REPORT OF THE CRIMINAL LAW REFORM COMMITTEE

THE DECISION IN DPP v. MORGAN: ASPECTS OF THE LAW OF RAPE

WELLINGTON NEW ZEALAND

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To : The Minister of Justice

Introduction and Summary

1. The committee has been asked to examine the implications of the decision in DPP v. Morgan.[1] In that case the House of Lords considered the question of the mental element in rape. A majority of their Lordships held that if a person accused of rape had honestly believed that the woman was consenting to intercourse he should not be convicted, even where that belief was not based on reasonable grounds.

That ruling initially provoked considerable outcry both in the United Kingdom and elsewhere, and was extravagantly described by some as tantamount to a "rapist's charter". Some critics claimed that the practical effect of Morgan would be that, in order to be acquitted of rape, an accused need merely assert his mistaken belief as to consent - however ridiculous his story might be.

2. We consider this criticism to be without substance.

Morgan demonstrates that there is no requirement of law that an accused's belief be based on reasonable grounds. The presence or absence of such grounds is a relevant consideration to which the jury should have regard, together with all other evidence, in considering whether the accused had such a belief.

In addition Morgan provides a clear ruling that recklessness as to whether the woman was consenting or not is sufficient for the purpose of criminal liability in a rape case.

We take the view that the law as stated by the majority of their Lordships in Morgan is also the law in New Zealand. However we think that it would be helpful to amend s.128 of the Crimes Act 1961 so that the statutory definition of rape will include the required mental element.

Background

3. In England an Advisory Group under the chairmanship of Mrs Justice Heilbron was set up "to give urgent consideration to the law of rape in the light of recent public concern". That Group, which duly reported in December 1975,[2] affirmed the principles stated by the majority in Morgan. Further, the Group recommended that the law governing intention in rape cases, as set out by their Lordships, be declared in statutory form.

4. Morgan was also subjected to close scrutiny in several Australian jurisdictions.

1. DPP v. Morgan [1975] 2 All ER 347

2. Report of the Advisory Group on the Law of Rape Cmnd. 6352 December 1975.

In a Special Report[3] the Criminal Law and Penal Methods Reform Committee of South Australia noted that the law in that state accorded with Morgan, and recommended no change.

The Law Reform Commission of Tasmania[4] approved both the decision in Morgan and the Heilbron Group's recommendation that declaratory legislation be enacted to avoid misunderstanding as to its effect.

The Law Commissioner of Victoria[5] reported that Morgan had caused little concern in that jurisdiction because there it had long been settled law that an intention to have intercourse without consent (either knowingly or recklessly) was an essential element of the crime of rape. However "none of the disastrous consequences which were apprehended in England by commentators on Morgan's case" had eventuated.

5. The Heilbron Report and the three Australian reports all indicated that most criticism seemed to be directed not so much against the substantive law of rape as against practices and procedures which might result in additional suffering or unpleasantness to a woman if she complained of rape. Most criticised were the rules of evidence which allowed the cross-examination of the complainant about her general sexual history or conduct, or the introduction of evidence relating to it, where this was not necessary for the proper defence of the accused.

Statutory changes were duly made in England and in most Australian jurisdictions to the rules relating to the admissibility of evidence as to the complainant's character.

6. In this country, too, the attention of the legislature was focussed on the courtroom plight of the complainant. In August 1976 a Private Member's Bill was introduced by Mr J.K. McLay MP and referred to the Statutes Revision Committee for consideration. That bill was also referred to this committee for study, and members of the committee presented our recommendations to the select committee.

The resultant Evidence Amendment Act 1977 provides that the complainant in the trial of a rape offence should not be subjected to questioning of her sexual behaviour which does not bear upon the matters in issue.

3. Criminal Law and Penal Methods Reform Committee of South Australia Special Report : Rape and Other Sexual Offences March 1976.

4. Law Reform Commission (Tasmania) Report and Recommendations for reducing harassment and embarrassment of complainants in rape cases February 1976.

