

NON-CONSENT *in* RAPE

Peter Moses

A critique of the 'no means yes' controversy.



Section 347 of the Queensland *Criminal Code* states that 'any person who has carnal knowledge of a female *without her consent* or with her consent if it is obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm is guilty of rape' (emphasis added).

In accordance with principles as to onus of proof, the prosecution therefore has to prove, beyond a reasonable doubt, as an element of the offence either that the female did not consent, or that the consent was obtained by one of the means specified. In practice, such proof seems to have been made a great deal more difficult than it would otherwise be by long-standing chauvinistic prejudice and mythology that has so far proved impossible to eradicate from popular beliefs about women consenting to sex. It seems such beliefs continue to influence large segments of the community including jurors, and especially older males, all the way up to trial judges presiding at rape trials, according to recent outstanding news reports.

The perpetuation of prejudiced beliefs

A good illustration of the persistence of such beliefs and their perpetuation even among younger people of both genders was the *4 Corners* program on ABC television on 9 August 1993. The program was produced by 'sexologist' Bettina Arndt and featured the 'No' means 'Yes' controversy. Ms Arndt also wrote a feature article about this issue entitled 'When "No" means "Maybe"' in the *Weekend Australian*, 7-8 August 1993.

Legal text writers themselves play a prominent role in perpetuating these unfortunate attitudes, as demonstrated convincingly in an illuminating article by Ngaire Naffine.¹ She points out that some of the prime culprits among text writers on criminal law are Brett, Waller and Williams,² Glanville Williams,³ and Howard.⁴ In this regard, it should be noted that no less a jurist than Glanville Williams still considers 'that some women enjoy fantasies of being raped' (at p.238) and continues to find illuminating Byron's notorious verse:

A little still she strove, and much repented,
and whispering 'I will ne'er consent' — consented.

Indeed, I myself recall hearing both defence counsel and trial judges quoting this verse in Queensland rape trials not many years ago! Is it any great surprise then that some trial judges presiding at recent rape trials have tended to echo these reactionary text book views? It is most disconcerting that such prejudiced views continue, via these texts, to be peddled to yet another generation of law students, thereby tending to perpetuate the views among future lawyers. (We can only hope that their law teachers attempt to counteract this tendency.)

Recent judicial comments

Among recent judicial comments that have added fuel to the public controversy still raging on this issue, were those of Judge Bland who, in April 1993 in the Victorian County Court, in sentencing a rapist, commented in relation to evidence that the victim had cried 'Stop it!' that:

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it does happen, in the common experience of those who have been in the law as long as I have, anyway, that 'No' often subsequently means 'Yes'.

Not surprisingly, this caused a strong media and public outcry.

In the course of this media furore, two recently retired judges with extensive experience in criminal courts came out strongly in newspaper articles in defence of Judge Bland and two other offending judges. One was Connolly J, recently retired from the Queensland Supreme Court, who was extensively quoted in a feature article in the *Sunday Mail*, 6 June 1993 ('The Case for Yes and No', at p.57). It would seem, however, that he protesteth too much, for he himself quoted approvingly the dreaded Byronic lines above and, worse still, went on to base part of his argument that women may be inclined to dissemble on the far-fetched tale from Mozart's opera *Così Fan Tutte*. In any event, he himself would probably not object to being described as somewhat traditional in his outlook.

Perhaps much the same may be said for former Judge Gee of the New South Wales District Court who wrote two newspaper articles in defence of the offending judges.³ One salutary point he made, however, is that there may be such an over-reaction to comments such as those of Judge Bland that Parliaments may be induced to change the law on sexual offences in such a way as to seriously imperil the hard-won rights of the accused (for example, regarding onus of proof). Indeed, it must be conceded that such over-reaction is possible, and needs to be guarded against.

The point, however, must be made clearly that Judge Bland's comments were totally uncalled for. In the case before him, the accused was guilty and was being sentenced. Therefore when the victim cried 'Stop it!', she must have meant it, and thus could not have meant 'Yes' or even 'Maybe', for neither would have been consistent with guilt. Hence, Judge Bland *must* have been showing gender bias and prejudice while making this remark in sentencing this accused. This remains true even if it is conceded, for the sake of argument, that Ms Arndt has successfully shown in her surveys and interviews that, in some social settings, some women may say 'No' when they mean 'Maybe' or 'Yes'. In so far as this has happened and still happens, it may be, as Ms Arndt points out in her feature article, that 'sexual stereotypes force both men and women to be evasive and disingenuous. Women sometimes play games, hide their true desires for fear of being seen as easy and promiscuous.' At the same time, it seems many men persist not only in well-tried seduction techniques, but also often in refusing to take 'No' for an answer. Even if all this is true, it in no way would justify any blanket prejudice or presumption either that this necessarily happens in every case, or that it must have happened in any particular case when a person has been charged with a sexual offence. Indeed, it cannot be repeated too loudly or too often – for the message still has not got through to certain judges – that the question of consent or non-consent is a matter entirely for the jury to decide on the evidence as a whole (*R v Bennett* (1900) 10 QLJ 147). 'Evidence', needless to say, does *not* mean or include gender bias or prejudice about how women allegedly behave in certain circumstances, however deeply entrenched in the community such beliefs may remain.

