Publication of name or identifying particulars of complainant prohibited by s 139, Criminal Justice Act 1985

IN THE COURT OF APPEAL OF NEW ZEALAND CA275/01

THE QUEEN

V

BENJAMIN GUTUAMA

Hearing:	19 November 2001
Coram:	McGrath J Fisher J Baragwanath J
Appearances:	D P H Jones for Appellant S P France for Crown
Judgment:	13 December 2001

JUDGMENT OF THE COURT DELIVERED BY FISHER J

Introduction

[1] A District Court jury found the 27 year old appellant guilty on one charge of indecent assault on a girl under the age of 16 years and another charge of sexual violation by rape. He was sentenced to concurrent terms of imprisonment for 18 months and five years respectively. He now appeals against conviction.

[2] No argument was advanced that the appellant was wrongly convicted of indecent assault on a girl under the age of 16 years (count 1). On the sexual

violation conviction (count 2), the grounds advanced in support of the appeal were late disclosure by the Crown and various forms of misdirection to the jury. The misdirections involved lies, credibility, and sexual violation.

[3] The second and third elements of sexual violation require the Crown to prove a negative. Experience suggests that it is easy to inadvertently obscure or reverse the onus of proof when explaining those elements to a jury, particularly when dealing with absence of reasonable belief in consent. The present case illustrates the problems. It also raises a point of practice about the use of documents in cross-examination.

Factual Background

[4] The evidence established that the complainant was a 14 year-old girl staying in an Auckland house with her mother and older sister. The appellant was a friend of the older sister. The complainant had a crush on him.

[5] On 16 January 2000 the appellant and complainant spent the night in her bed without the knowledge of others in the household. Some form of consensual intimacy falling short of sexual intercourse took place. The complainant recorded the incident in her diary along with her concern that they could have been caught.

[6] On 21 January 2000 the appellant again spent the night in the complainant's bed without the knowledge of others in the household. It is not disputed that he inserted his finger and tongue into her vagina and that they had sexual intercourse. It is agreed that she consented to the finger and tongue. There is a dispute over consent to the sexual intercourse.

[7] Later on the same morning the complainant recorded the following in her diary:

> Well this mornin' I finally lost it! 2 Ben of course! Fuck man it hurt! Bad! First off it was sore but then when he really went in that was it I had 2 tell him 2 get off! Fuck it hurts really bad! First off I was asleep & I was only wearing G-strings & he came in & just go 2 sleep. So he took off his top & jumped then I thought fucken hell

> what if someone walks in! & sees I only have G-strings on! So I got up & got on a nightie then jumped back in bed then he said are you scared of me! And I go na! So he turned around and we started getting with each other! Then he put his hand down my G and started fingering me. Then he pulled away and asked if he could play with me & I said yeah do what ever so he went down on me & he fingered me & licked me out! It's like [M] said! It feels like soft mud going through your toes like it feels gross but nice! WEIRD!

[8] At some later date or dates unknown the complainant added the following on the same page:

> After he licked me out he came up & said can I put it in and I said not without protection I don't wanna get pregnant! & he said "you know you can't get pregnant if I pull it out before I come!" Then I said no I don't trust you! & so I turned over. Then later on that morning he woke me up & started getting with me & went down again and licked me out & that shit!

[9] The complainant told her cousin about the incident on the same morning, another acquaintance two days later, and her mother 18 days later. She did not volunteer to any of them that she had not consented. Her mother was the first to raise that possibility. She told the complainant that if there had been no consent it would be rape. In response, the complainant said that she had told the appellant not to proceed without a condom but that he had gone ahead nevertheless. She was afraid that everyone would blame her.

[10] The complainant's family informed the police who escorted the appellant to the police station. In a video interview he agreed that he had spent the night in bed with the complainant but denied that there had been any form of sexual contact between them on that or on any other occasion. A prosecution against the appellant was commenced.

