

IN THE SUPREME COURT)
OF THE TERRITORY OF)
PAPUA AND NEW GUINEA)

CORAM : FROST, J.

Thursday,

10th October, 1968.

REGINA

v.

DIETER BRETSCHNEIDER

J U D G M E N T

1968

October 7, 8,

9, 10.

GOROKA

Frost, J.

The accused is charged with the rape of one Gor-Agua on 13th May, 1968 here at Goroka.

The Crown have to satisfy me beyond reasonable doubt of every element of the charge.

The offence is defined in the Criminal Code Section 347 as follows :-

"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,, is guilty of a crime, which is called rape."

So far as regards Carnal Knowledge, the offence is complete upon proof by the Crown of penetration (ibid, Section 6).

The circumstances of this case are from beginning to end a shameful episode, but my sole task is to decide whether the Crown has satisfied me beyond reasonable doubt of the accused's guilt. The prosecutrix Gor is the wife of Sie, and both of them were employed by the accused as his domestic servants. At some time a few weeks before the alleged offence, the accused who is an amateur photographer, as he said, better than average, showed Sie some typical slides of bare breasted Mt. Hagen women. I think that he did mention to Sie that he would like to take photographs of Gor, and repeated the request on Sunday 12th May, 1968. That night the accused went to the Goroka Hotel with a man called Werner Krupitza, and had two glasses of beer. The men went to the sports club and had about three more glasses of beer, so that the accused could not have been greatly under the influence of alcohol. The accused

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then drove Krupitza in his car to the accused's house in West Goroka. He lived in single quarters, occupying one of a number of single rooms above ground level. Sie and Gor lived in a room at ground level, and it is important to note that while the accused's room was not precisely above Sie's quarters, for a width of three feet the accused's floor was in fact the ceiling of Sie's quarters. Naturally the floor boards were not sound proof, and indeed noises or movements in the upper room would have been heard below. There was a stairway from ground level to a balcony upstairs on to which the doors of the single rooms opened; the bottom of the stairway was 17' from Sie's quarters. The accused's door was only about three paces from the top of the stairs. Thus Sie could move very quickly from his quarters to the accused's room.

Now when the two men arrived at the premises it was about half past ten. Both went into Sie's quarters. There they saw Sie's parents, Gor and their male child. The accused mentioned to Sie that he would like to take Gor's photograph, and then went and sat down on a bed near Gor, holding her hand and put another arm around her back. Sie spoke to her in their own language and told her he only wants to take your picture. But she attempted to draw away. Sie became angry and slapped her twice on the face and she began to cry. The accused intervened and told him not to strike her. This obviously was enough for Werner, who seems a decent man, and he asked to be driven home. The accused remarked that it was not a good time to take pictures; however, after he had taken Krupitza to his home, a short distance away in West Goroka, he must have changed his mind, for on his return, he knocked at Sie's door, and when Sie did not open it and told him to go away, he persisted until Sie finally opened the door. The accused's explanation to the Court is that as the other European had gone, he felt Gor's reluctance would disappear. He again went over to Gor, held her hand and put his arm around her. Sie then told his wife, he is an employer, I think he only wants to take your photo, so you had better go up. The accused said in evidence that Sie again slapped his wife, but Gor did not refer to this, and if it happened, I consider that she would have remembered it. Both Sie and Gor were asked the reason why Sie slapped her, and each gave the same reply,

that it was because Sie was angry at the European holding Gor, and Sie did it to make him go away. Although this reason was doubted by counsel, and Mr. Rissen contended that Sie's motive was to make Gor obey him and comply with the accused's request, I am inclined to believe that the reason given was the true reason. With the local people of this Territory, anger and grief are often given vent by resort to acts of violence, to our minds capriciously directed at some innocent bystander. Furthermore in this case, there is the added instinctive reluctance by Sie to strike his employer. However, before the night was out he overcame this reluctance, and gave the accused two robust punches to the nose. Although blood flowed, in my opinion, the accused got off lightly.

Thus the accused and Sie prevailed on Gor to accompany the accused upstairs. The accused gave Gor the key to his room and taking her by the hand, led her upstairs. He then walked down to the kitchen and brought back two bottles of beer, whilst Gor was waiting outside his room. He took the key from her, opened the door, and fortunately, as it transpired, leaving the key in the door, they both entered, and he shut the door behind them.

The accused said that Gor did not understand Pidgin - indeed Sie said that his own knowledge of Pidgin and accused's was such that Sie only half understood the accused - so that practically the only means of communication between the accused and Gor for the period of one hour or more in which they were in the room together, was by signs. He offered her beer; she refused. He took out his camera and fitted it with flash bulbs. He put a record on the record player. Gor was wearing two dresses, a blouse or cardigan, and although she said she had a skirt underneath, I feel that she was referring to the lighter dress underneath which was tendered in evidence. She said it was a cold night. The accused took off her blouse, and then indicated that he wanted her to take off the outer dress, which he thought would have spoilt the photographs. He preferred the dress underneath which he had before seen her wearing. She says she refused, and struggled, but the accused pulled the zipper, and the dress was removed, and I see no reason to disbelieve

him when he says she placed it on a chair. What the accused then proceeded to do was to take photographs of her. The first three were taken of the girl clothed in her dress.