Most of the comments above apply with even greater force to the earlier remarks of Bollen J of the South

Australian Supreme Court in late 1992, when summing up to the jury in a rape in marriage trial. He said: 'there is, of course, nothing wrong with a husband, faced with his wife's initial refusal to engage in intercourse, in attempting in an acceptable way to persuade her to change her mind, *and that may involve a measure of rougher than usual handling*' (emphasis added). Later, Bollen J explained that, by this remark, he meant 'vigorous hugging or squeezing and pinching'. There was a public outcry which may, in turn, have influenced the Crown's decision to appeal on a point of law to the Full Bench of the South Australian Supreme Court. This did not, and indeed could not, affect the acquittal, but it is nevertheless significant that, in a two to one decision, the court ruled that Bollen J had erred in law with these remarks. Perry and Duggan JJ were in the majority, while King CJ dissented on this point. All three members of the court, however, ruled that Bollen J erred in telling the jury in the same summing up the infamous anecdote about the man alone in the train carriage with a woman who later falsely accused him of rape, leading to his suicide – a tale which Bollen J told the jury in order to illustrate the alleged ease of making false allegations of a sexual nature and the alleged difficulty of disproving them.

Former Judge Connolly, in the article referred to above, complained in relation to Bollen J's comments in this case that 'it seems to me there has been a wilful failure to put these observations into context' and gave reasons why he considered the criticism was quite unfair. It is considered, however, that nothing can justify, excuse or satisfactorily explain away the statement as framed. It undoubtedly implies that a husband is entitled to use some degree of force on a wife to persuade her to have sex, a suggestion which in this day and age can only be viewed as totally unacceptable whether as a statement of law or otherwise. As to his Honour's tale to the jury about the man in the train, it is not surprising that the appeal court considered that it should not have been told to the jury, for it could only serve to reinforce the long-held prejudice that women are prone to make too readily false allegations of sexual assault.

The Queensland Code

In regard to Bollen J's statement about 'rougher than usual handling' it should be noted that the wording of s.347 of the Queensland Code that if consent 'is obtained by force . . .' it is rape, would seem to mean that in Queensland if the man uses any degree of force at all and that is the operative cause of the wife's (or any other woman's) consent, then the man is guilty of rape. At the same time, it should be recalled that the rape in marriage amendment was only inserted in s.347 in 1989, and that prior to this, a man could *not* be charged in Queensland with raping his wife. Moreover, in some earlier Queensland rape appeals, notably *R v Hinton* [1961] Qd R 17 and *R v Mayberry* [1973] Qd R 211, extremely sexist attitudes were expressed concerning the credibility of victims of sexual offences.

As to the situation under s.347 when consent is obtained 'by means of threats or intimidation of any kind or by fear of bodily harm' (in any of which cases, it would also be rape) there seems to be no real authority as to the interpretation of these phrases. Nevertheless, it is considered that they are clear enough on their face and should be interpreted to mean what they say in line with normal principles of statutory interpretation, and that they certainly should not be read

down in any way. Unfortunately, Herlihy and Kenny in their 'Criminal Law in Queensland . . .'⁶ consider that it would be sensible to limit 'threats' to threats of bodily harm. There seems no justification, however, for such a limitation which could clearly operate unfairly against the interests of rape victims. Why not give 'of any kind' its usual broad meaning? They also suggest that maybe the person threatened would need to fall within the scope of a special relationship with the victim. There is, however, nothing in the terms of the section to warrant such a limitation which also could work unfairly against the interests of rape victims.

