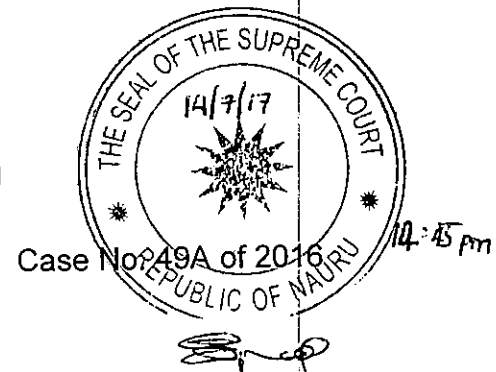




IN THE SUPREME COURT OF NAURU

[CRIMINAL JURISDICTION]



THE REPUBLIC OF NAURU

v.

BRONSON NOTTE

Before: Crulci J
For the Prosecution: F. Lacanivalu
For the Defence: S. Valenitabua

Dates of the Hearing: 10 – 13 July 2017
Date of Judgment: 14 July 2017

CATCHWORDS – *Criminal – Rape of girl – Indecent assault – Insensible – Intoxication*

CASES CONSIDERED

Crisafio v The Queen (2003) 27 WAR 169; 141 A Crim R 98
R v Agir [1975] NRSC 12
R v Blaney & Blanyney [2003] SASC 405
R v Bree [2007] EWCA Crim 804
R v Diehm [2011] NRSC 24
R v Flannery [1969] VR 31
R v Harling [1938] 1 All ER 307
R v Lang (1976) 62 Cr App R 50 (CA)
R v Malone [1998] 2 Cr App R 447 (CA)
R v Olsson [2011] NRSC 18
R v Pryor [2001] QCA 341

JUDGEMENT

1. At the time of the alleged offences the complainant in this matter was 14 years of age. The defendant then aged 21 years lived nearby. In order to protect the identity of the victim her name has been suppressed and she is referred throughout this judgement as 'YZ'.
2. At the commencement of the trial the prosecution sought to have two counts contrary to the *Criminal Code* 1899 ("the Code") discharged: one count of Obscene Publication and Exhibitions contrary to section 228(1), and one count of Indecent Assault contrary to section 350 of the Code.
3. The trial then proceeded with the defendant Bronson NOTTE pleading not guilty to the offence of Rape contrary to 347 and 348 of the Code. After the defendant had given evidence, it was agreed between the prosecution and defence that the date offence for count one should be amended to a date on or between the 27 and 29 October 2013.
4. At the end of the trial, prior to closing addresses by prosecution and defence counsel, the Court exercised its powers under section 191(2) of the *Criminal Procedure Act* 1972 and made an order to add a count of Indecent Assault contrary to section 350 of the Code, as the Court found it necessary to meet the circumstances of the case, following the evidence received during the trial. Count Two was put to the defendant who pleaded guilty to offence of indecent assault.

COUNT ONE

Statement of Offence

RAPE: Contrary to section 347 and 348 of the *Criminal Code* 1899

Particulars of Offence

BRONSON NOTTE on or between the 27th and 29th October 2013 at Nauru, had carnal knowledge of a girl namely YZ without her consent.

COUNT TWO

Statement of Offence

INDECENT ASSAULT: Contrary to section 350 of the *Criminal Code* 1899

Particulars of Offence

BRONSON NOTTE on or between the 27th and 29th October 2013 at Nauru, did unlawfully and indecently assault a girl namely YZ.

