A

R v MURRAY

Court of Criminal Appeal: Lee, Maxwell and Yeldham JJ

5 August 1987

Criminal Law — Sexual offences — Sexual intercourse without consent — Directions to jury on consent — Not required where denial of intercourse — Crimes Act 1900, s 61D(2).

B

Criminal Law — Sexual offences — Evidence — Complaint — Delay in making — Directions to jury on — Crimes Act 1900, s 405B(2)(a).

Criminal Law — Sexual offences — Corroboration — Directions to jury on — Warning on uncorroborated evidence of female complainant not required — Crimes Act 1900, s 405C(2).

C

On appeal against conviction on charges under the *Crimes Act* 1900 (the Act), s 61D, of sexual intercourse without consent and under s 89 of taking by force with intent to have carnal knowledge the principal grounds of appeal related to the adequacy of directions to the jury.

As to directions on the state of mind of the offender:

Section 61D(2) of the Act provides that a person who "… is reckless as to whether the other person consents to the sexual intercourse …" is deemed to know that the other person does not consent.

D

Held: (1) Where the offender denies that sexual activity took place and, therefore, does not assert that he thought the victim was consenting there is no context in which the issue of a reckless state of mind becomes relevant and no need for the trial judge to direct on it. (15F)

Director of Public Prosecutions v Morgan [1976] AC 182, referred to.

As to directions on delay in making a complaint:

Section 405B(2)(a) of the Act requires that where there is a delay in the making of a complaint a direction should be given that the delay "… does not necessarily indicate that the allegation that the offence was committed is false …".

E

Held: (2) The very words of the direction which the statute requires to be given, of themselves and as a matter of ordinary English, raise for the jury's consideration the question of the weight to be given to the complaint and, therefore, there is no need for the trial judge to give a positive direction that the delay could reflect adversely upon the credit of the complainant. (16G)

(3) In appropriate cases it is open to the trial judge to decide that more is required by way of direction than is contained in the words of the section. (18D)

F

R v Preval [1984] 3 NSWLR 647, followed.

R v Davies (1985) 3 NSWLR 276, considered.

As to directions on corroboration:

Section 405C(2) of the Act provides that on a trial for a prescribed sexual offence the judge is not required to give a warning as to the uncorroborated evidence of the complainant.

G

Held: (4) The effect of s 405C(2) is that in sexual offence cases the trial judge need not warn the jury that it is unsafe to convict on uncorroborated evidence of the complainant and a direction in terms of the section will suffice; it is always open to the trial judge however to direct that the evidence of a witness must be scrutinised

with great care and to draw the jury's attention to features in the complainant's evidence going to credibility. (19C-E)

Note:

A Digest — CRIMINAL LAW [100], [102], [410]

CASES CITED

The following cases are cited in the judgments:
Director of Public Prosecutions v Morgan [1976] AC 182.
Kilby v The Queen (1973) 129 CLR 460.
R v Davies (1985) 3 NSWLR 276.
R v Preval [1984] 3 NSWLR 647.

The following additional cases were cited in submissions:
Chamberlain v The Queen (No 2) (1984) 153 CLR 521.
Jones v Dunkel (1959) 101 CLR 298.
La Fontaine v The Queen (1976) 136 CLR 62.
Pemble v The Queen (1971) 124 CLR 107.
R v Daly [1968] VR 257.
R v McEwan [1979] 2 NSWLR 926.
R v Mawson [1967] VR 205.
R v Rosemeyer [1985] VR 945.
R v Towers (1984) 75 FLR 77; 14 A Crim R 12.
Whitehorn v The Queen (1983) 152 CLR 657.

APPEAL

This was an appeal against conviction and sentence before Loveday DCJ on several sexual offences.

P J Hidden QC, for the appellant.

E O G Pain QC, for the Crown.

5 August 1987

LEE J. The appellant appeals against his conviction on six charges of sexual intercourse without consent under the *Crimes Act* 1900, s 61D, and one charge pursuant to s 89, of taking the girl, the victim, Wendy, by force with intent to have carnal knowledge with her. He was sentenced on each count to seven years penal servitude, the sentence to be served concurrently and a non-parole period of five years was specified.

The trial took place before Loveday DCJ and a jury of twelve in the District Court at Penrith on 12 May 1986. The grounds of appeal allege failure by the learned trial judge to give adequate directions to the jury and a ground that the verdicts are unsafe and unsatisfactory is also relied upon.

