

IN THE SUPREME COURT )  
 )  
OF WESTERN AUSTRALIA )

Heard: 8th November, 1977

Delivered: 22nd November, 1977

## THE FULL COURT

CORAM: BURT C.J., JONES J., SMITH J.

Reference No. 20  
ATTORNEYS REFERENCE NO. 1  
OF 1977

REFERENCE UNDER SECTION 693A OF THE CRIMINAL CODE

JUDGMENT -

BURT C.J.

In my opinion, each of the questions which have been referred to this court for its opinion should be answered "no" and I publish my reasons.

JONES J.

I have had the advantage of reading the reasons now published by the Chief Justice and I agree with him that each question should be answered "no". I publish some brief additional observations of my own.

SMITH J.

I also have had the advantage of reading the reasons of the Chief Justice; I agree with them and that the answer to each of the questions should be "no".

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2203/A  
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OF THE CRIMINAL CODE

Mr. K. H. Parker, Q.C., with him Mr. H. McLernon,  
represented the Attorney.

Mr. H. A. Wallwork appeared for the respondents.

Authorities cited -

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THE FULL COURT

Reference No. 20

Attorneys Reference No. 1 of 1977

BURT C.J.

This is a reference made upon the request of the Attorney General of two questions of law which arose at a trial presided over by Wickham J. The indictment was presented against four men. Two of the accused were charged with the commission of two acts of rape, one was charged with one act of rape and with one count of attempted rape and the other accused was charged on one count of attempted rape. Each was charged as a principal offender. No application was made for separate trials. Each charge related to the same woman and the offences arose substantially out of the same or closely related facts. Section 586(7) of the Criminal Code.

Out of court statements had been made by each accused but after a hearing on the voir dire the trial Judge ruled the out of court statements made by each of three of the accused to be inadmissible. He ruled that the out of court statements written and oral made by the fourth accused who was charged with two counts of rape to be admissible.

Material in the out of court statements held to be admissible as against the one accused implicated each of the other accused persons in the commission of the crime or crimes alleged to have been committed by him. Such material was also relevant to the charges made against the accused who made that statement in that it fixed him with knowledge of facts from which it could reasonably be inferred that he at all material times knew that the woman was not consenting to sexual intercourse.

His Honour ruled that the material which had that double characteristic should be edited out of the written statement before it could be accepted into evidence and this was done. Mechanically it was done by excising the material and then re-typing the statement so that it would not appear to the jury that the excision had been made. There was some discussion before us as to whether the Crown consented to this method of proceeding but I am satisfied that his Honour did rule that he had the power to so order and he did rule that the material should be deleted. It was in the context of that ruling that the Crown agreed to the deletion from the statement of the material which implicated the accused persons other than the maker of the statement. The same ruling was given with reference to the admissible out of court verbal statements and the police officers in giving evidence omitted anything said to them by the accused which implicated any of the others.

The first question asked is: "In the trial, did the Court have any discretion to exclude evidence admissible against the accused against whom it was tendered upon the ground that it was inadmissible against and prejudicial to other accused persons?". That, in my opinion, is a question which "arose at the trial" within the meaning of s. 693A(1) of the Criminal Code.

The charging of a number of persons in the same indictment and trying them together is, of course, commonplace not only when such persons are charged with the commission of the same offence - s. 586(5) - but also when they are charged with committing separate offences the joinder in such cases being permissible "if the offences arise substantially out of the same or closely related facts". Section 586(7) of the Criminal Code. It is generally speaking a proper way of proceeding in cases which have become known, somewhat emotively, as pack rapes and this as the Crown saw it was such a case. On such a trial it is also commonplace that one or more of the accused persons has made an out of court statement which implicates the maker of it in the commission

of the offence charged as against him and which, questions of admissibility aside, implicate each of the other persons charged in the commission of the offence charged as against him. But such a statement is, of course, not evidence admissible in the trial of any of the others and the trial Judge will direct the jury accordingly and having done so that, generally speaking, will be enough to ensure a fair trial. As it is put in the advice of the Privy Council in Youth v. The King, (1945) W.N. 27: "It was true, no doubt, that in all joint trials the mind of the jury might be influenced by the reception of evidence which was only admissible against one of the accused, but the practice in this country has always been on a joint trial to admit such evidence leaving it to the presiding judge to warn the jury that the evidence must not be used to strengthen the case against, or lead to the conviction of, a prisoner against whom it was not admissible". See also R. v. Beaven, (1952) 69 W.N.(N.S.W.) 140, particularly at p. 143.