5. The defendant pleaded not guilty to Count One before the Court and the prosecution tendered 'Agreed Facts' by consent, and called two witnesses, including YZ.
6. The agreed facts are as follows (Prosecution Exhibit 1):
 - (a) The victim YZ of Buada district, was 14 years old in October 2013, having been born in 1999;
 - (b) The defendant Bronson Notte, was 21 years old in October 2013, his date of birth is 27 February, 1992;
 - (c) The defendant's home is a few meters from the complainant's home;
 - (d) On the night in question the complainant was sitting outside her house on a trampoline;
 - (e) The defendant later had sexual intercourse with the complainant by penile and vaginal penetration at his house;
 - (f) The police executed a search warrant dated 17 December, 2013 at the defendant's home and seized a black Samsung mobile phone and a grey USB with brown leather cover;
 - (g) The police interviewed the defendant on the 17th of December, 2013 and a record of interview was recorded;
 - (h) The police prepared a statement on a charge form for the offence of rape contrary to section 348 of the criminal code 1899 on the 17th of December, 2013;
 - (i) The police prepared a statement on a charge form for the offence of obscene publication and exhibition contrary to section 228(1) of the criminal code 1899 on the 17th of December, 2013;
 - (j) The police prepared a statement answer to charge form for an offence of indecent assault contrary to section 350 of the criminal code 1899 on the 17th of December, 2013.

7. The following statements agreed as between the prosecution and defence are read into the record:
- (a) Police statement as to answer to charge of rape dated 17 December, 2013
 - (b) Police statement on a charge of indecent assault dated 17 December, 2013
 - (c) Police statement on a charge of obscene publication and exhibition dated 17 December, 2013
 - (d) Birth certificate of complainant

Complainant's evidence

8. YZ lives at home with her parents and family. She and a female friend had been drinking in Meneng from the Saturday night through to the Monday. They were drinking vodka and Pure Blonde beer.
9. YZ and her friend left around nine in the evening and her friend dropped her off at home. YZ recalls her sister letting her in, however before YZ went in to the house she blacked out, and next thing she recalls is sitting on the trampoline outside the house.
10. YZ remembers that the defendant, Renz and Royon were with her on the trampoline, although she cannot recall what they were doing. YZ went back to sleep and when she next woke up in the afternoon, she was in her house. After getting up and having a cold drink, YZ went back to sleep.
11. Later YZ woke a second time and went to relieve herself; whilst at the toilet she discovered stains on her underwear. She was shocked to find stains as her period had finished earlier in the month. YZ had a shower and returned to bed for a short while.
12. Later YZ went to see two female friends and together they went to the shops. When they reached Detanemo's Store they saw some boys who were outside. The boys called to YZ saying that she should "*go there and check out the video of herself.*"
13. The complainant didn't see the video at the time as the boys refused to show it to her; she and her friends continued on their way to the shops. Later the complainant spoke with Royon who said words to her to the effect '*that there was a video but that you wouldn't want to see it.*'

14. In answer to a question from prosecution counsel in relation to sexual intercourse with the defendant, YZ's clear evidence to the Court was that she would not have agreed to sexual intercourse with the defendant saying "*I will never say yes to him.*"
15. Under cross-examination YZ agreed that she had been drinking for a number of days; she thought she had started drinking on the Saturday night and had slept over in Meneng. She confirmed that she arrived home on the Monday evening at around 10 o'clock, having travelled clockwise from Meneng to Buada.
16. The complainant did not recall having sat under a tree when she arrived home, nor did she recall having any conversation with the defendant. The only thing YZ could remember was sitting on the trampoline. She confirmed that she was scared of her mother but stated in evidence "*even when I drink I am not scared to go home.*"
17. YZ's evidence was that she did not recall any conversation with the defendant and she did not recall anything about her saying that she would go with the defendant to his house. She doesn't recall going with the defendant into his room and stated in answer to a question about being alone in the defendant's room with the defendant "*I don't remember that and if he had, he shouldn't have brought me into his room.*"
18. It was put to YZ that the defendant had asked her for sex and that she had taken off her own clothes and the defendant taken off his own clothes. The complainant said that she couldn't remember the defendant asking her for sex and that he was lying in relation to her having taken off her own clothes. All she remembered was that when she woke up she was at her own home.

Police witness

19. Police Inspector Daniel gave evidence that she has been in the Nauru Police Force for 13 years and was involved in the investigation of this matter. The police searched the defendant's house but did not find the video that they were looking for. They later received the video footage on a USB from an undisclosed source. Once the police officer viewed the video on the USB she saved it onto a disc¹ and later put the video to the defendant during the record of interview.

