

THE QUEEN

v.

WILLIAM IAN CLARKE

1306
Coram: Casey J (presiding)
Gault J
Sir Gordon Bisson

Hearing: 14 May 1991

Counsel: S J E Moore for Crown
B J Hart for Clarke

Judgment: 20 June 1991

JUDGMENT OF THE COURT DELIVERED BY CASEY J

The applicant, William Ian Clarke, along with two other men (Cordeaux and Tito) was found guilty of sexual violation and each was sentenced to 10 years' imprisonment. Cordeaux and Tito appealed against their sentences and they were reduced on 5 December 1990 to 8 years (CA 192 and 205/90). Clarke had sought leave to appeal against conviction and sentence but his application was adjourned because his counsel was not able to proceed with a hearing at that time. The facts are conveniently summarised in that judgment :

"The complainant, then just under 16½ years of age, attended a party at Albany on Saturday, 7 January 1989. At about 11.30pm she went into the kitchen of the house. She said that Tito, a single man then aged 26, hugged and kissed her and then, against her will, picked her up, and took her outside where he began taking off her jeans. According to Tito she was, up to this point at least, a willing participant affected by liquor. It is not possible from the verdicts of the jury to know what view they took of these differing versions and so the Judge put that part of the matter to one side as we do also.

Tito had come to the party with Clarke, another single man then just on 25 years of age and Cordeaux, also single and then aged 19. The three lived together in Auckland. These two saw Tito on top of the girl. They went over and at Clarke's instigation Cordeaux took the girl's legs and together they dragged her further from the house. Clarke then pulled off the girl's jeans, put his fingers into her vagina and then had intercourse with her. Next, Tito had intercourse. While he was doing so Cordeaux put his penis in the girl's mouth. Cordeaux then had intercourse and during it required the girl to get on her hands and knees and continued intercourse as a dog might do.

There were four counts in the indictment each laid against all three men. The first three were of sexual violation by rape. They reflected the three separate acts of intercourse and in each count the other two men were joined as parties. The fourth charge was sexual violation by unlawful sexual connection and was evidently directed to Cordeaux's act described above with the other two men being parties to the offence."

Conviction Appeal

Three grounds were advanced, but Mr Hart abandoned the third relating to the admissibility of a police interview. The first was a misdirection on intoxication. There was evidence of some consumption of liquor by all three, and the Judge said that it was only relevant if it deprived them of the ability to form an intent or make a rational judgment.

It must be accepted that this did not accord with the requirement for a proper direction spelt out by this Court in R v Kamipeli [1975] 2 NZLR 610. The appellant said he believed the complainant was consenting. Mr Hart referred to his evidence about her lack of resistance and suggested that this might have been misinterpreted as a sign of consent because the consumption of alcohol affected his judgment; what may appear unreasonable to a sober person may well appear reasonable to a person under its influence.

In that observation lies the basic flaw in Mr Hart's submission that the Judge should have directed that intoxication was to be taken into account in determining whether the accused had no belief on reasonable grounds that the girl was consenting. Under s 128 the absence of such a belief is an element in the offence of sexual violation by rape.

The adequacy of the grounds for a belief in consent must be judged objectively; this much is clear from the use of the word 'reasonable'. There is no warrant for reading it down to 'reasonable in the circumstances as he believed them to be' or in some other way bringing in a subjective approach to justify the accused's belief. To the contrary, the present s 128 of the Crimes Act was introduced in 1985 to displace the subjective approach enunciated in R v Morgan (1976) AC 182 - namely that honest belief in consent was sufficient. As Cooke P and Richardson J observed at p 668

of their joint judgment in Miller v MOT [1986] 1 NZLR 660,
(discussing the approach in R v Stawbridge) -

"In practical effect it [the Stawbridge test of belief on reasonable grounds] amounts to reading into a statute a mixed subjective and objective mens rea formula for which there is little if any warrant. If the legislature really wishes to produce this result, it can do so expressly, as in the current New Zealand rape legislation."

and at p 677 Somers J referred to s 128 as constituting rape an offence of negligence.

Accordingly there was no room for intoxication as a factor in determining whether reasonable grounds existed for the accused's subjective belief that the girl was consenting. That being so, there was no requirement on the Judge to direct the jury about the effect of intoxication in regard to that aspect of the offence and Mr Hart did not suggest it had any relevance to the other elements of the charges. It follows that the error in the direction could have had no effect on the propriety of the verdicts.

The other ground relied on in the conviction appeal concerned the disclosure by the accused to his counsel that he was facing other criminal charges or enquiries. It arose during part of his evidence in which he criticised the way the police had set about interviewing him over the alleged rape when he was at the station reporting on a fraud charge. This information emerged in examination-in-chief, his own counsel leading him with questions about it. Mr Hart

submitted that the Judge should have discharged the jury after that disclosure. He stressed that such knowledge must have affected his credibility in their eyes on the issue of his belief in consent.

We were informed that defence counsel at the trial (who was not Mr Hart) did not expect the accused to say he was reporting to the police in order to account for his presence at the station before the interview. He attempted to put that statement into context by asking why he was reporting. Shortly afterwards he applied to have the jury discharged, but the Judge felt the disclosures were not overly prejudicial and dealt with the matter by a direction to the jury which we think was quite adequate in the circumstances.

Accordingly we see no call to question the verdict on this ground either. The key issue at the trial was the complainant's credibility and all the accused made statements. As we observed in the earlier sentence appeal, on their face they rendered the not guilty pleas hopeless.

Sentence

Although counsel focussed on the applicant's particular involvement in this joint enterprise, and referred us to other rape sentences, we are satisfied there are no grounds for treating him any differently from the other two. For the reasons which prompted us to reduce their sentences,

we grant his application for leave and allow the appeal by
reducing his sentence also to one of 8 years' imprisonment.

M. E. Casey J.

Solicitors: Crown Solicitor, Auckland