MJB, GGH

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IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 339/88

THE QUEEN R

v.

BRYAN STUART GILLIES

Coram: McMullin J
Casey J
Ellis J

Hearing: 12 April 1989

Counsel: R B Squire for Crown
B J Hart for Appellant

Judgment: 20 April 1989

JUDGMENT OF THE COURT DELIVERED BY CASEY J

Bryan Stuart Gillies faced 6 counts in the High Court at Auckland alleging sexual violation of a young woman on 20 February 1988, 2 of them involving oral sex and 4 of them rape. He was discharged under s.347 on one rape count, found guilty on 2 others and not guilty on the 3 remaining counts. He was sentenced to 5 years' imprisonment and applies for leave to appeal against his conviction on two grounds - first that the guilty verdict on the two counts of rape were inconsistent with his acquittal on the other three

counts involving rape and oral sex; and secondly that there was a misdirection on the issue of whether he believed on reasonable grounds that the complainant consented.

Evidence

She gave evidence of meeting the applicant for the first time at a nightclub and accepted a ride home in a car with him and his friend Richard in the early hours of the morning. They called at their basement flat first in order (as she understood it) to pick up gear for their work that day. They all went inside and listened to some music, talked and smoked some cannabis. The applicant then went into his bedroom and she saw him lying on the bed with only his trousers on. When he asked her to come in she declined, but he took her in by the hand and shut the door. She felt a little worried, but sat on the side of the bed and saw him start to take his trousers off. She made some protest and he asked for oral sex which she refused. However, she said he forced her head down onto his penis in spite of her attempts to resist, and got it into her mouth; while he was holding her there with one hand he put the other up her skirt and tried to take down her pants. She said she struggled and actually bit him on the penis (she did not know how hard) and was able to wriggle away on the bed. He held her there and removed her pants and tried to put his tongue in her vagina. When she realised what he was doing she rolled from him and ended up on the far side of

the bed against the wall. At that stage Richard came in and lay down. These two incidents form the subject of the first two counts of sexual violation.

The complainant said she then tried to get off the bed and look for her clothes but the applicant grabbed her hair and threatened to beat her up if she pulled away, and he went to pick up his belt. She started screaming and thought Richard went upstairs to see if anybody else in the house had heard. She was able to get back into some of her clothes which the applicant had removed. He then led her into a second bedroom over her protests and locked the door. she was pushed on to the bed and says he forced her to have sex with him while she objected and tried to push him off. He then left her for a while and Richard came in and also wanted to have sex but the complainant said she was able to persuade him not to. The applicant returned and accused her of having sex with Richard; she denied it and was crying and upset. He threatened to hit her and forced her down on the bed and had sex with her again, which she described as being really hard and hurting her. Under questioning she said she was "pretty sure" there were three acts of forced intercourse altogether.

When it was finished she found her clothes and discovered that her money (about $60) was missing from her bag. She insisted on going home after giving the applicant her phone number because she was afraid he would hit her if

she did not. He had written down his name and address but tore it up after handing it to her. Richard eventually agreed to drive her home and she left with both of them in the car. On the way they stopped at a dairy and gave her $5 to get them some cigarettes. As she went in she saw them put her things on the footpath and drive off. She was able to ring her mother and told her what had happened and took a taxi home, being described as distraught and hysterical when she arrived.

When first interviewed by the police the applicant flatly denied having anything to do with the complainant. After he was confronted with Richard's statement that they had taken the girl home, he admitted doing so and also admitted that intercourse took place, but claimed it was consensual. At the trial he gave evidence of only two acts of sexual intercourse, the first taking place in the first bedroom and the second in the other. He also accepted that oral sex occurred, again with consent; however it appeared at the close of his cross-examination that he was confused about the meaning of that term and thought it was simply touching and feeling each other. He denied that she had his penis in her mouth, and a medical examination did not reveal any bite marks on that organ. He said he had 'licked' her for some ten minutes in the first bedroom. On his account of their overall activity, the complainant was a very willing partner.

A doctor called by the prosecution examined her about 6 pm and found her still distressed. She (the doctor) described abrasions, reddening and inflammation in the vaginal area with associated pain, indicating to her there had been forceful sexual intercourse which had probably been repeated. She thought it unlikely this was merely the result of vigorous consensual sex, saying she had examined hundreds of sexually active women and had never seen those appearances. On the other hand the applicant was adamant that she was entirely willing and relaxed and that he did not have to force her in any way and entered her vagina with ease. He said he had no idea how that area came to be in the condition described by the doctor, and his Counsel was reduced to suggesting that the complainant had inflicted it on herself manually.