¹ Exhibit 3

20. At the interview conducted on the 17 of December, 2013 the defendant made certain statements in answer to the questions and he signed each page of the interview transcript. The record of interview was read to the Court.

21. The defendant was interviewed and stated relevantly as follows:

Q9 It is alleged that on the 27 of October 2013, ... that you went to YZ at her residence whilst she was sleeping outside on her trampoline and you carried her to your residence, and conducted a sexual act towards her and did video record the incident, do you understand?

A9 I understand

Cautioned and advised of right to legal representation

Q12 Can you tell your version of what occurred during the time of the incident?

A12 It's not like that, I didn't lift her, I went to where she was and asked her if she could accompany me to my place and also I was harassing her, where she cannot walk properly so I assisted her and we proceeded to my place and we did it.

Q13 When you say you started harassing her could you clarify how you harassed YZ

A13 I told her something that is in a sexual harassing manner.

Q14 What did the YZ say to you at the time?

A14 She told me that she is tired of accompanying me to my place.

Q15 At that time were you under the influence of alcohol?

A15 Yes

Q16 How drunk were you at that time?

A16 I was not really drunk as at the time I have stopped drinking

Q18 Can you tell me who was with YZ when she was sleeping on the trampoline?

A18 No one

Q19 Was anyone with you when you went to where YZ was?

A19 No

- Q20 When you say you assisted YZ to your place, how did you assist her?
A20 I lifted one of her arm and we walked to my place.
- Q21 When you say you and YZ went to your place what happened then?
A21 We went into my room and we had sexual intercourse
- Q22 When you said you and YZ had sexual intercourse was she awake at that time?
A22 She was awake
- Q23 When you say she was awake did she gave you consent to have sexual intercourse with her?
A23 Yes
- Q24 When you say she gave you consent how did she say it?
A24 Well she didn't actually say yes, I just asked her to take off her clothes and she did.
- Q25 Was YZ drunk at the time when you had sexual intercourse with her?
A25 Yes she was fully drunk as she was not speaking clearly too
- Q26 Did at any time you video recorded your sexual intercourse with YZ?
A26 Yes
- Q27 How did you record it?
A27 I used a mobile phone
- Q29 Why did you video recorder yours and YZ sexual intercourse?
A29 I don't know
- Q30 While you are reviewing this video can you tell us whereabouts was this video footage taken?
A30 In my room
- Q32 Who is the female person in the video we have shown you?
A32 It's YZ

Q33 Who recorded this video you are viewing now?
A33 Me

Q34 As you can see the video, can you tell me who is the person inserting his finger YZ's vagina?
A34 Me

Q35 Was there anyone with you when you were recording this activity?
A35 No

Q37 When you indecently and sexually harassing YZ was she awake or asleep?
A37 She was asleep

Q38 When you were harassing and indecently touching YZ was she aware of your activity?
A38 No

Q39 Did YZ know that you were a video recording her naked and you were indecently conducting sexual activity towards her?
A39 No she is not aware of me video recording her

Q40 Did at any time YZ gave you consent to conduct a video record of her whilst you were indecently touching her??
A40 No

Q42 At any time you conversed with YZ after the incident?
A42 Yes, but it's not a really long talk or anything, as at that time I was in a rush

Q43 Can you tell me what was your's (sic) and YZ conversation about?
A43 She just asked me "why you video recorded me" and I replied it back to her telling her that "wait we will talk later as I am very busy"

Q44 What happened when you've finished video recording YZ what happen next?
A44 I woke her up at dawn and told her to go back to her place
Q45 When you woke her up did she wake up?
A45 Yes she did wake up and walked back to her residence.
(emphasis added)

22. Under cross-examination the police officer agreed that the interview had been conducted in Nauruan and that the questions and the answers were translated and typed into English.
23. At the close of the prosecution case, the defendant elected to give evidence on oath.