[11] The complainant's diary was then discovered by her sister. The sister and mother discussed the diary with the complainant. The mother then telephoned Detective Harris, an officer with responsibility for the case. In his job sheet for that day, 28 June 2000, Detective Harris recorded his account of what the mother said:

> My daughter [G] is now going to a special school in Jervois Road Herne Bay. She is still seeing a Counsellor in relation to her

> complaint. You have asked me about how [G] feels now that she has had some time to reflect on what has happened. I was the person who initially jumped to the conclusion that [G] was raped by Benjamin (GUTUTAMA). My daughter has spoken to me about the situation and told me that she believes that it was her fault and that she is to blame for putting herself in the position that she did. I jumped to the conclusion that she had been raped. I later saw and read [G]'s diary and realised that whatever happened between [G] and Ben GUTUTAMA, placed reliance on the writings in her diary, was by consent. [G] has wanted me to drop the whole thing because she said to me "I said yes Mum". I put her (G) into that situation (making of complaint). She has been caught up in events and didn't know which direction to take. [G] told me that she was attracted to Benjamin (GUTUTAMA) and it is my belief now that what occurred between her and Benjamin was by consent.

[12] Detective Harris spoke to the complainant. Contrary to what her mother had told the Detective, the complainant denied that she had consented to intercourse. The prosecution was therefore continued.

The Trial

[13] Until the day of the trial the appellant consistently instructed his counsel that nothing of a sexual nature ever took place between him and the complainant. Then on the morning scheduled for the trial he instructed his counsel that he had had sexual intercourse with the complainant after all, stating that she had consented. After an adjournment for a day the trial commenced.

[14] After the Crown opening defence counsel made a statement to the jury. He deposes that "after the Crown opening, I made a brief statement to the jury on behalf of the appellant to the effect that the defence was consent. At all times in the trial, the defence to the sexual violation charge was that the complainant had consented."

[15] The complainant's evidence was given by playing a video-taped interview supplemented by questions put to her by closed circuit television. Her evidence was that she had told the appellant that he could not insert his penis into her vagina without a condom and that at that point he went ahead against her will. She was cross-examined about her diary entries. At the conclusion of her evidence she was

released as a witness and the closed circuit television equipment removed. It was unavailable for the remainder of the trial.

[16] The complainant's mother described the association between the complainant and the appellant in general terms and the occasion when she confronted the appellant in the presence of the complainant. On that occasion she accused him of sexual intimacy with the complainant. No-one present suggested that it had taken place without consent. She said that he denied that there had been any sexual encounter at all. She was cross-examined about her conversations with the complainant. She agreed that it had been she, the mother, who had first raised with her daughter the possibility that there had been no consent to sexual intercourse.

[17] During the mother's re-examination counsel for the Crown read Detective Harris's job sheet for the first time. On the application of defence counsel the mother was recalled for further cross-examination on it. The result included the following:

> And then did you tell him that [G] had said, I said yes mum?…. I said yes, I told [G] that she said yes.
>
> Well I'll put it to you this way, it's noted as '[G] has wanted me to drop the whole thing because she said to me, I said yes mum'?…. I told her she said yes, I told [G] she said yes. In her diary she did – she said 'whatever' to me, that means yes.
>
> But - ?…. She did not –
>
> You referred to the police officer and you told him that [G] said I said yes mum?…. I said yes for her, I said yes to [G], [G] was confused, I told [G] she said yes.
>
> …
>
> I just want to go back again, just to clarify that one point, in the job sheet the officer has written quoting you, '[G] has wanted me to drop the whole thing because she said to me, I said yes mum', and he's got quotation marks around the bit that says I said yes mum. Now isn't that police officer writing down what you said to him?…. What I said to him, but I said yes, [G] didn't say yes, I said yes, I told her to say – she said yes, whatever it means in her diary, yes, everybody said it means yes.

[18] When Detective Harris gave evidence there was the following exchange:

> Now detective I just want to confirm with you that you spoke with [mother] on 28th June 2000?…. Yes.
>
> And that you recorded in a job sheet a statement by her which reads, "[G] has wanted me to drop the whole thing because she said to me 'I said yes mum'? "…. Yes.
>
> Did you put the quotation marks around "I said yes mum"?…. Yes.
>
> Do those quotation marks mean that your recording of the event is that [G] is saying yes "I said yes mum"?…. Yes.

[19] The appellant did not give evidence. In this Court he deposed that he "had a thing about speaking in front of people" and knew that he would freeze up and be unable to answer questions.

Was there non-disclosure?

