CASE COMMENT

RAPE: PROBLEMS OF CONSENT: *R.* v. *KAITAMAKI* [1980] 1 N.Z.L.R. 59.

In this case the Court of Appeal augmented, or at least clarified, the ambit of the crime of rape as defined by section 128(1)(a) of the Crimes Act 1961.

The facts of the case are relatively straightforward. The defendant was charged with, and convicted of, burglary and rape. The Crown's evidence showed that the defendant, having burgled a house, had sexual intercourse with the complainant, an occupant of the house, twice without her consent. The evidence of the defence was to the effect that the complainant had consented to the first act of intercourse in full and that she had also consented to the penetration on the second occasion, but that at some time thereafter and during the continuation of the intercourse, she withdrew her consent. At the least, the defence contended the evidence showed that the defendant honestly believed that she was consenting, with his becoming aware of her lack of consent only after he penetrated her on the second occasion. The trial judge directed the jury that if they found that the defendant continued to have intercourse after he realised that the woman was not consenting, it was rape, although prior to that he had thought she was consenting.

On appeal against this direction, the defence contended that because section 127 of the Crimes Act 1961 said that for the purposes of the rape section, and the other sexual crimes involving intercourse in Part VII of the Act "sexual intercourse is complete upon penetration", the question of consent, or the defendant's honest belief as to consent, must be determined as at the time of penetration only. The Court of Appeal, Woodhouse J. dissenting, dismissed the appeal, holding that section 127 did not obviate in the rape situation the generally accepted concept that a continuing act which is initially innocent may become criminal during its course as a result of a change in the defendant's beliefs about that act.

This outcome may appear to be correct and entirely supportable. Yet, the vigorously dissenting judgment of Woodhouse J. and the fact that counsel for the appellant was, at the time of writing, preparing to make application to the Court of Appeal for legal aid to enable the case to be heard by the Privy Council, suggest that the issues raised are

complex and contentious. It is now proposed to deal briefly with at least some of these issues.

The first major issue over which the judges of the Court of Appeal were at odds was the question of consent. It is, of course, clear that if a rape complainant consented to intercourse, or (since *D.P.P.* v. *Morgan* [1976] A.C. 182) if the defendant holds an honest belief that the complainant was consenting, the person accused of rape should not be convicted. Actual consent will negative the *actus reus* of the crime, while his belief as to the existence of consent will negative the *mens rea.*

The point in dispute concerned the significance of consent, or honest belief as to consent, at the commencement of intercourse and to what extent this consent is revocable by the complainant. Where there is no consent to penetration but consent is given freely after this time, the crime of rape is still committed. This is the result of the statutory provisions found in a number of common law countries which state that the slightest penetration of the female organ by the male organ is sufficient proof of sexual intercourse to establish liability in crimes involving sexual intercourse. *Kaitamaki* was concerned with the converse situation—the issue is whether the same result is attained where the woman consents, or the man believes she consents to penetration, however slight, but thereafter realises that she is not consenting any longer and he nevertheless continues to have intercourse with her.

It is convenient to deal first with the attitude of Woodhouse J. His Honour looked at the nature of the crime of rape as a criminal invasion of the body of the woman and noted, as stated above, that if consent is to be relied upon by a male to negative rape it must precede the act of intercourse; that the woman must, because of the effect of section 127, have signified her consent by the legally critical ctime of penetration. His Honour said:

> And all this carries an important corollary. As a matter of common sense the ambit and effect of the relevant consent must be consent to no more but also to no less than what is intended to follow: a normal act of intercourse . . . The initiation by penetration done with her consent is . . . physically, or legally in terms of the statute itself, quite incapable of separation from the rest of the same uninterrupted occasion of intercourse until withdrawn. (pp.64-64)

Woodhouse J. therefore treated consent in rape as different to consent in, for example, assault, where a person can consent to an activity that would fit within the definition of common or indecent assault, but can usually revoke this consent at any time. His reasons for this would appear to be that consent must be revocable in that situation where an activity could theoretically go on ad infinitum, whereas intercourse is a single act which is commenced and completed in a definite period of time. Instead, according to Woodhouse J., consent

which will negative rape must be unqualified and irrevocable consent to the entire act of intercourse. The time for determining this consent is at the time of penetration which is physically and legally inseparable from the rest of the act of intercourse—consent to the former is consent to what follows.