Defendant's evidence

24. The defendant confirmed that he understood he had been charged with an offence of rape of the complainant, and that the offences are alleged to have taken place over the weekend 27th to 29 October, 2013. He agreed that he met up with the complainant and from what he can remember it was on the Sunday night.
25. The defendant says YZ was sitting under a tree outside of her house and that he spoke to her and asked her "*What's happening?*", to which she replied that she was too scared of her mother to go into the house.
26. The defendant asked YZ to come with him and that she could sleep at his place. YZ stood up and went to sit on the trampoline. They continued to talk more when the complainant was sitting on the trampoline; the defendant stating "*I just kept on asking her to come with me to my house*". The defendant told the Court that "*After a long while of talking she followed me home. She put her arm over my shoulder whilst I held her on our way to my house.*"
27. In response to a question from his counsel about how YZ appeared to him, the defendant answered "*The way I see her she is not fully drunk and she knows what she is talking about, I understand what she is saying to me. She stood up on her own and she was also laughing.*"
28. The defendant told the Court that after a long while of talking that YZ went with him "*she put her arm over my shoulder whilst I held her on our way to my house*".
29. Upon reaching the house he asked YZ to undress and she did, he also undressed and then they had sex. The defendant said that YZ agreed to have sex with him, and that she showed her agreement by "*When I asked her to*

undress and she undressed and when I asked her to lay down on the bed for us to have sex so she lay down on the bed."

30. The defendant further stated that on the way to the house YZ asked him about him and her sister's relationship and *'what do you want of me'*, and he replied saying *'your sister and I are over'*.
31. The defendant then gave evidence as to the sexual act between them; and the defendant's evidence was that whilst they were having sex the complainant fell asleep. He stopped at that point but had not had an orgasm himself, so he was frustrated with her for *"leaving him hanging"*.
32. His evidence was that he then got up, turned on the lights and looked at the complainant who was fast asleep. The defendant took a video *"to show her as proof that she had been with me. I thought to delete it after I had shown her."*
33. The defendant states he woke the complainant around 6.00 AM she got up and got dressed, he said to her that we would meet up later and she said OK, and she left for her house.
34. The defendant stated that he did not know that others had taken the video from his phone, or how the video came to be with the other boys. His evidence was that his friends had asked him to Bluetooth them some video clips from his phone and he has two SD cards; one was in his phone and had the video on it.
35. Under cross-examination the defendant said he didn't know for sure that the complainant was 14 years of age at the time, but that he knew she was *'a bit young'*. He had lived in the house nearby since his childhood.
36. He did not agree in evidence that the complainant was falling asleep when she was on the trampoline nor that she was really drunk. He says he didn't believe he was really drunk and that he felt quite normal.
37. In answer to a direct question that the complainant had not said "yes" to having sex with him he responded *"Yes, that's right"*. In reply to the subsequent question that she did not say yes because she was fully drunk, he replied *"I think she might not be fully drunk but I think she might be thinking of her sister because of our previous relationship"* and further *"when I asked her to come with me to come to my house she agreed with me and she said yes OK let's go"*

38. The defendant denied in cross-examination that he took advantage of the complainant because she was drunk and stated that she had encouraged him. He agreed that YZ was not aware that the video recording was being done and that she was sleeping at the time; he said the video recording was not of them having sexual intercourse.
39. After the defendant's evidence the defence case rested.

Prosecution closing submissions

40. Prosecution counsel considered the question of age of consent to sexual relations in Nauru and drew the Court's attention to the *matrimonial Causes Act 1973* which states that a marriage between parties where either one is under the age of 16 years is voidable.
41. The *Queensland Criminal Code* (upon which our Code is based) was amended in Queensland in 2003 such that only proof of age under 13 years was required by the prosecution to negative consent to the offence of rape. Similarly in the United Kingdom and in Pacific region, legislation has been enacted to stipulate an age below which a child cannot consent to sexual activity.
42. In Nauru for the offence before the Court charged under the Code, the issue of consent remains a live one irrespective of age of the female complainant. This has now been cured by Parliament with the inclusion of section 116(1) of the *Crimes Act 2016*.
43. On the matter of consent vitiated through the consumption of alcohol the prosecution drew the court's attention to the cases of *R v Olsson*², when considering what the court should look to as to the state of mind of the defendant in relation to the consent or otherwise of a complainant.
44. *R v Francis*³ is cited for the proposition that "a woman who is insensible is incapable of giving consent." The consent given by the complainant must, the prosecution submits "be freely and voluntarily given with the cognitive capacity to give the consent"⁴.

