PARTIES:	McMASTER
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL
JURISDICTION:	NORTHERN TERRITORY
FILE NUMBER:	No CA 17/93
DELIVERED:	DARWIN 21 MARCH 1994
HEARING DATE:	2 MARCH 1994
JUDGMENT OF:	THOMAS J, PRIESTLEY J, GRAY AJ

CATCHWORDS:

Appeal - criminal law - offences against the person - carnal knowledge - directions to jury on - issue of consent - accused intention - did the accused intend to have carnal knowledge of the complainant without her consent - did the accused honestly and reasonably believe the complainant did consent to the act of sexual intercourse - burden of proof upon the prosecution - no directions were given to the jury as to the state of mind or belief of the appellant

Directions to jury - failure of counsel to raise an issue does not absolve the trail judge from the duty of giving directions on an issue raised by the evidence

Criminal law - evidence - verdict unsafe and unsatisfactory

Criminal law - evidence - fresh evidence on appeal

Criminal Code 1983 (NT), s31(1) and s32

R v Saragozza [1984] VR 187, referred to
R v McEwan (1979) 2 NSWLR 926, referred to
R v Brown (1975) 10 SASR 139, referred to
Ryan v The Queen (1967) 121 CLR 205 at 215, applied
The Queen v O'Connor (1980) 146 CLR 64, referred to
Loveday v Ayre & Ors [1955] St. R Qld 264, applied
Brimblecombe v Duncan [1958] Qd R 8, applied
Van Den Doek v The Queen (1986) 161 CLR 158 at 161, applied
R v Verdon (1987) 30 A Crim R 388, referred to
R v Storey (1985) 19 A Crim R 275 at 290-291, referred to
Chidiac v The Queen (1991) 171 CLR 432, referred to
Green v The Queen (1938) 61 CLR 167, referred to

REPRESENTATION:

Counsel:
Appellant: W.H. Morgan-Paylor (with him J.C.A. Tippett)
Respondent: R.S.L Wild (with him M. Fox)

Solicitor:
Appellant: NTLAC
Respondent: DPP

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IN THE COURT OF CRIMINAL APPEAL
IN THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No CA 17 of 1993

ON APPEAL FROM KEARNEY J
SCC. No 131 of 1992

BETWEEN:

BRETT WILLIAM McMASTER
Appellant

AND:

THE QUEEN
Respondent

CORAM: THOMAS J, PRIESTLEY J, GRAY AJ

REASONS FOR JUDGMENT

(Delivered 21st March 1994)

THOMAS J

I have read the Reasons for Decision of Gray AJ. I agree with his Reasons and the orders he proposes.

PRIESTLEY J

I have had the benefit of reading in draft the reasons of reasons of Gray AJ. I agree with all he has said and with the orders he proposes.

In my opinion the appeal should be allowed, the conviction quashed, and a new trial ordered.

GRAY AJ

On 26 August 1993 the appellant was found guilty by a jury of one count of assaulting NMH with intent to have carnal knowledge contrary to s192(1) of the Criminal Code. Two aggravating circumstances were also found by the jury, first that NMH was under 16 years and the appellant over 18 years and, secondly, that the

appellant had carnal knowledge of NMH. At the time of the alleged offence, namely June 1989, the appellant was 28 and the prosecutrix was 15 years and 9 months. The learned trial judge sentenced the appellant to 11 years imprisonment with a minimum term of 5 years. This appeal is against the conviction and sentence.

Ground 2 of the Notice of Appeal alleges that the learned trial judge erred in failing to give the jury adequate directions on the issues of consent, intent and mistake. I propose to consider this ground before dealing with the other grounds of appeal.

Before further discussing the point raised by ground 2, it is necessary to make some reference to the facts of the case which are bizarre, complicated and, in some respects, confusing.

The prosecutrix, who I will hereafter call "H" is the step-daughter of the appellant. The appellant married H's mother in August 1987. After the marriage, the McMasters' lived at Katherine and H was a member of the household. Mrs McMaster, who was 10 years older than her husband, had undergone a hysterectomy in 1977 and was unable to bear children.