5. Law Reform Commission (Victoria) Rape Prosecutions (Court Procedures and Rules of Evidence) 1976.

The Decision in Morgan

7. The facts in Morgan's case were that Morgan invited three other men with whom he had been drinking to have intercourse with his wife, who was a stranger to them. The three men claimed (but Morgan denied) that Morgan told them his wife would struggle a bit and simulate resistance, but that in reality she would be a willing participant. Morgan and his companions awakened Mrs Morgan and dragged her from the bedroom where she was sleeping with one of her young children into another room. There they held her on a bed while each of them had intercourse with her in turn.

Mrs Morgan consented to none of this. On the contrary she struggled and screamed for help, ran from the house as soon as she was able, and made immediate complaint at the hospital that she had been raped.

8. Morgan was charged as a party to rape. The other three men were charged with rape and with being parties to rape.

In court the other three men admitted that there had been something of a struggle; but asserted that they believed that Mrs Morgan both consented to and enjoyed what took place.

9. The trial Judge directed the jury that the prosecution had to prove that the accused had intended to have intercourse with Mrs Morgan without her consent; and that if the accused had believed she was a willing party they could not be found guilty, provided that belief was reasonable. The Judge said [6]:

> And secondly, his belief must be a reasonable one; such a belief as a reasonable man would entertain if he applied his mind and thought about the matter. It is not enough for a defendant to rely upon a belief, even though it be honestly held, if it was completely fanciful; contrary to every indication which could be given to carry some weight with a reasonable man.

10. All four accused were convicted.

They appealed on the ground that the direction set out in paragraph 9 was wrong. Their counsel contended that the burden was on the Crown to negative honest belief in consent, and that the question whether there were reasonable grounds for the belief was merely a factor in the evidence to be considered by the jury in deciding whether the relief was honestly held.

11. The Court of Appeal, Criminal Division, rejected their appeals. The court held that to secure a conviction for rape the Crown must prove circumstances that objectively demonstrate the complainant's lack of consent. On proof of such circumstances -

6. Sub nom. R. v. Morgan [1975] 1 All ER 8.

which must have come to the notice of the accused - it can be presumed that he appreciated their significance and that the complainant was not consenting. That presumption casts upon him the evidential burden of showing that he had in fact entertained an honest and reasonable belief that the complainant had given her consent.

According to the Court of Appeal, to merely assert an honest but mistaken belief, in the absence of reasonable grounds for that belief, was evidence of insufficient substance to raise an issue requiring the jury's consideration.

12. Nevertheless the Court of Appeal agreed that the decision involved a point of law of general public importance and granted the appellants leave to further appeal. The Court certified this question for the House of Lords:

> Whether in rape the defendant can properly be convicted notwithstanding that he in fact believed that the woman consented if such belief was not based on reasonable grounds.

13. The House of Lords, by a majority of three (Lord Cross, Lord Hailsham and Lord Fraser), to two (Lord Simon and Lord Edmund - Davies) held that the defendant cannot be so convicted; and that in the instant case the jury had been misdirected by the trial Judge.

Lord Cross said (at 352):

> ... the question to be answered ... is whether according to the ordinary use of the English language a man can be said to have committed rape if he believed the woman was consenting to intercourse and would not have attempted it but for his belief, whatever his grounds for so believing. I do not think that he can.

Lord Hailsham (at 361) was more detailed in rejecting the requirement of reasonableness:

> Once one has accepted, what seems to me abundantly clear, that the prohibited act in rape is non-consensual sexual intercourse, and that the guilty state of mind is an intention to commit it, it seems to me to follow as a matter of inexorable logic that there is no room either for a "defence" of honest belief or mistake, or of a defence of honest and reasonable belief and mistake. Either the prosecution proves its case or it does not. Either the prosecution proves that the accused had the requisite intent, or it does not. In the former case it succeeds, and in the latter it fails. Since honest belief clearly negatives intent, the reasonableness or otherwise of that belief can only be evidence for or against the view that the intent was actually held ...

14. The majority nevertheless held that the proviso to s.2(1) of the Criminal Appeal Act 1968 (U.K.) should be applied and the appeal dismissed because the misdirection had not led to any miscarriage of justice. The allegation made in evidence by the

defendants that Mrs Morgan was a willing and enthusiastic participant had clearly been rejected by the jury, in favour of her diametrically opposite version of the facts.