² [2011] NRSC 18

³ [1992] QCA 274

⁴ Prosecution submissions, 14 July 2017 at [27]

45. The prosecution points to the evidence before the Court that:
- YZ had been drinking alcohol for two days;
 - The defendant admitted in interview that YZ *'was fully drunk and wasn't speaking properly'*⁵;
 - YZ was only 14 years of age at the time and less likely to be used to dealing with the effects of alcohol, than an adult such as the defendant;
 - On her return home YZ had 'blacked out';
 - That the defendant persistently harassed her to come with him to his house;
 - That YZ could not walk un aided;
46. Counsel cites the case of *R v Pryor*⁶ to negate a requirement that a complainant is required to forcibly resist the defendant:
- "It is a question of fact for the jury to determine in each case whether the woman consented... 'it is a perfectly proper question' for the complainant to be asked to 'affirm on oath that she did not consent to having sexual intercourse with the accused on the occasion in question'."*⁷
47. Counsel submits that there is evidence before the Court to show beyond reasonable doubt that YZ did not consent to sexual intercourse with the defendant and furthermore due to her intoxicated state she was incapable of giving consent to the sexual acts. The defendant therefore should be found guilty of rape of YZ.

Defence closing submissions

48. Counsel for the defendant drew the Court's attention to the common law requirements to be considered for the offence of rape. The prosecution have to show, as stated by Eames CJ in *Republic v Donny Olsson*⁸ that:

"The common law as described in R v Flannery [1969] VR 31 at 33 (And see Worsnop v R [2010] VCSA 188 at [27]-[28]) requires that the prosecution prove beyond reasonable doubt either that the accused was aware that the woman was not consenting, or else, that he realized that she might not be, but decided to have intercourse with her whether she was consenting or not. Were I to conclude that the complainant was

⁵ Record of Interview, Exhibit 3, ("ROI") at [A25]

⁶ [2001] QCA 341

⁷ Supra note 3, at [33]

⁸ [2011] NRSC 18

not, in fact, consenting then the accused would still not be guilty if, pursuant to s.24 of the Criminal Code, he held an honest and reasonable belief, although mistaken in fact, that the woman was consenting.”

49. Counsel submits that even if the Court concluded from the evidence that the complainant was not in fact consenting, then the accused would still not be guilty if, pursuant to s.24 of the Criminal Code, he held an honest and reasonable belief, although mistaken in fact, that the woman was consenting.⁹
50. The defence argues that the complainant YZ could not have been so drunk as to not remember what happened to her that night. That it is unlikely that she consumed as much alcohol as she stated without causing herself injury. Had she been as intoxicated as claimed, the defence argue that she would not have been able to sit on a motorbike on the way home, nor move between the house and trampoline.
51. Defence counsel submits that the prosecution should have called independent witnesses as to YZ’s level of intoxication. The Court’s attention is drawn to the case of *R. v Bee* [2007] 2 Cr.App.R. 13, CA and the following extract cited:

“(i) as to the effect of excessive but voluntary consumption of alcohol on the ability of a person to consent to sexual activity, the proper construction of s.74 is that consent can only be said to have been absent if the effect of the alcohol was such that the complainant had temporarily lost the capacity to choose whether to engage in the sexual activity; this stage may be reached before unconsciousness; whether or not it had was a question of fact which would depend on the actual state of mind of the parties involved; the question of capacity was not dependent on (a) whether the alcohol had made either or both parties less inhibited than they would otherwise have been, (b) whether either or both might afterwards have regretted what happened, and wished that it had not, (c) whether either or both may have had a poor recollection of what happened, (d) whether either or both had behaved irresponsibly; the essential question for decision would be whether the evidence proved that the complainant had not consented.” (underlining by defence counsel).

⁹ Ibid.

