R v Pauga: Making the Rape Complainant Invisible?

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Introduction

In the recent Court of Appeal decision *R v Pauga*,[1] Casey J (writing for a unanimous Court) upheld the High Court judgment of Smellie J[2] that a rape conviction could be properly sustained in law on the basis of the accused's videotaped confession[3] alone. Despite extensive efforts by the Police to locate a complainant, no other evidence to corroborate the confession existed because the victim of the rape had never been identified.

The Court of Appeal found that there was no rule that a conviction could not rest wholly on an uncorroborated confession, within certain restrictions.[4] The specific application of this rule where the accused confesses to rape produces the intriguing result that a conviction may be secured without the identity of the victim being known. It may also be argued that the *Pauga* decision enables convictions to be secured upon satisfactory confessions where the identity of the victim *is* known, but where the prosecution does not call the victim to give evidence.

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1 Court of Appeal. 23 April 1993 CA 164/92 Casey J.

2 [1992] 3 NZLR 241.

3 A confession is distinguished from an admission: see Mathieson, *Cross on Evidence* (4th NZ ed 1989) 545.

4 Supra at note 1, at p6.

The case has been considered as somewhat novel:[5]

> Pauga is believed to be the first person in New Zealand legal history to be convicted of an offence against an individual, when the identity of the victim has not been established.

This article will explore the novel implications of the *Pauga* decision, and ask whether and to what extent this result can be said to advance the interests of victims in rape offences. It begins with a look at the evidentiary issues raised by the case, followed by an examination of the implications of the decision in cases of rape, and concludes by discussing the general implications for the law concerning rape.

Confessions in Law

A confession of an accused is technically an exception to the hearsay rule and may be admitted as evidence, even where the accused later denies the validity of that confession and advances a plea of not guilty. However, Mathieson[6] submits that before it can be admitted, the statement must under common law be made voluntarily,[7] unless s 20 of the Evidence Act 1908 applies. That section provides that the confession may still be admitted if it is made under a threat or inducement which is not the exercise of violence or force or other form of compulsion, and the judge is satisfied that it is not likely in fact to cause an untrue admission of guilt. In addition, recent cases confirm that confessions will not be admitted unless the requirements of the New Zealand Bill of Rights Act 1990 concerning police interrogation are met.[8] Furthermore, the confession must be admitted in full, therefore including any exculpatory content.[9] Once admitted, it is a question for the jury to consider the probative effect of the confession.[10]

Convictions upon a Confession: The decision in *R v Pauga*

In *Pauga* Casey J concluded that there was no rule of law to the effect that a conviction cannot rest solely upon the accused's confession alone. His Honour said:[11]

> We were referred to a number of other authorities[12] but in all of them the real point has been the

5 *New Zealand Herald*, 14 March 1992, section 1, 1.

6 Mathieson, supra at note 3, at 545.

7 A confession is made voluntarily if it is not made under the pressure of threats, violence or force and is not made in consequence of a hope of advantage from the person in authority; ibid, 548.

8 *R v Butcher* [1992] 2 NZLR 257 (CA); *R v Goodwin* [1993] 2 NZLR 153 (CA). The question of complying with the Bill of Rights is different from the question of voluntariness since a confession may be made without any threat or inducement yet be in breach of s 23 because the accused was not advised of the right to counsel.

9 See Mathieson, supra at note 3, at 547.

10 Ibid.

11 Supra at note 1, at p6 (emphasis added).

12 These are *R v Kersey* (1908) 1 Cr App R 260; *R v Davidson* (1934) 25 Cr App R 21; *McKay v The King* (1935) 54 CLR 1; *R v Lord and Doyle* [1970] NZLR 526; *McKinney v The Queen* [1991] 65 ALJR 241; *R v Whitu* noted [1991] BCL 1131.

> adequacy of the evidence of confession, or its reliability. These are factors common to all confessional statements sought to be proved in evidence, but do not affect the general rule in the above-mentioned Commonwealth common law jurisdictions that they are admissible as proof of guilt without *independent evidence* of the existence of a criminal fact.

The case makes it clear that while a confession need not be corroborated,[13] it must be sufficiently reliable under the general principle that a jury receive only satisfactory evidence upon which the accused could be reasonably convicted. Casey J supported the position stated by Fisher J in *R v Whitu*:[14]

> It may well be that in a case where the Crown relies solely upon a confession without any independent evidence that a crime has been committed, one would consider the reliability of that confession anxiously before deciding that the case should go to the jury.