The facts in the case are as follows. The victim, Wendy, who was nineteen years of age at the time, was in the employment of the appellant in his business at Blacktown. On 30 September, after spending some time with the girl at a hotel, the appellant drove the car to a point somewhere past Penrith and there had intercourse with the victim, she protesting and resisting. In fact, before the intercourse began, he struck her, according to her, with his closed fist on the face. Those events were the subject of the first count.

On the next evening the appellant came to the victim's flat and told her to get up, she being asleep when he arrived. She got up and went into the kitchen to make a cup of tea and a man named Kirk, who was sharing the flat

with her, came out and a discussion occurred between him and the appellant. That led to an argument between the appellant and Kirk and the two men engaged in fisticuffs. The man Kirk told Wendy, whom the appellant had asked to accompany him to the hotel to pay the staff their wages, to run to the door and while she was trying to do this the appellant grabbed her by the hair and in due course hit her a number of times about the face, kicked her in the chest and ultimately took her out of the flat. Two neighbours in the adjoining flat witnessed the girl being forcibly removed from the flat and taken down the stairs. These events form the subject of the count under s 89. He then drove off and on the journey he ordered the victim to perform fellatio upon him. She, being afraid, acquiesced. He then had vaginal intercourse with her in the car and later again on the grass. She protested but he told her to shut up and at one point he said: "If you do anything, I'm going to kill you." The appellant and the girl then went in his car to the appellant's home at Hebersham, arriving about 10.45 pm. The appellant's girlfriend, one Darlene Craigie, was inside. The appellant then ordered the girls, each one, to perform oral sex on him. The girls, on the order of the appellant, performed cunnilingus on each other. The events that I have just referred to form the subject matter of the other charges of sexual intercourse without consent.

The complainant reported the matter to the police on 3 October at 10.45 am, that is to say, two days after the completion of the events just described.

The appellant made an unsworn statement from the centre of the court in which he denied that there was any sexual activity between himself and the girl on either of the days the subject of the charges.

The grounds of appeal relate to his Honour's summing-up, the first ground being "that his Honour erred in failing adequately to direct the jury as to the meaning of 'recklessness' in s 61D(2) of the Crimes Act". Section 61D, after providing that a person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to sexual intercourse shall be liable to the penalties stated, goes on in subs (2) to provide:

> "For the purposes of subsection (1), a person who has sexual intercourse with another person without the consent of the other person and who is reckless as to whether the other person consents to the sexual intercourse shall be deemed to know that the other person does not consent to the sexual intercourse."

His Honour in dealing with the matter directed the jury as to the ingredients of the charge and on the matter of knowledge he went on:

> "How do you prove what's going on inside somebody's head? Well if you pause again to think — you would know something if you were told it and specifically if a woman told the man that she was not consenting he should know that she wasn't consenting. It is certainly evidence that he would know. And apart from actually telling someone, of course knowledge can be gained from conduct from circumstances which are obvious or must have been known. So that the Crown can prove knowledge of the accused by proving conduct or circumstances from which he must have known that there was no consent. It is a matter of course for you to say whether the Crown has proved that knowledge. But let me say this to you, a person who has sexual intercourse without

> the consent of the other person and who is reckless as to whether that other person consents, is deemed to know that the other person does not consent. So that a man can't just recklessly go ahead and say 'Oh I didn't know she wasn't consenting'."

It has been submitted that his Honour should have dealt with the question of recklessness and given an explanation to the jury of what was involved in that concept and that his failure to do so requires a conclusion that the jury's verdict should not be allowed to stand.

There was, however, no issue between the girl and the appellant at the trial in regard to the accused's state of knowledge as to whether the girl was consenting or not. His state of mind was not in issue except, of course, that the Crown was required to prove beyond reasonable doubt that he intended to have intercourse with her without her consent. If it was proved that he knew she was not consenting no further question in regard to his state of mind arose. The common law of rape provided that it was an essential ingredient of rape to show beyond reasonable doubt that the accused either knew she was not consenting or went ahead not caring whether she was consenting or not. It is this latter aspect of knowledge which the section of the Act now expresses in the phrase: "… is reckless as to whether the other person consents to the sexual intercourse. …"

This aspect of knowledge was succinctly explained by Lord Hailsham in *Director of Public Prosecutions v Morgan* [1976] AC 182 at 215 when he said:

> "… I am content to rest my view of the instant case on the crime of rape by saying that it is my opinion that 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 no."