52. The defendant points to the evidence given that the complainant was walking, talking, laughing, following instructions to undress and lie on the bed and engage in sexual intercourse to submit to the Court that YZ had not lost the capacity to consent through her consumption of alcohol.
53. Defence counsel cites the case of *Crisafio v The Queen*¹⁰ for the proposition that the defendant's evidence cannot be rejected outright and that in this case it is not proven beyond reasonable doubt that YZ did not consent.

Murray J: ". . . the jury must be properly instructed that if they are left unable to reject the evidence of the accused, although they do not positively accept it, they could not find guilt established beyond reasonable doubt, and even if the evidence of the accused is rejected, attention must still be given to the important question whether the evidence of the complainant, or so much of it as the jury do accept, establishes the commission of the offence beyond reasonable doubt."

54. Turning to the question of age of consent to sexual acts in Nauru, the defence cite the case of in *R v Lambert*, [1919] VLR 205 in which Cussen J stated:

"In R v Lock, [1872] 2 C.C.R. 10 Brett, J., says in effect that if a child of tender years merely submits to what is done by way of immoral act, and the accused knows this, there is an assault, but if the child consented to what was so done, his or her ignorance of its morality would not, apart from statutory enactment, make it an assault."

The case cited is distinguished from the case before the Court, counsel states, as YZ did not 'submit' to sexual intercourse but rather consented to it.

55. In this case counsel submits that YZ's age is not material to the charge of Rape insofar as "consent" and "capacity to consent" is concerned.
56. In closing counsel pleads that the defendant should be acquitted of the charge of rape and advises that it is open to the Court to find the defendant not guilty of rape but guilty of a lesser offence under the Code, such as Indecent Assault contrary to section 350.

RELEVANT LAW

57. 6 Carnal Knowledge

¹⁰ (2003) 27 WAR 169; 141 A Crim R 98 (CCA) at 183, 112 [59].

When the term '*carnal knowledge*' or the term '*carnal connection*' is used in defining an offence, it is implied that that the offence, so far as regards that element of that, is complete upon penetration.

58. 347 Definition of Rape

Any person fifth 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 and as to the nature of the act, and or, in the case of a married woman, by personating her husband, is guilty of a crime, which is called rape.

348 Punishment of Rape

Any person who commits the crime of rape is liable to imprisonment with hard labour for life.

59. 350 Indecent Assaults on Females

Any person who unlawfully and indecently assaulting a woman or girl is guilty of a misdemeanor, and is liable to imprisonment with hard labour for two years.

CONSIDERATIONS

60. The defendant has through the agreed facts and in evidence admitted that he had carnal knowledge of the complainant YZ. The issue for determination for this Court is that of consent.
61. There are offences under the Code which stipulate that certain sexual acts with a girl of a particular age is an offence, and consent is not an issue open to the defendant. For example, the offences under s 211 Defilement of Girls under Twelve, s 215 Defilement of Girls under Fourteen, and s 216 Indecent Treatment of Girls.
62. For the offence of rape, however, the defence of consent is open to the defendant whatever the age of the girl. This is discussed in the case of *R v*

*Harling*¹¹ which was an application for leave to appeal by a 27 year old defendant against a conviction for rape of a girl under 16 years. Humphreys J stated:

*"It is desirable for this court to re-state the law, which is not subject to doubt. Upon a charge of carnal knowledge of a girl under 16, while such a girl is perfectly capable of consenting... such consent affords no defence to the accused man. Where, however, the charge is one of rape, it is necessary that the prosecution should prove that the girl or woman did not consent, and that the crime was committed against her will. It may well be that in many cases the prosecution would not want much evidence beyond the age of the girl to prove non consent, but in every charge of rape the fact of non-consent must be proved to the satisfaction of the jury."*¹²

63. It is for the prosecution to prove beyond reasonable doubt that the defendant was aware that the complainant was not consenting or might not be consenting and was still determined to have intercourse¹³. In this case the evidence put forward by the prosecution is that the complainant lacked the capacity to consent to the sexual intercourse because she was insensible due to her consumption of alcohol.
64. The Courts in the United Kingdom have considered the question of alcohol consumption and consent in relation to sexual intercourse. In *R v Lang*¹⁴, the Courts said:

"We have no doubt that there is no special rule applicable to drink and rape. If the issue be, as here, did the woman consent? the critical question is not how she came to take the drink, but whether she understood her situation and was capable of making up her mind. In Howard (1965) 50 Cr App R 56; [1966] 1 WLR 13, the Court of Criminal Appeal had to consider the case of a girl under 16. Lord Parker CJ (at pp. 58 and 15) said: "... in the case of a girl under 16 the prosecution... must prove either that she physically resisted, or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist."