Because of the approach they adopted the majority did not need to deal as directly with the question of revocability of consent as did Woodhouse J. They answered his argument by looking at the "ordinary and natural meaning of the language which Parliament has chosen to define the statutory crime of rape". They said: "The 'act of a male person' referred to in s128 is not just an act of intercourse. It is the complete act of having intercourse without the woman's consent. Accordingly the conduct of a man who persists in sexual intercourse after he realises that the woman is no longer consenting . . . may fairly and naturally be described as the 'act of a male person having sexual intercourse with a woman without her consent'." (p.61) This implies, of course, that if consent is withdrawn during the act this will be legally effective to transform a man's actions in having intercourse into rape as soon as he ceases to hold an exculpatory belief that the woman is consenting. And that it is permissable by the terms of the statute to focus on a portion of the act that falls within the definition of the crime, rather than looking at the act as an inseparable whole to which consent either has or has not been given.

The views of the majority appear more in line with usual notions of consent. It is settled law that it is permissible for a court to focus on a portion of an act at which the necessary concurrence of the *actus reus* and *mens rea* exist. The majority made specific mention of the case of *Fagan* v. *Metropolitan Police Commissioner* ([1969] 1 Q.B. 439) a case in which Fagan had accidentally driven his car on to the foot of a police officer, the physical element of the assault. The mental element of the offence, and therefore the offence itself, arose upon the defendant's realisation that his car was on the foot of the officer and his failure to take immediate steps to remove it. That case, although not concerned with revocation of consent, is illustrative of how all elements of an offence may arise at some point during the continuation of an act. The majority held that the concept applied equally to sexual intercourse.

The second issue which arose was basically one of statutory interpretation. It concerned the true purpose and effect of section 127 of the Crimes Act. That section states that for the purposes of Part VII of the Crimes Act 1961 "sexual intercourse is complete upon penetration". Counsel for the appellant argued that its effect was to limit the ordinary meaning of sexual intercourse in such a way that only the act of penetration is relevant. Accordingly, so the argument goes, the

question whether the woman was consenting, or alternatively whether the man honestly believed her to be consenting, has to be determined solely at the time of penetration.

The majority stated that the purpose of section 127:

> is to remove any doubts as to the minimum conduct on the part of the accused person which the prosecution will have to establish in order to prove that he had sexual intercourse with the woman concerned.

They continued, saying that the purpose of section 127 was not to remove from the scope of the definition of rape all of the accused's acts subsequent to penetration:

> which would in ordinary language be described as having sexual intercourse.

It is interesting to note that *R.* v. *Richardson* [1978] Tas. S.R. 178, a recent decision of the Court of Criminal Appeal of Tasmania, and which supported the argument on behalf of Kaitamaki and rejected the only judgment upon which the majority relied, was not considered by the Court. The decision is directly on point but it is likely that the Court would have summarily distinguished it with the other Australian cases as being based upon differently worded legislative provisions. It does appear, however, that the bulk of judicial opinion, when interpreting sections with a similar effect to section 127, favours the view that penetration is the critical time at which consent is relevant, and that if there is consent upon penetration there will be no rape, no matter what occurs afterwards, until penetration occurs again. A recent American case *State* v. *Way* (1979) 254 S.E. 2d. 760, also favours this view. This could be an important factor should the case find its way to the Judicial Committee.

The third issue upon which their Honours disagreed, and possibly the most important in terms of the ultimate outcome of the case, revolves more around matters of policy than matters of law.

All judges in *Kaitamaki* agreed that the approach taken by the majority could lead to unsatisfactory results. This was the underlying consideration in Woodhouse J.'s judgment. His very first comment was:

> In essence the jury was directed that a man could become guilty of raping a woman during the one act of intercourse to which she had given her prior consent. It means that after he had entered her with consent she could transform his innocent and acceptable conduct into criminal activity of the most serious kind should he fail to meet her sudden indication that he must leave her. It is not explained just how rapidly he would need to act upon that indication to avoid becoming a rapist . . . (p.64)

The majority, however, were not deterred and said that any other construction would lead to equally unsatisfactory results "at the other end of the scale" by creating a situation where a girl who had been seduced into permitting a slight degree of penetration could not cry rape if she were then forcibly and against her wishes subjected to a full act of intercourse.

> Nor could a man be guilty of rape who began to have intercourse in the belief that the woman consented but carried on after he realised that she was not and never had been a consenting party. (p.63)

The majority were therefore not sufficiently convinced by the potentially unhappy consequences to depart from what they saw as the plain words of the statute.

It is submitted that the very foundation of the dispute lies in the fact that honest belief as to consent on behalf of the accused must be treated legally as having the same effect as actual consent given by the complainant. Most people would agree that a man should not be guilty of rape where he had entered into the act of intercourse with a willing partner who subsequently regrets what she has done and withdraws her consent late in the act. On the other hand, a majority of people would agree to the conviction of a person who had blithely continued with intercourse after he became aware that a woman is not, and probably never was, consenting. His honest belief being based upon her lack of resistance which is itself probably induced by fear of a worse alternative.