Pauga's counsel argued that where a confession is the only evidence of the commission of a crime such evidence is so inherently unreliable that a reasonable jury could never convict upon it. The Court was referred to situations where confessions had been volunteered by insane or mentally disturbed persons, or made in order to shield the real criminal, or to seek publicity, or were made because of a mistake of law or fact. However, Casey J found that there was not the slightest suggestion that any of these factors were present in the case. Presumably though, if one of these factors, or any other indicia of unreliability (although unspecified)[15] were present, then a confession alone could not constitute satisfactory evidence upon which a jury could convict.

Establishing the crime from a confession

The *Pauga* decision makes clear that a jury can only convict on the basis of a confession alone if the elements of the offence can be proved beyond a reasonable doubt on the basis of that confession. In a rape case, s 128(2) of the Crimes Act 1961 specifies both penetration and absence of consent. In addition, the prosecution will need to disprove the argument, if advanced by the defence, that the accused believed on reasonable grounds that the victim had consented.[16]

A preliminary question for Smellie J was whether the jury could infer from the videotaped confession that penetration occurred without consent, as required by s 128(2)(a). The legal issue raised is how the jury can receive evidence concerning

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13 This is also the position in England. In the United States and Scotland, however, a confession must be corroborated in order to found a conviction. See Choo, "Confessions and Corroboration: a comparative perspective" [1991] Crim LR 867; Pattenden "Should Confessions be Corroborated?" (1991) 107 LQR 317.

14 Supra at note 12.

15 On a related point, Smellie J thought that a jury would be in a better position to convict upon a videotaped confession than on a written or otherwise recorded confession because first, only the actual words of the accused are conveyed, and secondly, as he speaks his demeanour can be observed; supra at note 2, at 245-246. For a note regarding the increased use of videotaping by the Police, see Mahoney "Evidence" [1992] NZRLR 29, 39.

16 Section 128(2)(b).

the victim's mind. Need it always be provided by the victim as a matter of law? Since the question of consent is about the mind of the victim, while a confession reveals the state of the accused's mind, it could be argued that a confession could never be the source of an inference concerning consent. However, Smellie J said that:[17]

> If I am right that the absence of consent can be established by the drawing of inferences on the part of the jury, then I am unable to see, again as a matter of principle, that the facts upon which the inference is based cannot all come from the accused's admission of guilt.

Thus in principle the absence of consent can be inferred from an accused's confession. This means that the jury, in determining whether the victim consented, need not always construct a chain of inferential reasoning upon evidence provided by the victim. *Pauga* confirms that the jury can do so upon evidence provided exclusively by the accused. However it is a question to be asked in each case whether a *particular* confession is capable of yielding this necessary inference.

In the present case the police officer had skilfully induced the accused to talk about the rape in detail while interviewing the accused with regard to another sexual offence, leading Smellie J to refer to it as being of "a quality and in a form which is about as satisfactory as can be had."[18] For instance, the accused gave details about how the victim had tried to escape and how he thought the victim had eventually submitted because she feared being beaten if she resisted him. Under s 128A, the victim in such a situation is deemed not to have consented. It was this description of the victim's conduct in Pauga's confession which served to initiate the jury's inference that the victim did not consent.

Discussion

At the outset it should be stressed that most of the implications of *Pauga* are limited to situations where a suitable confession is volunteered by or obtained from the accused. *Pauga* affirms that confessions need not be corroborated in order to gain a conviction. A corollary to this is that the victim's testimony may not always be strictly necessary in order to convict. It must be asked whether this applies not only to cases where there is no complainant, but also to cases where, although the victim is available, she is not needed for evidence. The immediate response is that it should, as a confession is sufficient to initiate and sustain the inference that the elements of the offence have been met. Thus the prosecution could theoretically prosecute regardless of whether a complaint has been laid, and regardless of whether the victim has withdrawn from proceedings. Even where the victim does not withdraw, the prosecution may dispense with her testimony.

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17 Supra at note 2, at 243.

18 Ibid, 245.

One question that immediately arises is whether the decision advances the interests of the victims of rape. The victim may be interested in some or all of the following:

(i) not testifying (for a variety of possible reasons, such as fear of retaliation or the trauma of testifying);
(ii) anonymity (desire to avoid a perceived stigma of being a rape victim);
(iii) reconciliation with the offender (if she is in a relationship with him); and
(iv) conviction of the offender.