I say that generally speaking such a direction to the jury will be enough to ensure a fair trial because there might well be a case in which as it appears at the beginning it is proper that the accused persons should be tried together but which as it develops it can be seen that the out of court statements made by one of them are so prejudicial to the position of the other that even with such a direction given in the strongest terms the prejudice cannot be assumed to have been removed. In such a case it may be right to direct that the trial of one or more of the accused be had separately and to discharge the jury from giving a verdict as to one or more of them. Section 624 of the Criminal Code. I agree that the case in which that power could fairly be exercised in the course of the hearing is not an easy one to imagine. See R. v. Stuart and Finch, (1974) Q.S.R. 297 at p.305 per Douglas J. But if that cannot be fairly done then the jury could be discharged altogether and a new jury be sworn to try each accused person separately. R. v. Demirok, (1976) V.R. 244, appears to have been such a case. In that case the appellant and



his wife had been tried together upon a presentment containing three counts. The first count charged the appellant but not his wife with murder. The other two counts, one of wounding with intent to murder and the other of wounding with intent to do grievous bodily harm were laid against both the appellant and his wife. The wife made an out of court statement which was admissible as against her and highly prejudicial to the appellant upon the first count. The appellant having been found guilty of murder and of having wounded with intent to murder appealed to the Court of Criminal Appeal and that court quashed the convictions and ordered a new trial notwithstanding the finding that the trial Judge had not erred in refusing an application for a separate trial. It did so because the prejudicial effect of the out of court statements made by the wife was such that it could not be effectively removed by anything the trial Judge could say in his directions to the jury. An application for special leave to appeal from that decision to the High Court was refused. The Queen v. Demirok, (1976) 50 A.L.J.R. 550.

So the position, as I apprehend it, is that it is generally enough when upon the trial of persons together evidence being an out of court statement which is admissible as against the accused person who made it but not against the others who are on the indictment is led that the jury be directed that the statement is only admissible in the trial of the person who made it and is not to be considered in reaching their decision as against the other persons. In some cases that may not be enough. In such cases the only course open is to order separate trials. But nowhere, with one exception, can I find any authority for the proposition that it is permissible to prevent the Crown from leading evidence which is admissible against one accused upon the ground that it is inadmissible as against another and prejudicial to that other's defence. The one exception is the decision of Crichton J. in R. v. Rogers and Tarran, reported only as a case note in (1971) Crim.L.R.. And that was an exceptional case in that the statement

although legally admissible as against Rogers, only went to the proof of a fact which was admitted by him. It was, however, prejudicial to the position of Tarran. On the other hand, the decision of the Court of Criminal Appeal in Gunewardene, (1951) 35 Cr.App.R. 80, gives no support whatever to the view that a court has a discretion to exclude admissible evidence for the reason mentioned in this reference. That was a case in which the appellant who was a medical man was tried together with a woman named Mrs. Hanson, the allegation of the prosecution being that a pregnant woman had died as the result of an operation for the purpose of procuring a miscarriage having been performed on her by Mrs. Hanson and that the appellant was an accessory before the fact. Mrs. Hanson had made an out of court statement which implicated the appellant. The submission made was that "it was wrong that the whole of Mrs. Hanson's statement should have been read to the jury. The portions which implicated the appellant should have been excluded". The Court of Criminal Appeal dealt with that submission in a way which seems to me in effect to supply the answer to the question now under consideration. The passage, which is long, is as follows:

".....there is no doubt that the statement made by the prisoner Hanson incriminated the appellant in a high degree. This is a matter of very frequent occurrence where two or more prisoners are charged with complicity in the same offence. This state of affairs is, no doubt, a ground upon which the Judge can be asked to exercise his discretion and order a separate trial, but no such application was made in the present case. If no separate trial is ordered, it is the duty of the Judge to impress on the jury that the statement of the one prisoner not made on oath in the course of the trial is not evidence against the other and must be entirely disregarded, and that warning was emphatically given by Hilbery J., in the present case. But it would be impossible to lay down that, where two prisoners are being tried together, counsel for the prosecution is bound, in putting in the statement of one prisoner, to select certain passages and leave out others. The woman prisoner having pleaded Not Guilty, he was bound to prove the case against her, and so far as she was concerned the evidence mainly consisted in the statement she had made. The learned Judge not only

warned the jury that they must not regard her statement as evidence against the appellant but was at pains not to read, in his summing-up, the whole of the statement which she made, confining himself to those parts which bore on her guilt and not on that of the appellant, though he did read one passage which implicated the appellant, again warning the jury that it was not evidence against him. He went so far as to advise the jury not to ask for the woman's statement when they retired, so that they should not have before them matter prejudicial to the appellant.

If we were to lay down that the statement of one co-prisoner could never be read in full because it might implicate, or did implicate, the other, it is obvious that very difficult and inconvenient situations might arise. It not infrequently happens that a prisoner, in making a statement, though admitting his or her guilt up to a certain extent, puts greater blame upon the co-prisoner, or is asserting that certain of his or her actions were really innocent and it was the conduct of the co-prisoner that gave them a sinister appearance or led to the belief that the prisoner making the statement was implicated in the crime. In such a case that prisoner would have a right to have the whole statement read and could, with good reason, complain if the prosecution picked out certain passages and left out others. The statement was clearly admissible against Hanson and was read against her, and although in many cases counsel do refrain from reading passages which implicate another prisoner and have no real bearing on the case against the prisoner making the statement, we cannot say that anything has been admitted in this case which was not admissible, and the learned Judge gave adequate and emphatic directions to the jury on the subject."

I appreciate that those remarks were made with reference to an indictment charging two persons with "complicity in the same offence". However once the decision has been made to charge persons with committing different or separate offences in the same indictment and to try them together then, as it seems to me, they apply equally to such a case.

For those reasons in my opinion the first question asked should be answered "No". To answer that question in that way is not, of course, to say that a statement made by an accused person



which contains evidence which is inadmissible against him either in law or in the exercise of the judge's discretion cannot be edited to remove that material from it. The authorities clearly lay down that that can be done. See R. v. Weaver, (1966) 51 Cr.App.R. 77, and Driscoll v. R., (1977) 15 A.L.R. 47, at p. 61 per Gibbs J.

The learned trial Judge directed the jury as follows:

"The Crown must prove that the accused did not at the time honestly believe that he had voluntary consent and the reason for that simply is that a man, or a woman for that matter, is not guilty of a crime if he or she has done what has been done under an honest mistake.

In assessing the question of whether a belief is honest or not you can, of course, take into consideration the facts of the case and give consideration as to whether such a belief would, on the facts of the case, be a reasonable belief, but that is only an aspect of deciding upon whether the man honestly held the belief. The element or the ingredient in the crime which the Crown has to prove (and it is really a negative element) is that the Crown has to satisfy you beyond reasonable doubt that the accused did not have an honest belief that he had voluntary consent".

This gives rise to the second question asked in the reference it being whether that direction is "a correct statement of the law pertaining to the nature of the belief in consent relevant to the crime of rape". That is a question which with reference to the common law felony called rape has been much debated of recent times and it is a question which is, I think, best formulated as it was in the D.P.P. v. Morgan, (1975) 2 All E.R. 347, as being: "Whether, in rape, the defendant can properly be convicted notwithstanding that he in fact believed the woman consented if such belief was not based on reasonable grounds". That question for the purposes of the law of England has been finally answered in the negative by the decision of the House of Lords in Morgan's case and it has been answered in the same way in Victoria and in South Australia but to the

contrary in New South Wales. The authorities in those non-Code States are collected and fully discussed by the Court of Criminal Appeal of South Australia in The Queen v. Brown, (1975) S.A.S.R. 139 particularly in the reasons of Sangster J. at p. 161 of the report and following.