15. One of the dissentients, Lord Edmund-Davies, also preferred the approach that an honestly held belief in the existence of facts can exculpate, even if that belief is unreasonable. However His Lordship thought that such an approach must wait until the legislature reformed this part of the law. Meanwhile, in his opinion, the authorities required him to uphold the trial judge's direction.

16. Only Lord Simon, in the other dissenting opinion, agreed with the Court of Appeal that a statement of belief for which the accused can indicate no reasonable grounds is insufficient evidence to put to the jury. He also thought (at 367) that as a matter of policy the law should maintain a balance between victim and accused:

> It would hardly seem just to fob off a victim of a savage assault with such comfort as he could derive from knowing that his injury was caused by a belief, however absurd, that he was about to attack the accused. A respectable woman who has been ravished would hardly feel that she was vindicated by being told that her assailant must go unpunished because he believed, quite unreasonably, that she was consenting to sexual intercourse with him.

Intention

17. The primary issue raised in Morgan related to intention - in particular, the effect of mistake on intention. By "intention" we mean one of the blameworthy conditions of the mind that in most instances must accompany the commission of the act (or omission) the law forbids to constitute an offence. The requirement that a blameworthy condition of the mind must accompany the act is commonly expressed by the maxim:

> Actus non facit reum nisi mens sit rea (literally, An act does not make a person guilty unless his or her mind be guilty)

In relation to rape it means that an accused ought not to be convicted unless it be proved that in having intercourse with the woman his actions were associated with a wrongful intention (or other condition of the mind blameworthy at law).

18. The need for a wrongful intention to be proved is a fundamental principle of the common law. This was strongly emphasised by Lord Morris in Sweet v. Parsley[7] in the following words:

7. Sweet v. Parsley [1969] 1 All ER 347.

> My Lords, it has frequently been affirmed and should unhesitatingly be recognised that it is a cardinal principle of our law that mens rea, an evil intention or a knowledge of the wrongfulness of the act, is in all ordinary cases an essential ingredient of guilt of a criminal offence.

19. It is equally a fundamental principle that, generally speaking, the onus of proving the presence of mens rea lies squarely on the Crown:[8]

> ... if, on the totality of the evidence, there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction, and if, on a review of the whole evidence, they either think that the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted.

20. Intention may be proved from what the accused says or from his conduct. However intention is proved the question always is: what did the accused actually intend?

21. To better explain this point we quote the following passage from Glanville Williams' Textbook of Criminal Law:[9]

> To use language that has become common in legal circles, the test of intention is subjective, not objective. An objective test means that one merely asks whether a reasonable man would have foreseen the result in question as likely or probable. A subjective test of intention, on the other hand, attempts to look into the mind of the defendant, and uses the test of the reasonable man only as some indication of what the defendant probably intended.

Effect of Mistake on Intention

22. One reason the accused may lack an intention to commit a crime is because he acted upon a mistake of fact. If he mistakenly believed in the existence of facts which, if true, would have made his act innocent he will not have intended the crime because he was ignorant of the facts making his act criminal.

23. In Morgan therefore the accused were contending that, because they genuinely believed - albeit wrongly - that the woman consented to sexual intercourse, they did not intend to commit rape because this required an intention to have intercourse without consent.

8. R. v. Steane [1947] 1 All ER 813, 816 per Lord Goddard.

9. Glanville Williams Textbook of Criminal Law 1978 p.60.

Prior to Morgan however there had been considerable argument as to whether a mistake, to be a defence, must be reasonable. The most frequently cited authorities suggested that there was such a requirement. The following passage from Tolson[10] was regarded as the locus classicus:

> At common law an honest and reasonable belief in the existence of facts which, if true, would make the act for which the prisoner is indicted an innocent act, has always been held a good defence ... .

The facts of the case were that Mrs Tolson, believing herself a widow after her brother-in-law and others had told her that her husband had been lost at sea, remarried. When the original husband reappeared she was charged with bigamy, but her conviction was quashed because of her mistaken belief on reasonable grounds that her husband was dead.