In the present case the evidence of the girl made clear that she did not consent, and if the things happened as she alleged they did happen, then her evidence was eloquent of the fact that the appellant was well aware that she was resisting, protesting and not consenting. In short, there was a firm foundation in the evidence from which the jury was able to conclude beyond reasonable doubt that not only was she not consenting but that the appellant knew that she was not consenting. In regard to the first count the appellant struck her across the face and, in regard to the other counts of sexual intercourse without consent, I have detailed briefly the circumstances in which the appellant dragged the victim from her flat, took her out in his car and there and in her room indulged in the various forms of sexual activity with her which has been recounted. The appellant in his case merely denied any sexual activity. It was not a case in which the appellant was asserting that he thought she was consenting or anything of that nature. There was simply no context in which the matter of a reckless state of mind became relevant and there was no need for his Honour to direct specially in regard to it.

Mr Hidden of counsel did seek to contend that certain features in the evidence of the complainant, certain remarks made by her, together with the general background of the case, particularly on the second night — the fact that the appellant had alcohol — could have raised a question as to the state

of mind of the appellant in regard to having intercourse, but in my view there is no evidence at all which in any way suggested that the case ever went beyond the circumstances of the girl protesting and the appellant demonstrating by his conduct that he intended to have intercourse with her in the full knowledge that she was not consenting. The appellant lost nothing, in my view, by the absence of a full direction as to the meaning of "recklessness", and to have intruded a full definition or explanation into the case in my view, in the light of the evidence, could well have confused the jury. His Honour's short reference to the matter "… a man can't just recklessly go ahead and say 'Oh I didn't know she wasn't consenting':" was, if any reference at all was required, sufficient to give completeness to the definition of knowledge which his Honour was putting to the jury. In my view this ground of appeal fails.

It was next submitted: "That his Honour erred in failing to direct the jury that the absence of or delay in complaint may reflect adversely upon the credit of the complainant."

The *Crimes Act*, s 405B, now provides as follows:

> "(2) Where on the trial of a person for a prescribed sexual offence evidence is given or a question is asked of a witness which tends to suggest an absence of complaint in respect of the commission of the alleged offence by the person upon whom the offence is alleged to have been committed or to suggest delay by that person in making any such complaint, the Judge shall —
>
> (a) give a warning to the jury to the effect that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false; and
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> (b) inform the jury that there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making, a complaint about the assault."

The direction which his Honour gave was in these terms:

> "First of all, complaint, you recall that there was mention made that no complaint was made, certainly to the police, until 3 October and these matters on the Crown case are alleged to have occurred on 30 September and 1 October. Let me say to you that in law absence or delay does not necessarily indicate that the allegation is false in matters of this sort. There may be good reason why a victim should hesitate or refrain from making a complaint at all or from making it at the first opportunity. And if you think a moment it's obvious. She may hesitate because of the publicity. There is still, I believe, but it's a matter for you, some adverse publicity which attaches to any woman who makes a complaint about sexual conduct in relation to her. It's a matter for you, perhaps I should say I believe, I should say I put it to you. There would be, you may think, the knowledge that she may have to undergo the ordeal of a criminal trial, something that wouldn't lightly be undertaken. I just point those out as two matters which, you may think, it's a matter for you, would cause any woman to hesitate before making a complaint."

The ground of appeal asserts that his Honour, as I say, failed to direct the jury, that is, give a positive direction, that the delay in making a complaint could reflect adversely upon the credit of the complainant.

At the outset it seems to me important that the very words of the direction which the statute requires to be given, of themselves as a matter of ordinary

English, raise for the jury's consideration the question of the weight to be given to the complaint made by the complainant: The expression "… does not necessarily indicate that the allegation that the offence was committed is false", makes that abundantly clear and that being the case the jury has before it even if counsel for the accused has not referred to it, which would be most unlikely, a direction from the trial judge in regard to the matter of complaint which requires them to come to a conclusion as to the weight which they will give to it.

In the case of *R v Preval* [1984] 3 NSWLR 647, a ground of appeal was that the lateness of the complaint had not been adverted to by his Honour in his summing-up in terms requiring the jury to consider whether that delay in complaining reflected adversely upon the complainant. It is pertinent to cite the direction which was under consideration in that case (at 651-652):

> "If she knows how many beans make five and she imagines she has to stand in this Court for hours and be cross-examined publicly she might have some second thoughts. That is what this section says; the judge will warn the jury if they find there was any delay in actual complaint that it does not necessarily mean that the allegation is false.
>
> The second thing that this Act says is that the judge shall inform the jury that there may be good reasons why a victim of sexual assault may hesitate in making or refrain from making a complaint about the assault."

The Chief Justice, Sir Laurence Street, after citing that direction (at 652) went on:

> "It is not suggested that his Honour made any error or that he disregarded in any way the requirements introduced into the *Crimes Act* by the recent amendments. I am by no means persuaded that his Honour erred in any way in the manner in which he dealt with the question of delay in the making of a complaint."