¹¹ *R v Harling* [1938] 1 All ER 307

¹² *Ibid.*, at 308 F-H

¹³ *Criminal Law of Queensland*, R. F. Carter, 1988, Butterworths, 7 Ed., at 326

¹⁴ *R v Lang* (1976) 62 Cr App R 50 (CA), at 52

In our view these words are of general application whenever there is present some factor, be it permanent or transient, suggesting the absence of such understanding or knowledge. The cases support this view of the law. In Camplin (1845) 1 Den 45, the judges, by a substantial majority, rejected the submission (and I quote the words of Serjeant Ballantine: "that there must be an opposing will on the part of the person ravished" (p. 90) and upheld the conviction in a case in which the man had made a girl of 13 "quite drunk and, when she was in a state of insensibility, took advantage of it and violated her." It has been held that intercourse with a sleeping woman is rape..."
(emphasis added)

65. The question of whether the act of intercourse, not actively opposed, was positively consented to was considered in *R v Malone*¹⁵ where Lord Justice Roach said:

"The actus reus of rape is an act of sexual intercourse with a woman who at the time of the act of intercourse does not consent to that act of sexual intercourse. There is no requirement that the absence of consent has to be demonstrated or that it has to be communicated to the defendant for the actus reus of rape to exist"

66. The Court in *R v Bree*¹⁶ considered a case where the complainant lost consciousness after consuming a substantial amount of alcohol. When the complainant regained consciousness, the appellant was engaging in sexual activity with her. The complainant said she never consented to the intercourse. Lord Justice Judge said (at [26]):

"In cases which are said to arise after voluntary consumption of alcohol the question is not whether the alcohol made either or both less inhibited than they would have been if sober, nor whether either or both might afterwards have regretted what had happened, and indeed wish that it had not... Moreover it is not a question whether either or both may have had very poor recollection of precisely what had happened. That may be relevant to the reliability of their evidence. Finally, and certainly, it is not a question whether either or both was behaving irresponsibly. As they were both autonomous adults, the essential question for decision is, as it

¹⁵ *R v Malone* [1998] 2 Cr App R 447 (CA)

¹⁶ *R v Bree* [2007] EWCA Crim 804

always is, whether the evidence proved that the appellant had sexual intercourse with the complainant without her consent.¹⁷
(emphasis added)

67. In the Australian case of *R v Blayney & Blayney*¹⁸ the Appellants appealed the conviction on the basis of directions to the jury regarding the consent of the complainant. The prosecution case was that the complainant was in such an intoxicated state that she was unable to grant consent. The defence case was that, although the complainant was intoxicated, she was not so intoxicated that she could not understand what was occurring and so was able to give consent freely and voluntarily. In the course of the reasons, DeBelle J said as follows:

"A complainant may be so drunk that she is not capable of freely and voluntarily giving consent: The Queen v Camplin (1845) 1 Cox CC 220; R v Lang (1975) 62 Cr App R 50; R v Malone [1998] 2 Cr App R 447; R v Francis [1993] 2 Qd R 300. Similarly, if a complainant is asleep, she may be incapable of freely and voluntarily giving consent: R v Mayers (1872) 12 Cox CC 311. In each instance, the complainant has no comprehension of what is occurring and is incapable of making up her mind whether to consent or not."¹⁹
(emphasis added)

68. The complainant gave evidence to the Court in a calm and clear manner. Whilst aspects of the personal nature of some of the evidence could be seen to cause her embarrassment she was a credible and compelling witness. YZ did not resile from the fact that her considerable consumption of alcohol resulted in her blacking out and not being able to recall parts of the evening in question. She was adamant that she would not engage in sexual relations with the defendant and that she should not have been in his room.
69. The defendant on the other hand appeared more calculating in his responses. On a number of occasions when the questioning pointed to his actions, he asked for the question to be repeated and then gave an answer that placed his actions in a more favorable light, in contradiction to his answers to during the Record of Interview, shortly after the offences were alleged to have been committed.