24. However writers of leading treatises on the criminal law vigorously contested the notion that a mistake, to afford a defence to a criminal charge, must be reasonable. For example, Glanville Williams[11] and Smith and Hogan[12] emphasised that any genuine belief in the absence of facts required for a crime means the accused did not intend the crime. To allow mistake to excuse only if it is based on reasonable grounds would be to punish inattention and negligence, but in serious crime such liability is exceptional (the most obvious example being manslaughter). In Tolson the mistake was reasonable and Glanville Williams suggested the judges may have been merely cautious in stating the scope of the rule for it was not necessary to decide whether an unreasonable mistake might excuse. But in bigamy the courts have insisted that reasonableness is required.[13]

25. In this country the apparent inconsistency in holding actual intention to be necessary for criminal liability but also requiring a mistake to be reasonable before it can excuse was noticed by Professor I.D. Campbell.[14] He criticised the requirement of reasonableness, the effect of which, in his words, is:

> ... to impose criminal liability on (a person) not because he was a rogue but because he was a fool.

10. R. v. Tolson (1889) 23 QBD 168, 181 adopted by the Privy Council in Bank of NSW v. Piper (1897) AL 383, 389.

11. Glanville Williams, Criminal Law (2nd edn 1961), paras 66, 71; see also (1951) 14 MLR 485.

12. Smith and Hogan, Criminal Law (3rd edn 1975) pp 148-151.

13. King [1963] 3 All ER 561 CCA

14. I.D. Campbell The Resurgence of Mens Rea (1956) 32 NZLJ 325,326.

26. Glanville Williams, Smith and Hogan and Professor Campbell all cite the judgment of Lord Goddard CJ in Wilson v. Inyang[15] as authority for their proposition that a mistake need not be reasonable to excuse. That case involved a person charged with wilfully and falsely holding himself out to be a medical practitioner. The defendant wrongly believed that a correspondence course he had completed entitled him to so describe himself.

The Divisional Court rejected the contention that the defendant could not have acted honestly if he had no reasonable grounds - by ordinary standards - for his belief. Nevertheless the Court acknowledged that the presence or absence of such grounds was a factor in determining whether the defendant had acted honestly. Lord Goddard CJ said:

> A man may believe that which no other man of common sense would believe, but he yet may honestly believe it ... . If he has acted without reasonable grounds and says: "I had not properly inquired, and did not think this or that", that may be (and generally is) very good evidence that he is not acting honestly. But it is only evidence.

27. Therefore in Morgan their Lordships were faced with two conflicting schools of thought. On the one hand there was the line of authority beginning with Tolson holding that what negatives a "guilty mind" is an honest and reasonable belief in facts which if true would make the act innocent. On the other hand was the argument, supported by the reasoning in Wilson v. Inyang, that intention may be lacking even if the belief is not based on reasonable grounds.

Reasonable Grounds Not a Requirement in Respect of Rape

28. In Morgan the House of Lords had to interpret section 1 of the Sexual Offences Act 1956 (UK) which simply declared it to be an offence "for a man to rape a woman". The Act did not define the term "rape" and so the common law definition was applied. The description of the physical element of the offence was found to be as stated in Archbold:[16]

> Rape consists of having unlawful sexual intercourse with a woman without her consent by force, fear or fraud.

The issue in Morgan concerned the mental element required. The speeches of the majority contain various lines of reasoning, but each of them concluded that at common law the full definition of rape requires that the accused intended to have sexual intercourse without the woman's consent, or irrespective of whether she

15. Wilson v. Inyang [1951] 2 All ER 237, 240.

16. Archbold, Pleading Evidence and Practice in Criminal Cases (38 edn, 1973) para. 2871.

consented or not. It was held to follow that he should be acquitted if he mistakenly believed the woman consented, whether or not he had reasonable grounds for this belief, for in any such case the only intention proved is an intention to have intercourse with a consenting woman.[17]

29. Their Lordships declined to disapprove Tolson, but Lord Hailsham thought it "a narrow decision based on the construction of a statute, which prima facie seemed to make an absolute statutory offence, with a proviso, related to the seven year period of absence, which created a statutory defence".

