Supreme Court Notes

by Anita Del Medico

APPEAL - Criminal Law - appeal against conviction and sentence for rape - where consent of victim only "live" issue in trial - failure by trial judge to direct on the issue of the accused's belief as to whether the alleged victim was consenting to sexual intercourse - burden of proof upon prosecution to prove absence on part of accused of a genuine belief that victim consenting - belief need not be reasonably held - relationship between s31(1) and s32 Criminal Code.

TRIAL - positive duty of trial judge to direct on issues not raised by counsel but raised by the evidence.

McMaster -v- R

21.3.94 CCA: Thomas, Priestley JJ & Gray AJ

On 26.8.93, the appellant ("A") was found guilty by a jury on one count of assaulting NMH with intent to have carnal knowledge contrary to s192 (1) of the Criminal Code. Two aggravating circumstances were also found by the jury: that NMH was under 16 years and A over 18 years at the time the offence was committed and that A had carnal knowledge of NMH. A was sentenced to 11 years imprisonment with a non-parole period of 5 years. A appealed against conviction and sentence. It was alleged in Ground 2 of the Notice of Appeal that the trial judge had erred in failing to give the jury adequate directions on the issues of consent, intent and mistake. The defence case had been confined to an invitation to the jury to reject the victim's evidence that sexual intercourse had occurred without her consent; the trial judge had simplified the elements of the charge for the jury by saying that the "sole live issue" in the trial was one of consent. The question of A's state of mind was never raised by A's counsel in her final address to the jury. Some time after the jury had retired to consider its verdict, a question was asked of the trial judge which clearly indicated that the jury considered A's state of mind or belief at the time of the commission of the alleged offence, to be relevant to its deliberations. This was raised by A's counsel in submissions to the trial judge in the jury's absence; there was no submission made that the trial judge should instruct the jury on mistake of fact, but it was indicated by A's counsel that "... they should be satisfied that the accused knew that she was not consenting...". The trial judge answered the jury's question by stating that in order for there to be consent it must be consent operating at the time of the sexual intercourse, and no directions were given as to the state of mind or belief of the appellant. No request was made to rectify this by A's Counsel when asked by the trial judge whether anything further arose from the redirection. Notwithstanding this, the second ground of the appeal alleged that the evidence in the trial raised the issue of A's belief in relation to consent, and that the jury's question indicated that it was concerned with this issue and it was therefore imperative that the trial judge give a direction in accordance with s32 of the Criminal Code.

HELD, per Gray AJ, Thomas and Priestley JJ concurring, allowing the appeal, quashing the conviction and ordering a new trial:

(i) In the common law States, it is clear that it is an element of the crime of rape that the accused intended to have sexual intercourse without consent. This requires proof by the Crown that the accused knew the woman was not consenting or knew she may not be consenting and proceeded regardless.

R -v- Saragozza [1984] VR 187;

R -v- McEwan (1979) 2NSWLR 926;

R -v- Brown (1975) 10SASR139, referred to.

This means that a jury should be directed along these lines in all cases, but especially in the case where the act of intercourse is admitted by the accused but absence of consent is denied. The accused's belief that the woman is consenting need not be a reasonable belief; what the Crown must negative is a genuine belief, whether reasonable or not.

(ii) The same result is reached in the NT by virtue of s31(1) of the Criminal Code. This provision is doubtless intended to give expression to the common law principle that a person is not criminally liable for unintended conduct. Section 23 of the Qld Criminal Code is another form of expression of the same principle. In relating s31(1) to the present case it must be remembered that the assault which constitutes the elements of the offence is defined by s187(a) of the Code as "the direct or indirect application of force to a person without his consent...". Section 31(1) produces the result that the prosecution must prove that it was the intention of the accused to assault the victim without his/her consent. This involves the proposition that the accused knew that the victim was not consenting or knew that he/she may not be consenting and proceeded regardless. **A judicial direction to this effect should be given in all cases because the necessary mens rea of the accused is an element of the crime. The direction becomes a necessity whenever the evidence raises the issue of the accused's intention in relation to consent.** The issue may also arise, although perhaps infrequently, in cases of common forms of assault, but it is raised in all cases of sexual assault (such as the present), where sexual intercourse is admitted but consent denied. The burden is upon the prosecution to prove the absence on the accused's part of a genuine belief that the victim was consenting, whether reasonable or otherwise.