Inconsistent Verdicts

After giving the jury the usual directions and definition of the offences charged, the Judge put the issues succinctly to the jury in this way :

> "Looking at those five counts in turn, as to the first the act alleged is one which we now find, although that wasn't apparent at the outset, is denied by the accused. The attempted sexual violation charged in count two so far as the act is concerned is not denied by the accused, indeed he goes further than she did and says that the act was a completed one: but her evidence was only of an attempt. The sexual intercourse, the act involved in each of counts 3, 4 and 5, is said in the evidence of the complainant all to have occurred in the second bedroom, and is said by the accused to have occurred on

> one occasion in the first and one occasion only in the second bedroom. What that means is that in respect of count one and either one or two of the last three counts, whichever way you read his evidence, you will need to be satisfied that the act stated is sufficiently proven. But in all five counts there is what was of course regarded by both counsel, and correctly, as the essential overriding significant issue in the trial, namely the question whether or not whatever sexual activity you find proven was had without the girl's consent. And it is the Crown's obligation to satisfy you by evidence that the complainant did not consent, and not the onus of the defence to prove she did."

The rest of the summing-up was principally directed towards issues of credibility and consent, but were preceded by a warning that each count had to be considered separately on the evidence relevant to it, although the jury might well think that "most of the evidence relevant to consent in one count is also, at least in some degree, relevant to your consideration of consent on other grounds."

In support of the ground based on the inconsistency between the verdicts, Mr Hart submitted that the jury must have rejected the complainant's unequivocal account of sexual violation without consent in the first three counts. With all the events so close in place and time, their acceptance of evidence of lack of consent on the two remaining counts of rape was irrational, lack of consent being the only relevant issue before them. As noted earlier, he also complained that the applicant was deprived of the opportunity to have the question of his belief in consent considered by the jury. We will deal with that aspect later.

It is clear that consent became the critical issue in this trial once sexual intercourse and oral vaginal sex had been admitted. However, there was still a dispute about whether there had been contact between the applicant's penis and the girl's mouth, while the vaginal oral sex had been charged only as an attempt (following amendment, presumably at the close of the prosecution case), whereas the applicant apparently admitted to a completed act. There was obviously confusion in his mind about what consituted sex of that description.

Mr Squire informed us that in his closing address the Crown prosecutor told the jury that if they had any doubt in the first two counts that accused was confused by "oral sex", and about what he was admitting, they would be better to forget those counts. In the light of those comments it would not be surprising if the jury simply decided to put them to one side. They seem of relatively minor importance by comparison with the serious rape charges. On the complainant's evidence his attempts to engage in oral sex in the first bedroom may have appeared as litle more than unpleasant and unwanted preliminaries to the full sexual intercourse he obviously had in mind, and she was largely able to frustrate them.

In the recent case of R v Hunia (CA 162/88; 12/4/89), we cited a passage from this Court's judgment in R v Irvine [1976] NZLR 96, 98, to the effect that juries sometimes

acquit for no other reason than an unwillingness to convict, particularly in cases where to do so could result in an unnecessary double conviction. We think those comments are relevant here, and are not surprised by the acquittals on the first two counts.

On the rape counts, the case against the applicant on the crucial issue of lack of consent was very strong. His credibility must have been severely damaged by his denials to the police, followed by his change of tack when confronted with Richard's statement. In cross-examination he was sometimes in difficulty explaining inconsistencies between his police statements and his evidence. As a result, the jury may well have experiencd difficulty about believing his assertions that the girl was at all times a willing partner, who was so relaxed that he was able to enter her vagina with ease. That statement was effectively contradicted by the medical evidence of the condition and tenderness of that area, affording convincing support of her claim that she never consented.

In these circumstances the verdict of not guilty on the first rape count at first sight seems puzzling. The Judge recognised this in his sentencing remarks. He mentioned the complainant's account of oral sex in the first bedroom, and after attempts to have full intercourse were interrupted by Richard, that the applicant took her to the other bedroom and there raped her three times. He observed that the

latter said she was not only a consenting but a willing party to intercourse which took place in both bedrooms, and that only one act of sexual intercourse occurred in the second one. He also referred to a question from the jury after they had retired, wanting to know where it was alleged that the first rape took place and whether there was any evidence showing "where the first attempted rape took place." He thought this showed the jury was considering the possibility that sexual intercourse or attempted sexual intercourse had occurred in the first bedroom. We find this understandable, especially in the light of the passage in his summing-up at p.16 where he told them that "at least one possibly two of the rape counts will require your careful assessment of the evidence to decide whether you find the particular acts proven."

In his sentencing remarks the Judge went on to say :

> "In my view the most probable explanation of the verdicts was that the jury retained some doubts about the complainant's initial response to your advances, particularly having regard to the evidence of consumption of cannabis after alcohol, but was satisfied that she had not consented to what happened in the second bedroom, and that two acts of intercourse occurred there. There is one other possible but in my view less likely explanation, namely that the jury decided that the defence of mistaken belief in her consent might be available in respect of the first stages of this affair."

With respect we find some difficulty in understanding the proposition that the jury may have had some doubts about the complainant's initial response to the applicant's advances,

if that expression includes the first act of intercourse. There could really be no half-way house on any one of those episodes; her evidence was of vigorous resistance from the outset whereas his was of willing co-operation and enjoyment. Any ambiguity in her reactions would have been far more likely towards the end of her ordeal when she had given up trying, and not during the first act of intercourse forming the basis of count one.

