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18TH JANUARY 1985

THE QUEEN v. EGAN, ROONEY, ANDREWS, LIBERATO AND SEKULIC

C.C.A. Nos. 69, 70, 71, 72 & 73 of 1984

Dates of Hearing: 11th, 12th, 13th & 14th December, 1984

COURT OF CRIMINAL APPEAL

Coram: Zelling, White & Mohr JJ.

J U D G M E N T of the Honourable Mr. Justice Zelling

(On appeal from the Honourable Mr. Justice Prior)

Counsel for the appellant Egan:	Mr. D.H. Peek
Solicitors for the appellant Egan:	P.N. Waye & Associates
Counsel for the appellant Rooney:	Mr. K.V. Borick with Mr. A. Nicholson
Solicitors for the appellant Rooney:	Palios, Meegan and Nicholson
Counsel for the appellant Andrews:	Mr. S.W. Tilmouth with Mr. C.J. Caldicott
Solicitor for the appellant Andrews:	Craig J. Caldicott
Counsel for the appellant Liberato:	Mr. R.D. Wyatt
Solicitors for the appellant Liberato:	Wyatt, Matcham & Co.
Counsel for the appellant Sekulic:	Mr. R.C. Halliday with Mr. R. Soulio
Solicitors for the appellant Sekulic:	Ross, McCarthy & Nosworthy
Counsel for the respondent:	Mr. B.R. Martin, Q.C., with Mr. P.A. Cuthbertson
Solicitor for the respondent:	Ms. C.M. Branson, Crown Solicitor.

Judgment No. 7995

THE QUEEN v. EGAN, ROONEY, ANDREWS, LIBERATO and SEKULIC

Court of Criminal Appeal

Zelling J.

I agree with the judgment about to be delivered by
Mr. Justice White and with the orders proposed by him.

REG. v. EGAN, ROONEY, ANDREWS,
LIBERATO AND SEKULIC

Court of Criminal Appeal

White J.

The charges.

The five appellants were convicted by jury verdict of repeatedly raping a woman in a suburban house in Adelaide in the early hours of the morning of January 17 1984. Egan was convicted of 4 rapes (vaginal, anal, oral and vaginal); Rooney of 3 rapes (oral, vaginal and oral); Andrews of 1 rape (vaginal); Liberato of 1 rape (oral); and Sekulic of 2 rapes (both vaginal). In all, the five men were convicted of 11 acts of rape. The sexual activity commenced about 6 a.m., in early daylight hours, after the woman had been in their company and unmolested for 7½ hours. She drank with them at a hotel, and from midnight at the home of Andrews. At 6 a.m., Egan seized her, carried her into the next room and commenced what was to become a series of rapes, on her account. The order and nature of the rapes were as follows: count 1 - Egan - vaginal; count 2 - Rooney - oral; count 3 - Andrews - vaginal; count 4 - Liberato - oral; count 5 - Rooney - vaginal; count 6 - Egan - anal; count 7 - Sekulic - vaginal; count 8 - Rooney - oral; count 9 - Egan - oral; count 10 - Egan - vaginal; and count 11 - Sekulic - vaginal.

The complainant.

The complainant was a 23 year old married woman who lived in Germany and was visiting Australia as a tourist. She had a reasonable command of the English language. She was making her way alone around Australia by bus. She had married her brother's friend in Germany so that he could avoid army service. She

intended to divorce her husband after she returned to Germany. At times she had difficulty in expressing herself and in understanding what the appellants said to her. During the trial she had the assistance of an interpreter. From time to time during the course of the trial there were misunderstandings between the complainant, counsel, the judge and the interpreter.

She first met and spoke to some of the appellants at Eucla on the Nullabor Plain when they were riding their motorcycles from Perth to Adelaide on their way back to Sydney and she was travelling as a passenger in a bus which stopped briefly at Eucla on the way from Perth to Adelaide. She appears to have been a lonely and extroverted person who sought out friends. She had a drink with Rooney, one of the appellants, at Eucla and gave him her Adelaide telephone number. She could see that he and his friends were dressed as bikies.

On arrival in Adelaide, Rooney rang her. He later called at the house where she was staying. She went off quite willingly as a pillion passenger on Rooney's motorcycle to the hotel where they met up with the other appellants and the defacto wife of Andrews.

Consumption of intoxicating liquor.

The appellants, the complainant and Andrews' defacto wife drank some beers at the hotel for 1½ hours. When the hotel closed at about midnight, the complainant again rode as pillion passenger with Rooney to the Andrews' house. She had some doubts about going and asked Sekulic whether they could be trusted. She was re-assured by the fact that the other woman would be there. At the house, all of them continued to consume beer.

The complainant had had a drinking problem in Germany when she was younger and gave up drinking liquor for a while. She

mentioned this herself. She drank quite freely at Andrews' house, as did the appellants.

At first, she watched television with the men and the other woman was about the house. Later she played cards in the kitchen with the men. The other woman went to bed at some time between 3 a.m. and 4 a.m. In the course of her stay at this house, the complainant said that she drank 8 echoes, that is, 8 half-bottles of beer. Her blood alcohol level was about .15%. She said that she was not grossly affected by liquor and that she knew what she was doing. She gave quite a detailed account of the complicated events of that night although there were brief periods of which she had no memory. She agreed that she was "drunk" but that word covers a whole range of states of partial intoxication.

The complainant's attraction towards Liberato.

While the complainant was playing cards and drinking with the men in the kitchen between 3 a.m. and 6 a.m., she made certain advances to Liberato and responded to his advances. She had earlier taken off her shoes. Under the table she rubbed her bare feet up and down his lower leg and entwined her leg with his. They went on with these friendly overtures for 2 hours or more during the card playing. Liberato believed that she was sexually attracted to him. She said that she was attracted to him. The others saw what they were doing. At one stage, several men went outside and they discussed her actions with Liberato. She continued to act in the same way on their return to the card table. They claimed eventually that she led them to believe - from her general behaviour, from her sustained drinking and from her preparedness to remain long hours alone with them until dawn - that she was prepared to

consent to intercourse not merely with Liberato but with each of them in turn.

The appellants were not acting in concert.

It was expressly agreed by the prosecutor prior to the trial that the appellants were not alleged to be acting in concert. For example, it was not suggested that the men were plying her with drink or had a concerted plan to get her drunk or were in any other way acting in concert. That was the basis upon which the trial was conducted. It was agreed between prosecution and defence that each man was responsible for his own individual role in relation to the woman. Between midnight and 5 a.m., all five men behaved in a decent and sensible manner towards her. This may have been due to the fact that Andrews' defacto wife was up and about until after 4 a.m. or so. There was much talk on general matters but little or no talk about sex, except some remarks by her about Australian male attitudes.

The first sign of sexual aggression.

At about 5 a.m., without warning, Egan grabbed the complainant and "pressed" her to him. She angrily rejected his clumsy embrace. Rooney apologised for Egan. They continued playing cards for another hour. She showed no signs of going home. At 6 a.m. Egan suddenly got up, carried her to the next room and had intercourse with her. The 10 other acts of intercourse followed. Before dealing with the detail, inevitably sordid detail, of those acts, I propose to say something about the mental element in the crime of rape - knowledge of, or reckless indifference as to, the woman's non-consent.

The mental state of the accused in the crime of rape.

In every case of rape and in this case, the prosecution has to prove beyond reasonable doubt that the particular accused either knew the woman did not consent to the particular act of penetration or was recklessly indifferent as to whether the woman was consenting (section 48 of the Criminal Law Consolidation Act, as amended by Act No. 83 of 1976). Prior to the 1976 amendment, the mental state which the prosecution had to prove beyond reasonable doubt was actual knowledge of the woman's non-consent. After the amendment, the accused's mental state was not so difficult to prove. All that the prosecution had to prove to secure a conviction for rape was reckless indifference as to her consent. By the date of the trial in September 1984, the meaning of the words "recklessly indifferent" should have been clear and their application to particular cases should have been straightforward. However, there was confusion about these matters in the course of addresses by counsel and in the course of the summing-up. In particular, a novel concept of "assumed consent" crept into the case, at least into the minds of the jury, who asked a late question about "assumed consent", a concept which bears no relation to the mental element prescribed by the amending statute and interpreted by the court.

The parliament entrusted to the courts the task of interpreting its intention when it used the words "recklessly indifferent"; and the courts, case by case, have entrusted to juries the task of finding in each particular fact situation whether the accused person or persons was recklessly indifferent as to the woman's consent. (I will refer to the male state of mind as to the woman's consent as that is the fact situation under appeal.)

The meaning of the words "recklessly indifferent" has been examined and explained in a number of decisions of the Court of Criminal Appeal. For example in Reg. v. Wozniak & Pendry (1977) 16 S.A.S.R. 67, Bray C.J. said (p. 74):-

"If it is, as I have suggested on reflection might be a preferable test, an intention to have intercourse without any belief in consent, then that belief is lacking if he realizes that she might not be consenting but nevertheless proceeds with intercourse."