The Position in New Zealand

30. In New Zealand the crime of rape is defined in s.128(1) of the Crimes Act 1961 as follows:-

> Rape - (1) Rape is the act of a male person having sexual intercourse with a woman or girl -
>
> (a) Without her consent; or
>
> (b) With consent extorted by fear of bodily harm or by threats; or
>
> (c) With consent extorted by fear, on reasonable grounds, that the refusal of consent would result in the death of or grievous bodily injury to a third person; or
>
> (d) With consent obtained by personating her husband; or
>
> (e) With consent obtained by a false and fraudulent representation as to the nature and quality of the act.

31. Section 128(1) defines the physical element in much the same way as the common law but is silent on the mental element. There are passages in the speech of Lord Cross in Morgan that might suggest that when a statute defines an offence without specifying the mental element, reasonable grounds are required before mistake can provide a defence. These passages however were unnecessary to the decision and were not adopted in the other speeches. Moreover we know of no instance of a court suggesting that the mental element required for rape in this country is different from that required at common law.

32. Indeed it now seems clear that there is no difference.

In Walker[18] the Court of Appeal had to consider a case where on a charge of rape the trial judge in one passage of his summing up had indicated that the defence was that "the accused reasonably believed she was consenting". Of this the Court of Appeal said:

17. [1975] 2 All ER 347, at 352, per Lord Cross; at 357-58, 361-362, per Lord Hailsham; at 381-82, per Lord Fraser.

18. R.v. Walker, unreported (CA 133/79, March 3 1980).

> Of course a jury, as was pointed out in Morgan, is obviously entitled to consider the presence or absence of anything which could amount to reasonable grounds as relevant when deciding whether or not an accused person did in fact honestly believe that the woman was consenting. But it was clearly laid down that honest belief is in law sufficient whether or not there be reasonable grounds for it. So that we cannot escape the fact that this particular passage in the summing up amounted to a misdirection. Crown counsel felt obliged, quite properly, to accept that this was so.

33. Nevertheless the Court applied the proviso and affirmed the conviction because there was no real risk that the verdict might have been different had the jury been properly directed. It was clear to the Court that:

> the jury in this case must have been satisfied that the girl's story as to the violence and rough treatment meted out to her was the truth ... . Once the jury accepted the girl's story as to violence then there was no room left, in the circumstances of this case, for the notion that Walker honestly believed she was genuinely consenting.

34. It could be said that Walker does not determine finally the question of the applicability of Morgan to rape in New Zealand. That point was not argued and it was not necessary for the Court to decide it.

We understand however that Morgan has been followed regularly by trial judges in directing juries. Further, in 2 cases prior to Walker the Court of Appeal did not question that Morgan applied here.[19]

35. In our view therefore the mental element in rape is the same in New Zealand as in England. We recommend that it should remain so.

36. To amend the law to require reasonable grounds for mistaken belief in consent would mean that an accused was to be judged on what a reasonable man would have been aware of, not on what the accused himself was aware of. This would be contrary to what we regard as a fundamental principle that, in general, criminal intent must be proved when a serious crime is charged. In rape the presence or absence of consent is a central question for it makes the difference between an innocent act and one of the most serious offences. It would be wrong for a person to be held guilty of the crime if he was ignorant of the crucial fact that the woman did not consent.

19. R. v. Poupouare, unreported (August 16 1976);

R. v. Woolnough [1977] 2 NZLR 508, 518.

Criticisms of Morgan

37. It has been suggested that not to require that an honest belief in consent be based on reasonable grounds may lead to perverse acquittals, or acquittals in circumstances where it is unjust for the man to go unpunished. This, the argument has it, could happen in two ways.

38. First, there was the fear of some critics that Morgan would expedite wrongful acquittals, it being thought that a "bald assertion" that the accused believed the woman consented would readily secure an acquittal.

In practice however there is little likelihood of this happening.

In most cases where the question of mistake is likely to arise the question whether the woman in fact consented will also be in issue. Once the jury find that in fact she did not consent it will usually be an obvious inference that the accused was aware of this, and if the finding of absence of consent has involved rejection of the accused's version of the complainant's conduct any claim of a belief in consent would almost inevitably be rejected as well. This was the position in Morgan, as it was in Walker.