The direction which was under consideration there is not in material respects different in intent or substance from the one we are considering here and in my view, unless I am constrained by other authority to take a different view, I would be of the opinion that the direction was sufficient.

However, counsel has drawn attention to the decision of this Court in *R v Davies* (1985) 3 NSWLR 276, where Hunt J, delivering the judgment of the Court (at 278) made this statement:

> "… In my opinion, the trial judge in a sexual assault case should as a general rule, in addition to giving the directions required by s 405B, continue to direct the jury that the absence of a complaint or the delay in making one may be taken into account by it in evaluating the evidence of the complainant and in determining whether to believe her."

It has been submitted that that should be taken as meaning that a failure to give such a direction will lead to the conviction being set aside. I do not understand that judgment to mean what Mr Hidden contends. It seems to me, as I have said, that the very requirements of the section of the statute bring home to the jury the necessity for the jury to pay regard to the absence or lateness of the complaint on the question of whether the girl's story is false or not. In my view Hunt J was doing no more than explaining that the existence of the statutory requirement did not stand in the way of a positive direction being given that absence or lateness of complaint might be

indicative of falsity of the complainant's story, and that in his opinion, it would be in order in most cases to give such a direction. But his Honour in my view is not to be taken to suggesting that a failure to give such a direction will lead to a setting aside of the conviction. The view that it is a matter for the judge to decide whether he will go further than the requirements of the statutory direction is clearly implicit in the remarks of the Chief Justice in *R v Preval* to which I have referred, and I support that viewpoint. In the present case it is to be noted that there was no cross-examination of the girl in regard to the lateness of the complaint and no suggestion made to her that there had been some failure on her part to take action earlier. It seems to me that the trial judge, sitting in an atmosphere which cannot be recaptured here and having heard counsel's addresses, would be fully aware of the significance, if any, of the lateness of the complaint in the overall context of the evidence of the trial. It is true that counsel for the appellant at the trial did ask for a direction on the matter and he cited *R v Davies* and also *R v Preval*. Counsel's concluding remarks in regard to *R v Davies*, namely that "it leaves the door open" was tantamount to a submission that it was for his Honour to decide if he would give the direction sought, and, in my view, that was the correct approach to the matter.

The law does not lay down any defined direction in regard to the lateness of a complaint and in my view it is a matter in every case for the trial judge, in his own judgment, to determine whether anything more is required than what is in fact contained in s 405B(2). Each case should be looked at on its own facts and the extent of the delay and factors bearing upon the likelihood of the complaint being a false one should be taken into consideration. In the present case complaint was made to the police within two days and there was nothing in the overall circumstances to suggest that it might have been fabricated. In my view that ground of appeal fails.

The next ground of appeal taken relates to the curious situation which has arisen under the *Crimes Act* in regard to the giving of directions in sex cases in regard to corroboration. Section 405C(2) provides that:

> "On the trial of a person for a prescribed sexual offence, the Judge is not required by any rule of law or practice to give, in relation to any offence of which the person is liable to be convicted on the charge for the prescribed sexual offence, a warning to the jury to the effect that it is unsafe to convict the person on the uncorroborated evidence of the person upon whom the offence is alleged to have been committed."

The ground of appeal is "that in the circumstances of the case, his Honour erred in confining his direction upon corroboration to the second count in the indictment". The second count was the count under the *Crimes Act*, s 89, and at common law that count was one which required a direction that it would be unsafe to convict on the uncorroborated evidence of the complainant. The remaining six counts, however, all fell within the terms of s 405C and accordingly in law required no such direction.

At the end of the summing-up counsel requested his Honour to give the direction required at common law. His Honour followed the terms of the section but did not take the matter any further.

Once again it seems to me that in this case nothing further was required. The judge was bound to give the direction which s 405C(2) required him to give and he did that. He gave the direction in regard to the other offence

because he was required to do so and it is appropriate to refer to a short passage in his summing-up. He said:

> "Now it's a strange circumstance but it is necessary that I should give you a direction about corroboration in relation to the second charge, only in relation to the second charge, that is the charge of abduction."

He then gave the direction that, generally, it is not safe to convict on that charge on the uncorroborated evidence of the girl. There was, of course, in regard to that charge the evidence of three persons, including Mr Kirk who was present at the time and saw the manner in which the girl was removed from the flat.

