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IN THE COURT OF APPEAL OF NEW ZEALAND

C.A. 300/84

THE QUEEN

v.

ATHOL TREVOR WATERS

447
Cited in
R v Cook
[1986] 2 NZLR

Coram: McMullin J.
Somers J.
Casey J.

Hearing: 20 March 1986

Counsel: R.B. Squire for Appellant
C.T. Young for Crown

Judgment: 7 May 1986

JUDGMENT OF THE COURT DELIVERED BY SOMERS J.

Athol Trevor Waters applies for leave to appeal against his convictions in the High Court at Invercargill on 31 October 1984 on counts of wounding with intent to do grievous bodily harm, rape, and conversion of a motor car. The two grounds advanced both relate to the summing up of the trial Judge. The first, which is claimed to effect all charges, is that the jury was not adequately directed as to the relevance of alcohol or drugs taken by Waters. The second relates only to the count of rape and is that the Judge failed to direct the jury adequately as to intent on that charge.

As long ago as Saturday 30 June 1984 Waters together with a man called Wilson and the latter's wife set off from Invercargill at about 5.30a.m. in a car owned by Wilson and driven by Mrs. Wilson. They intended to go into the countryside to drink at hotels, to sell some cannabis, and to shoot rabbits. Earlier, Waters had borrowed two rifles. About an hour before they left Invercargill Waters was described by Wilson's sister, with whom he lived, to be "out of it" and "stoned". Mrs. Wilson agreed with that description. On the way out of Invercargill Wilson bought a large bottle of wine and while Mrs. Wilson drove the two men drank some of it and smoked cannabis. They called at a house in Riverton and according to Wilson "had a couple of smokes of marijuana, had some hash on the end of a needle." Mrs. Wilson described this occasion as a "couple of cannabis smokes and a couple of spots of hash." Then all three went to the Riverton Hotel where they had some liquor. Waters was said to have had two rum and cokes. They then set off in the car towards Winton. At about 10p.m. they turned aside on a gravel road. Waters told the others he wanted to collect some cannabis which had been hidden. He left the car taking a rifle with him but returned shortly after to get Wilson's help. After looking at the place where the cannabis was said by Waters to be hidden Wilson decided he needed his gumboots. The two men then set off to return to the car with Wilson in the lead. Without warning Waters fired the rifle and shot Wilson in the right ear. Wilson said he turned round to remonstrate and was set upon by Waters with the butt of the rifle. He said he was hit about six times,

two or three of the blows being upon his head. There was evidence of wounds to Wilson's head. Wilson was unable to give any reason why Waters should attack him and he deposed that Waters kept saying he was sorry as he hit Wilson and referred to money that Wilson owed him. Wilson said no money was owing. In the end Wilson gave Waters some money and ran off.

Waters then went back to the car and told Mrs. Wilson that they would meet Wilson further on. He drove her off in the car, badly it appears on the gravel road, but normally once he reached the highway. After a short time he stopped and tied Mrs. Wilson's arms behind her back and then drove to Invercargill holding the cord from Mrs. Wilson's arms in one hand. When Mrs. Wilson tried to reason with him Waters threatened to gag her and put her in the boot of the car.

Waters drove to a flat in Invercargill belonging to a friend. There he sat Mrs. Wilson on a bed and tied her feet to one end with a digital clock cord while he moved the car from the front of the flat. He then returned and cut the cord binding Mrs. Wilson's hands and tied them separately to each side of the bed end. According to Mrs. Wilson he then left the room but presently returned, cut the cord around her feet and raped her. Later, around 4 a.m. she said he raped her again. On this occasion she said her left arm only was tied to the head of the bed. When he left she said he asked if the car was insured and said that if the Police chased him he would 'write off' the car. The complainant got free and left the house at once meeting a

policeman, no doubt there because Wilson back at Winton had sounded the alarm. At that time she had marks on her wrists and a piece of cord still tied to one ankle.

Waters did not give evidence. When seen by the Police on Monday, 2 July 1984, Waters said, in effect, that the shooting was an accident and that after it occurred Wilson tried to grab the rifle and he, Waters, had swung it round hitting Wilson. He denied hitting Wilson on the head. As to the later events he told the Police that at the flat Mrs. Wilson had asked him to get into bed with her as she was cold; that she had said that if you're going to do it to untie her hands; that he did not think he "gave her one as when you're on speed your cock shrinks" (he measured with his fingers a half inch span approximately); and that he had been taking duramoyne. A little later he told another policeman that he had not gone to see the Police earlier because he was 'freaked out'.