Ryan -v- R (1967) 121 CLR205 and 216;

R -v- O'Connor (1980) 146 CLR 64, referred to.

(iii) It is well-established that where a s32 question arises, the Crown must prove beyond reasonable doubt the absence of the relevant belief: the belief which the Crown must exclude

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

Loveday -v- Ayre and Ors [1955] St R Qld 264;

Brimblecombe -v- Duncan [1958] QdR8, referred to.

(iv) It is well-established that the failure of counsel to raise an issue does not absolve the trial judge from the duty of giving directions on an issue raised by the evidence.

R -v- Van Der Hoek (1986) 161CLR 158 at 161, applied.

R -v- Verdon (1987) 30 A Crim R 388;

R -v- Storey (1985) 19 A Crim R 275 at 290-91, referred to.

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

Appeal against conviction and sentence.

WH Morgan - Paylor with JCA Tippett, instructed by NTLAC, for the appellant.

RSL Wild QC with M Fox, instructed by the DPP, for the respondent.

APPEAL - Criminal law - Crown appeal against sentences imposed for aggravated armed robbery - whether sentences should be increased in these matters and whether a "bench mark" for this type of offence should be set - use to be made of sentencing statistics - whether "clear pattern" emerges.

SENTENCING - aggravated armed robbery - seriousness of offence - principal sentencing considerations - less room for subjective factors such as youth of offender - prior convictions an aggravating factor - role of Court of Criminal Appeal in resentencing.

R -v- Spicer and Tartaglia; Fotiades; S J and D Lilliebridge

7.04.94 CCA: Angel, Priestley JJ and Gray AJ

All five matters were Crown appeals against sentences imposed for aggravated armed robbery (s211(1) and (2) of the Criminal Code). The respondents Spicer, Tartaglia and Fotiades had pleaded guilty to charges relating to the armed robbery of the Venturins on 8.2.93 when they stole $19,000 in cash. It was premeditated and professionally planned; the victims' home was specifically targeted in the expectation of large monetary gain. Spicer and Tartaglia entered the victims' home at night with masks and loaded firearms and a knife; Fotiades drove them to the scene. Loaded firearms were pointed at the victims and threats to kill were made; Mrs Venturin had a knife held against her throat; telephone wires were cut. The respondents Spicer and Tartaglia had commenced to tie up the victims but relented when they thought that one of the victims was going to have a heart attack. On 9.8.93 Tartaglia was sentenced to 6 years' imprisonment with a non-parole period of 2 years and six months. Spicer was sentenced to 5 years and six months with a non-parole period of 2 years. On 20.8.93 Fotiades pleaded guilty to a charge of aiding and abetting Spicer and Tartaglia to commit the aggravated armed robbery. He had driven them to the scene knowing they were to use loaded weapons; drove them from the scene; he disposed of disguises, weapons and ammunition after the robbery. His share of the proceeds was significantly less. On 25.8.93, he was sentenced to 3 years' imprisonment with a non-parole period of 9 months.

The respondents Steven and David Lilliebridge pleaded guilty to the charge that on 27.2.93 they robbed the Nightcliff Newsagency of $29, 736 in cash and $2,835 in jewellery, whilst armed with loaded firearms contrary to s211 (1) and (2) of the Criminal Code. On 9.8.93 each was sentenced to 6 years' imprisonment with a non-parole period of 2 years and 6 months.

In each appeal, the Crown complained that the sentences were manifestly inadequate. In the appeals in respect of Tartaglia and Steven Lilliebridge, both of whom had prior convictions for stealing and housebreaking, the Crown alleged the sentencing judge failed to properly apply Veen (no 2) (1988) 164 CLR465 at 477-8. The parties had put before the sentencing judge statistics relating to armed robberies and the Crown submitted that the CCA should set a benchmark for armed robbery.

HELD, per Angel J and Gray A J (Priestley J dissenting), the appeals against Spicer, Tartaglia and Fotiades should be allowed and the sentences increased. Per curiam, the appeals against the sentences of the Lilliebridge brothers should be dismissed.

(i) (Per Angel J) Armed robbery is a major crime where there is less room for subjective factors to be considered in mitigation, the principal sentencing considerations being retribution and personal and general deterrence.

Williscroft [1975] VR 292;

Spiero (1979) 22 SASR 543;

Zakaria (1984) 12 A Crim R 386, followed.