¹⁷ Ibid., at [26]

¹⁸ *R v Blaney & Blanyney* [2003] SASC 405

¹⁹ Ibid., at [16]

70. YZ's clear evidence is that she had been drinking alcohol for an extended period of time over the weekend prior to arriving home on the evening in question. After arriving home she recalls sitting on the trampoline outside the house. The next thing she remembers is waking up in her house. In relation to whether she would agree to have sexual intercourse with the defendant she clearly said to the Court "*I will never say yes to him.*"
71. Had the issue of the video recording never surfaced YZ may never have known that the defendant had had sexual intercourse with her, as her recollection is going to sleep on the trampoline and waking up in her house.
72. The defendant knew that the complainant was under the influence of alcohol as he stated in interview that she was "*fully drunk and not speaking clearly*"²⁰, and needed assistance to walk to his house²¹.
73. When asked in interview as to whether YZ consented to have sexual intercourse with the defendant, he responded "*Well she didn't actually say yes, I just ask her to take off her clothes and she did*" and further that "*Yes she was fully drunk as she was not speaking clearly too.*"²²
74. In evidence before this Court the defendant accepted that YZ had not said "Yes" for him to have sex with her. His evidence to the court was that he "*just kept on asking her to come with him to his house; that she was talking to him and put her arm over his shoulder whilst he held on to her on the way to his house; when they have reached his place he asked her to undress and she did so he also undressed and then they had sex*"
75. The defendant's evidence to the Court that during the sexual act YZ "*fell asleep*" is a clear demonstration to the defendant and to this Court as to the insensibility of YZ due to her level of intoxication.
76. The video recording was played to the Court. It runs for 1 minute and 32 seconds. It shows YZ lying on her back on a bed, naked from the waist down. Her legs are spread apart. The defendant's hand is seen and his fingers digitally penetrate YZ's vagina on a number of occasions. She does not move any part of her body and her eyes are closed throughout the course of the video (including when touched by the defendant).

²⁰ ROI, at [A25]

²¹ ROI, at [A20]

²² ROI, at [A24] and [A25]

77. The defendant's reason for taking the video footage of the complainant when she was asleep on his bed, naked from the waist down, was to "*show her as proof that she had been with me*". This statement by the defendant is a clear indication to the Court that at the time the defendant knew that the complainant was so insensible through her consumption of alcohol that she had no knowledge of the events.
78. If YZ was as the defendant claims, a willing party to the sexual act, and had made a consensual cognisant decision to the intercourse with the defendant, the complainant would be aware that she had been with the defendant. There would be no need on the part of the defendant to video record the complainant lying naked on the defendant's bed to *prove* to YZ that she and the defendant had been sexually active together. His words and actions show that he was not hold a reasonable, but mistaken, belief about YZ's consent to his actions.
79. In these circumstances the Court finds that it is satisfied so that it is sure that the defendant was aware of YZ's level of intoxication and consequent insensibility, and taking advantage of her drunkenness and inability to resist, the defendant had sexual intercourse with her. YZ was so insensible due to the consumption of alcohol that she was incapable of giving consent to the act of sexual intercourse. The sexual intercourse was not consensual, and as such the offence of rape is proven beyond reasonable doubt.
80. In relation to the charge of indecent assault, the defendant pleaded guilty to that offence. He admitted in interview that he digitally penetrated YZ as she was sleeping on his bed, and he videoed himself committing this offence.

DECISION

81. Held:
- 1) On Count One the Court finds defendant guilty of the offence of rape, and he is convicted of the offence;
 - 2) On Count Two the Court finds the defendant guilty on his own plea and the evidence before the Court, and he is convicted of this offence.
82. The Court wishes to note it's thanks to both counsel for their comprehensive and helpful submissions in relation to the issues raised in this case.