The learned former Chief Justice used the words "might not be" advisedly. Counsel contended in that case that the man had to realize that she probably was not consenting. His Honour rejected that contention. He said:-

"In short, the requirement of a belief in the probability of non-consent, as opposed to whatever degree of possibility is involved in the word 'might', has never, as far as I can see, been held to be a necessary ingredient of rape and it is implicitly excluded in all the formulations I have been able to discover."

It should be noted that his Honour also used the word "realizes". This will become of significance in relation to partial intoxication. There must be a sufficient basis or substratum of fact, proved by the prosecution from the circumstances, including what the woman says and does, which discloses to the man the fact that the woman might not be consenting. Once it is clearly proved that she might not be consenting, then the man is recklessly indifferent if he presses on with intercourse without clearing up that difficulty of possible non-consent.

In Reg. v. Sherrin (1979) 21 S.A.S.R. 250, King C.J. said (p. 253):-

"Read as a whole, the summing up makes it clear that the onus was on the prosecution to prove beyond reasonable doubt that the applicant believed that the girl was not consenting or was recklessly indifferent as to whether

she was consenting or not. And that is the effect of the section. I think that this case emphasises the importance of directing juries as to the elements of rape in the terms laid down in the section."

The learned Chief Justice did not suggest that a trial judge ought to confine himself to the words of the statute. He recognized that the jury would need assistance with the meaning which the law attached to that expression. He continued:-

"I do not, of course, mean that the jury, having been told of the elements of the crime in terms of the section, should not be assisted with further directions as to the meaning of the terms. Moreover, where the accused asserts a belief that the victim was consenting, there is every reason for a direction that the existence of that belief, if the jury considers it to be a reasonable possibility, is inconsistent with the knowledge or reckless indifference constituting the mental element of the crime. It is, however, undesirable, in my view, for a trial judge to substitute for the words of the section a gloss or paraphrase of his own."

In that case, the statutory words were never put by the trial judge to the jury but his paraphrase was nevertheless held to be sufficiently accurate. In the case presently under appeal, the trial judge repeatedly used the words of the section throughout the summing-up but the jury was eventually to some extent deprived of the benefit thereof when, towards the end, in a re-direction, he did not firmly eradicate a misconception raised by a specific jury question as to the relationship between "reckless indifference" and "assumed consent".

There is nothing in the above cases about "assumed consent". Indeed, the concept of "assumed consent" (that is, the concept that the man is entitled to make such an assumption in an ambiguous situation) is the very evil at which the amendment was aimed. The error of law involved in this line of thinking

and now manifesting itself in the jury question, should have been firmly quashed. The appellants were entitled to infer consent, if there was a sufficient basis therefor, but not to assume. An accused person is never entitled to assume anything about consent once it is in doubt and once that doubt is sufficiently realized by the man. Upon receiving notice of the possibility of her non-consent, he is put upon inquiry before he proceeds to intercourse. The prosecution must prove beyond reasonable doubt, often in very complex sexual situations, that the man had notice ("realized" - Wozniak supra) that she might not be consenting yet pressed on with intercourse, thus being recklessly indifferent as to whether she was consenting.

It is trite to observe that a woman's sexual responses may change from moment to moment in the course of a sexual encounter. Consent may be refused initially but be given eventually as a result of perseverance short of measures overbearing the woman's will or forcing her into submission. Juries are regularly told what is common sense and universal experience, namely, that true consent must be a free and willing consent. Care must be taken, however, not to draw analogies too closely from other areas of experience or commercial life, such as undue influence in contract or freedom to make other types of decisions without being "pressured". In the nature of things, men frequently bring some kind of "pressure" to bear to obtain a woman's consent, "pressures" in the way of compliments, blandishments, caresses, sexual touching and the like, all of which may legitimately be directed towards securing consent through her sexual arousal. This has always been the case and and it seems too obvious to mention. These appellants claimed to entertain a genuine belief in her consent for a host of reasons which will be mentioned later, more particularly, her

conduct in relation to Liberato which they interpreted as a willingness to extend her consent beyond Liberato to themselves. To say the least, this was a self-serving extension.

The jury is always directed that it is for them, the persons representing the community and the arbiters of its standards, to draw the line in each case which divides off those acts which can be accepted as leading to an inference of full and free consent to sexual intercourse (albeit induced by sexual persuasion, "pressure" etc.), on the one hand, and those acts leading to submission to intercourse through force or violence or fear thereof, on the other. Further, in instructing juries in sexual cases, trial judges customarily tell them that they are not to act out of prejudice against, or revulsion at, the sexual mores of others, for example, when sexual intercourse is in the presence of others or in a group situation. They are told not to substitute their own sexual views or preferences for those of the accused or the woman involved. It may well be that most jurors would be repelled instinctively by group sex or sex in the presence of others, and thus tempted to assume, adversely to accused persons, that they were recklessly indifferent about her consent, from the sheer weight of numbers having intercourse with the one woman. The jury are told that each case is a pain-staking examination of respective states of mind. Since the woman's mind might be changed in the course of a particular sexual encounter or a series of encounters, they must examine the woman's state of mind and the respective man's state of mind from moment to moment, at the time of each penetration. And there was a change of mind here. At least in relation to Sekulic, the woman, on her own story, had a different attitude, or expressed a different attitude openly, than that expressed at the beginning towards the others.

The question to be determined by the jury here with respect to each man's state of mind at each relevant point of time was whether in fact the woman was not consenting at that time; and if in fact she was not consenting, whether she conveyed her non-consent to the man by her words or by her conduct or by both in a sufficiently overt manner, thus causing the man to "realize" either that she was not consenting or that she might not be consenting. I find it convenient to refer to the process of bringing non-consent to the man's attention by overt acts as "signalling". Proof that the man realizes her non-consent or the possibility of her non-consent is achieved by proof of signals, signals emanating from the circumstances and from what she says and does. Usually in a rape case, the signals are loud and clear. In many other cases, the signals are either ambiguous or they change in intensity or significance. An initial general signalling of her non-consent to all men present can and should carry forward in point of time and still operate on the minds of the men at a later stage. An initial adverse signal to one man (here, to Egan) could and should make the other men (except Liberato) realize that their advances might also be unwelcome. It was not necessary for the prosecution to prove a specific adverse signal to each man each time once she had given an adverse signal to one of them. An adverse signal to one should serve as an adverse signal to all, unless she later makes a favourable signal. This she did to Liberato by continuing to rub her feet on his after she rebuffed Egan. Naturally, signals can be adverse to some and favourable to some. The weakness of the defence cases at the trial and on the appeal, once the complainant's story was believed in substance, was their tendency to assume that favourable signals to one or more men extended virtually automatically to them all.

Non-resistance and inertia was then interpreted as favourable signals from which they were entitled to assume consent; or so it was argued.

The complainant's account of the sexual acts.

I have taken the facts to be those sworn to by the woman because the jury, having seen her examined and cross-examined for five days by six counsel and having convicted all appellants, obviously believed what she said, notwithstanding the high onus of proof and the customary warning given in sexual cases which applied only in Liberato's case. Liberato was convicted by the jury in spite of favourable signals by the woman towards him earlier in the evening, in spite of the fact that he did not lie to the police, and in spite of the fact that there was no corroboration of her word. That is some measure of the faith which the jury had in her evidence. In the other four cases, it is likewise reasonable to adopt her evidence because the four other appellants lied heartily to the police when they were questioned next day, falsely denying their involvement in any sexual activity. They gave evidence on oath explaining why they told lies, in effect, panic and fear of unjust conviction. I will be dealing later with the topic of lies. I mention them here merely to indicate why it is just to act upon the complainant's version of what happened, unless and until her accepted version can no longer be safely acted upon by reason of some misdirection which might fairly be said to have affected the jury's assessment of her credibility.

In the course of her evidence, the woman freely admitted that she was attracted towards Liberato. This was quite evident from her actions with her feet under the table for two hours or more. Although she did not say so expressly, the jury would have been entitled to infer, if they had wished, that she might well have responded later to sexual advances by Liberato in appropriate circumstances, for example, when the two of them were not in the company of the others.

I have already mentioned the sustained rubbing and entwining of her feet and lower legs with Liberato's. The other men observed and placed their own interpretations upon what was happening between her and Liberato. At one stage, three of them went outside to discuss the significance of her "touching up" of Liberato, as he described it.

The events and signals prior to count 1 at 6 a.m.

