IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA

CA NOS 7/07, 13/07.

	IN THE MATTER	of
	BETWEEN	**TANGAROA UEA** **Appellant**
	AND	**THE POLICE** **Respondent**
Before:	Barker JA (Presiding) Fisher JA Paterson JA	
Counsel:	Mr N George for the Appellant Mr T Elikana and Ms M Henry for the Respondent	
Date of hearing:	26 November 2008	
Date of decision:	29 November 2008	

JUDGMENT OF THE COURT OF APPEAL

Introduction

1. Mr Uea was found guilty by a jury and convicted of 10 offences of a sexual nature, namely two of rape, one of attempted rape, two of indecently assaulting a girl between the age of 12 and 16 years, one of committing an indecent act on a girl between the age of 12 and 16 years, and four of indecently assaulting a girl over the age of 16 years. He was sentenced to a total term of imprisonment of 7 years 6 months and has appealed against both the convictions and the sentence.

The Conviction Appeal

2. In his application for leave to appeal, Mr Uea stated several grounds and the ones relied upon at the hearing were:

(a) The trial judge erred in fact and law in his directions to the jury. Some of the alleged errors, set out below, are relied upon as discrete and distinct grounds of appeal.

(b) An unbalanced summing up, favouring the Crown.

(c) The failure to direct the jury on the possible consent of one of the complainants.

(d) A failure to direct the jury on evidence of similar conduct by the three complainants.

(e) A misdirection by the Judge on the appellant's alibi defence.

(f) The manner in which the charges were laid.

(g) A breach of s. 7 of the Juries Act 1968.

Unbalanced Summing Up

3. Putting aside for the moment the consent, similar fact and alibi issues the allegations of an unfair and unbalanced summing-up are summarized in this Court's words as:

(a) Far greater emphasis on the Crown's case than on the appellant's case.

(b) Failure to identify the main differences between the two cases so that the jury could focus on them.

(c) Failure to refer to evidence given by defence witnesses, particularly Mr Uea's wife.

4. This was a case where there were three complainants and 14 charges. Some were alternative charges, and there were representative charges. A lack of consent was an element in some of the charges but not others. The charges were laid under five different statutory provisions. Mr Uea's defence was that the allegations were false; the events did not happen. The basic issue for the jury was credibility.

5. Mr George submitted that His Honour summed up the Crown's case in 105 sentences but only required 50 sentences to sum up Mr Uea's case. Fairness and balance does not require an equal amount of time to be spent on each case. Where there are numerous allegations which have to be explained to a jury, each with its own factual context, a judge is expected to summarize the alleged factual position to the jury. In this case Nicholson J did that partly when explaining the elements of the charges and also when he summarized each party's case.

6. The defence to each of the 13 charges was that the complainants were not telling the truth. In a case such as this, it is inevitable that more time needs to be spent on the Crown case. Even repeating 13 times that "the accused denies it happened" takes far less time and words than summarizing the Crown's factual allegations which must be proved to satisfy the elements of the different charges. It is the context of what is said and not the number of sentences which the judge employs to describe the respective cases which is important. The respective lengths of each description can not assist Mr Uea in a case such as this.

7. While there are matters relating to the defence case which could have been put to the jury, we are satisfied that apart from the alibi and consent issues, Mr Uea's defence was adequately put to the jury. When summarizing the Crown's case, the judge noted that Crown counsel "referred to the accused's evidence as being adamant that these things did not happen and the accused's evidence the girls only came to his house when there were people around...". In summarizing defence counsel's submissions he noted the following submissions:

- "ask yourself a one line question, where is the evidence which relates to the charges"

- "He said the defence had tried to produce evidence of where the accused was at the critical times and that this evidence had not been discredited or rebutted by the Crown"
- "He said that [the complainants'] evidence of alleged sexual intercourse relied only upon her word and there was no medical evidence which supported her allegation that she had been penetrated"
- "...the Crown had failed miserably that any of the alleged physical acts occurred and therefore the accused did not have the opportunity to do the alleged acts"
- "He pointed out that credibility, believability of the complaints on the one hand and the accused and his wife on the other was the key issue in this case and he asked "who do you believe, the servants of God or these 3 wayward girls?"
- "Mr George then made detailed submissions about first each complainant's evidence and criticised that evidence, second, about the way each complainant gave evidence, third, the lack of trauma and emotion by each of the complainants and fourth, the lack of complaint by each of the complainants to members of their families after the alleged abuse occurred."