The learned sentencing judge took too much account of subjective factors, particularly the youth of the respondents. Young persons who commit serious armed robberies, despite their youth are, in the absence of exceptional circumstances, to be severely punished.

"If young people of 20 years of age want to commit crimes of this serious nature, and to act in an adult way in doing so, then they will be punished as adults with much less weight being given than would usu-

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ally be given to their youth": per Hunt CJ at CL (Allen and Loveday JJ agreeing) in Vu at 4, citing Pham & Ly with approval.

Pham & Ly (1991) 55 A Crim r128 at 135;

Vu CCA (NSW) 11 November 1993 (unrep) at 4;

Hawkins (1993) 67 A Crim R 64 at 66, followed.

(ii) (per Angel J) The sentences were so disproportionate to the sentences which the crimes required as to indicate error in principle and were manifestly inadequate. Tartaglia's prior criminal record should have been taken into greater account.

(iii) (per Gray AJ) The sentencing judge was mistaken in not treating Tartaglia's prior convictions as an aggravating factor. Tartaglia was 20 years old and over the previous 2 years he had suffered 12 convictions for unlawful entry and 12 convictions for stealing. He had also breached a bond and had been released from prison less than 1 month before committing the present offence.

(iv) (per Priestley J, dissenting) Whilst the sentences seemed low and lower than most judges would have imposed, the sentences were not so obviously inadequate as to be unreasonable or plainly unjust. The appeals should be dismissed.

(v) (per Angel J) Carrying loaded firearms was a significant aggravating circumstance; it demonstrated increased criminality on the part of the participants and introduced a danger of harm to others in the event of a deliberate or accidental discharge.

(vi) As to the sentencing statistics put before the sentencing judge, per curiam, no clear pattern or sentencing for armed robbery emerged from the past cases to which the court was referred. Per Angel J, there is no evidence that armed robberies of the gravity of these offences are prevalent; each case must be decided by its own facts. The present sentences were on their face manifestly disproportionate to 6 year terms of imprisonment imposed for lone, knife-point robberies from tills during daylight hours. The sentencing judge took too much account of sentences from other cases.

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Per Priestley J, Thomas J gave proper consideration to the sentencing material before her, bearing in mind the general principle of consistency in sentencing:

Lowe (1984) 154 CLR 606 at 610 -11;

Griffiths (1977) 137 CLR 293 at 326, applied.

Per Gray AJ, "...I do not think that anything really helpful can be derived from the list".

(vii) (Per Angel J, Gray AJ concurring) Although at 1st instance, Tartaglia deserved more, it being a Crown appeal it was appropriate to impose a lesser sentence.

Raggett, Douglas and Miller (1990) 50 A Crim R 41 at 44, applied.

Tartaglia was resentenced to 8 years' imprisonment with 4 years non-parole. Spicer was sentenced to 7 years' imprisonment with 3 years non-parole. Fotiades was sentenced to 4 years' imprisonment with 18 months non-parole.

(viii) As regards the respondents Lilliebridge, per Angel J, this robbery, like the Venturin robbery, was of the worst kind. The sentencing judge underestimated the gravity of the crime and gave undue weight to subjective factors. Notwithstanding this and bearing in mind the Court of Criminal Appeal's role in resentencing, no manifest injustice would be done if the appeals were dismissed in the exercise of the Court's residual discretion to do so.

Holder and Johnston (1983) 3NSWLR 245 at 255 - 6; 13 A Crim R 375 at 384-5, followed.

The Lilliebridge sentences were no guide as to the disposition of future like cases which would attract heavier sentences.

Per Priestley J, the sentences were not manifestly inadequate and no error had been shown.

Per Gray AJ, the sentencing judge had undervalued the significance of Steven Lilliebridge's prior convictions. Upon the whole of the circumstances the Crown had not shown appealable error and although the sentences were lenient, the appeal should be dismissed.

Crown appeals against sentence.

L Flanagan QC, Director of Public Prosecutions, for the appellant.

M Weinberg QC, with S Cox instructed by NTLAC, for the respondents Spicer and Tartgalia and S and D Lilliebridge;

M David QC, for the respondent Fotiades.

(On 7.4.94 the CCA (Angel, Priestley JJ and Gray AJ) allowed an appeal by A F Wade from a sentence of 10 years' imprisonment with a non-parole of 4 years in respect of a knife-point armed robbery of a female taxi-driver at night, substituting a sentence of 7 years' imprisonment with a non-parole of 3 years and 6 months.)

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