Her actions and the interpretations by all appellants of her actions must be seen in the context of the partial intoxication of them all. Their respective states of partial intoxication had a bearing upon her consent and their respective beliefs about the possibility of her consent. They saw that she was becoming progressively affected by liquor although not grossly affected. They saw that she was happy to be alone with them after the other woman went to bed. They saw that she was showing no signs of wishing to go home after the other woman went to bed. They saw her overtly signalling to Liberato and to them her affection for and attraction towards Liberato. Were they entitled

to infer that those signals were also directed at them? I think not. They should have realized, in spite of their states of partial intoxication, that she was confining her intentions and her signals to Liberato. Rooney had been kind to her earlier. He was the one who had her phone number. He was the one who rang her up. He was the one who had gone to the trouble of travelling by motorcycle to collect her from her aunt's place. He had given her a pillion ride on his motorcycle, first to the hotel and later to the Andrews' house. If anyone had claims upon her gratitude and perhaps her favours, if she was anyone's "girl", she was Rooney's. Yet throughout the period of playing games at the table, the very fact that she was concentrating her attention and favours upon Liberato, must have been a signal, a negative signal to Rooney, that she was not attracted to him. The others knew what Rooney had done for her and could see that she was not favouring Rooney with the same attentions. She might have done so but she did not. Rooney was sitting on the other side of her. Yet she encouraged only Liberato. At no stage did she encourage Egan, for example. Indeed, at about 5 a.m., Egan made the first aggressive sexual move when he gave her a bearhug without invitation. She repelled that approach clearly and unequivocally. In spite of that, one hour later, Egan picked her up and carried her into the next room and began the sexual activity. He was the first to participate and he participated more often than the others. He was obviously a leader in the

sexual activity. In addition, he was the one who led the woman into Sekulic's bedroom.

All other males except Sekulic were present when the woman plainly signalled her rejection of Egan's advances at 5 a.m. They could all see that she clearly rejected his bearhug. Rooney went so far as to apologise for Egan's bad behaviour. Andrews claimed in evidence that he was not present. However, the woman said that he was present at that time and I will deal with the matter on the basis that Andrews was in fact there and saw what Egan did.

That event was of great importance because it signalled to the four men present her aversion to Egan.

The sexual activity from 6 a.m. onwards.

In spite of that clear signal, Egan one hour later, at 6 a.m., as the dawn light was making the interior of the house reasonably well lit, picked her up, put her over his shoulder, and carried her from the kitchen to the living room. In their presence, she said "what's going on?" He said "now it's time". She said "time for what?" But he didn't answer. In their presence, she tried to push herself away from him without success. All three men saw her thus carried away unceremoniously and without her consent.

Liberato made no attempt to intervene. It may be that he was reluctant to do so being a mere aspirant for membership of the bikie club. Andrews could have intervened, since he was the householder and Egan was his guest, as was the complainant, but he did not. Rooney was the man who had brought her and who no doubt was to return her to the aunt's place. He could have intervened but he did not.

Pausing at that stage, all three watching appellants, and Egan himself, realized she was not consenting to the way this whole series of sexual acts commenced. Did anything happen in the next room to change her non-consent and their realization?

The woman said that Egan threw her on the floor and commenced to undress her. The others did not see this. She started to cry and call out ("screamed") for help "Frankie. Help." That was a call for help directed to Liberato. If Liberato heard it, the jury were entitled to infer that the other two men heard it, that is, Rooney and Andrews. Liberato went from the kitchen table to the living room door and observed Egan with her at a time when she was crying for help and giving the clearest evidence of her non-consent to Egan's approaches. He simply looked, gave no help and went out again closing the door behind him. He returned to the company of Rooney and Andrews. The jury was clearly entitled to infer that all three heard the cry for help, saw Liberato go to the door and that Liberato told them what was going on when he returned. If Egan afterwards by caresses, sexual stimulation or in some other way, changed her resistance to consent, they were not to know. They were not there. The last they knew of the matter on her account was that she was resisting him.

From the fact of abandonment of the woman to Egan in spite of the call for help, Liberato must have realised from that moment that he no longer had her gratitude, affection or goodwill. He had abandoned her to what he must have known was obviously rape. The jury ultimately convicted Liberato. He was the one least likely to be convicted. He had been involved in only one incident, oral rape. He was the one she liked. He later promised to help her. The jury must have found that Liberato was no longer entitled to rely upon earlier favourable signals. For their part, Rooney and Andrews were in a less

favourable position than Liberato.

Count 1: Egan's vaginal intercourse.

The woman said that Egan took off her jeans in a forcible manner and held her arms forcibly. She was sitting on the ground. He said "be a good girl, you don't want that (sic.) I hurt you". His uttered words were words of threat. He grabbed her shirt and she stopped him and took off her own shirt. She said she did this to gain time. In all of the circumstances, the jury could hardly have given Egan any credit for mis-interpreting her action in taking off her own shirt. In any event, after she took off her shirt she crawled away from him and cried. There is a gap in her memory at this stage. She remembers being on her back and him penetrating her with his penis in her vagina. The others gave evidence of some sexual actions prior to penetration because they came into the room before penetration. Egan and the others also said that she was a willing party and co-operated and enjoyed the intercourse. She denied this. It was a jury question whether she did consent to vaginal intercourse and the jury convicted Egan. The jury must have been satisfied that if he did anything in this period which she could not remember, he either knew he didn't have her consent or was recklessly indifferent about her consent. I will deal later with the effect which mis-directions about partial intoxication, lies and other matters might have had upon the jury verdict.

The woman said that while Egan was having vaginal intercourse, Rooney, Andrews and Liberato all came into the room and watched. They stood there and exposed their penises.

Count 2: Rooney's oral intercourse.

Thereupon, Rooney knelt down, turned her head towards his penis and told her to "suck it". She did not complain of any violence. She did not offer any resistance. She said that his penis was limp when she took it in her mouth. He gave a different

account about some embracing before that happened and great willingness on her part to engage in oral intercourse but I do not rely upon that as the jury rejected it. The jury must have found Rooney guilty of commencing this act of oral intercourse without her consent notwithstanding that, after insertion of his limp penis into her mouth, she embarked upon a puzzling, even extraordinary, course of conduct for a woman in her position. She said, in effect, that she deliberately stimulated Rooney to a full erection by making movements with her lips on his penis or by sucking his penis over quite a prolonged period. It may have been, as Mr. Peek suggested to her in cross-examination, that she had temporarily lost control of her sexual inhibitions, perhaps under stimulus of her intercourse with Egan. If she was at a later stage of the oral intercourse signalling her consent to Rooney, Rooney had no such signal from her prior to telling her to take his penis in her mouth and suck it. There was no "relation back" of consent to the earlier time when the oral intercourse commenced. The jury was entitled to find Rooney guilty of oral rape on that evidence in spite of her later puzzling response. This is all said subject to later discussion about misdirections.

Count 3: Andrews' vaginal intercourse.

Andrews stood watching while Egan had vaginal intercourse and Rooney had oral intercourse. When they finished he had intercourse. Andrews might have been encouraged by what he saw of her apparently willing reaction to oral intercourse with Rooney. He was not entitled to "assume" that she would consent to vaginal intercourse with him without more. He simply joined the queue and took his turn without inquiry of her as to her consent. The jury was plainly entitled, on her evidence, to find Andrews guilty of rape; and they did so. Andrews knew how the

whole sexual activity had been put in train. As far as he knew, Egan had just raped her. His mind was affected still by the facts of the 5 a.m. rebuff, the 6 a.m. forcible carrying into the living room, and her cry for help and the abandonment by Liberato. Now her so-called friend and expected rescuer Liberato was standing in the queue waiting his turn.

Count 4: Liberato's oral intercourse.

For the same reasons, Liberato could not expect the benefit of past promise of sexual favours. He had not helped her when she was in need. Now he was standing over her waiting his turn to take advantage of her. As soon as Andrews had finished, he had oral intercourse with her without inquiry as to her wishes. She said that after the oral intercourse, Liberato said to her "Don't cry. I will look after you. Don't be afraid". What he said afterwards is not of much help to him because there was no conversation with him beforehand. There was also evidence that Liberato was involved at the time of the anal rape in count 6. However, those later activities are of not much assistance. The relevant point of time was the time when he was about to commence having oral intercourse. The jury convicted him because he was recklessly indifferent about her consent - if he did not know full well she was not consenting to his act.

Count 5: Rooney's vaginal intercourse.

Rooney was next in the queue having previously had oral intercourse. Notwithstanding the encouragement he might have inferred from her signals when she actively stimulated his penis at the time of count 2, Rooney made no further inquiry of her and just took his place in the queue. Rooney could hardly believe that what she did at the time when Egan was concurrently having vaginal intercourse with her, was an open invitation for him to

have intercourse when and how he liked. In all of the circumstances, including his knowledge of how the whole train of sexual events commenced, he was put upon inquiry about her consent, and her specific consent to this particular act. The jury was plainly entitled to find Rooney guilty of count 5. This is subject to what I say later about mis-directions.

Count 6: Egan's anal intercourse.