At some time prior to June 1989, it appears that there were discussions in the McMaster household about the possibility of acquiring a baby. There is evidence, which might have been accepted by the jury, that H volunteered to have a baby for her mother, although she was then only 15 years. In about May 1989, H, who conceded that she had previously had sexual intercourse with an unidentified man or boy, feared that she was pregnant. Her mother took her to a clinic in Nightcliff. Whether because of a miscarriage or otherwise, H was found to be not pregnant. Whilst this scare was on foot, there is evidence that H and her mother devised a scheme whereby H was to lie down on the appellant's bed when he was in drunken state. The plan was to attribute the suspected pregnancy to the appellant who, it was supposed, would be unable, through lack of

recollection, to deny paternity. The need to put this plan in operation ended with the clinic's finding of no pregnancy.

There is evidence from the appellant that two or three weeks prior to the events giving rise to the charge he commenced a consensual sexual relationship with H. The evidence in this area is extremely confusing. The date of the act of sexual intercourse alleged in the indictment is not clear. The indictment alleges that the act occurred between 1 June and 30 June 1989. It was common ground between the participants that an act of sexual intercourse occurred within that period which resulted in H's pregnancy and the birth of a son on 28 March 1990. When interviewed by the police in February 1992, the appellant stated that he had consensual sex with H at about the time of the first pregnancy scare. He said this was two to three weeks before the sexual act charged in the indictment. In his evidence in chief at the trial the appellant said that he had consensual sex with H for the first time "when she was 15 and 10 months old". When asked "when else did you have sexual intercourse with her?", the appellant answered "two or three weeks later we slept together again." The appellant went on to say that at some later stage H discovered she was pregnant.

The appellant's evidence is that his sexual relationship with H continued for about 15 months after its inception and all acts of intercourse, including the act charged, were entirely consensual. In cross examination the appellant, in an extremely confusing passage, seemed to admit that he did not have sex with H at the time of the first pregnancy scare or, alternatively, could not remember. The appellant's evidence is that his wife knew nothing of his affair with H until some years later.

At this point it is convenient to refer to H's account. She denied having sex with the appellant at any time prior to the act the subject of the charge. Her version of that event, as recorded in the transcript at page 37:

"I'm going to ask you about the middle of 1989, an evening where an incident occurred with Mr McMaster. Before you went to bed that evening did you have anything to drink?---Yes, mum gave me some vodka and orange and Brett gave me some rum.

Was Brett there while your mum gave you the alcohol? ---Yes.

How much did your mother give you?---More than what she used to allow me to have.

What about the rum that Brett gave you - how much was that?---About the same amount.

Are you able to say that in glasses or not?---No, I've forgotten how many glasses I would have had.

What effect did it have on you that you can recall?---Just made me dizzy and sleepy.

Had you drunk that much before at any time in your life?---No.

You went to bed?---Yes.

Which bed did you go to?---My bedroom.

Did you go to bed in your clothes or did you change into your pyjamas or sleep naked, what was the position there?---I normally put my - I had my pyjamas on.

Did you go to sleep?---Yes.

What's the next thing you recall?---Waking up in mum and Brett's bed with Brett on top of me.

What was he doing?---He was having sex with me.

What do you mean by that?---His penis was in my vagina.

How long did that continue for?---Well, I don't know. I - I must have went back to sleep and then I woke up again.

Whilst he was having sex with you, did you do anything?---Well the first time I fell back to sleep and the second time I pushed him off.

Did you notice whether anyone else was present at that stage?---My mum was laying on the bed.

Do you know whether she was awake or asleep?---She was awake.

> Did she say or do anything do you recall?---She said something but I don't know what she said, and because when - when she said something I was running into my bedroom."

Mrs McMaster, in evidence given at the trial, denied that any such event had ever occurred. She denied having any knowledge of any sexual relationship between her husband and H until early 1992.

The course of events after June 1989 can be summarised as follows.

