Supreme Court of New Zealand
Te Kōti Mana Nui

17 June 2015

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

AH-CHONG v THE QUEEN

(SC 93/2014)

[2015] NZSC 83

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

The appellant was convicted on one count of assault with intent to commit sexual violation under section 129(2) of the Crimes Act 1961 following a jury trial in the District Court.

The Crown alleged that the appellant, who was a co-worker of the complainant but did not know her, had followed her into the women's bathroom, grabbed her from behind, pressed himself against her and prevented her from leaving, all in an attempt to have sexual intercourse with her. The Crown said that the complainant had managed to free herself only when the appellant had let go of her with one of his arms to remove her clothing.

The appellant accepted that he had followed the complainant into the bathroom, but claimed he did so because he honestly believed that she was interested in a sexual encounter with him and desisted immediately when he realised that she was not.

At trial, the Judge directed the jury to find the appellant guilty if they were satisfied beyond a reasonable doubt that the appellant had assaulted the complainant in the manner she alleged, that he intended to have sexual

intercourse with her, that she did not truly consent to intercourse and that the appellant did not honestly and reasonably believe she was consenting. The latter direction was based on this Court's decision in *L v R* [2006] NZSC 18, [2006] 3 NZLR 291, in relation to attempted rape under s 129(1) of the Crimes Act.

The appellant appealed against his conviction to the Court of Appeal on the ground that the trial Judge's directions were wrong but the Court rejected the appeal.

The Supreme Court granted leave to appeal on the question whether the trial Judge's direction to the jury on the mental element of the offence of assault with intent to commit sexual violation in section 129(2) of the Crimes Act was correct.

The appellant submitted the trial Judge was in error in treating the offence of assault with intent to commit sexual violation in section 129(2) similarly to the offence of attempted sexual violation in section 129(1). In relation to attempted sexual violation this Court held in *L v R* that, where a complainant did not consent to sexual intercourse, the mental element is satisfied if the accused had a mistaken belief that the complainant was consenting but that belief was unreasonable. The appellant submitted that the mental element of assault with intent to commit sexual violation should be different, so that an honest belief that the complainant was consenting was a defence, even if that belief was unreasonable.

By a majority comprising Elias CJ, McGrath, Glazebrook and Arnold JJ, the Supreme Court has dismissed the appeal.

The majority has held, on the basis of a contextual reading of the statutory language, the general policy of the sexual offences provisions and practical considerations, that the mental element for the offence of assault with intent to commit sexual violation should be approached the same way as for the offence of attempted sexual violation. The majority considered that it would undermine the proper approach to the intention to commit sexual violation element of the offence for an inconsistent standard to be applied to the assault element.

Moreover, the majority is satisfied that, even if the appellant's submission was accepted, he was rightly convicted because, on the facts, there was nothing to indicate that he had an honest belief in consent if the jury accepted, as it did, the complainant's version of events.

William Young J has dissented, holding that the Judge should have instructed the jury that the appellant should be found guilty only if the jury were satisfied that he intended to have sexual intercourse with the complainant irrespective of whether she consented. William Young J would have allowed the appeal and ordered a retrial.

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