The nature of the offence is such that there will rarely be a real possibility of mistake, reasonable or unreasonable. In the exceptional cases where mistake is a live issue reasonable grounds are not an ingredient of the defence but the reasonableness or otherwise of the alleged mistake is an important factor for the jury to consider in deciding whether the accused might in fact have believed the woman consented. Juries are most unlikely to accept that a mistake might have been made if no credible grounds are suggested in evidence. Unfounded and absurd claims of a belief in consent are likely to destroy the credibility of the accused in respect of that and other issues.

39. The second line of criticism is that those deserving punishment may go unpunished. This follows broadly the reasoning of the minority judgment of Lord Simon. To recapitulate, his Lordship took the view that where a woman has been subjected to sexual intercourse without her consent it is unfair to the victim that the perpetrator of the act should escape punishment merely because he unreasonably believed she consented.

We agree with the Heilbron Group's rejection of this objection:[20]

> To this criticism there is, we feel a real objection. If carried to its logical conclusion the argument would lead to the abandonment entirely of any requirement of a guilty mind, for the harm suffered by the victim is the same whatever the man's intention may be. We are concerned with criminal not civil law, not only with harm but with culpability.

20. Paragraph 74

Recklessness

40. The other important aspect of Morgan is that the decision laid down that recklessness as to whether the woman is consenting to intercourse is sufficient mens rea for rape.

41. The following are clear and unambiguous statements that their Lordships regarded recklessness as an alternative to intention:

Lord Cross (at 352):

> Rape ... imports at least indifference as to the woman's consent.

Lord Hailsham (at 362):

> ... the mental element is and always has been the intention to commit that act, or the equivalent intention of having intercourse willy-nilly whether the victim consents or not.

Lord Simon (at 365):

> the mens rea is knowledge that the woman is not consenting or recklessness as to whether she is consenting or not.

Lord Edmund-Davies (at 371):

> ... the man would have the necessary mens rea if he set about having intercourse either against the woman's will or recklessly, without caring whether or not she was a consenting party.

42. In the context of serious crimes, courts in England have recently held that a person is "reckless" as to the consequences of his acts if he realises they might occur and he unjustifiably takes that foreseen risk.[21] And in rape it has been held in South Australia that the accused may be reckless if he knows the woman "might" not be consenting, there being no requirement that he realise this is "probable".[22]

43. We agree with the Heilbron Group that Morgan provides an important strengthening of the law of rape in emphasising that recklessness is sufficient.[23] An actual belief that the woman consented excludes recklessness as well as intention, for the accused does not realise she might not be consenting, but if he

21. R. v. Stephenson [1979] 2 All ER 1198 CA; Flack v Hunt [1980] Crim. L.R. 44

22. R. v. Wozniak (1977) 16 S ASR 67 FC

23. Paragraph 77

has real doubts about the matter and goes ahead notwithstanding the risk, he may be held to have been reckless. This may be significant, for example, in a "gang rape": by the time the particular accused had intercourse there may be little manifestation of lack of consent from the complainant, but if the accused was aware of the circumstances he would probably be found to have been at least reckless as to her lack of consent.

Drunkenness

44. The Heilbron Group[24] made brief reference to the relevance to intent of evidence of drunkenness, as Morgan and his companions had been drinking before they committed the offence. The Group regarded the matter as largely outside its brief (particularly as the case of Majewski[25] was about to be considered by the House of Lords), but did comment that the statutory emphasis on recklessness they recommended might "well solve some of the problems".

45. To elaborate, drunkenness - like mistake of fact - may occasionally result in a person not having the state of mind necessary to render his actions criminally culpable.

The relevance of alcohol in respect of intent was considered by the Court of Appeal in this country in Kamipeli.[26] The Court, stressing that it is always for the Crown to prove that an accused person actually had the intent necessary to constitute the crime , said:

> Drunkenness is not a defence of itself. Its true relevance by way of defence, so it seems to us, is that when a jury is deciding whether an accused has the intention or recklessness required by the charge, they must regard all the evidence, including the evidence as to the accused's drunken state, drawing such inferences from the evidence as appears proper in the circumstances. It is the fact of intent rather than the capacity for intent which must be the subject matter of the inquiry.