When H's pregnancy was confirmed by a visit to a clinic at Casuarina, the McMasters did their best to conceal H's condition from their acquaintances at Katherine. Mrs McMaster and H agreed that Mrs McMaster should pretend that she was about to have a baby of which the appellant was the father. This pretence was carried out by all the McMasters during H's pregnancy. The family all went to Adelaide for the birth which duly occurred in March 1990. Photographs where taken of Mrs McMaster in the hospital bed holding the baby while H stood beside the bed fully dressed.

The family returned to Katherine and Mrs McMaster looked after the baby as if it were her own. The appellant and Mrs McMaster were still living together at the time of the trial and have had physical custody of the child throughout that period.

After the birth of the child, H went to work in Katherine and remained a member of the family. In about October 1990, H left Katherine and went to South Australia to live with a young man named Darren Gade. A de facto relationship continued between them until December 1991 when H went to live with her natural father at Karratha in Western Australia. Soon after, in early 1992, the matter was reported to the police and the appellant was interviewed.

H's version of the critical events in June 1989 receives some potential corroboration from evidence of two conversations involving the appellant. The first in point of time was a conversation between

the appellant and Brian Waldock soon after the baby's birth. Waldock's evidence is that the appellant, who was intoxicated, said that he "hopped on H, had sex with her, she did not stir, she didn't even wake."

The second conversation took place soon after H's arrival in South Australia in October 1990. Dennis Gade, the step father of Darren Gade, spoke by telephone to the appellant concerning the circumstances in which H's child had been conceived. The evidence of Gade senior is that the appellant said "the girl was asleep and she knew nothing of it". The first of these conversations was disputed by the appellant in his evidence. As to the latter, he conceded that he said something of the sort to Gade senior, but only to make things look better for H in the eyes of her new boyfriend and his step father.

The foregoing summary of the evidence is by no means complete but is sufficient to enable ground 2 to be discussed.

In the course of his directions, the learned trial judge handed the jury a document described as an "Aide Memoire" in which the elements of the offence were set out. The document is in the following terms:

> "First count - aggravated sexual assault
>
> A. The sexual assault alleged
>
> Before you can find the accused guilty, you must be satisfied beyond reasonable doubt that ALL Four (4) of the following elements of the offence charged have been established:
>
> 1.that the accused
> 2.assaulted NH,
> 3.unlawfully, and
> 4.with intent to have carnal knowledge of her.
>
> Notes: (a)"assaulted" means, 'applied force to NH in the sense of sexual intercourse with her, without her consent'. A 'consent' requires that NH was a willing

partner in the act of sexual intercourse with the accused.
(b)"unlawfully" means, without authorization, justification or excuse.
(c)"carnal knowledge" means sexual intercourse, and it occurs as soon as there is penetration.

If you ARE NOT satisfied beyond reasonable doubt that ALL FOUR (4) elements are established, it is your duty to find the accused "not guilty".

If you ARE satisfied beyond reasonable doubt that ALL FOUR (4) elements have been established, it is your duty to find the accused "guilty" of the sexual assault charged; you then go on to consider whether the circumstances of aggravation in B. below have been established."

The aggravating circumstances were to be taken as established if the jury was satisfied that sexual intercourse occurred and that the participants were under 16 and over 18 years respectively. His Honour simplified the elements of the charge for the jury by saying that the sole live issue was one of consent. From the verdict it can be taken that the jury was satisfied that, on the occasion charged, the appellant had sexual intercourse with H without her consent.

The central question raised by ground 2 is whether the jury should have been invited to consider whether, not with-standing the absence of consent, the appellant honestly and reasonably believed that H did consent to the act of sexual intercourse.

It is clear from the learned trial judge's summary of counsel's argument in his charge, that the question of the appellant's state of mind was not raised by counsel for the appellant in her final address to the jury. The defence case was confined to an invitation to the jury to reject the evidence of H that intercourse had occurred without her consent. This circumstance doubtless led the learned trial judge to direct the jury that:

" .... The question which you have to pose to yourself in that regard is this; am I satisfied beyond reasonable doubt that when the accused had sexual intercourse with NH in June of 1989, he had that sexual intercourse without her consent."