The Crown case was that Waters attacked Wilson as part of a plan to get Mrs. Wilson away from him so that he might have intercourse with her. The case for the defence as put to the jury was that the shooting was an accident, that Wilson was not hit on the head by Waters, the injuries to Wilson having been sustained in some other way, and that Mrs. Wilson's evidence about intercourse was false the facts being as Wilson had told the Police. It was also put to the jury in respect of the charge of wounding with intent that by reason of the liquor and drugs Waters had taken he had no such intent as was involved in the charge.

It is against that background of evidence and in the context of the issues before the jury that the two grounds of appeal must be considered. The first concerns the directions given as to alcohol and drugs.

On the evidence that was given the case is not one in which it could be suggested that Waters was so affected by liquor or drugs, or a combination of the two that he was unable to form any rational intention at all, that he was in effect just an automaton. And it is right to say that counsel did not suggest that. It is a case, at least so far as the wounding charge is concerned, in which the jury had to be satisfied not that Waters was capable of forming the relevant intent but that he did in fact form that intent. See R. v. Kamipeli [1975] 2 N.Z.L.R. 610; R. v. Henderson (C.A. 186/84; judgment 24 October 1984; R. v. Hart (C.A. 117/85; judgment 24 February 1986). The issue on the first ground of appeal is whether the summing up made this sufficiently clear to the jury.

The direction given by the Judge was as follows -

"It is clear that on this night in question the accused was affected by drugs and liquor. Under our law intoxication, and it does not matter whether it is intoxication as a result of alcohol or drugs, is no excuse for the commission of a crime. It is true that the vast majority of crimes that come before this Court are committed by people who are affected at the time either by liquor or drugs. It is a sad fact of life. It is true in a number of cases that the crimes would never have been committed but for the liquor or the drugs. What is important is the onus on the Crown to prove what was the intention of the accused. A drunken intention is the same as a sober intention provided that the man is not in such a state as to be delusional, in

which case he is innocent, or to have no intention at all. Now it is frequently said in these cases that people were intoxicated therefore they could not have intended the consequences of their act. Again it is a matter of inference for you to take into account and it is not the inference of what an ordinary sober person would have done, it is what this accused was doing at the time in the condition in which he was in. But counsel has drawn your attention to the fact that he was driving a motor car. He knew exactly where he was going when he brought this woman back to the flat. Intoxication can really only be an answer to a crime if it gets you to the stage where you are left in a doubt as to whether the man had an intention. In other words if he was unconscious but physically moving if that is not too Irish a way of describing it, if one was acting automatically without any deliberate thinking process at all then there would not be any intent. But if the intent was merely something that was important either because a person was drunk or intoxicated or affected by drugs it is just as valid an intent for legal purposes as that of a person who was sober. There does not appear to me to be evidence from which you could infer from the conduct of anyone on that night that they were so intoxicated or affected by drugs as not to know what they were doing but that again is a matter for you and in that respect I remind you that the onus is on the Crown, it is not on the accused, it is on the Crown, to prove the intent which is a necessary ingredient of each charge. If you are left in a reasonable doubt about it then clearly the fact that a person had had a considerable amount of liquor and drugs is relevant in determining whether they had an intent or not. But it seems difficult to see that the actions that were described on this particular night were committed without any intent at all. If there was not any intent at all then what was the intent and if you are then convinced that the only intent was to have intercourse with her without her consent or to wound him with intent to cause grievous bodily harm then the Crown has proved that matter. If, however, considering everything, and particularly having regard to the state of intoxication, you are left in a doubt about it I repeat again the accused is entitled to the doubt."

(The emphasis has been added)

The passages emphasised all convey the understanding that liquor and drugs were only material if they had so affected the accused that he acted without knowing what he was doing. The

repetition of this theme is such that it cannot safely be said that the jury would understand their function. Having read and reread the direction several times we are of opinion that the Judge in fact addressed the jury on capacity to form an intent and not on whether, having regard to what they found as to liquor and drugs, Waters in fact had that intent which the Crown was obliged to establish. Accordingly we think there was a misdirection.

Before considering its effect it is desirable to consider the second ground of appeal namely that the Judge gave no directions on the intent involved in the crime of rape.

Rape was at the material time defined in s.128 of the Crimes Act 1961 as follows -

"Rape is the act of a male person having sexual intercourse with a woman or girl -

- (a) Without her consent; or
- (b) With consent extorted by fear of bodily harm or by threats; or
- (c) With consent extorted by fear, on reasonable grounds, that the refusal of consent would result in the death of or grievous bodily injury to a third person; or
- (d) With consent obtained by personating her husband; or
- (e) With consent obtained by a false and fraudulent representation as to the nature and quality of the act."

