse when the van first stopped. The first journey of the van, on the evidence admissible against Hapakuku, must have been to some other part of Christchurch. The complainant put the time at 10 to 15 minutes. Her estimate of this first part of the journey may be less open to criticism than those of later periods of time. In any event it could hardly have taken more than half an hour at the most. The girl's evidence about getting dressed marked the incident as occurring very shortly after the van stopped.

Although the precise time at which the van left the hotel, the time spent on the first trip, and the time between the van stopping and the intercourse taking place is not known we think the evidence is sufficient to justify in verdict of the jury that intercourse took place before midnight. Even if that were not so the case is one for the application of the proviso. The verdict of the jury establishes that intercourse took place without the consent of the complainant and that Hapakuku knew that she did not consent or did not care whether she consented or not. Those features embrace the essential elements of rape and also of sexual violation by rape. In these circumstances there was no substantial miscarriage of justice even if the offence occurred after midnight.

Te Poono

The evidence of Te Poono's intercourse with the girl also rests upon his own written statement to the Police. He said he was at the Hornby Hotel but was asked to leave at 10.15 or 10.30 because he was wearing his gang patch. He then sat out in the hotel yard drinking with others. The following contains the material parts of his statement, admissible only against Te Poono, which was in question and answer form.

Q. What did you do next?

A. Left the pub in the blue Ford.

Q. Where did you go then?

A. Looking for a rage at this fellas place. I

Q. What happened?

A. We saw some AT dogs.

Q. Does AT dogs mean members of the Aotearoa chapter of the Mongrel Mob?

A. Yeah.

Q. So there is the Christchurch Chapter and the Aotearoa Chapter. Is that right?

A. Yeah.

Q. What did you do when you met up with the AT Dogs?

A. We went to look for Mona and Martin. Martin was driving the blue Ford. The AT's had just been stopped by the cops. There was 5 cars, 2 Paddy Wagons and a Dog Car. they were just leaving.

Q. So you got out of the blue Ford?

A. Yeah and asked if I can go with them.

Q. Didn't the Christchurch Mongrels wait around?

A. No.

Q. Why's that?

A. They don't get on with the AT Mongrels, you can just feel the air.

Q. Where did you go next?

A. To Martin's place. That's where the party was.

Q. Where did Martin live?

A. 50 Ely Street.

Q. Did you go into the party?

A. Yeah I took my mates in.

...

Q. What about the pakeha girl that Ox picked up?

A. She was in the van.

Q. Where was the van?

A. Out on the street, like in the sketch (see attached).

...

Q. What was happening in the van when it was parked outside the party?

A. Ox and that girl was...sex at the back. Having sex at the back.

Q. Was anyone else having sex with the girl?

A. Just me, Ox, Socks that all I know.

Q. Who is Socks?

A. Joe Chase.

Q. Do you know Ox's name?

A. No.

Q. Is he a Christchurch Mongrel?

A. No and he's not AT either.

Q. Did you have sex with her in the van?

A. In the van not the house.

Q. Did you have full sex with her?

A. No, couldn't get it up...

Q. Did you try?

A. Yeah, played with myself.

Q. Did that work?

A. No.

Q. If you could have got it up would you have had full sex with her?

A. Yeah.

Q. Did you put your penis inside the girls vagina?
A. Couldn't fit. too loose.

Q. Did you make her do anything to you?
A. She was trying to play with it because I told her to but I couldn't get it up.

Q. Did you tell her to do anything else?
A. No. I just got out of the van.

Q. Did you tell her to put your penis in her mouth?
A. No I was telling her to play with me.

Q. Was anyone else in the van with you?
A. Just only me and Ox.

Q. Was Ox in the van when you first got into it?
A. Yeah.

Q. What was he doing?
A. Just finished.

Q. Just finished having sex with the girl?
A. Yeah.

Q. Did he say anything to you?
A. No.

Q. So you just get in and started to have sex with her?
A. Yeah. She just opened her legs.

Q. Did she have any clothes on?
A. No, she had nothing.

Q. Did you talk to her?
A. Yes.

Q. What did you say?
A. My turn.

Q. What did you do then?
A. I just pulled the zip open.

Q. Did she say anything to you?
A. She just opened up her legs.

Q. Did she say anything to you when you were in the van?
A. Nothing.

...