After some delay, Egan had anal intercourse with the woman. When he was about to do so, she caused some delay by saying she had to go to the toilet. She also said she had no experience in this and it was hurting her. Liberato offered to get some Vaseline. Egan said it was not necessary. Later the doctor found a slight tear. Egan was the only person that night who had anal intercourse with the woman. He knew that he had raped her initially. He also knew that he set in motion the chain of sexual assaults. He might have observed her response to Rooney in count 2. He might have observed the fact that she was not overtly resisting or preventing others from having intercourse. Her failure to protest, her failure to struggle, her inertness, was no more than a signal of submission; it was not a signal of consent. The jury was clearly entitled to find Egan guilty on her story of count 6.

Count 7: Sekulic's vaginal intercourse.

After the sexual activity in the living room had finished, Egan took the naked woman into Sekulic's bedroom. Sekulic had been sleeping, or apparently sleeping, for some time. Sekulic was oblivious to all that had transpired before in the kitchen and in the lounge. There was no evidence to the contrary. Sekulic was not affected with the same knowledge and the same signals from the woman. He had not seen her 5 a.m. rebuff of Egan, nor had he seen Egan's 6 a.m. carrying of the woman into the living room. He had not seen Egan's rape of the woman nor Liberato's

cowardly abandonment of her. Further, he had not seen the queue standing and successive rapes in the living room. He had gone to bed early because he was tired and because one of his legs was in plaster from foot to just below the knee. He had earlier watched television but had not been playing cards. The woman said that Egan took her into the room and pushed her towards Sekulic but that Sekulic was still asleep. She said that when she was first brought into the room, she said to Egan "this is enough, this is enough, I would like a smoke" and that Egan went outside the room and brought a cigarette in. However, she also said that Sekulic at this time was asleep. It was only after Egan returned to the room with a cigarette that he woke up. The room was dimly lit by the morning light. There was no artificial light. The freshly awakened Sekulic was told by Egan "here is a present for you". He could not see anything other than a naked girl who sat on his bed and had a smoke. He said "what a lovely present". She sat there for 5 minutes. While sitting there, she was thinking things to herself but not crying, not showing obvious signs of distress. She wished to say something but didn't. Eventually she said "I trusted you. Why are you doing all this to me?" Egan had gone by this time and they were alone. The words could have mystified Sekulic because in the absence of some information from Egan or the others he would not know what "all this" was or what was being done. All he saw was a naked woman sitting on his bed smoking a cigarette and saying little. Nevertheless, there was some evidence from which the jury could have inferred that there was a possibility of her non-consent. It was not very strong. He might have wondered how this woman came to be in his bedroom or what had happened to her beforehand or how she came to be naked. The jury must have rejected Egan and Sekulic who said Egan woke Sekulic earlier. Aroused by her

presence, Sekulic undressed. She said he pulled her towards him. She often used words which were expressed as though there was reluctance on her part when it transpired there was not, especially with regard to Sekulic. She said "I had to sit on him". There was no suggestion that she resisted or did or said anything that signalled that she was not consenting. Indeed, Sekulic was lying on his back with one leg in plaster and she placed herself in a position where she was over his body, mounted above him and made it possible for there to be penetration. It was she who arranged this. She agreed that she had facilitated the intercourse and made movements as though she enjoyed it. She never at any stage signalled her non-consent to him.

Speculation as to a conversation between Egan and Sekulic.

While dealing with count 7, I might as well deal with the complaint in one ground of appeal that the trial judge suggested during the course of his summing-up to the jury that Sekulic might have received knowledge about what had happened before count 7 if Egan had come into the room and spoken to him before the woman was brought in. Not only was that speculation, but there was the woman's positive evidence to the contrary, that Sekulic woke up only after Egan had brought her into the room, gone out again, got a cigarette and came back into the room. There was not a scintilla of evidence that there had been sustained discussion between Egan and Sekulic. The suggestion to the contrary was adverse to Sekulic. In the context, his Honour was dealing with Egan's case, pointing out that the woman and Liberato were both indicating that Egan was forcing the woman into the bedroom to see Sekulic. However, in the course of dealing with Egan's case, it was put too highly against Sekulic. The following remark was directed against Egan but it had a "spin-off" effect adverse to Sekulic's case:-

"Just what was said between Mr. Egan and Mr. Sekulic before Mrs. Knauff went into the bedroom?"

If that had been the only passage, it would have been buried in a very long summing-up. There was another reference to a conversation - it was probably this same conversation - at p. 40 where his Honour said:-

"And just as we know there was a conversation between Mr. Egan and Mr. Sekulic with respect to what happened in the bedroom, that is very relevant against the two of them, even though you are left to speculate as to what that might be and draw inferences as between what was said and what was done."

His Honour is there referring to something that had happened in the past in the bedroom. He may have been there referring to a conversation before Sekulic's next act of vaginal intercourse in count 11. More importantly, his Honour said something, between the above two passages, when dealing with the conversation outside and Liberato's claim that the woman was "touching him up". In pointing out that that had nothing to do with Egan as he was not outside and party to that conversation, his Honour continued:-

"He wasn't a party to that, but it may be for you to conclude that there is a key to what might have been said between Mr. Egan and Sekulic in the bedroom."

Overall, it is more likely that the passages refer to a conversation prior to count 7, not count 11, as, much later in the summing-up, his Honour said in relation to count 7 and in relation to Egan's words "here is a present for you":-

"Was that all there was? Was it because something was said between Egan and Sekulic that can only be understood against a different view of the matter than the accused asked you to take ... you must consider the evidence about how (the woman) came to be in the room. As I say, consider for yourself whether you believe that what both Mr. Egan and Mr. Sekulic say was said between them before she came into the room."

They were saying the same things as the woman said about "this being a present for you." The suggestion that there was a more substantial conversation was mere speculation. A passing reference not to speculate later in a re-direction did not cure the defect.

Count 8: Rooney's oral intercourse; Count 9: Egan's oral intercourse; Count 10: Egan's vaginal intercourse.

I find it convenient to deal with these three acts together because they occurred at a time immediately after Sekulic had intercourse under count 7. He left the room. Rooney and Egan came in. (The way in which the men left the room and left the woman alone with one or two persons, gives rise to a very strong suspicion that this was part of a modus operandi. However, it was agreed by the Crown that the men were not acting in concert or acting according to a plan and were only responsible for their individual roles.) Having been awakened at about 7 a.m., it is quite natural, perhaps, that Sekulic might leave the bedroom. First Rooney and then Egan had oral intercourse with the woman. Rooney might have been affected by his memory of the oral intercourse in count 2 and Egan either by Rooney's description of it or what he observed of count 2 when he was involved in count 1. Without any preliminaries as to consent, she submitted to these acts of oral intercourse in counts 8 and 9 whereupon Egan had vaginal intercourse with her, count 10. They were both affected by everything that had transpired before. Further, Egan was affected by the fact that he had forced or pushed the girl into Sekulic's bedroom. They were not entitled to assume consent. Everything that had happened before gave them warning that she was only submitting and was not consenting. Her evident

enjoyment of the intercourse with Sekulic on count 7 was not seen by Egan and Rooney as they were not in the room at the time of count 7. There was no evidence, that is, believable evidence, on the woman's story, that they came to learn about what she did with relation to Sekulic. They were simply continuing to gratify themselves without inquiry as to her wishes. The jury were entitled to find Rooney and Egan guilty on counts 8, 9 and 10, subject to what will be discussed later about misdirections.

Count 11: Sekulic's vaginal intercourse.

Sekulic returned to the room. He must at least have known that Rooney and Egan were there. There was no reliable evidence from her as to how Sekulic came to return to the room. He could have been to the toilet and simply returned.

At the time of count 11, Sekulic had the benefit of signals of her willingness to have intercourse with him in count 7, and also by this time the knowledge that there had been further sexual activity between her and Rooney and Egan under counts 8, 9 and 10. He was able to walk slowly with his leg in plaster. He came in and saw Egan having intercourse with her. He said he became aroused by what he saw. On the woman's story, he lay down and she once more freely and without objection, positioned herself above him and had vaginal intercourse with him, not once but twice, once facing him and once with her back away from him. She commenced to frame her story of these two acts of intercourse (count 11) with the words "I had to sit on him". But she immediately qualified that description by saying that at the end of the act of intercourse "I scared myself by saying to Sekulic 'I am doing this because I like you'". There is nothing which Sekulic did which made her change her position above him other than a request with which she complied.

She was acting in every way as if she was the dominant party. On her own story in examination-in-chief, she was acting at this time (in spite of her tiredness and all the previous sexual activity) as if she had lost her sexual inhibitions. She appeared by her actions to be not only consenting but enthusiastically enjoying what was happening. When cross-examined (p. 273) she repeated that she had said to Sekulic the words "I am doing this because I like you". These words of approval of what was happening in relation to count 11 seemed to cut across the tenor of what she was saying when she said that she "had" to mount him. There was a long discussion between the judge and the interpreter (pp. 273-275) as to what she meant when she said that these words ("I am doing this because I like you") "fell from my mouth". After some discussion the interpreter suggested that the word was not so much "fell from my mouth" as "tumbled from my mouth" and he suggested that the woman meant that she was not speaking voluntarily or deliberately. Counsel objected to the interpreter putting a gloss upon the words. In any event, the plain fact is that the woman gave evidence that she said those words of consent and approval to Sekulic, whatever her motives.