There are no words indicative of the existence of an intent. But we entertain no doubt that the elements of the crime are the act of intercourse, the absence of consent, and the intent to have non-consensual intercourse. That is to say that

intent is not merely the intention to have intercourse but to have it without the consent of the woman or, what is essentially the same thing, to have it not caring whether the woman does or does not consent.

This is clearly established in England in Director of Public Prosecutions v. Morgan [1976] A.C. 182. There s.1(1) of the sexual Offences Act 1956 provided that it was an offence "for a man to rape a woman". While that phraseology differs from that used in s.128 of the Crimes Act 1961 the reasons which led the House of Lords to conclude that intent to have non-consensual intercourse was an element of the crime are largely applicable to the New Zealand enactment. The crime is so serious that it is unthinkable that it should be unattended by an intent. The same view was reached in Victoria in R. v. Flannery and Prendergast [1969] V.R. 31 and in new South Wales in R. v. McEwan [1979] 2 N.S.W.L.R. 926. It is implicit in the decision of this Court in R. v. Paku (C.A. 65/79; judgment 2 October 1979). (A contrary view has been expressed on the effect of the Criminal Code in Tasmania: Arnol v. The Queen [1981] Tas.R 157; and see also Attorney-General's Reference No.1 of 1977 W.A.R. 45, on which cases see also the article by J.B. Blackwood in (1982) 56 A.L.J. 474).

The consequence is clearly expressed by Lord Hailsham of St. Marylebone in Morgan -

Once one has accepted, what seems to me abundantly clear, that the prohibited act in rape is non-consensual

sexual intercourse, and that the guilty state of mind is an intention to commit it, it seems to me to follow as a matter of inexorable logic that there is no room either for a "defence" of honest belief or mistake, or of a defence of honest and reasonable belief or mistake. Either the prosecution proves that the accused had the requisite intent, or it does not. In the former case it succeeds, and in the latter it fails. (214F)...it is my opinion that the prohibited act is and always has been intercourse without consent of the victim and the mental element is and always has been the intention to commit that act, or the equivalent intention of having intercourse willy-nilly not caring whether the victim consents or no. A failure to prove this involves an acquittal because the intent, an essential ingredient, is lacking. It matters not why it is lacking if only it is not there..." (215C)

It must be stressed that is not a case under the new s.128 enacted by s.3 of the Crimes Amendment Act (No.3) 1985 which provides that intercourse must be without consent and 'without believing on reasonable grounds that she consents to that sexual connection'. Upon the analysis made in Morgan, it may be that the mental element now required is not compatible with any general intent to have non-consensual intercourse.

It is a commonplace that a summing up should be tailored to the case and what is necessary to be said about intent will depend upon the evidence led. Proof of intercourse and want of consent if there be no more will be sufficient to manifest the necessary intent. Commonly however where consent is in issue there will be other evidence suggestive of belief in consent, mistake or some other feature which requires a closer examination of the state of mind of the accused.

In the instant case, putting to one side the question of liquor and alcohol, the jury might well have been told that if

they accepted the woman's evidence of intercourse and the circumstances in which it was had, that is to say she did not consent and was tied down, such facts would clearly demonstrate the necessary mental element in the crime. Indeed on that hypothesis Mr. Squire rightly accepted that without any direction at all the case was one in which the proviso would be applied.

We are of opinion that the defects in the direction about liquor and alcohol - which it should be noticed did include a reference to intent to have intercourse without consent - do not affect the verdict on the count of rape. In the first place the defence to this charge was not that there was no intent but that there was no intercourse at all and that Waters' approaches were well received and failed due to his physical incapacity. Next there was a significant lapse of time between the events near Winton and the complaint about the happenings at Invercargill. That the jury accepted Mrs. Wilson's evidence is apparent from the verdict. They must have accepted that intercourse took place, that she did not consent, that she was tied down. The acts of Waters so disclosed cannot leave any doubt whatever as to his criminal intent.

But we think it is otherwise in the case of the remaining convictions. The wounding charge carried a specific intent of causing grievous bodily harm. Even if the jury accepted that Wilson was clubbed by Waters it is not impossible that properly directed they may have concluded that while Waters intended to hit Wilson he may not by reason of the state of his faculties

have formed the intention to do grievous bodily harm. And on such a direction the shooting may have been viewed differently. we include the car conversion since its beginning was in such close sequence to the wounding.

Leave to appeal is given; the appeal against the convictions for wounding with intent and conversion of the car are allowed; those two convictions are quashed and a new trial thereon is ordered. The appeal against conviction on the charge of rape is dismissed.

Hawes J.

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