Section 405C(2) has brought about the result that women are no longer, in the eyes of the law, to be put before juries as persons whose evidence requires corroboration before it is safe to act upon it. That concept which has been in the law for a long time has now gone. That, of course, does not mean that a judge cannot draw attention to the absence of corroborating testimony from witnesses who are shown by the evidence to have been present and able to offer corroboration of the girl's story, if it were true, nor does it preclude the judge from making such observations as he considers ought to be made about the credibility of the complainant's evidence, but always with the proviso, of course, that he must make it clear to the jury that those are his opinions and that the weight to be given to the testimony of the woman is entirely a matter for the jury. The fact that a judge does not comment upon the absence of corroboration of the complainant's evidence cannot, in my view, in the case of those offences to which s 405C applies now be made the basis of a criticism of his summing-up, but again this does not mean that the judge cannot or should not, as is done in all cases of serious crime, stress upon the jury the necessity for the jury to be satisfied beyond reasonable doubt of the truthfulness of the witness who stands alone as proof of the Crown case. In all cases of serious crime it is customary for judges to stress that where there is only one witness asserting the commission of the crime, the evidence of that witness must be scrutinised with great care before a conclusion is arrived at that a verdict of guilty should be brought in; but a direction of that kind does not of itself imply that the witness' evidence is unreliable.

There will be cases where the failure to bring home to the jury the position of the uncorroborated witness will undoubtedly lead to the verdict being set aside but that is a different matter altogether from requiring a direction that it is unsafe to act on the uncorroborated evidence of the complainant in a sex case.

In the present case I am not persuaded that his Honour's direction was in any way inadequate and in my view that ground of appeal should fail also.

The final ground of appeal taken is: "That the verdict should be regarded as unsafe and unsatisfactory." The case was one in which it can be said that the applicant had a fair trial in all respects. The complainant gave her evidence, of course, under oath in the witness box and was subject to a probing cross-examination and the credence to be attached to her evidence was a matter for the jury who had seen her and heard her and could assess her credibility in the light of the cross-examination of her. The appellant, by contrast, made a statement from the dock, so that he was never in any sense at the disadvantage of having his claims tested. The jury chose the sworn testimony of the complainant as the evidence which was acceptable to it and convicted

the appellant and in my view nothing appears in the evidence which suggests that that was not a proper view of the girl's evidence. The very relationship between the parties, the fact that she was an employee of the appellant, being thirty-eight years of age, would inevitably give rise to the question why she would want to make up a story of unwanted sexual activity unless in fact it were true.

In my view there is no reason shown why this Court should be concerned as to the propriety of the verdicts and in my view the appeal against conviction should be dismissed.

I would add that Mr Hidden has pointed out at the commencement of his submissions that although there is an appeal against sentence on the file, he would not be proposing to put any submissions. The extent of the appellant's sexual activity with the complainant and his total disregard for her as a woman is a solid foundation for a conclusion that the appellant might well regard himself as being somewhat fortunate in having received only the sentence which he did. The appeal against sentence will be dismissed.

MAXWELL J. I agree with the orders proposed by Lee J and I have nothing to add.

YELDHAM J. I too agree and I would add only this in relation to the ground based upon his Honour's direction concerning complaint. No doubt in some, and perhaps many, cases it would be desirable for a trial judge to give what might be described as the "old" direction concerning a failure to complain. By "old" direction I mean the direction which finds expression in many cases, including *Kilby v The Queen* (1973) 129 CLR 460. Such direction, of course, would require to be accompanied by an explanation in accordance with s 405B. Cases that come to mind are where the parties, the accused and the alleged victim, are complete strangers, where the victim is perhaps an adult person of mature years and a woman of the world and cases where no complaint at all is made. But in a case such as the present, where the complainant was eighteen, the accused being thirty-eight, where she was his trainee secretary, and where in fact she did complain at half past ten on the morning of 3 October (the last of the sexual acts complained of occurring at some unspecified time after 10.45 pm. on 1 October) I do not think that, as a matter of law, his Honour was obliged to give any such direction.

This is not a case of absence of complaint. Complaint was made, albeit perhaps delayed. His Honour, as the learned presiding judge has said, in obeying the provisions of s 405B did make it apparent to the jury that absence of complaint might be, but is not necessarily, a ground for rejecting the evidence of the complainant.

Although, as I said, in many cases it is desirable to give the "old" direction together with the additional guide which s 405B requires, it cannot be said as a matter of law that that must be done in every case and in this case, in view of the circumstances of it, it was not necessary.

I agree with the reasons of Lee J and the orders proposed.

Appeals against conviction and sentence are dismissed.
The sentence and non-parole period are confirmed
and the whole of the time is to count.

Solicitors for the appellant: *Craddock, Murray & Neumann*.
A Solicitor for the Crown: Solicitor for Public Prosecutions.

G PESCE,
Barrister.

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