As I understand the reasoning which leads to this conclusion it is that it is an element of the crime of rape at common law that the man should intend to have intercourse with the woman whether she consents or not or, as expressed by Lord Hailsham in Morgan's case at p. 362 of the report, "the prohibited act is and always has been intercourse without consent of the victim and the mental element is and always has been the intention to commit that act, or the equivalent intention of having intercourse willy-nilly not caring whether the victim consents or not". Once that is accepted then it follows from it, and I express this without regard to the siting of the onus of proof, that an honest, but mistaken, belief held that the woman is consenting negatives the requisite intent and this remains true whether the belief held is based upon reasonable grounds or not.

The question to be decided under the Criminal Code can then be seen to be whether the offence created by it and by it called rape has a like mental element. The offence is created by s. 325 of the Criminal Code which is in these terms:

"Any person who has carnal knowledge of a woman or girl, not his wife, without her consent, or with her consent if the consent is obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false and fraudulent representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of a crime which is called rape."

It is immediately apparent that that section has nothing to say about intention and nothing to say about belief. It seems to me that the section simply says what s. 1 of the Sexual Offences Act, 1956 (U.K.) does not say, namely that "a man who has sexual intercourse with a woman" not his wife "who does not consent commits" the offence called rape. See Lord Cross in Morgan's case at p. 353. Whether upon the proof of the elements of the offence as they appear in that section the man is criminally responsible will then depend not upon anything to be found by way of implication within the section but upon the application to him of one or other of the sections appearing in Chapter V of the Code and more particularly for present purposes upon the application to him of s. 24 which so far as is now relevant provides that: "A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist". In the crime called rape consent or no consent of the woman is, I think, a "state of things" within the meaning of that section and hence if the man does the act - "has carnal knowledge of the woman....not his wife without her consent" - but does that act under an honest and reasonable but mistaken belief that she is consenting then he is not guilty of the offence called rape. But the belief to be within s. 24 of the Code must be both honest and reasonable. Honest belief not based upon reasonable grounds is not enough.

I would for those reasons answer the question in the negative.

The question which has been answered was asked specifically with reference to the crime of rape. The direction, however, appears to have been given with reference both to the crime of rape and to the crime of attempted rape. Intention is an element of the crime of attempted rape. It is made so by s. 4 of the Code and with reference to that crime the direction was, I think,

correct and this because the holding of an honest belief that the woman is consenting to the carnal knowledge which the man is attempting to have will negative the intent to have carnal knowledge without her consent and this is so whether the belief is based upon reasonable grounds or not. The honest belief prevents it being held that the accused is "a person intending to commit" rape as defined by s. 325. This conclusion is no way dependent upon the application of s. 24 of the Code.



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Mr. K. H. Parker, Q.C., with him Mr. H. McLernon,  
represented the Attorney.

Mr. H. A. Wallwork appeared for the respondents.

JONES J.

I have read the reasons published by the Chief Justice in this reference, and I agree with him that for those reasons each of the referred questions should be answered "No". I wish to add only two brief comments for myself.

On the first question, it is too seldom remembered, I think, that as Sir Garfield Barwick once reminded us, the requirement to have a fair trial comprehends not only fairness to the accused but also fairness to the prosecution - i.e. to the State, the community. The community has a legitimate and a vital interest to see the law upheld and guilty persons convicted. Nothing could be more inimical to that interest than the exclusion of evidence that is relevant and admissible and perhaps of great weight against one accused, solely because of solicitude - as I think, an over-tender solicitude - for the interests of his co-accused. In my opinion when two or more accused are properly tried together - i.e. in circumstances where there is no indication for separate trials - each of them can have no valid claim to any further protection than that the judge should direct the jury that it should have regard only to evidence admissible against him, and the judge can and should be relied upon to do that.

As to the second question, it has long been my opinion that the specific provisions of the Criminal Code itself provide the conclusive answer, leaving as I think no real room for argument. It is therefore a matter of surprise that debate on the matter has gone on for so long. Perhaps it has done so, without generating much heat, because really the question is theoretical rather than practical; for it is very difficult to imagine circumstances, in the context of rape, where a man could have an honest belief in the woman's consent if that was not also a reasonable belief. Nevertheless such circumstances could conceivably arise, and it is important therefore to have the question specifically and conclusively answered, as by the Chief Justice's reasons in this reference, in my respectful opinion, it now has been.