Q. Did you ask the girl if you could have sex with her?

A. She said yeah, she just opened her legs. It was a sign.

Q. What did the sign mean?

A. Yeah.

Q. Did she actually say yes or did she just make that sign?

A. She just opened her legs.

As 50 Ely Street is not the address of the girl Melissa all this must have occurred at the first place at which the van stopped.

In Te Poono's case it seems more likely than not that intercourse took place after midnight as the jury's verdict indicates. On his own statement, which was the only evidence against him he seems to have arrived at Ely Street after the van and to have gone in to the party before he had intercourse. But there is a reasonable possibility of it having happened before midnight. That means that a reasonable jury must have entertained a doubt as to the date of the commission of the offence.

It is therefore necessary to consider whether the proviso can and should be applied. It can only be applied, for the reasons already mentioned, if it is clear that the jury were satisfied that Te Poono had no genuine belief that the girl was consenting.

The complainant's evidence-in-chief of the events at

the time the van first stopped is as follows:

'I recall the van stopping at one stage. I have no idea where that was. It stopped as I recall it only stopped twice, first time it stopped the back doors were opened and there were people outside and they just all come in and said what they liked and that. It was on the street, they were all just standing round and drinking and swearing and yahooring around. They didn't appear to be near a house that I could see. At that stage I was in the back of the van trying to put my clothes on. I had been completely naked up till then. From the time I left the hotel till the van stopped and the doors were opened would have taken 10 or 15 mins. The van had been driving around at normal speeds. When we got to the place where the van stopped some remained in the van, they didn't all get out. I don't remember who remained in the van. I am not sure if Ox remained in the van. The ones who remained in the van were all sitting drinking and laughing at me. I was still wanting to go home. I was crying and really sore. Someone then approached the van. I am not sure if it was someone who had been in the van or standing by the side of the road. A couple of people come in and held me down while another person opened my legs and had sexual intercourse. While that was happening I had to give another person oral sex. This happened while the person was having intercourse. I couldn't see if they were gang members. They appeared to be I would say Maoris. There was no lighting from the street. As to how many times I had intercourse or someone tried to have intercourse while we were parked, about 5 or 6. I am not sure how many times oral sex happened. Sodomy occurred once. Nothing else happened. The people who were coming into the van, that was just outside they were all standing just outside by the back of the van, it must have been near a house because there was music. While the people were having intercourse I was saying I wanted to go home, leave me alone, I was saying it quite loudly and every time I said it I was punched. Quite a few of the people who had intercourse with me or made me have oral sex would have hit me. The people standing around outside the van would be able to see and hear what I was saying. the van would have been at that place about 20 minutes. I made no effort to actually get away at that stage, I couldn't. I actually had to have my legs prised open again. When the car was parked they were just swearing and telling me to hurry up and do this and that. While I was in the van I would have been struck quite a few times. After that 20 mins was up the van then went on driving again. I was still trying to put my clothes on at that stage.

This evidence was not subject to cross-examination by counsel for Te Poono or Chase. Te Poono's statement has already been set out.

It is of course clear that if the jury thought Te Poono had, or might have had, an honest belief that the girl was consenting they were satisfied there were no reasonable grounds for such a belief. The evidence of the girl provided no foundation for the existence of such grounds and the only other evidence which touched on it was that afforded by Te Poono's own statement. If his statement, that the girl said nothing but by her actions signified her consent, could not have reasonably lead to a belief in consent we think the jury must have rejected the statement itself and formed the view that Te Poono intended to have non-consensual intercourse or, perhaps more likely, did not care whether she consented or not. Either of those two states of mind would negative honest belief in consent.

On this point it is material to look at the case of Hapakuku in which the verdict of rape shows that he had no honest belief in consent. Like Te Poono he did not give evidence. In his statement he said -

She was putting her clothes back on - getting dressed - and I asked her what was happening - she said "Nothing". So I asked her for a fuck. She said alright but she didn't want all the others as well. I said that I didn't know about them and only knew about me. I fucked her and she didn't mind. It was in the back of the van. I have no comment on whether others

fucked her after me or before.

It was not a gang type blocking but a willing thing - just like the whole night. Its pretty obvious isn't it that she wanted it as she knew who we were, knew our reputation and yet she came with us, so it all adds up doesn't it.

On its face this is rather more exculpatory than Te Poono's statement. Yet it was entirely rejected by the jury who must have accepted the girl's evidence of her protests during this period of time.