Sekulic's request for a no case or Prasad ruling.

Counsel asked the judge to rule that Sekulic had no case to answer on count 6 or count 11. With regard to count 6, there were the words adverse to him ("I trusted you. Why are doing all this to me?") which the jury might have selected as her true state of mind and as sufficient notice to him that she might not be consenting. However, her later actions at the time of count 7 of evident enjoyment were quite contrary to those words. With regard to count 11, there was the circumstance, adverse to Sekulic, that other men to his knowledge had had

intercourse with her (counts 8, 9 and 10). But in his favour was her declaration that she was doing it because she liked him. It was within the judge's province to rule no case on count 11 and to rule that he would give the jury some advice of their right to acquit without hearing more on count 7 if that was their wish (cf. Reg. v. Prasad (1979) 23 S.A.S.R. 161 at 163. He elected not to do so. Another judge might have ruled there was no case on count 11 but I am not prepared to say the judge was wrong in refusing to do so. Nor, with respect to counts 7 and 11, am I prepared to say the judge was wrong in refusing to advise the jury of their right to acquit without hearing more if they wished. It had been a long and difficult trial. There were 11 counts. Any premature direction would only have tended to confuse the jury. It was appropriate for the trial judge to defer until his summing-up, once he ruled that there was a case against Sekulic on count 11, everything he wished to say on counts 7 and 11. In the course of his summing-up, his Honour could have dealt with the weakness of the case against Sekulic. He did not take advantage of the opportunity in his long summing-up of pointing out to the jury the weakness of the case against Sekulic, especially on count 11. He made some references to it. He made more references to the lies which Sekulic had made in denial when questioned by the police. The ambivalence of her attitude towards Sekulic and the weakness of the case against him render it more likely that the verdicts cannot stand if there were any mis-directions. Before turning to them, I will complete the narrative.

Events subsequent to the sexual activity.

The woman asked for her clothes and began to dress. She could not find her panties and the men were of little help to her. She may have been piqued and annoyed by their conduct

afterwards. Sekulic made a joke that Liberato might have had her panties on. Having been raped and degraded, these taunts could only make her feel more hostile. She saw Rooney and Sekulic playing cards before she left. The callousness of this "shocked her". Finally, she found a lucky charm she had been wearing. It was broken. The finding of it affected her emotionally. It reminded her of her home. It brought her to a realisation of where she was and what she was doing, "Life returned to me. I found some relation to (the lucky charm) and suddenly I knew then who I actually was. I then only cried."

Most of the explanation of her subsequent conduct, distress and complaints to the police could be attributed to the way she was treated throughout those early hours of the morning but part of it could be attributed to the way they treated her afterwards.

When Sekulic said "don't cry - nothing's wrong - you enjoyed yourself" he was expressing something which was consistent with what he knew about what had happened. While she was having intercourse with him (counts 7 and 11) she gave every appearance of enjoying what happened and she told him she did it because she liked him. Now he was puzzled by her wanting to go home, by her crying and being upset.

Rooney said that she could stay there if she wished. She did not have to go home. If she wanted to go home, he would get a car taken out so that he could get his motorcycle out. She declined the offer of a ride. She opened the door and went outside. She said she ran or stumbled out. Nobody attempted to follow her. She noted the name of the street and bus stop number. She walked to a nearby petrol station and asked for a pencil and paper. She wrote these things down. She attempted to ring her aunt's place without success. At one stage, she said she got behind the counter because she was frightened the men might follow

her. Eventually police officers arrived and she was taken to the Queen Elizabeth Hospital. She saw Dr. Black who found some reddening and tenderness around the vaginal and anal area which could be consistent, of course, with much consensual intercourse, and she also found a slight tear near the anus.

The trial judge correctly directed the jury that the evidence of the woman's distress and the state of her genital area could not amount to corroboration. However, he directed the jury that the lies told by all appellants, excepting Liberato, could amount to corroboration. They in fact told many lies and in general denied that there was any sexual activity in which they were involved. That was plainly untrue.

Lies as corroborative evidence.

The judge summed up separately in relation to each appellant. The case against each of them was different and his Honour was bound to do that. In the course of doing so, he told the jury each time that the lies could amount to corroboration if the jury believed that they were lies told out of consciousness of guilt or a fear of the truth. That was a correct description of the use that could have been made of the lies if the jury viewed them in a certain way. However, he did not each time qualify his direction with a warning that they should be careful about using lies as corroborative evidence because there might be other explanations why lies were told. These men were members of a bikie gang. In January 1984 when they told the lies, there was not very much special publicity about the lawlessness of bikie gangs but by the time of the trial in September 1984 there was a great deal of publicity about the lawlessness of bikie gangs. Since there was no other corroboration of the woman's word, the use of the lies as evidence capable of amounting to corroboration was important to the prosecution case. Since his Honour was forced to make a separate direction

in each case about the lies being corroborative if the jury believed they evinced a consciousness of guilt and a fear of the truth, it would have been desirable each time to accompany that with a warning that there might have been other reasons, such as panic or distrust, for such lies.

There is ample authority that lies can amount to corroboration of the complainant's story. For example, Ready and Manning v. The King (1942) Argus L.R. 138 at 139-140 (H. Ct.); Eade v. The King (1924) 34 C.L.R. 154; Morrison v. Taylor (1927) V.L.R. 62; Reg. v. Colless (1964) 84 W.N. Pt. 1 (N.S.W.) 55; Reg. v. Duke (1979) 22 S.A.S.R. 46 at 52-53; Reg. v. Lindsay (1977) 18 S.A.S.R. 103 at 10 ; Reg. v. Tripodi (1961) 104 C.L.R. 1. See also Loneragan (1963) Tas.S.R. 163; May (1961) Qd.R. 456.

The trial judge did mention that panic or other things might be explanations for the lies and he did say it on more than one occasion. However, he did not stress that innocent alternative nearly as much or nearly as often as he stressed the adverse use which the jury might make of the lies. It might have been better if he had grouped the case against the four lying appellants together and told the jury once, in relation to all of them, that they could use their lies as consciousness of guilt or fear of the truth or, in the alternative, attribute their lies to fear of injustice or panic. After all, the four appellants belonged to a bikie sub-culture or tradition which had no reputation for co-operation with the police. The fact that four of them, friends and members of bikie gangs, all lied similarly about having any knowledge of any sexual activity could possibly be explicable in terms of panic or fear that admission of any intercourse would lead to a verdict ultimately of rape because there was so many of them and because they were bikies. Having said that, I am of the opinion that the

alternatives were before the jury and known to the jury and that the jury did not make improper use of the direction that lies could be corroborative.

Refusal to answer some questions as corroborative evidence.

Allied to the general complaint as to lies being potentially corroborative was the specific complaint by Rooney that his right to silence was undermined when the trial judge linked his refusals to answer ("no comment") with his earlier lies, by saying to the jury:-

"It is for you to say what construction you put upon the particular denials and the particular 'no comments'."

His Honour had told the jury immediately before that passage that Rooney's lies could be corroborative if told with a consciousness of guilt and fear of the truth. By implication, it was argued, a series of "no comments" after some lies in the course of many answered questions, were elevated to the status of lies. It was also argued that Rooney's lies about counts 1 and 2 were not very serious in that the interrogating officer made a mistake about the location where those counts occurred. However, the substance of the allegation which the police officer was putting to Rooney was clearly intercourse in counts 1 and 2, the exact room being incidental. Having falsely implied that he was not present or involved, Rooney thereupon began to answer further allegations by saying "no comment". This was not a case where an accused person was selective, answering some questions and not others. This was a case where the accused person decided at a given point on the interrogation to exercise his right to silence and he consistently did so thereafter. The trial judge should not have undermined that right by linking his "no comments" with any earlier false denials. However, it was a one brief passage reference in a very long summing-up (well over 120 pages). In

my opinion, it would not have affected the result. The case against Rooney was very strong for other reasons, so strong that there is no reasonable possibility, in my opinion, that this one mis-direction denied him a fair trial. I have not yet specifically pointed out that Rooney and Egan seemed to act together in several ways. When Egan misbehaved at 5 a.m., Rooney apologised. While Egan was involved on count 1, Rooney was involved concurrently on count 2. Finally, they were together in the bedroom at the time of counts 8, 9 and 10. After Egan, Rooney was next most involved.

Credibility - believing one party or the other.