The obvious and immediate answer is that the decision does advance the interests of rape victims, for two main reasons. First, as mentioned above, procedurally the failure of the victim to lay a complaint[19] or her withdrawal from proceedings will not necessarily prevent a conviction. This will be favourable where the victim acted in order to preserve her privacy or to avoid a trial, or was simply too scared to report the incident to the police, but nevertheless wishes to see the offender convicted.

Secondly, since testifying in a rape case is often a traumatic experience for victims, *Pauga* should be welcomed, as it enables a conviction to be gained without the victim having to confront the offender in court and re-live the event.

Pauga highlights these advantages. In the case of a confession, the prosecution is now able to act independently of the victim. However, these same advantages may also be disadvantages where acting independently of the victim means acting contrary to her interests. The prosecution's decision to go to trial may occur regardless of, and may indeed be contrary to the victim's interests.

The victim may have withdrawn from proceedings[20] or not laid a complaint specifically to prevent the matter coming to trial. Moreover, the victim may fear reprisals from the accused.[21] Since the prosecution may continue on the strength of a confession, or in the hope that one will be forthcoming (if a confession has not been made), the victim's attempt to avoid a trial could be frustrated.

It is also possible that the prosecution may proceed contrary to the victim's wishes by compelling her to testify[22] in order to corroborate a less than sufficient

19 Rape is notoriously under-reported. Stone, Barrington & Bevan estimated that only one in five rapes were reported to the police: "The Victim Survey", in *Rape Study* (1983) 13.

20 This occurred in seventeen per cent of the cases in the survey by Stace, "Rape Complainants and the Police", in *Rape Study*, ibid, 18.

21 Young, "A Discussion of Law and Practice", in *Rape Study*, ibid, 14-15.

22 All persons are competent and compellable to testify in any case unless falling within one of the recognised exceptions. At common law these relate to children and mentally disordered persons, while statutory exceptions in s 5 of the Evidence Act 1908 relate to the accused in a criminal case, and the accused's spouse (although he or she may appear voluntarily). This exception may now also extend to partners in a de facto relationship. In *R v B* (High Court, Dunedin 18 February 1992 T 16/91) Williamson J did not exercise statutory authority under s 352 of the Crimes Act to detain the victim for refusing to testify when compelled, because she was able to provide a "just excuse" as recognised in the section.

confession. In *R v B*[23] the accused was charged with raping his de facto partner, there being no evidence establishing the charges except his confession. The prosecution attempted unsuccessfully to compel the victim to testify against her wishes.[24] The prosecution continued, compelling the mother and sister of the accused to testify.[25]

Implications on a wider scale

To say that *Pauga* is advantageous premises that advancing the interests of the victim is a matter of securing more convictions. To that end *Pauga* could be regarded as following a general trend over recent years for the Police and prosecutors to treat complainants of rape more seriously and to work harder to obtain more convictions.[26]

However the interests of victims can also be seen from a wider standpoint. Advancing these interests can be seen as not primarily increasing convictions, but rather increasing the victim's role in determining the process within which those convictions occur. With this in mind, *Pauga* may not be seen so favourably. In a number of situations it will be possible for a trial to occur without the victim's testimony, and in others it is possible for the trial to occur against the victim's wishes. In these situations, even though convictions are obtained the victim is effectively disempowered from determining the trial process.

The issue raised by *Pauga* is, to what extent should the state's intervention in a rape case be determined by the victim as opposed to the state itself. Should the state in these cases pay heed to the victim's wishes, if they amount to a request that the state not intervene?

The argument turns upon considering which is the greater interest of the state: determining convictions or administering justice to the victim's needs. On the one hand it can be argued that the state should intervene where there is enough evidence to convict because it has a responsibility to protect members of society, not only through punishment but also through deterrence. Furthermore, it can be argued that there would be a drop in convictions if only cases initiated by the victim came to court. Victims characteristically fail to report rape offences and often withdraw from proceedings.[27] This argument is analogous to that underlying the Hamilton Police arrest policy for domestic violence,[28] whereby in spite of the wishes of the victim, the police arrest whenever enough evidence exists to support

23 Ibid.

24 *R v B (no 2)* noted in [1992] BCL 744.

