R v Marama [2001] NTSC 1

PARTIES:	THE QUEEN
	v
	JAMES ARAMA MARAMA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	9929566
DELIVERED:	10 January 2001
HEARING DATES:	8-10 January 2001
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Prosecutor:	A. Fraser
Defendant:	P. Elliott

Solicitors:

Prosecutor:	Office of the Director of Public Prosecution
Defendant:	North Australian Aboriginal Legal Aid Service

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

R v Marama [2001] NTSC 1
No. 9929566

BETWEEN:

THE QUEEN

AND:

JAMES ARAMA MARAMA

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 10 January 2001)

[1] The accused is charged, inter alia, with having sexual intercourse with a female without her consent. The Crown has invited me to address the issue of consent by reference to s 32 of the *Criminal Code*. It is submitted that I should not follow the decision of the Court of Criminal Appeal in *McMaster v The Queen* (1994) 4 NTLR 92. The basis of that submission is the contention that the decision of the High Court in *Charlie v R* (1999) 162 ALR 463 effectively overruled the earlier decision of the Court of Criminal Appeal in *McMaster v The Queen*.

[2] At the time *McMaster* was decided sexual assaults were dealt with in s 192 of the Code in the following terms:

"192 SEXUAL ASSAULTS

(1) Any person who unlawfully assaults another with intent to have carnal knowledge or to commit an act of gross indecency is guilty of a crime and is liable to imprisonment for 7 years.

(2) If the person assaulted is under the age of 16 years and the offender is an adult, he is liable to imprisonment for 14 years.

(3) If he thereby causes bodily harm to the person assaulted or commits any act of gross indecency, he is liable to imprisonment for 14 years.

(4) If he thereby causes grievous harm to the person assaulted or has carnal knowledge, he is liable to imprisonment for life."

[3] That section has subsequently been amended. Dealing with the section as it then stood the Court of Criminal Appeal in *McMaster v The Queen* held that s 31 of the *Criminal Code* had application when the issue of absence of consent arose. Gray AJ (with whom Thomas and Priestly JJ agreed) said (at 99):

> "In States where the elements of the crime of rape are governed by the common law, it is clear that it is an element of the crime that the accused intended to have sexual intercourse without consent. This requires proof by the Crown that the appellant knew the woman was not consenting or knew she may not be consenting and proceeded regardless. See *R v Saragozza* [1984] VR 187, *R v McEwan* (1979) 2 NSWLR 926 and *R v Brown* (1975) 10 SASR 139.
>
> This means that a jury should be directed along these lines in all cases, but particularly in cases where the act of intercourse is admitted by the accused but absence of consent denied. The above authorities show that, under the common law doctrine, the belief on the accused's part that the woman is consenting need not be a reasonable belief. What the Crown must negative is a genuine belief, whether reasonable or not.

In my opinion, the same result is reached in the Northern Territory by virtue of s31(1) of the Code which provides:

> 'A person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct.'

This provision is doubtless intended to give expression to the common law principle that a person is not criminally liable for unintended conduct. In *Ryan v The Queen* (1967) 121 CLR 205 at p216, Barwick CJ said:

> 'In my opinion, the authorities establish, and it is consonant with principle, that an accused is not guilty of a crime if the deed which would constitute it was not done in the exercise of his will to act.'

See also *The Queen v O'Connor* (1980) 146 CLR 64.

Section 23 of the Queensland Criminal Code 1982 (the equivalent of s31), provides that 'a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will.' I take this to be another form of expression of the same principle.

In relating s31(1) to the present case it must be remembered that the assault which constitutes one of the elements of the offence charged is defined in s187(a) of the Code as 'the direct or indirect application of force to a person *without his consent* .....'.

In my opinion, s31(1) produces the result that the prosecution must prove that it was the intention of the accused to assault the victim without his or her consent. This involves the proposition that the accused knew that the victim was not consenting or knew that he or she may not be consenting and proceeded regardless.

A judicial direction to this effect should, in my opinion, be given in all cases because the necessary mens rea of the accused is an element of the crime. The direction becomes a necessity, whenever the evidence raises the issue of the accused's intention in relation to consent.

The issue may only arise infrequently in cases of the common forms of assault although it is not too difficult to imagine such a situation arising.

> But in cases of sexual assault such as the present, the issue of the accused's intention is raised in all cases where sexual intercourse is admitted but consent denied. Nor can there be any doubt that the burden is upon the prosecution to prove the absence on the accused's part of a genuine belief that the victim was consenting, whether reasonable or otherwise."

[4] In *Charlie* the High Court considered a matter in which the appellant was convicted of murder. The issue on appeal was whether s 31 of the *Criminal Code* had application to the offence of murder alleged under s 162(1)(a) of the *Criminal Code*. The majority held that it did not. It held that s 162(1)(a) is a section which reflects an intention to exclude the application of the general exculpatory provisions of the Code. This was because the section prescribed its own mental element (per Callinan J at 478).

[5] It was the submission of the Crown that s 192 of the Code in the form considered by the Court of Criminal Appeal in *McMaster* was also a provision which prescribed its own mental element and therefore should have been treated in the same way. It followed, it was submitted, that *McMaster* should be regarded as having been implicitly overruled by *Charlie*.

[6] I do not have to consider whether *McMaster* has been implicitly overruled by the decision in *Charlie* because the relevant section was subsequently amended. Section 192 in its current form does not prescribe its own mental element. It was the submission of the Crown that, consistent with *Charlie*, the general exculpatory provisions of the Code have application to it. I agree.

[7] However the application of the exculpatory provisions (including s 31) in circumstances such as prevail in the present case were addressed by the Court of Criminal Appeal in *McMaster*. This occurred in the passage I have quoted above. There is no suggestion that the approach adopted by the Court of Criminal Appeal to that issue in that passage has been directly or implicitly overruled by the High Court in *Charlie* or elsewhere. That being the case, and whether I agree with the observations made in *McMaster* or not, they are binding upon me.

[8] I propose to direct the jury accordingly.

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