Possible reform of rape law

In the Final Report of the Criminal Code Review Committee, it is recommended that, in place of s.347, a new s.97 be enacted as follows: 'Rape. Any person who has carnal knowledge or carnal knowledge by anal intercourse of another person, without that other person's consent, is guilty of a crime and is liable to imprisonment for life'.⁷ This at least has the advantage of simplicity, even though in two significant respects, it widens the concept of rape to include anal penetration, and to provide that the victim no longer has to be female. In the absence of a definition of 'consent', however, can it be guaranteed that the situations at present covered under s.347 (where it is rape if consent is obtained by force or by threats or intimidation of any kind or by fear of bodily harm) would be covered by the new section as, in reality, cases of non-consent? At the very least, this is problematic. If such cases are not so interpreted, this could leave a gaping hole in the rape law which would seem to leave many victims unprotected, except in so far as the force, if any, might constitute another offence such as assault. Moreover, the proposed new section would do nothing to prevent judges in their summing up from making comments to the effect that sometimes 'No' means 'Yes' or 'Maybe', or comments on the allegedly mendacious tendencies of women making complaints of sexual offences, the supposed ease of making such complaints and the alleged difficulty of disproving them – all of which are part of the sexist folklore perpetuated for centuries by writers of legal texts and by lawyers and judges.

Further, it has been suggested that the offensive judicial comments which have received publicity recently may be only the tip of the iceberg. Apparently most such trial comments remain unreported and unpublicised. It is hoped, however, that after all the adverse publicity, and following moves by Justice Elizabeth Evatt and others, such as Justice Deidre O'Connor of the Australian Institute of Judicial Administration, to provide voluntary in-service training for judges in this area, such harmful sexist comments from the bench will become, ultimately, a thing of the past.

Meanwhile, the only sure way to prevent such comments in Queensland is to amend s.620 of the Code. At present, this section allows a trial judge in summing up to a jury to make such observations on the evidence as the court thinks fit to make. This could be amended, either generally or more specifically, in relation to trials of sexual offences, to restrict the comments a trial judge is entitled to make. Such an amendment might well be difficult to frame; nevertheless, it should be considered.

Serious consideration should also be given to adding to the proposed new s.97 of the Code a suitable adaptation of the innovative ss.36 and 37 of the *Crimes Act 1958* (Vic.) as amended by the *Crimes (Rape) Act 1991* (Vic.). These sec-

tions state:

36. Meaning of consent

For the purposes of Subdivisions (8A) to (8D) 'consent' means free agreement. Circumstances in which a person does not freely agree to an act include the following:

- (a) the person submits because of force or the fear of force to that person or someone else;
- (b) the person submits because of the fear of harm of any type to that person or someone else;
- (c) the person submits because she or he is unlawfully detained;
- (d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;
- (e) the person is incapable of understanding the sexual nature of the act;
- (f) the person is mistaken about the sexual nature of the act or the identity of the person;
- (g) the person mistakenly believes that the act is for medical or hygienic purposes.

37. Jury directions on consent

In a relevant case the judge must direct the jury that:-

- (a) the fact that a person did not say or do anything to indicate free agreement to a sexual act is normally enough to show that the act took place without that person's free agreement;
- (b) a person is not to be regarded as having freely agreed to a sexual act just because: –
 - (i) she or he did not protest or physically resist; or
 - (ii) she or he did not sustain physical injury; or
 - (iii) on that or an earlier occasion, she or he freely agreed to engage in another sexual act (whether or not of the same type) with that person, or a sexual act with another person;
- (c) in considering the accused's alleged belief that the complainant was consenting to the sexual act, it must take into account whether that belief was reasonable in all the relevant circumstances.

Because of s.24 of the Code, it would be unnecessary to include s.37(c). More importantly, however, the inclusion of a provision like s.37(a) would seem to create a *prima facie* presumption of fact that in some cases may not accord with social reality, for reasons discussed above. To this extent, it could be seen as tending to erode somewhat the principle that the prosecution must prove all elements of an offence – in this case, non-consent – beyond a reasonable doubt.

Nevertheless, on balance, it would seem to be a good idea to incorporate these provisions with any necessary adaptation in the new Queensland *Criminal Code* when it is enacted, subject to prior assessment to confirm that they have been operating satisfactorily in practice in Victoria.

References

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2. Brett, P., Waller, L. and Williams, C. R., *Criminal Law: Text and Cases*, 6th edn, Butterworths, Sydney, 1991, p.82. Unfortunately the objectionable quote from Hale was repeated in their 7th edn, 1993, p.87.
3. Williams, Glanville, *Textbook of Criminal Law*, 2nd edn, Stevens, London, 1983, p.238.
4. *Howard's Criminal Law*, 5th edn, by Fisse, L.B., Sydney, 1990, pp.169, 178.
5. 'Rape outcry, may place hard-won rights at risk', *Sydney Morning Herald*, 18.6.93, p.15; and 'Missing words the weapons of confusion', *Sydney Morning Herald*, 24.6.93, p.12.
6. Herlihy J.M. and Kenny R.G., *An Introduction to Criminal Law in Queensland and Western Australia*, 3rd edn, Butterworths, Sydney, 1990, p.230 [1408]; the sole text on the Criminal Code.
7. At pp.63, 204.