46. At about the time that Kamipeli was decided the Court of Appeal in England dealt with the same kind of issue in Sheehan[27] and reached the same conclusion. In that case the Court first remarked that it was proper to direct a jury that a "drunken intent is nevertheless an intent" but said it must be -

24. Paragraph 78.

25. DPP v. Majewski [1976] 2 All ER 142 (HL).

26. R. v. Kamipeli [1975] 2 NZLR 610, 616.

27. R. v. Sheehan [1975] 2 All ER 960, 964.

> ... subject to this, the jury should merely be instructed to have regard to all the evidence, including that relating to drink, to draw such inferences as they think proper from the evidence, and on that basis to ask themselves whether they feel sure that at the material time the defendant had the requisite intent.

47. We must add that since Kamipeli the House of Lords has delivered its ruling in Majewski that, while evidence of self-induced intoxication negativing mens rea may be a defence to a charge of a crime requiring proof of "specific intent", it is no defence to any other charge. Lord Simon held that rape is not a crime of specific intent, and thus falls in the second category.

The question of the applicability or otherwise of Majewski in New Zealand has been expressly left open by the Court of Appeal in Roulston.[28]

48. We do not see that evidence of intoxication gives rise to any special problems peculiar to the law of rape. In rape cases the basic issue for the jury is whether the accused intended to have intercourse with a woman without her consent, or (since Morgan) being reckless as to whether she consents or not. Applying the principle laid down in Kamipeli, if there is evidence suggesting intoxication the jury should be directed to take this into account and determine whether it is weighty enough to leave them with a reasonable doubt that the accused had that intention or was so reckless.

A Possible Lesser Offence

49. The Heilbron Group[29] went on to discuss whether there should be a lesser offence of rape by negligence, to catch the man who honestly, but mistakenly and unreasonably, believed the woman he was having intercourse with was consenting.

The Group rejected this idea: first, because it would greatly complicate the task of the Judge and jury; second, because of the difficulty of formulating a satisfactory test of reasonableness in respect of personal sexual relations; and third, because of the temptation it would give juries to convict of a lesser offence as a compromise to convicting or acquitting of rape.

50. We agree with the Group's conclusion. As well as the practical considerations just mentioned there is the more fundamental point that such a lesser offence would necessarily involve the test of how the hypothetical reasonable man would have acted in the circumstances in which the accused found himself. In other words it would make negligence the measure of criminal

28. R. v. Roulston [1978] 2 NZLR 644, 653.

29. Paragraph 79.

liability. There are very few crimes under our law in which negligence is the gist of the offence, manslaughter being the only serious crime in this category.

Declaratory Legislation

51. The final question arising from Morgan is whether Parliament in this country should adopt the Heilbron Group's recommendation[30] that the principles in that case should be put into statutory form.

In the United Kingdom there was quick response to that recommendation; and there the mens rea in rape is now defined in s.1 of the Sexual Offences Amendment Act 1976 (UK).[31]

52. Although there seems no doubt that the principles in Morgan represent the law in New Zealand we think it would be helpful to amend s.128 of the Crimes Act 1961 to incorporate them expressly.

A clear and authoritative statement of the law would then be available to everyone. It would also avoid any risk of uncertainty arising, and in particular it would make it absolutely clear that recklessness is sufficient mens rea.

We recognise that such an amendment would require the rewriting of s.128, which would raise questions of policy that are beyond our present terms of reference.

53. The legislation in the United Kingdom[32] also expressly provides that the presence or absence of reasonable grounds for a belief that a woman consented to sexual intercourse is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether the man had such a belief.

30. Paragraphs 81-84.

31. Section 1(1) of the Sexual Offences (Amendment) Act 1976 (U.K.) provides as follows:

> (1) For the purposes of section 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if -
>
> (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and
>
> (b) at the time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it;
>
> and references to rape in other enactments (including the following provisions of this Act) shall be construed accordingly.

32. Section 1(2) of the Sexual Offences Amendment Act 1976 (UK).

But this is a general evidentiary principle applicable to all offences to which mistake may be a defence and we do not think it necessary or desirable that such a provision should be included in the New Zealand legislation relating to rape.

Chairman

Members

The Hon. Mr Justice Savage (Chairman)
Mr A.A.T. Ellis
Mrs J.E. Lowe
Superintendent R.J. McLennan
Dr G.F. Orchard
Mr P.G.S. Penlington QC
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