As both of these situations must be treated by the same set of legal rules it is perhaps to be expected that wide differences of opinion will exist. On balance, it would appear that the result in *Kaitamaki* is correct for both legal and policy reasons, although it is to be hoped that future decisions or legislative enactment will provide a formula for differentiating between those situations outlined above.

S.J.B.

JUDICIAL REVIEW OF COMMISSIONS OF INQUIRY: *Re ROYAL COMMISSION ON THOMAS CASE*, [1980] 1 N.Z.L.R. 602.

Commissions of inquiry in New Zealand have been held to be amenable to judicial review by way of the prerogative writs since *Cock* v. *Attorney General* ((1909) 28 N.Z.L.R. 405). This radical departure from the position in other common law jurisdictions was recently affirmed by the High Court in *Re Royal Commission on Thomas Case*. In reaffirming its supervisory jurisdiction the court recognised the potential of commissions of inquiry to affect seriously and detrimentally the personal rights of individuals mentioned in their reports and the consequent need for the protection afforded by judicial review.

There were two sets of proceedings before the court in *Re Royal Commission on Thomas Case*. The first was an application for judi-

cial review of the operation of the Commission under the Judicature Amendment Act 1972. The second was a motion seeking orders that a writ of certiorari or writs of prohibition issue to the Commission.

The four applicants were the New Zealand Police Association; the Police Officers Guild Incorporated; Mr Bruce Hutton, the police officer in charge of the investigation into the deaths of David Harvey and Jeanette Crewe; and Mr Murray Jefferies, an officer involved in the investigation. The respondents were the members of the Commission and Thomas; the third and fourth respondents, the Department of Scientific and Industrial Research and the New Zealand Police, having sought and been granted leave to withdraw.

Under the first cause of action the applicants asked that the 'decisions' of the commission be reviewed, quashed or set aside, that a declaration be made that the decisions are wrong in law, and that a direction should issue to the Commission requiring it to reconsider the 'decisions'. The 'decisions' to which the applicants objected were those relating to the meaning and effect of the Royal pardon, the identification of Exhibit 350 as a .22 cartridge case, and the non-admissibility of evidence by the police tending to implicate Thomas.

In their second cause of action the applicants sought an order by way of a writ of prohibition against the Commission from continuing to consider the matters referred to it under the terms of reference, or alternatively a declaration to the same effect. The ground relied upon was disqualification by bias.

The third cause of action sought a declaration that the police should not be restricted from pursuing their inquiries into the deaths, notwithstanding that such inquiries may tend to implicate Thomas.

The fourth cause of action sought a declaration that the Commission should not consider when shell 350 was ejected because the terms of reference expressly excluded any question of the conduct of the trials.

On behalf of the Commission and Thomas notices of motion were filed asking that the proceedings by the applicants be struck out or that certain questions of law be discussed as preliminary matters. The ground stated and questions raised were firstly, the question of the locus standi of the applicants; secondly, whether the proceedings were in 'derogation of the power reserved to the Governor-General by Clause IX of the Letters Patent of 11 May 1971' and thirdly, whether the Court had jurisdiction to entertain the proceedings at either common law or under the Judicature Amendment Act.

The first issue considered by the Court was the question of locus standi. The Court relied upon the following passages from de Smith, which are quoted in the judgment, as determining the matter. "A person aggrieved, that is, one whose legal rights have been infringed or

who has any other substantial interest in impugning an order, may be awarded a certiorari or ex debito justitiae if he can establish any of the recognised grounds for quashing . . . For this purpose, persons aggrieved have been defined as those 'who have a peculiar grievance of their own beyond some grievance suffered by them in common with the rest of the public." (p.609)

The Court considered all four applicants capable of being persons aggrieved as a result of the operation of the commission.

The second issue to be dealt with was the Court's jurisdiction to interfere with the Commission and its operations. The respondents argued that the Crown lacked jurisdiction because the Commission, being appointed under the Royal prerogative, is immune from judicial control.

The Court rejected this argument relying on *Cock* v. *Attorney-General* which it declined to interpret restrictively as applying only to the ultra vires appointment of royal commissions. It was said that: "Even if the matter were free from authority we should still be of the opinion that the jurisdiction of the court in its supervisory capacity is not ousted merely because the tribunal has been appointed under the Royal prerogative . . . If the Crown is subject to the law—as it is—then a fortiori a delegate body of the Crown must likewise be subject to it." (p.611).

Having determined that the court had jurisdiction to review the Royal Commission, notwithstanding that it was appointed under the Royal prerogative, the Court proceeded to cloud the issue by noting that the Commission was, in any event, also appointed under the Commissions of Inquiry Act 1908, the assumption being made that Commissions of Inquiry under the Act were clearly subject to review

The court then considered the third ground of the respondent's motion to strike out the procedings, namely that the Commission was not subject to the control of the Court by way of certiorari or prohibition at common law, nor was it exercising the statutory power of decision within the meaning of the Judicature Amendment Act 1922 and 1971.