Whilst dealing with lies and their effect as corroborative evidence, it is convenient to deal with a common ground of complaint, namely, that the judge on several occasions told the jury that their verdict would depend upon whether they believed the prosecutrix on the one hand or the particular accused on the other. For example, he said(p. 39 and p. 74) words to the effect that the case boiled down to who was believed on the particular topic. A direction such as this must be avoided because it diverts attention away from the burden of proof which rests upon the Crown. See The Queen v. Calides (1983) 34 S.A.S.R. 355 where Wells J. said at 358 that while it is perfectly natural to place two opposing bodies of evidence in juxtaposition as they both cannot be true, it is not sufficient for the judge to go on to say that "it depends upon whom you believe" or "it is for you to decide where the truth lies between those opposing accounts". The two possibilities of one or the other being correct or truthful is not the point because:-

"there is the third possibility, which must never be overlooked, and that is that the jury, after a full and careful consideration, may arrive at the result that they are unable to say where the truth lies, or that they are unable to say who is telling the truth. If that is the situation, then, of course, the verdict must also be not guilty."

Those several references to a choice between two bodies of evidence were buried in a very long summing-up which made it very clear where the onus of proof lay and also that, if there was uncertainty, any such uncertainty was to be resolved in favour of the accused. Many times over, his Honour cured the defect in these two misdirections.

Partial intoxication and its relevance to the mental element in rape.

The partial intoxication of the woman might have led her to do things that night which she would not normally do when she was sober, just as the partial intoxication of the men might have led them to do things that night which they might not have done when they were sober. In the course of his summing-up, the trial judge reminded the jury of the latter but not the former - or at least not as emphatically.

In the grounds of appeal, the appellants have a common complaint, that is, his Honour summed-up on total intoxication and incapacity to form a criminal intent (which was not a forensic issue) instead of summing-up on the effects of partial intoxication upon the mental element in rape. The following are the relevant passages in the summing-up:-

"The accused all tell you that they had had what you may think was plenty to drink; but that fact has not been mentioned much in the course of addresses. However, it may well be simply because it is so obvious that none of the accused are arguing about the fact that they too, like (the woman) had been drinking. It seems that everyone involved had had plenty to drink ... what does drink do? How are we to view it? Are we to treat these as normal people although we know they were not, (in that) they had had something to drink? ... rape requires proof of the particular state of mind - that is to say, knowledge of absence of consent or reckless indifference. That is a state of mind. There could be cases in which a person was so advanced in drink, so befuddled, so bewildered and confused by it that he just could not achieve that state of knowledge at all or state of awareness, in which case, of course, he could not be guilty of rape. But you may think that that can hardly be the case here because although they

have told you about what they drank, all of the accused seem to have given a fairly detailed and long account of their versions of what took place in a fairly coherent way. You might think, therefore, it is unlikely, very unlikely, that they would have arrived, even as a reasonable possibility, at that state that they were so befuddled and confused that they could not have achieved that degree of knowledge that I have just discussed."

Pausing there, his Honour, so far, was dealing fully with total incapacity to form an intention as a result of total intoxication. He continued:-

"Consumption of liquor may operate in another way. It may serve - but it is entirely for you to say about this, as it is with all these factual matters - to explain all sorts of wrong-headed and abandoned conduct that would otherwise be inexplicable if the person whose conduct was under review had been sober. What a person does when he is affected by liquor is not necessarily what he would do if he is sober. It may explain all sorts of wrong-headed conduct which may otherwise be strange. To sum it up, it is no excuse in law that a man does in drink what he would not do when sober and the consumption of liquor may explain his conduct."

His Honour is there referring to partial intoxication but only in a way which is adverse to the appellants. He did not say anything in that passage which was favourable to them. In particular, he did not say that it was a factor to be taken into account when the jury were assessing the particular accused's realization that she might not be consenting. Before the adverse effects of intoxication can be taken into account, the Crown must first prove that notwithstanding his partial intoxication he realised she might not be consenting. The partial intoxication could make more dull or more blunt his perceptions of the finer nuances of ambiguous conduct on her part. It could have an effect on his reading of her signals.

If her signals were conflicting or ambiguous then partial intoxication could be very relevant. Where her signals were loud and clear and all one way, partial intoxication would have to be very advanced; and that was not the case here.

Continuing now with his Honour's summing-up:-

"The time when the consumption of liquor may provide a person with a defence is when the degree of intoxication is so far advanced that that person could not have formed the necessary state of mind required to be proved. You may think, although it will be for you to say, that that was not the situation in this case."

That was a return to the question of total intoxication and total incapacity which may have affected later re-directions. To this stage, his Honour had not dealt with the topic of partial intoxication and its relation to (and effect upon) the mental element of realisation that the woman might not be consenting.

The following passage was not a relevant or helpful direction in this regard:-

"The effects of alcohol in this case are part of the total picture out of which you either derive satisfaction that the case is proved beyond reasonable doubt on each element of each particular charge or you do not. It is not a separate matter, but mixed up in the whole of the evidence on each element of the particular offences you are considering ... It is part of the totality of the evidence which may or may not raise a reasonable doubt as to the proof of one or more of the elements of the particular crime charged or under consideration.

Do the circumstances cause you to doubt with respect to any particular charge that the particular accused knew (the woman) was not consenting, or to doubt that he was recklessly indifferent as to whether she was consenting or not? Was he so much affected by the liquor that he did not know that?"

While this direction was quite close to the point, it is unspecific and, in the last sentence, it stops short at "know".

His Honour does not go on to say "Was he so much affected by the liquor that he did not realize that she might not be consenting and press on in that state of mind?"

At p. 85 his Honour returned to the subject of intoxication:-

"I spoke of a haze of liquor. The fact is she wasn't the only one who had liquor that night, and you may ask why it is that you have not been asked to take any particular account of the effect that that liquor may have had upon the accused, either by the Crown or by their counsel. Nevertheless, it is my duty to explain to you in a way that I hope I have clearly put, the relevance, if any, of intoxication and invite you to consider just what you may think was the effect of liquor upon the attitudes of each particular accused towards this woman at the time of intercourse ... and you may well think that liquor is something you cannot overlook when considering whether, as I put it to you, at the very least, was this particular accused, at the time, of this particular intercourse clearly recklessly indifferent as to whether she was consenting or not, at least. And that, I hope, is something that I need not repeat again." The topic had not been "clearly put". However, at this stage, his Honour makes good the defect which was evident in the first passage on p. 22 which was restricted to "knowing". When his Honour referred the jury to what had been said before, he might have been referring to the total intoxication aspect or the partial intoxication aspect - more probably to the partial intoxication aspect (p. 24). In my view, it would have been preferable if his Honour had said that the onus was on the Crown to prove realization that she might not be consenting and then referred to partial intoxication as a factor to be weighed in the scales when considering whether a particular accused did in fact realise that that was the situation and point out to them that the partial intoxication might weaken or make more blunt or dull their perception of any ambiguous signals emanating from the woman, especially since she, too, was partially intoxicated and at some stages, to some of them, in particular Sekulic, was giving

ambiguous signals which could be mis-interpreted due to such partial intoxication.

The appellants relied upon The Queen v. Martin (1983) 32 S.A.S.R. 419, especially at 450. In that case, the complaint made by the appellant concerned non-direction as to the effect of partial intoxication upon the actual formation of the basic intention to stab. I held that the non-direction was fatal, relying upon the implications of certain passages in the judgment of Barwick C.J. in O'Connor (1980) 54 A.L.J.R. 349 and other statements of principle in Kamipeli (1975) 2 N.Z.L.R. 610; Viro (1978) 52 A.L.J.R. 418 (especially where Aickin J. approved Kamipeli); Garlick (1980) 70 Cr.App.R. 291; Herbert (1982) 42 A.L.R. 631. I said in Martin (450):-

"The only substantial question at Martin's trial on this issue of intoxication was whether the prosecution had proved beyond reasonable doubt that Martin (if he was the 'stabber') had actually formed the basic intent to insert the knife into the upper part of the body of the deceased, taking into account partial intoxication with all of the other circumstances. Incapacity for voluntary action or for basic intention was very much a secondary question."

I also drew the distinction (453) between total intoxication and total incapacity, on the one hand, and partial intoxication and its relevance to the formation of basic criminal intent, on the other. The High Court refused leave to appeal against the decision in Martin, (1984) 51 A.L.R. 540.

The fact situation is very different here. Further, the issue here relates to the specific or specified statutory state of mind rather than to the basic intent. Nevertheless, the principle is the same. Having embarked on rather conflicting directions as to the relevance of liquor, the jury should have had, at the end of the day, clear assistance as to how they should apply partial intoxication to the state of mind of each accused when considering whether the prosecution had proved

beyond reasonable doubt that each accused actually realized that she might not be consenting. In a very general way, his Honour adverted to that topic, on p. 24 as to knowledge and p. 86 as to reckless indifference. But that was against a background of an irrelevant direction as to total incapacity, a statement that intoxication was no defence and an adverse comment that liquor might cause them to do what they would not do when they were sober.