The jury retired to consider its verdict at 11.15 am. At about 5.00 pm the foreman sent a note to the learned trial judge in the following terms:

> " .... 'Consent, when does consent begin and end, for example can a person consent now for a future event. If H consented before consuming alcohol, is that consent valid at period later; if she was asleep or if it was another day?' ...."

The learned trial judge invited counsel to make submissions as to how the question should be answered. Counsel for the Crown made some observations and then His Honour asked counsel for the defence if she wished to add anything. Then followed a discussion which is recorded in the transcript at pages 205-207 as follows:

> "HIS HONOUR: Thank you for that. Anything you wish to add to that, Ms Cox?
>
> MS COX: Your Honour, I've had difficulty with the question too. It's a question of fact; consent, and it can be communicated by conduct.
>
> HIS HONOUR: Yes.
>
> MS COX: It's my submission, a person can consent now for a future event but you have to look at the circumstances, all surrounding circumstances of the event in question; that is, the sexual intercourse, and ask then the question, has the Crown proved beyond reasonable doubt that she did not consent at that time, and - - -
>
> HIS HONOUR: I can't see - if the jury is concerned that some how or other you can give a consent prior to an event, so perhaps they're contemplating that even though she was asleep, well then, she consented before to it so it would be all right that it happened when she was asleep. That's not the law.
>
> MS COX: No, but what concerns me, Your Honour, is that it raises this question and because of the way the question's framed, as to the accused's belief, and they seem to be concerned - my reading of the question, to that to some extent.

HIS HONOUR: Are you talking about his belief?

MS COX: Yes.

HIS HONOUR: This case was never run that way.

MS COX: No, it wasn't, Your Honour, but it seems from the way the jury - - -

HIS HONOUR: Your case is a simple denial that it happened.

MS COX: Yes, a denial that it happened in the way it happened.

HIS HONOUR: That's right.

MS COX: But, it seems - - -

HIS HONOUR: You're not - are you suggesting that I should instruct them on mistake of fact under - - -

MS COX: No, but they should be satisfied that the accused knew that she was not consenting.

HIS HONOUR: Was?

MS COX: Not consenting.

HIS HONOUR: Not consenting?

MS COX: Yes.

HIS HONOUR: Yes, burden of proof.

MS COX: He knew that she was not consenting.

HIS HONOUR: Yes, at the time of the act.

MS COX: Yes.

HIS HONOUR: Thank you for that, I'm indebted to you both for your assistance. ...."

In the result, His Honour answered the jury's question by stating that in order for there to be consent it must be consent operating at the time of the sexual intercourse. No directions were given as to the state of mind or belief of the appellant. After the further directions were given, the learned trial judged asked Ms Cox if there was anything further arising out of what he had said to the jury. Ms Cox answered "No, your Honour".

The appellant's contention under ground 2 is that the evidence in the trial raised the issue of the appellant's belief in relation to consent and that the jury's question showed that the jurors were interested in this issue. It was said that a direction in accordance with s32 of the Code should have been given in any event and that the jury's question made the need for such a direction imperative. This was said to be so notwithstanding the failure of counsel for the appellant to raise the issue initially or to complain about His Honour's failure to redirect after the jury's question.

Although the appellant's argument in support of this ground was confined to s32, it is desirable to discuss the question upon a broader basis.

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 (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.

As I have said, upon the appeal before this court it was argued that s32 of the Code required the learned trial judge to give a direction regarding the appellant's belief as to consent.

Section 32 provides:

> "A person who does, makes or causes an act, omission or event under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for it to any greater extent than if the real state of affairs had been such as he believed it to exist."

It is well established that where a s32 question arises, the Crown must prove beyond reasonable doubt the absence of the relevant belief. See *Loveday v Ayre & Ors* [1955] St R Q'd 264 and *Brimblecombe v Duncan* [1958] Qd R 8. The belief which the Crown must exclude is an honest and reasonable belief.