[20] The first ground of appeal was that the defence was prejudiced by the late disclosure of the job sheet of Detective Harris concerning his conversation with the complainant's mother.

[21] It is unclear whether the job sheet was disclosed to the defence prior to trial. There is conflicting evidence on the point. What is clear is that the mother's statement that the complainant had said to her "I said yes Mum" recorded in the job sheet came to the attention of defence counsel only in the course of the mother's re-examination during the trial. Whether that was due to non-disclosure by the police or oversight by defence counsel does not matter in the end. The accused did not have the benefit of an earlier appreciation of its existence. We are prepared to approach the case on the basis that the precise allocation of responsibility between the police and defence counsel is immaterial. The question is whether it may have produced a miscarriage of justice.

Potential significance of job sheet

[22] The complainant's evidence was that immediately before the appellant penetrated her she made it clear to him that he was not to do so. The job sheet suggested the contrary. It went directly to the central issue in the trial. On the other

hand, it was merely a second-hand account of the complainant's alleged admission that she had agreed to sexual intercourse.

[23] Mr France submitted that an earlier appreciation of the document could not have made any difference. He argued that the effect of the mother's evidence was to explain away what otherwise appeared to be a concession from the complainant. In his submission all the mother was conveying to Detective Harris was the mother's own interpretation of the complainant's diary. The mother was available for full cross-examination on that point. The job sheet could not have been put to the complainant herself in cross-examination.

[24] We agree that the document could not have been put to the complainant as a document for which she was responsible. She was not involved in its preparation. Nor did she provide the maker of the document with the information it contained. In those circumstances counsel could not have used cross-examination on the document as an opportunity to convey its contents to the jury: *R v Youssry* (1914) Cr App R 13; *R v Windass* (1989) 89 Cr App R 258, 263. Counsel could not have framed questions that suggested that certain assertions were made in the job sheet.

[25] It seems to us, however, that an earlier defence appreciation of the job sheet could have had significance in two ways. First, earlier notice might have permitted the defence to make indirect use of it when cross-examining the complainant. The fact that defence counsel could not have framed questions that implied that there were factual assertions in the job sheet does not mean that the document would have been no use to him at all. Without referring to the document, counsel could have asked her whether she had said "I said yes Mum" to her mother. If the complainant had been lying, and if she had indeed said that to her mother, the revelation that others were aware of the fact might have shocked her into admitting consent. Defence counsel could also have used the document for a "silent read" cross-examination, that is to say without referring to the nature or content of the document he could have simply handed it to her, asked her to read it silently to herself, and then asked her whether she adhered to her previous answer: *R v Yousry* (1914) Cr App R 13, 18; McHugh "Cross-examination on Documents" [1986] NZLJ 309 at 310-311.

[26] Secondly, it is possible that with earlier notice the document could have been used more effectively in cross-examination of the mother. The mother's evidence about her conversation with the Detective is far from clear. Probably it is intended to convey the notion that what she had conveyed to the Detective was merely her own reconstruction of events after reading the diary. But the defence was not bound by that explanation. The Detective was unshaken as to the accuracy of what he recorded. Quoting her daughter as having said "I said yes Mum" would have been a strange way for the mother to convey a mere reconstruction on her own part.

[27] We do not criticise defence counsel for the cross-examination of the mother that did take place. However, time to prepare usually results in more effective cross-examination. With earlier notice there would also have been the opportunity to use the document in cross-examination of the mother at depositions. If the mother had accepted that she was in fact quoting her daughter, the defence would have had direct evidence of a prior inconsistent statement by the complainant. That would have been a powerful weapon for later cross-examination of the complainant herself.

[28] All of that is speculative. However, in a case as finely balanced as this one we are unwilling to dismiss those possibilities as negligible. Little would have been needed to induce a reasonable doubt in this case, given the innocuous account which the complainant recorded in her diary and repeated to others after the event. The complainant admitted that after the sexual intimacy became known by others she was afraid that she would be blamed for it. In our view, there was a danger of significant prejudice stemming from the late stage at which the job sheet came to the notice of defence counsel.