8. The jury was clearly directed on Mr Uea's defence. The general ground of an unbalanced summing-up can not succeed. It is necessary to consider whether any of the specific grounds has merit.

Possible consent

9. At the trial "consent" was not raised by Mr Uea's counsel either in his opening or closing addresses. The defence was that the allegations were false and the events did not happen. Nevertheless, Mr Uea's counsel cross-examined each complainant on whether she had consented to the alleged activities.

10. The Appellant's "similar fact" issue is in effect an allegation that the Judge was required to direct the jury that all three complainants condoned the actions of Mr Uea, since they returned to the Mission House often after the alleged offences had been committed. It is not a similar fact defence, but a submission that there were factual matters not referred to by the Judge in his summing-up which were relevant to whether the complainants consented to Mr Uea's actions. Consent is a defence to some of the charges and the Crown must satisfy the jury that the complainant did not consent to the actions alleged in those charges.

11. We find that it was not necessary to have directed the jury on these so called similar facts. The jury would have been well aware of the frequency of some of the alleged activities. Some of the charges were brought on a representative basis. While a counsel of perfection may suggest the matter should have been referred to by the Judge, we do not see that the failure to mention the matter could have led to a verdict contrary to the evidence.

12. As noted, defence counsel cross-examined the complainants on their consent to the activities. In the cases of the two older complainants, who did not allege rape, they denied consent. There was thus no acceptable basis on which a consent defence could be mounted to the charges based on their complaints. Mr Uea, who

gave evidence, did not in his evidence lay the basis for a consent defence.

13. The position is different in respect of the charges arising from the evidence of the youngest complainant. She was the alleged victim in respect of the two rape charges and attempted rape charge. The Crown was required to prove beyond reasonable doubt that she did not consent to the sexual activity. In her evidence-in-chief and initially during cross examination she denied consenting to the activities. However, her cross examination ended with the following exchange:

> *"Q. Do you understand the meaning of, or what do you understand the meaning of the word rape?*
> *A. It's when a male has intercourse with someone that did not want to have, it's when a male wants to have intercourse with someone or a female when that female did not want to have intercourse.*
> *Q. [X] this didn't happen to you did it?*
> *A. Well, yes it did.*
> *Q. But you agreed didn't you?*
> *Court: I think she's thinking, do you want some time to think of your answer or not?*
> *A. Yes.*
> *Court: Your answer is yes, you want time or yes you agreed?*
> *A. Yes I agreed.*
> *Mr George: Thank you Sir, no further questions."*

14. Crown counsel then began his re-examination and his first exchange with the complainant reads:

> *"Mr Elikana: [X] on the first night of the 18th of April 2006, we just pick up where Mr George left off, do you agree that you were raped on that night?*
> *A. Yes.*
> *Mr George: I object to that line of questioning.*
> *Court: That is leading Mr Elikana, I won't allow that.*
> *Mr Elikana: In terms of what you said to the Court over cross examination regarding what rape is, how do you see what happened to you on the 18th?*
> *Court: Mr Elikana I intend to next hearing explain what rape is and has to be with the full consent of a person who is able to*

give consent and you well there's a law which says .....(inaudible)"

There was no further re-examination on the issue of consent. There was therefore evidence from the complainant, which was not modified except by an answer elicited by a grossly leading question, which was evidence of consent. The complainant should have been re-examined, in a non leading way, as to the meaning of her answer "Yes I agreed".

15. Although Mr Uea's defence was that the allegations were false, the complainant's evidence raised consent as a possible defence. The Judge had a duty to direct the jury that the Crown had to prove beyond reasonable doubt that the complainant did not consent.

16. His Honour did direct on consent in his summing-up. In his introductory remarks, he noted that if a charge involved consent, the jury had to go on and consider the aspect of consent. Then when describing the elements of the charge he said:

"Now to consent, for there to be a consent, it must be full, in other words the woman or girl must say yes, in effect I agree to you having intercourse tonight for example, consent to say kissing or intimate touching but do not do sexual intercourse, must be full consent, consent to sexual intercourse, it must be voluntary, that is the girl is quite willing, voluntary, it must be free, there must not be any circumstance where the girl cannot make a free decision and it must be informed, the girl must know the nature and quality of the act that she is consenting to. Now in this case the crown allege that there was sexual intercourse and it was without the consent of the two complainants involved and one of them is {X}, no, only one complainant, [X]. The defence didn't go that area because they said it never happened but if you find proved beyond reasonable doubt that it did or any one of the particular charges, then you've got to consider the aspect although the defence haven't relied on it of whether it was with the consent of [X]. Now I am going to deal more particularly with the aspect of the evidence of consent, not only of [X] to the rape charges but also indecent assault relating to the other two complainants, I'll deal with that last but pressing on now, it must be real genuine consent of the sort I've stated."