Although, in my opinion, s32 does not touch upon the elements of the offence created by s192(1), the trial judge should give a direction upon s32 in all cases where the evidence raises the issue. There is a considerable degree of overlap between s31(1) and s32.

In this case the appellant admitted having intercourse with H on the relevant occasion. His evidence was that H consented to the act. Inherent in such evidence is a belief on the appellant's part that H consented. This is not a case where the appellant denied

having intercourse at all. In such a case it may be said that no question of the accused's intent or belief arises.

In addition to the appellant's evidence as to the act charged is his evidence that he had consensual sex with H two to three weeks earlier. The appellant's evidence on this point is confusing but it was in my view open to the jury to make such a finding. An admission to a similar effect was made by the appellant in his 1992 interview with the police.

Although the jury was satisfied that H did not consent to the sexual act charged, it by no means follows that the jury accepted her bizarre account in its entirety. The learned trial judge correctly instructed the jury that it could accept all of a particular witnesses' evidence, some of it or none of it.

It is by no means unlikely that the jury accepted that H was the worse for liquor and, although showing no physical resistance, could not be taken to have consented to the sexual act which occurred in such circumstances. The question asked by the jury suggests that some prior communication of consent was being considered. This, in turn, suggests that consideration was being given to the prior consensual act of which the appellant gave evidence.

Although there is a large element of speculation in the above comments, it is impossible, in my view, to say that the question of the appellant's belief as to consent did not arise on the evidence.

One can sympathise with the learned trial judge because counsel for the appellant did not raise the issue until the jury question was asked and then did not press His Honour to give the appropriate directions. But it is well established that the failure of counsel to raise an issue does not absolve the trial judge from the duty of giving directions on an issue raised by the evidence.

In *R v Van Den Hoek* (1986) 161 CLR 158 where the question was whether provocation should have been left to the jury, the joint judgment of Gibbs CJ, Wilson, Brennan and Deane JJ makes it clear (at p 161) that:

> " ..... Neither the fact that the applicant did not expressly say in evidence that she had been deprived of the power of self-control, nor the fact that counsel in effect told the learned trial judge that provocation was not an issue, absolved the learned trial judge from the necessity of leaving that issue to the jury if there was some evidence fit for its consideration. ...."

See also *R v Verdon* (1987) 30 A Crim R 388 where the circumstances bear a striking similarity to the present. Also *R v Storey* (1985) 19 A Crim R 275 at pp290-291.

In the present case the appellant was, in my opinion, denied the opportunity of an acquittal which may have followed from the jury's consideration of the appellant's intention in relation to consent. If I am wrong in my opinion that s31(1) required a direction on this point, then a direction in the terms of s32 was called for. I consider that a new trial should be ordered.

Ground 1 of the Notice of Appeal alleges that the verdict was against the weight of the evidence and is unsafe and unsatisfactory. This ground was shortly argued by Mr Morgan-Payler upon the authority of *Chidiac v The Queen* (1991) 171 CLR 432 and the earlier cases there referred to.

Initially I thought that there was substance in this ground because of the improbable features of the testimony of H and the aura of unreliability which surrounds her evidence as it reads in the transcript. If there was no significant corroboration of her testimony, I would have been disposed to find this ground established. But having carefully considered the whole of the evidence, I consider that it was open to a reasonable jury to be satisfied of guilt beyond reasonable doubt. The evidence of H was significantly supported by the evidence of Gade Senior and Waldock

to which I have referred. The evidence of each of those witnesses was free from any obvious criticism and the jury was entitled to treat their evidence as providing weighty support for the evidence of H. Ground 1 has not been made out to my satisfaction.

The first of the two remaining grounds of appeal complained of the learned trial judge's directions regarding good character. This ground has, in my view, no substance and was virtually abandoned by the appellant's counsel. The other added ground sought leave to rely on fresh evidence. In my opinion, the application satisfied neither of the two pre-conditions to the reception of fresh evidence on appeal. See *Green v The King* (1938) 61 CLR 167. I would not give the leave sought, but the evidence in question may be led in the event of a new trial.

I would allow the appeal, quash the conviction and order a new trial.