We are satisfied that the jury must have found that Te Poono had no genuine belief in consent and accordingly the proviso can apply to his case. And we are in no doubt that it ought to be applied.

Chase

His statement to the Police again affords the only evidence of his implication. He said he left the hotel in the van and that only one person had intercourse with her during that trip. The statement in question and answer form continues -

- | | |
|---|-------------------------------|
| Q. Where did you go to? | A. To a party. |
| Q. Where was the party? | A. Don't know. |
| Q. What happened when you got to the party? | A. I got out and went in. |
| Q. Were others having sex with the girl there? | A. Don't know. |
| Q. But there were a lot of people missing in the party. | |
| Q. Did you have sex with this girl? | A. I tried to. |
| Q. What do you mean? | A. I never had enough energy. |
| Q. How many others had sex with her? | A. There were heaps. |

Q. How many were there in the van when you tried to have sex with the girl? A. There were only two, there two while I was in the van...

I was only in the van for about 10 or 20 minutes.

He said he then returned to the party.

The Judge in summing-up to the jury put the Crown case as being that the incident must have taken place after midnight Chase 'left the hotel in another car, then transferred to another car before actually getting to the position where the van was parked'. These however were facts relating not to Chase but to Te Poono. Mr. Barker who did not raise the matter at the end of the summing-up doubted if the jury would have been misled.

However that may be the evidence is not such that the jury could be satisfied that intercourse took place before or after midnight.

In Chase's case too therefore it is necessary to consider whether the proviso can and should be applied. Some further parts of the evidence of what he told the Police must be set out -

Q. When you got in the van was anyone having sex with the girl?
 A. No, she was lying there by herself with no clothes on, nobody was rooting her.
 Q. How many of your mates had sex with this girl while you were in the van?
 A. While the van was moving there was only one person her rooted her.

- Q. Who was that?
 A. I don't know.
 Q. Can you describe this person to me?
 A. He just looked big, long, big fellow, not fat.
 Q. Was the girl screaming when this person was having sex with her?
 A. No she was calling out I love it, fuck me fuck me.

...

- Q. Did you have sex with the girl?
 A. I was just lying on top of her, it wouldn't go hard?
 Q. While you were doing this what was the girl doing?
 A. She was talking to me.
 Q. What was she saying?
 A. She was just mumbling. Mumbling.
 Q. You can't remember what she was saying?
 A. No.
 Q. Did your mates tell you that they had sex with this girl?
 A. No.
 Q. Did you see any other persons having sex with this girl?
 A. Yes.
 Q. How many?
 A. Two of them. One was fucking her and the other one was on the side. Lying beside her. He must have been waiting. I was only in the van for about 10 or 20 minutes.
 Q. Do you say that the girl was not screaming or complaining while this was going on?
 A. No, sounded like to me that she was liking it.
 Q. What did she say?
 A. She said to me that she had been blocked from the Black Power before.
 Q. When you got in the van did you have to wait your turn?
 A. No.
 Q. You just got straight in a tried to have sex?
 A. I never got in, I got on her.

...

- Q. Why did you think police were looking for you?
 A. For that sheila.
 Q. What for?
 A. For questions.
 Q. Because you raped her?
 A. We never raped her, she more or less gave it.
 Q. What do you mean more or less gave it?
 A. She wasn't fighting us off, she was just saying to me one more.

The assertions in the statement that the girl was calling for intercourse are directly contradictory to her own evidence which was indisputably accepted by the jury in the case of Hapakuku. Had the jury given credence to Chase's oral statements to the Police or even thought they might have been true they must have acquitted on the footing that an honest belief in consent had not been negatived. Their verdict in our judgment shows they found that either he had no such belief or did not care whether the girl consented or not.

In Chase's case too we would apply the proviso.

In the result the three applications for leave to appeal are dismissed. The point taken was ingenious, as the Judge indicated to the jury, and this Court has considered it carefully. If we thought that on the evidence any of the three applicants had lost a reasonable chance of acquittal by the jury because of the Judge's use of the word 'clever' or the general tone of his observations about the questions of date, we would not have hesitated to quash the convictions. As it is, however, we are satisfied that, on the evidence that the jury must have accepted, there was no reasonable possibility of an acquittal in any of the three cases.

W. S. J. (S. J.)