25 *R v B (no 3)* noted in [1992] BCL 745.

26 "Likewise changes in the law of evidence and in the conduct of trials since 1979 have made rape convictions easier to secure": Newbold, *Crime and Deviance* (1992) 97. Some might however argue that these improvements merely rectify the law's previous inadequacies.

27 See Stace, supra at note 20.

28 Busch, Robertson & Lapsley, *Domestic Violence and the Justice System: A Study of Breaches of Protection Orders* (1992) 13.

that arrest. The Busch report[29] has recommended that this policy be implemented throughout New Zealand. It is argued that this is preferable to intervening when requested by the victim: "to put the responsibility on the victim is to assume victims have power they in fact lack."[30]

Conversely, however, it can be said that if the victim is the state's first responsibility, then it should be at the determination of that victim whether the state intervenes. Yet if victims are the state's first responsibility they seem to be in a peculiar position. That is, the law concerning rape exists to protect them and to address crimes committed against them, but they have no autonomy to affect, or even any influence to affect, the implementation of that law. This irony can be seen in *Pauga,* as the conviction gained was not initiated by the victim, but by the Police, and, should in fact be traced to the accused's own confession.

Feminist legal theory

The response of some feminists is to argue that the state's first interest is not the victim, but the crime. Writers such as MacKinnon have argued that this is so because the law concerning rape is essentially "defined and adjudicated from the male standpoint".[31] For example, the exact same act can be considered rape, which is a crime, or sex, which is not a crime, depending on whether the accused can show that he had a belief, based on reasonable grounds, that there was consent.[32] It does not depend on whether the victim actually consented or not. The direct result is that, while the injury to the victim will be the same in each case, the legal status of the event may change according to the accused's perception of the event. This leads MacKinnon to assert that:[33]

> [T]he injury of rape lies in the meaning of the act to its victim, but the standard for its criminality lies in the meaning of the act to the assailant. Rape is an injury only from women's point of view. It is a crime only from the male point of view, explicitly including that of the accused.

The result is that the victim's experience of being injured is not as important as the question whether the legal elements of the offence have been met. Indeed, it is the answer to this question which dictates whether, from a legal standpoint, the woman was raped or not.

With this analysis in mind, it is possible to consider *Pauga* as a result of the law's preoccupation with the crime rather than the victim. The fact that the Court was able to answer the question of consent without the complainant simply confirms the secondary role played by the victim and her perception of the event. Arguably, this is because the victim is not the state's first concern. It can be concluded on this basis that victims' inability to affect the implementation of the

29 Ibid, 159.

30 Welfare worker, interviewed by and cited ibid.

31 MacKinnon, *Toward A Feminist Theory of the State* (1989) 180.

32 Section 128(2)(b) Crimes Act.

33 Supra at note 31, at 180.

law in rape cases, while being a matter of criticism and concern, is not an isolated matter. It is instead derivative of the state's failure to treat victims with priority. This emphasis of the law on the crime rather than the victim means that if the prosecution's actions coincide with the victim's interests, this will be by accident rather than by design.

Analyses aside, state intervention in cases of rape is possible regardless of the wishes of the victim. The advantage is that in a case like *Pauga,* where no complainant is forthcoming, the state is able to convict an offender. However, the disadvantage is that there may be cases where the state will exercise this autonomy at the expense of failing to recognise the victim's wishes and to that extent it must be questioned whether the result in *Pauga* really does advance the interests of the victim.

Conclusion

The decision of *R v Pauga* involved a conviction for sexual violation by rape in which the victim was invisible because she had not laid a complaint and the Police had been unable to identify her. That she was invisible might not cause much concern because that was of her own volition. What may cause concern, though, is whether *Pauga* stands for the proposition that a victim can be rendered invisible in cases where the prosecution has obtained a satisfactory confession. This could occur when the victim chooses not to lay a complaint, or withdraws, yet the prosecution still decides to bring a case on the strength of the confession. The victim is effectively powerless to prevent the intervention of the law where she would prefer non-intervention, for whatever reason.

The decision of *Pauga* concerned an evidential matter, but it has implications for the conduct of rape trials as a whole. As happens in many cases, the Court, by confining itself to the question of whether a conviction could be sustained on the basis of a confession alone, did not deal with the various implications of its decision (however limited in scope they may be) and it is this writer's hope that in future the situation may attract further thought.