The Court distinguished Canadian and Australian authority cited to it by counsel, on the grounds that the relevant statutes relating to commissions in those countries are different from our own. This is somewhat surprising in view of the fact that the Court also recognised that commissions of inquiry in the three jurisdictions are "merely inquisitorial bodies with no power to do other than inquire and report". (p.612) It may therefore have been a valuable exercise to examine how other jurisdictions had dealt with the question making the necessary allowances for statutory variations.

The court then considered the common law relating to the issue of

writs of certiorari and prohibition and their relation to administrative tribunals concluding that: "We are satisfied that dicta in earlier cases to the effect that a commission of inquiry is immune from certiorari or prohibition because it is doing no more than inquiry and reporting are now out of date, and are not in accord with the court's responsibility to ensure that all tribunals carrying out functions (either investigative or decisive or both) which are likely to affect individuals in relation to their personal civil rights, or to expose them to prosecution under the criminal law, act fairly to those concerned." (p.615)

This conclusion appears to overlook the fundamental distinction between the duty to act judicially and the duty to act fairly and thus allows the court to grant the remedies of the prerogative writs for breach of fairness, despite the body of authority recognised as supporting the opposite view.

Having concluded that the writs sought would issue at common law the court proceeded to examine the applicants' application for review under the Judicature Amendment Acts 1972 and 1977. The question was whether or not the Commission was capable of exercising a 'statutory power of decision' or the 'statutory power' under section 3.

The court found that the applicants came within section 4(1) of the Judicature Amendment Act 1972 and it was therefore unnecessary for them to rely on the provisions of subsection (2A) of section 4, inserted in 1977. The conclusion that a commission of inquiry is subject to control by the courts was considered to be reinforced by the enactment of the Commissions of Inquiry Amendment Act 1980.

The court summarised its three fold jurisdiction as being firstly, to ensure that the Commission acts fairly to persons likely to be aggrieved; secondly, to prohibit the Commission from exceeding its jurisdiction by committing errors of law or by wrongfully admitting or excluding evidence; and thirdly, to exercise the powers given to the High Court on an application for review under the Judicature Amendment Act 1972.

Having dealt with the preliminary matters the Court proceeded to consider the four causes of action. In an examination of the 'principal complaint', that the Commission had misconstrued the meaning and effect of the Royal Pardon and had thereby misconceived the scope of its inquiries, the Court found that the effect of a prerogative pardon:

> was to remove the criminal element of the offence named in the pardon but not to create any factual fiction, or to raise the inference that the person pardoned had not in fact committed the crime for which the pardon was granted. (p.620)

In other words it was recognised that a pardon does not have the effect of altering the facts as distinct from the legal consequences of those facts. Section 407 of the Crimes Act was interpreted as a reaffirmation of the effects of the prerogative pardon and as minimising residual

legal disabilities or attainders. The court found that the applicants had established an error of law relating to the Commission's interpretation of the pardon and errors of law in relation to the admission or exclusion of certain classes of evidence. Thus it made the following declarations:

1) That the pardon granted to Thomas in no way limits the ambit of the Commission's inquiries pursuant to its terms of reference; and
2) That although any decision as to the relevancy of particular evidence to any particular term of reference is a matter for the Commission to determine it would be wrong in law to exclude evidence solely upon the ground that it might tend to implicate Thomas or upon the ground that it was circumstantial or indirect evidence only.

The second cause of action which sought prohibition against the Commission on the ground of bias was held not to have been established. The test applied was whether a reasonable observer, one sufficiently informed of the nature and conduct of the proceedings to enable him to form a sound opinion, would have formed the conclusion that there was a likelihood bias existed.

The third cause of action seeking a declaration that the police ought not to be restricted in any way from pursuing inquiries into the Crewe murders was dismissed. The Court considered it perfectly clear:

> that the Commission has no more power than has the Court to instruct the police as to the manner in which they carry out their statutory duty to investigate unsolved crimes. (at page 624)

The fourth cause of action stating that consideration of the time at which shell 350 was ejected was expressly excluded by the Commission's terms of reference, was held to have failed also because term of reference 1(a) expressly referred to the cartridge and because any mention of the trial by the Commission in connection with the cartridge was purely incidental.

For policy reasons the decision of the High Court in this case is to be welcomed in that it reaffirms that Commissions of Inquiry are subject to judicial supervision. However, the vague and cursory manner in which the major questions are dealt with suggests that the decision may be carried to the centre stage of controversy rather than welcomed as a rationalisation of the law relating to commissions of inquiry.

D.A.C.

Ed. Note: Ms Joanna Manning has recently completed a dissertation on Judicial Review of Commissions of Inquiry which includes a chapter on this case. This case is now being taken to the Court of Appeal.