It is important that the effects of this possibly inadequate direction be seen in perspective. If counsel had relied upon partial intoxication in their addresses, it could amount to an error of law. Even if counsel did not refer to the topic in their addresses, it could still be an error of law not to direct clearly if it might have had an adverse effect upon the result or if any accused was thereby denied a fair trial. Further, this issue is important because its resolution has a bearing upon the next matter discussed in these reasons, namely, the trial judge's answers to the jury question as to the relationship between "reckless indifference and assumed consent".

Counsel did not address on partial intoxication. This may have been due to oversight, although this is to be doubted because counsel were experienced, and they raised the point immediately after the summing-up was completed. It is more likely that counsel appreciated the fact that the arguments based on partial intoxication were two-edged, like a two-edged sword as it were. There is a favourable or helpful edge which assists accused persons in cases like this, at the first stage of the exercise where the jury is considering the question whether the accused realized she might not be consenting. They get the benefit at that stage of any dulling of his perceptions due to partial intoxication. Once the jury decides that he did realize, notwithstanding partial intoxication, that she might not be consenting, the very fact of partial intoxication may then be used

by the jury as the explanation why the accused pressed on with intercourse recklessly indifferent as to her consent. That is the adverse or unhelpful edge of the direction as to partial intoxication. It may be that counsel realized this difficulty and for tactical reasons, did not make too much of the issue.

There is a further reason why a full and clear direction did not matter very much in this case, except perhaps in the case of Sekulic. The woman's signals of non-consent were so clear to Egan, and to those watching how Egan began the whole of the sexual activity, that they must necessarily have been seen and heard by these men and warned them, at the very least, that she might not be consenting. That fact coupled with counsel's own failure to rely upon the point in their addresses indicates that the appellants (except Sekulic) are now crying crocodile tears on the appeal. With regard to Sekulic, I think the signals were not loud and clear but quite ambiguous to him. He was partially intoxicated, although not quite so intoxicated as the other men since he had ceased drinking much earlier and had gone to bed. Nevertheless, there was sufficient evidence of his partial intoxication to warrant a full and clear direction on this topic when the mental element was so finely balanced and when so little might have been required to tip the scales. I will delay further consideration of Sekulic's case until the next topic has been discussed.

Reckless indifference and "assumed consent".

After the jury had been deliberating for three hours, they returned at 4.45 p.m. to ask the trial judge the following question:-

"We would like your definition of rape again, please, referring to the reckless indifference and assumed consent. There seems to be some confusion in the jury about that."

In order to understand how this jury question came to be

asked, it is necessary to recount what transpired after the jury retired for the first time at 1.43 p.m.

As soon as the jury retired, Mr. Peek for Egan, raised (p. 120) the whole topic of partial intoxication in relation to the mental element, more particularly, the dull perception of finer nuances in sexual signals. He raised many other points as well. Other counsel raised many other matters too. By the time they had raised everything they wished to argue, it was 3.31 p.m. The jury had been deliberating for 1 hour and 45 minutes. His Honour then proceeded to re-direct the jury on a number of matters. He said amongst other things:-

"With respect to liquor, you will bear in mind what I told you." (p. 176)

...

"It is of course important that you remember that the fact that the particular accused person may have consumed liquor, may be a circumstance which you think leaves you in doubt as to his state of mind at a particular time of any particular act of intercourse, and if that were the fact then that would be an occasion for you to give the benefit of a doubt to an accused, if that was your view about the effect of liquor at that time." (p. 176-177)

In spite of that re-direction the jury came back 1 hour later (at 4.45 p.m.) with their question. They were confused and wanted help on a subject matter of "reckless indifference and assumed consent". His Honour thereupon repeated the statutory definition of the mental element re consent (p. 182) and said:-

"As I understand it, you seek some help from me with respect to the question of consent and reckless indifference. Is that right?

FOREMAN: Yes."

On the one hand, the jury wanted particular help with "reckless indifference and assumed consent", that is to say, with two conflicting concepts or views of the male state of mind. Their

question correctly presupposed that there was a subtle but important difference between "assumed consent" (each appellant assuming he had her consent) and "reckless indifference". On the other hand, his Honour's re-statement of the question changed its nature and thrust. I say that because in the re-statement of the question, the "consent" becomes a reference to the woman's consent while "reckless indifference" necessarily means a reference to the male state of mind. That this is so becomes clear from the passage which followed:-

"As to each charge against each accused, the Crown has the burden of proof of satisfying you beyond reasonable doubt that (the woman) was not consenting and equally it has the burden of proof of showing that the particular accused believed she was not consenting" ("realized" might have been a better word than "believed") "or was recklessly indifferent as to whether she was consenting or not. Can I deal with the phrase 'recklessly indifferent' first and then go on to the question of consent? Consent if you like, is with respect to, in this case, (the woman) and the state of mind relates to the particular accused with respect to the particular charge."

Pausing there, his Honour re-directed the jury, in relation to "consent", in terms of the woman's consent although he did link it with the accused's state of mind as to it. He continued:-

"Recklessly indifferent means that the accused realised that there was a very real risk that (the woman) was not consenting to intercourse."

This is the only reference to the accused's "realization" in the summing-up. It is a correct reference. (Wozniak, supra). In speaking in terms of "very real risk", his Honour was stating the test too favourably to the accused. Any risk that she might not be consenting would be enough, so long as it was not minimal or fanciful.

The rest of the re-direction on p. 183 deals correctly with the onus of proof but it still does not answer the jury's question. Later on p. 183 and on p. 184, his Honour deals with consent as follows:-

"As to the ingredient of consent that, as I understand it, is the other matter that you ask for some direction on; consent in law means a willingness to have sexual intercourse freely given. Mere submission by itself is not the same thing as consent ..."

The re-direction is concerned with the woman's consent. It has nothing to do with the jury's question or difficulty.

His Honour went on to tell them about the difference between submission through fear, and free and willing consent. Having reversed the order of the jury's question, his Honour missed the point of it and re-directed them on a topic they did not ask about. As I said, the jury wanted to know the relationship and difference between the two male states of mind - his "reckless indifference" on the one hand and his "assumed consent" on the other. There was "some confusion in the jury about that". The jury had every reason to be confused if they were thinking in terms of "assumed consent".

The law was for the judge. If counsel addressed the jury in terms of "assumed consent" or "they were entitled in the circumstances to assume her consent", they should have been interrupted. If the jury arrived at this concept alone, now was the opportunity to correct it. The correction was not made.

His Honour asked whether the jury had any further question about the re-direction and the foreman was not sure. He said "I don't think so your Honour".

At this stage, Mr. Peek for Egan, correctly drew his Honour's attention to the fact the jury's question "related to reckless indifference and ... assumed consent".

His Honour agreed that the word "assumed" had been used and said:-

"Mr. Foreman, I think it is proper to tell you that you don't assume consent at all. It is for the Crown to prove beyond reasonable doubt that at the particular time of the particular act of intercourse, she was not consenting."

This further re-direction suffered from the same defect in that it gave no help on the male state of mind of "assumed consent".

Mr. Peek then said:-

"Your Honour, isn't it really this in a nutshell, simply this? If it is reasonably possible that any of the accused did in fact assume that she was consenting, then that accused must be acquitted. That is what it comes down to, in my respectful submission. If the jury think it is reasonably possible that he assumed she was consenting, then obviously he does not have the mental element of rape and he must be acquitted."

That, too, was not a correct statement of the law. It was too favourable to the accused. It avoided the policy of the section. An accused person might assume a woman was consenting without inquiry, without any basis, even contrary to her signals in the circumstances. He might realize she might not be consenting but, out of self-interest, assume she is consenting simply because it suits him. The assumption might be made in spite of a realization that she was not consenting, whether his perceptions were dimmed by intense self-interest or by partial intoxication. When his Honour told the jury a little earlier "You don't assume consent at all" and that "it was for the Crown to prove it", he was referring to the woman's non-consent, not the man's realization. When Mr. Peek was referring to each accused assuming consent, he was obviously speaking about the male state of mind.

The whole purpose of the amending legislation was to prevent men from assuming that women were consenting when they might not be, and pressing on with sexual intercourse.

The evidence in a particular case must be such that the jury can safely draw the inference beyond reasonable doubt that the man in fact realised that the woman might not be consenting and that he, in spite of such realization, recklessly pushed on with intercourse without resolving the doubt. That is a far-cry from saying that "if he assumed she was consenting, he could go ahead". Mr. Peek's formulation of the law was of no assistance to the jury nor to his Honour in that it served the interests of the appellants too much. It over-stated the test in favour of the appellants. His Honour did not accept or reject Mr. Peek's formulation of the test at that stage. He spoke neutrally about it by adding:-

"You have to give the benefit of any doubt to the accused, ladies and gentlemen; and there may be occasions where a belief of the accused is something that you are satisfied about and if that gives rise to a doubt about the ingredients of the charge, then the accused must have the benefit of that doubt."