Lies/onus of proof/reasonable belief in consent

[29] During the video interview the appellant denied any sexual intimacy with the complainant. It is not a matter over which he could have been honestly mistaken. By the commencement of the trial his instructions to counsel were that they had had oral sex and sexual intercourse. Cross-examination and addresses at trial were conducted on that premise. It was common ground that he had lied in his statement to the police.

[30] At two places in his summing-up the Judge directed the jury on the subject of lies. The first arose when explaining the different forms in which the evidence had come before the Court. In that context the Judge said:

> The Crown has said that the accused lied in his videotape when he denied that sexual intercourse had ever taken place and, in effect, said that he had merely laid on top of the bed and nothing further had happened. You must, of course, be satisfied that the accused did tell a deliberate lie, that is that he was not, for instance, simply mistaken or confused. If you are satisfied that what he said was a deliberate lie, you must be careful about the weight you place on that. The mere fact that an accused person did tell a lie is not, of itself, evidence of guilt. You must ask yourself what prompted him to do so. Remember that people might lie for various reasons, for example to protect someone else, because they are embarrassed, out of panic or confusion, or matters of that kind. If you are satisfied that there was a deliberate lie, you may regard that as a relevant factor in assessing his credibility, that is whether you can rely on any other evidence of his. That is a matter for you to assess.
>
> It is important that you guard against any tendency to think that, if the accused told a lie, he must be guilty of the offence for that reason alone.

[31] Later in the context of discussing consent the Judge said:

> The Crown says that the accused lied repeatedly in his videotape interview. The accused now puts forward a defence of consent, which is inconsistent with the earlier denial of sexual intercourse. I have already referred to the mere fact that an accused person lying is not, of itself, evidence that he is guilty. You must ask yourself what prompted him to lie and, of course, people can lie for various reasons, including embarrassment. If you are satisfied that the accused deliberately lied, you may treat that as relevant to your assessment of his credibility, as I have explained. That is whether you can accept his defence that he believed, on reasonable grounds, that the complainant consented to sexual intercourse.
>
> Please also guard against any tendency to think that, if the accused lied, he must be guilty of the offence for that reason alone. It is important to both the Crown and the Defence as to the question of credibility generally.

[32] It was entirely appropriate to warn the jury of the various innocuous reasons a suspect may have for telling a lie. It was also appropriate to warn them of the

dangers of assuming that a lie is necessarily evidence of guilt. Unfortunately, however, there were difficulties in other respects.

[33] The first was the invitation to use the lie in assessing the appellant's credibility. Before credibility can arise there must be a factual assertion whose truth is challenged. The difficulty in this case is to find the assertion. It could not have been the lie itself since the exercise would then be circular. The lie was the video-taped denial of sexual intimacy. The Crown was not challenging anything else in the statement. The fact that the same lie was made earlier to the family does not advance the matter. No other statement by the appellant was put in evidence. The appellant did not give evidence.

[34] It is true that upon his client's instructions counsel for the appellant advised the jury that the defence was consent. It is important to recognise, however, that that did not involve any positive assertion of fact by or on behalf of the appellant. It was not for the appellant's counsel to state facts from the bar. There is no suggestion that he did so. Properly analysed, his role was the purely negative task of testing the Crown's evidence in cross-examination and commenting upon it to the jury. At no point did that involve any affirmative factual assertion by or on behalf of the appellant. By inviting the jury to use the appellant's lie for the purpose of assessing his credibility the Judge must have left the jury in a quandary. What was the assertion the Judge had in mind as the target of the credibility assessment? If it was the videotape denial of intercourse, that had already been withdrawn. The only other option was the credibility of the accused's defence that the complainant consented. That leads into the next point which is the onus of proof.

[35] Having advised the jury that if they were satisfied that the accused had deliberately lied they could use that for assessing credibility, the Judge went on to say:

> That is *whether you can accept his defence* that he believed, on reasonable grounds, that the complainant consented to sexual intercourse (emphasis added).

There is an inadvertent reversal of the onus of proof here. It was for the Crown to prove that the appellant did not believe, on reasonable grounds, that the complainant consented. It was never for the jury to decide whether it could accept the appellant's defence.

[36] We accept Mr France's point that the onus of proof is correctly stated in other parts of the oral summing-up. It is properly explained both in general terms and in the direction that it was for the Crown to prove the three essential elements of sexual violation by rape. But unfortunately the matter does not end there.