Then His Honour came back to the topic when he said:

"*On this aspect of consent, or believe of consent, I just remind you of the evidence which may be pertinent as I have noted it and recollect it, so far as [X] is concerned, consent is not an issue with relation to counts 1 and 2 and 3 as I've explained to you but it is relevant to the counts of rape or attempted rape and in that regard I suggest in deciding if you are to the situation of deciding whether the Crown has proved beyond reasonable doubt that she did not consent and that the accused did not believe that she was consenting you perhaps should take into account the background evidence that the accused's conduct with her started with kissing her and touching private parts when she said she was scared and confused because he said it wasn't wrong because it was part of the ministry and it would help her through life and told her verses from the bible. She said that I thought that there was nothing wrong with it because I respected him because he had the authority to speak the word of God. So that was her state of mind during the period when she said in December and through to April he indecently assaulted her by kissing and touching her. And that you may feel if you accept that was also her state of mind when the events of April of alleged rape or attempted rape occurred. When on Tuesday the 18th her evidence was he told her to go to his bedroom, took off her clothes, put the penis in her vagina. But on this she actually said, her evidence was relating to that first evening in the bedroom, I was screaming loud, I was pushing him and he wouldn't get off and the last time I pushed he got off. So her evidence was that on that particular occasion the first alleged occasion of rape of her, she said I was screaming loud, I was pushing him and he wouldn't get off. Now if that is so, you accept that evidence you may feel that she clearly was not consenting to what he was doing and that he continued knowing that she wasn't consenting. But that is a matter for you. Now on the next occasion, the alleged rape on the 19th of April, [X's] evidence was again told to go to bedroom , clothes taken off, couldn't put his penis into the vagina, asked for a blow job which she did and she said I thought what we were doing was right. The pastor told me it was part of the ministry. Now with regard to the third occasion in the bedroom, week of the Manea games, again she said, told me to go to the bedroom, clothes taken off, he forced his penis into my vagina and she said I was in pain and I was telling to get off but he wouldn't listen and was pushing me down, I was crying and screaming and after 15 to 20 minutes he took his penis out and said sorry. Now if you find that there was such sexual intercourse, with considering the question of whether she consented, take that evidence into account, when she said he forced his penis into her vagina, she was in pain, she was telling him off but he wouldn't listen and was pushing me down. Now if you accept that evidence, you may feel that is clear evidence*

that she did not consent that he could not believe that she was consenting and when she said when he finished he said sorry."

We note the Judge's references to "the absence of belief that the complainant is consenting" is in error as a belief of consent is not an element which the Crown must prove under s. 141 Crimes Act 1969 (i.e. the rape charges).

17. Consent having been raised by the complainant's evidence, and there being an apparent admission of consent, the issue of whether the consent if given was truly given by a person who was in a position to make a rational decision needed to be addressed.

18. We accept that the direction given by the Judge covered both consent and whether it was freely given. It referred to many of the relevant matters the jury should have taken into account when considering these two factual matters. However, there was no reference to the admission referred to in paragraph 13 above. Members of the jury may not have recalled the words "Yes I agreed", and in our view they should have been directed to this answer. It may or may have not altered their verdicts, but it was a vital and central piece of evidence to be considered when determining whether the Crown had discharged the onus of proof. It was the one piece of evidence which supported the appellant and the consent direction was, in this respect, unfair to the appellant. The consent direction was unbalanced in that it only referred to evidence which favoured the Crown.

19. We have considered the Judge's lengthy direction on consent and whether on the facts, including those referred to in his direction, we are satisfied that there has been a miscarriage of justice. It is our view that the failure to refer to the complainant's admission caused a substantial miscarriage of justice in terms of s. 60 of the Criminal Justice Act 1980-1981.

20. In the circumstances we therefore allow the appeal against the two rape convictions. The evidence of consent could apply only to the actual act of intercourse, and not to a charge of attempted rape. Consent is not a factor in the other charges relating to this complainant and the appeal against those other charges can not succeed on this ground. Nor can the appeal in respect of the convictions relating to the other two complainants as there was a lack of evidence which could have assisted the appellant.