I pause to note that the comment unintentionally reverses the onus of proof, as if the accused is called upon to establish a belief ("where a belief of the accused is something that you are satisfied about"), because his Honour had defined "satisfied" earlier in terms of proof beyond reasonable doubt.

His Honour asked the prosecutor for his views. The prosecutor said:-

"I prefer your Honour to leave it on the basis of the definition you have given of reckless indifference, which is a realisation that there was a very real risk that (the woman) was not consenting. If that has been proved beyond reasonable doubt, then that element has been satisfied."

As I said earlier, the reference to realization was correct, but the reference to "very real risk" was too favourable to the accused (Wozniak supra). Neither statute nor case law requires the prosecution to prove a "very real risk", only that she might not be consenting. His Honour then adopted Mr. Cuthbertson's proposition in a general way direction.

Other counsel then joined with Mr. Peek's submission. Finally, his Honour said:-

"You have had the benefit of that submission from Mr. Peek and my attempts to explain to you the law and if there is anything further that you would ask we will wait upon you."

With respect, that did not constitute a direction at all. Too much was left to counsel. The law was for the trial judge. Further, counsel were submitting contrary propositions, so the conflicts in law could not be left thus to the jury.

In the event, the jury's question was not answered and the legal position was not explained. However, the jury were left with two different propositions, each too favourable to the accused. His Honour seemingly approved Mr. Peek's proposition that if an accused "assumed she was not consenting, he did not have the mental element for rape and he must be acquitted". And he also seemingly approved the prosecutor's proposition which included a reference to realization of "a very real risk".
Was there a substantial miscarriage of justice?

The above matters have a very real bearing upon the application of the proviso to section 353(1) of the Criminal Law Consolidation Act 1935. The section provides:-

"353(1) The Full Court on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there

was a miscarriage of justice, and in any other case shall dismiss the appeal: Provided that the Full Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

Most of the grounds of appeal referred to mis-directions or non-directions on questions of law, while some referred to mis-directions or non-directions or inadequate directions on matters of fact. I have dealt with the main ones. I have not dealt in detail with the conglomeration of complaints about the order of addresses, the sending in of statements to the jury room, the contrast between the warning applying to four appellants but not applying to one, the delay in bringing the jury back for re-directions, the speed or lateness of the conclusion of the summing-up, the amount of attention paid to the defence cases and the like minor matters. Having heard argument on them, I am satisfied there is no substance in them either separately or cumulatively. I have dealt with the matters of substance except for one matter peculiar to Sekulic where his Honour said (p. 92-93), ground of appeal 3(k):-

"(Sekulic) has to answer for the girl's story about Australian men (admitted by him to be told to him at the hotel). That being said, how can he sustain a doubt about his belief that she was consenting or recklessly indifferent to consent (sic.)?"

Insofar as that direction has been properly recorded, it appears to reverse the onus of proof. The Crown had to exclude his innocent belief beyond reasonable doubt. Allied to this apparent reversal of the onus is the problem of speculation about a possible conversation between Egan and Sekulic before the woman was brought into the room, and the ambivalence of her attitude towards Sekulic already mentioned. Finally, there was a general complaint about hurrying the summing-up, especially towards the

end. If anyone had a complaint about hurrying, it was Sekulic because by the time his Honour was dealing with Sekulic's case it was beyond lunch-time.

I now draw together the matters which were of some substance and they are as follows:-

1. A number of incomplete or inadequate or confusing directions as to the use which the jury should make of evidence of partial intoxication: first, when considering whether each accused realized she might not be consenting; if he did, then secondly, whether partial intoxication explained how each accused came to press on with sexual intercourse.
2. A number of incomplete or confusing directions following the jury question as to "reckless indifference and assumed consent".
3. Too many separate directions over-emphasizing the importance of lies as evidence capable of amounting to corroboration - coupled with too few directions or inadequate directions that the lies might be explicable in terms of panic or fear of injustice - and coupled also with an erroneous direction that refusal to comment could impliedly be equated with lying.
4. Occasional mis-directions undermining the principle that the onus of proof remained with the prosecution throughout, including (i) suggestions that an accused had to satisfy the jury about his belief or to sustain his belief and (ii) that an issue might be resolved by asking who is believed on that topic.
5. Speculation about an unproved conversation between Egan and Sekulic.
6. The effect of the above matters cumulatively on the jury's deliberations in those cases where the complainant's signals of non-consent were ambiguous.

In Mraz v. The Queen (1955) 93 C.L.R. 493 Fullagar J. said (p. 514):-

"(The section) ought to be read, and it has in fact always been read, in the light of the long tradition of the English

criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried." (underlining mine)

However, that position is qualified when the error relates to facts. See Simic (1980) 30 A.L.R. 519 where the High Court said in a joint judgment that there was a difference of onus, depending upon whether there was an error in a question of fact or a question of law. In the former case, the onus lies on the appellant.

In this case, virtually all of the mis-directions or non-directions were on matters of law. The onus is therefore upon the Crown to show why the appeal should not be allowed (Mraz supra) See also Simic where the Court said (529-530):-

"However, the distinction between misdirection of law and misdirection of fact is fundamental and must always be borne in mind when evaluating the significance of a misdirection of the latter kind. In the case of the former, the jury is assumed to have observed and applied the directions that were given to them, and any mistake by the trial judge in his charge to the jury on matters of law is itself a ground for allowing an appeal, if, subject to the proviso, the Court of Criminal Appeal thinks fit to do so."

On the main grounds of mis-direction of the jury as to the effects of intoxicating liquor upon each accused's state of mind under the section and explanations given in answer to the jury question about reckless indifference and assumed consent, the result was that the directions ultimately given were much more favourable to the appellants than the direction to which they were entitled. It follows that any shortcomings in these directions

were beneficial rather than detrimental to all appellants. As for the trial judge's direction that the case depended upon who was believed, this did not, in the long run, have an important bearing on the result. The trial judge made it abundantly clear, time and time again, that everything had to be proved by the prosecution and that the accused had to prove nothing. From time to time, his Honour lapsed into suggestions that the accused might have to prove their respective beliefs but that was cleared up time and time again and finally in the re-directions and the further re-directions. Since the jury must be presumed to have applied the law as it was finally given to them, the law on the mental element was considerably more favourable than it should have been and the detriment from other misdirections was finally removed, in my opinion.

Having said that, I still have misgivings about Sekulic's two convictions. In his case, not only were there a number of incomplete or confusing directions as to partial intoxication which I have already discussed, but there was the possibility of an unfair trial due to a specific reversal in the onus of proof as to his belief, specific prejudice arising out of speculation about an unproved conversation, and specific prejudice arising out of his lies being due to consciousness of guilt and therefore corroborative. I have dealt with the first two matters. As to the third, the woman's story did not require confirmation except on the one utterance "how could you do all this when I trusted you". He denied to the police having intercourse with the complainant and by implication denied all conversation with her prior to intercourse. Her remark as to trust must have had some meaning for Sekulic because when they were all at the hotel she had asked him, in relation to going to Andrews' house, whether she could trust "you". From time to time during the trial, there were

difficulties with the interpretation of the word "you" as singular or plural. She must have meant "all of you" because there was no reason to distrust Sekulic personally. According to the complainant, he assured her, in effect, that she could trust them all. He proved to be right up to the time when he retired to bed. They were all trustworthy and nothing had happened to her. Apart from the 5 a.m. incident, nothing happened to her until 6 a.m. which was 3 hours after Sekulic went to bed. When she accused him of some breach of trust at 6.30 a.m.-7 a.m., without explanation by her or anyone else, that utterance became a flimsy basis for suggesting that his blanket denial mattered in the result. When her story is analysed, it barely implicates him as having a guilty mind at all because any signals she conveyed to him were either favourable or so ambiguous as not to raise a real doubt about her consent. When he told a general lie to the police, as he did, his lie could not be used to elevate her story to a higher plane than the story itself. His lie could only give support for her story, for what it was worth, in relation to his guilt. The importance of a correct direction, in Sekulic's case, about lies and the importance of warning the jury of the matters which I have just mentioned as well as telling them that there might be an alternative explanation for his lies, became of special importance in Sekulic's case. When coupled with the other matters, the cumulative effect was, in my opinion, to cause a substantial miscarriage of justice. The Crown has not shown otherwise. I would allow the appeal in relation to Sekulic's counts 7 and 11 and quash his convictions. I would not order a re-trial of Sekulic. The woman has returned to Germany and the case against him was relatively flimsy in any event.

As to the other four appeals, the Crown has established, in my opinion, that there was no substantial miscarriage of justice.

REG. v. EGAN, ROONEY, ANDREWS, LIBERATO AND SEKULIC

Court of Criminal Appeal

Mohr J.

I agree with the judgment of White J. and with the order proposed by him.