[37] The Judge supplemented her oral summing up with a memorandum for the jury. The memorandum summarised the law that the Judge explained orally in more detail. We applaud the use of such memoranda but, of course, their wording is critical. Having correctly stated that it was for the Crown to prove the three statutory elements of sexual violation, the memorandum went on to say, with respect to the third:

> When considering *absence of belief* what must be considered is not merely what in fact the accused believed, but also whether that belief was based on reasonable grounds. So what are reasonable grounds? They are simply grounds that you in a commonsense way judge to be reasonable, having regard to your experience of life.
>
> If the Crown proves that the accused intended to have intercourse, and was indifferent to whether or not the complainant consented, that will be enough to show a lack of actual belief or a lack of reasonable belief.

[38] The word "indifferent" should be avoided in this context. Strictly speaking, "indifferent" conveys the notion that the accused had no care or concern about consent. It is concerned with the accused's attitude. Attitude is not belief. An attitude that he would proceed whether she consented or not is not irreconcilable with a belief that when it came to the point she did happen to consent. What had to be proved was absence of reasonable belief in consent, not indifference to the whole subject.

[39] The memorandum was also a lost opportunity to remove any misunderstandings there may have been over onus of proof. The concept of proving

a negative has always been a difficult one. It requires even more care where there are two independent ways in which the onus can be discharged. This might explain the frequency of jury directions on the third element of sexual violation that are either barely adequate or positively wrong. We would have preferred something along these lines:

> Remember that as with all aspects of the charge of sexual violation, the Crown has the onus of proving the third element. The Crown must prove that the accused did not have any reasonable belief in consent. It is not for the accused to show that he did have such a belief.
>
> There are two ways in which the Crown could satisfy you on that subject. Either would do.
>
> One would be to satisfy you that the accused did not in fact believe that she was consenting. That is concerned with what the accused himself thought at the time. If he himself did not believe she was consenting, that would be enough from the Crown's point of view.
>
> The other way of satisfying the third element would be to satisfy you that no reasonable person in the accused's shoes could have thought that she was consenting. That is concerned with the belief of a reasonable person placed in the accused's position. If no reasonable person would have thought that she was consenting, that too would be enough from the Crown's point of view.
>
> On the third element of sexual violation the onus is on the Crown to satisfy one or the other of those requirements. It must satisfy you beyond reasonable doubt.
>
> If the Crown has failed to prove that the accused did not believe on reasonable grounds that she was consenting, the third element of sexual violation would not be satisfied. In that case you would find him not guilty.

[40] For the sake of completeness, we add the obvious point that a similar approach is needed when directing the jury as to the second element of sexual violation, lack of actual consent on the complainant's part. What must be relevantly conveyed to the jury is that the onus of proving absence of consent lies on the Crown; it is not for the defence to show that the complainant did consent. Almost invariably, that concept is correctly explained when outlining the elements of sexual violation. More care is needed, however, if it is to be adhered to when discussing the evidence and argument later.

Conclusions

[41] The late stage at which the job sheet came to the notice of appellant's counsel may have caused significant prejudice to the defence.

[42] There were also misdirections in relation to lies, onus of proof, and lack of reasonable belief in consent. It is not appropriate to microscopically inspect every last word or phrase in a summing up. What matters is the overall impression on the jury. In this case, however, the difficulties all tended to minimise the burden of excluding reasonable belief in consent. We cannot say that their combined effect was insignificant.

[43] Nor can we say that these errors did not result in any substantial miscarriage of justice for the purposes of s 385 of the Crimes Act 1961. On the charge of sexual violation the case for the Crown was marginal at best. The conviction for sexual violation cannot stand.

[44] It is a matter for concern that this young complainant may face a second trial relating to the sexual violation charge. A conceivable alternative might be a plea of guilty to count 3 (sexual intercourse with a girl under the age of 16). At an earlier point the Crown had been amenable to that approach. At that stage the appellant did not wish to plead guilty to count 3. Conceivably that topic could be revisited. However, the course which the proceedings now take must remain a matter for the parties.

Result

[45] On count 2 the appeal is allowed, the conviction quashed, and a new trial directed. For the removal of doubt, the conviction on count 1 will stand.

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