In our view the jury's question points to a far more likely explanation - namely that they thought the first rape count (count 3) might relate to the events in bedroom one, where the applicant said intercourse occurred; whereas on the complainant's evidence he might be regarded as only trying to have it there until interrupted by Richard. As noted above, the Judge described the events in that way in his sentencing remarks. So the jury may have felt some uncertainty over how far things had gone in that bedroom, but have been in no doubt about the two acts of intercourse she described in such detail in the second bedroom.

We also find the Judge's alternative explanation equally difficult to accept. As we have already observed, the only evidence about consent was in total conflict and mutually exclusive of any middle ground for mistaken belief. Assuming they turned their minds to that question, the jury's verdict of guilty on the last two counts indicates that they must have accepted the complainant's evidence

about those two acts of intercourse, rendering it highly unlikely that they had any doubts about her account of the character of the resistance she put up to the first intercourse so shortly before. Accordingly, and notwithstanding the Judge's thoughts at the time of sentencing, we remain of the view that the "not guilty" verdicts on the first two counts relating to oral intercourse, and on the third count for rape, are explicable in the ways we have indicated; and that they can stand alongside the two guilty verdicts without giving rise to any misgivings. Indeed, in the light of the compelling medical evidence to which we have referred, we think the applicant's conviction on the two admitted acts of intercourse was inevitable.

Misdirection

The second ground of appeal is that the Judge wrongly took away from the jury consideration of the accused's mistaken belief. In defining rape and unlawful sexual connection, he told them on two occasions that it must take place without the consent of the complainant and without the accused believing on reasonable grounds that she is consenting to what is done. However, after summing up the content of the five counts in the first passage quoted above, he went on to say :

"It can be a sufficient defence to these charge or such charges as these, as the passages I have read you from the code indicate, if although the complainant was not a consenting party the accused mistakenly but on reasonable grounds believed that she was. That defence has not been urged in the present case, and in my view the omission of such a claim was a sensible and proper course for counsel to have taken. That is of course because before you could find that the complainant was not a consenting party you must necessarily have accepted that her version of events was essentially correct, and also must have rejected the accused's totally contrary version of the activity between them. To get to that stage you must also have accepted that she did tell him she did not want sex, and that she was screaming and struggling and the like.

Once that situation is reached it is surely very difficult to contemplate how he might mistakenly on reasonable grounds have thought that she was a consenting party.

This really simply means that the issue of consent, the question whether her absence of consent, as I have explained to you, is adequately proved, involves only the question: "Is it established to the necessary standard that the complainant did not consent to the particular sexual activity?"

Mr Hart complained that in this passage the Judge had effectively removed the issue of mistaken but reasonable belief from the jury and he should not have done so, because it is a component of the statutory definition of all the offences charged. Both the absence of consent and the absence of any reasonable belief in it must be proved by the Crown to sustain a conviction.

He also criticised the indication in the first paragraph that reasonable belief in consent was a defence, thereby suggesting that this was something for the accused to prove.

Counsel at the trial (who was not Mr Hart) submitted an affidavit stating that his client's clear instructions had always been that the complainant had consented and that in his final address he no doubt placed the issue of consent at the forefront of his submissions, "but I certainly did not indicate that the jury ought not to consider the issue of whether my client believed on reasonable grounds that she was consenting." Although invited to do so by the Judge at the close of his summing-up, he made no comment on the direction now in question. It would seem from the terms of this affidavit that the Judge's comment to the jury was correct about the way the case was presented.

It was in order for the Judge to tell the jury that in appropriate circumstances the issue of mistaken belief did not seriously arise. It is elementary that a summing-up should be tailored to the facts of the case, and if there can be no rational argument about the existence of one of the elements required to be proved he may say so. We think that was the situation here. The Judge told the jury that before they could find the complainant was not a consenting party, they must necessarily have accepted her version of events as essentially correct and must have rejected the accused's totally contrary version. His comments in the second paragraph about the difficulty of contemplating how the applicant might mistakenly have thought she was a consenting party are a common-sense assessment of that

evidence, in the light of the way the case was put. His views may have been expressed in strong terms but they certainly did not go so far as to take this issue away from the jury's consideration altogether.

However, we must agree that the opening lines of this extract from his summing-up may be understood as reversing the onus of proof on the question of mistaken belief. Had this issue really been a live one there may have been difficulties in allowing the two guilty verdicts to stand. But in the light of the foregoing comments and of our view that the convictions were inevitable, we are satisfied in any event that there was no miscarriage of justice, and that this would be a proper case for the application of the proviso.

For the foregoing reasons, leave to appeal against the convictions is dismissed. Counsel advised that a later appeal against sentence was abandoned and it is also dismissed.

McCasey J

Solicitors: Crown Solicitor, Auckland, for Crown