Alibi Defence

21. Mr George, counsel for the appellant, did not raise the possibility of an alibi in his opening submission. No notice of alibi had been given. Witnesses were called for the defence, presumably to establish an alibi. In his final address, Mr George made submissions on an alibi defence. He referred to the alleged offences being committed when the appellant was somewhere else and said the "irrefutable alibi of the accused cannot be torn apart, cannot be broken."

22. The Crown was entitled to have been given notice of alibi. Although there may not be a statutory provision of the Cook Islands requiring notice, s. 3 Criminal Procedure Act 1980-1981, provides that as to any matter of criminal procedure for which no special provision is made by that Act or any other law in the Cook Islands, the law as to criminal procedure for the time being in force in New Zealand shall apply. Counsel for the appellant was obliged to give notice of alibi to the Crown, since that was part of the New Zealand law of criminal practice in force at the relevant time.

23. The failure to give such a notice would entitle the Crown to seek leave to call rebutting evidence, and, if necessary obtain an adjournment. No application for such was made.

24. An alibi defence is not easy to run against a representative charge, where it is alleged there were several incidents. In this case the factual basis for an alibi defence was not made out in the evidence given.

25. The first alibi witness sometimes looked after the Mission Home. She gave evidence of the appellant saying grace and eating with teams at the Manea Games which were on at a time when some of the alleged offences occurred. She was not sure whether Mr Uea always said grace. She said he usually hung around until late in the evening. The non-specific nature of her evidence was not a solid basis for an alibi.

26. Another witness gave evidence similar to the first witness as to the appellant's usual routine at the Manea Games. However, apart from the evidence being of a general nature it was undermined when she said:

> *"some nights he was there but then he left, he didn't stay with us until the end of the night."*

27. The final alibi witness, although giving evidence similar to the other two witnesses, was also unspecific. He said Mr Uea was usually there, sometimes he would say grace, but sometimes it was someone else. He did not recall whether Mr Uea would be there at the end of the evening.

28. Although we accept that the Judge should have directed the jury that the onus of proof did not rest with the accused and the jury needed to be satisfied beyond reasonable doubt that the accused was not absent as he claimed to be, before it could find the accused guilty, the failure to so direct did not lead to a miscarriage of justice. A solid basis for an alibi defence has not been made out.

Other matters

29. None of the other grounds of appeal can assist Mr Uea. The manner in which the charges were brought could not be a ground for appeal, nor could the time the Police took to investigate the complaints. There was ample evidence upon which the jury could be satisfied that there was penetration on the rape charges.

30. Although the breach of s. 7 Juries Act 1968 is of concern, the trial proceeded with a jury of twelve. No objection was taken to the position at the time of the trial.

31. Section 7 Juries Act requires the Registrar to call not less than 36 potential jurors and summon them to Court. Only 17 responded to the summons in this case. The intent of the provision is to have sufficient jurors to allow the parties to exercise all their statutory challenges if they wish to do so. The Registrar should ensure, by prosecuting those who fail to appear if necessary, that the community takes its obligation to respond to such summonses seriously.

Result

32. The appeal against conviction is allowed in part. The two convictions for rape are quashed and in their place we substituted convictions for the alternative charges of "*did have sexual intercourse with a girl over the age of 12 years and under the age of 16 years, not being his wife" (s. 174 Crimes Act 1969).* This Court has power, under s. 56 Judicature Act 1980-1981, to make such an order. Consent is not a defence under s. 174 Crimes Act 1969, and

the jury's verdict found the other elements of the charges under s. 174 proved. It does not order a retrial on the rape charges

Sentence Appeal

33. The Court, in view of its decision in *The Queen v Katuke Katuke CA 3/07,* does not consider the sentences imposed manifestly excessive. The Judge took into account the relevant considerations. While it is accepted that the Sentencing Act in New Zealand may be more severe than in the Cook Islands, the sentence imposed is considerably below that which would have been imposed in New Zealand.

34. In view of the findings on the conviction appeal the sentences on the rape charges are set aside. This was a case of a Pastor, in a position of trust, indulging in inappropriate sexual behaviour with teen age girls. This Court imposes a sentence of two years six months on each of the s. 174 charges, such sentences to be concurrent with each other.

35. The other sentences imposed by the sentencing judge will stand and be served concurrently. However the concurrent sentences under s. 174 will be cumulative to those other sentences. This rneans that the overall result is that the appellant will serve a sentence of 5 years.

Barker JA Fisher JA Paterson JA