The coloured slides which were shown in Court by means of a projector, proved to be most significant evidence. The first one showed the girl holding a cigarette given her by the accused, sitting with her legs up, her side against the long back of the divan. The accused had placed her in that sophisticated position, holding her and placing her limbs. The second photograph taken from above showed her lying on her back again on the divan with one arm, again placed in position by the accused, under her head. The third photograph was of her head and upper chest only, again in what appears to be a standard sophisticated pose for the amateur photographer. Here Gor had a cigarette held in her left hand at shoulder level, and the right hand was again held behind her head. In this photograph the shoulder strap of the dress as shown had been pulled down over the girl's right shoulder, as she said tearing it.

Gor said that before he had taken these photographs the accused had removed all his clothes, except a pair of black under-pants. But the accused said this occurred only when he next decided that he wanted to take photographs of her in the nude, and her dress was removed, and he most certainly had on his underpants only, when that occurred.

The girl said the accused pulled down over/^{her} legs the remaining dress as she was lying on the bed, that she struggled and tried to call out, but the accused put his hand on her throat. But she did not avail herself of the ample opportunity to cry out when she then submitted to two further photographs being taken of her in the nude whilst she was on the divan. The first one, which is said to have been lost, and thus not produced before me, was taken by the accused, as Gor knelt in front of him, also kneeling but on the floor at the end of the bed, showing her bosom, in a lascivious pose on her hands and knees. The final photograph was taken by the accused as he knelt on the table at the side of the bed, and showing her lying on her back, legs apart, in a frank sexual pose.

She freely admitted that it was the accused again who formed her pose, placing an arm across her chest to her other shoulder, and her legs apart. Asked why did she think the accused put her legs in that position, she answered, I thought he wanted to take a picture of my private parts.

Having taken this final photograph, she said the accused then jumped on her and took off his pants as he lay on top of her. She moved around and closed her legs but the accused pushed them apart. He held her knees down on the divan, holding down her arms above her head, and as he penetrated her she called out to her husband twice and loudly. He came in, as the accused said, like greased lightning, came over to the bed looked at them and with the accused still lying on Gor, and with his hands firmly on her throat. He said to accused, you know we both work for you, you know she is my wife, she is not a prostitute, you told me you would take her photograph. It was then that Sie gave the accused two hard and well deserved punches to the nose. With blood pouring from his nose, the accused told them to leave, which they did after Gor put on one dress, and picked up the others from the chair.

I ruled that there was a case to answer, and the accused then gave evidence. Mr. Rissen relied strongly on two statements made by the accused, first that after the last photograph was taken, Gor left the room to urinate, and after five minutes or so returned, removed the dress she had put on when she left the room, and lay down naked on the bed, and secondly, that Gor co-operated with him in the sexual act. Having heard the accused, I have no hesitation in rejecting both statements.

The case for the Crown was that the accused cunningly contrived, step by step, the final situation in which he had Gor lying naked on the divan, her legs apart, and having from the beginning intended to have sexual intercourse with her, then threw himself on her, and had intercourse with her knowing that she had been compelled against her will by her husband to come to the room in the first place, and that if she did pose, it was unwillingly, and she was certainly not consenting to sexual intercourse. Further

he was trying to stop her cry out as he put his hand on her throat. The fact that both Gor and her husband did not consent to her having sexual intercourse, is shown, on her part, by her cries as he penetrated her, and on Sie's part, by his rapid entry to the room, and punches, showing plainly his attitude.

Mr. Rissen strongly submitted that I should not be satisfied that she was a consenting party, she knew she was going to have sexual intercourse when she left to go upstairs to the accused's bedroom, Gor must have known at the time that that was his object, and that I should be left in doubt that she did not consent.

Now I consider that Sie knew that in taking photographs of her, Gor could be involved in having part at least of her clothing removed, and he knew there was a risk of the accused taking liberties and attempting sexual intercourse. Indeed he was uneasy about it. But he felt he should trust his employer and I accept the Crown's submission that his action in allowing Gor to go upstairs was not a tacit permission on his part for the accused to have sexual intercourse with his wife. Of course the only relevance of Sie's thoughts is that it might throw some light on Gor's attitude. Of course to allow his wife to remain in the accused's bedroom for over an hour at that time of night was quite foolish on his part and it may well be asked what did he think was going on for so long.

As for Gor, she overcame her unwillingness to have her photos taken only because of Sie's insistence. Although there are several matters which at first gave me doubts, on the whole, I feel that she did not consent to having intercourse with the accused. She was shown, on first going to the room, magazine pictures of nude women and, an obedient wife, she believed that it was Sie's wish that she should be so photographed, but when he sprang on her and she felt his body in hers, she showed plainly enough that it was against her will.

However this is not the end of the matter. Mr. Rissen relied on Section 24 of the Code, and submitted that I should come to the conclusion that on the whole of the evidence that the accused

had an honest and reasonable belief that Gor was consenting to him having sexual intercourse, or that I should be in a state of reasonable doubt about it, and so the accused was on this ground entitled to an acquittal. This defence is not uncommon in cases of rape. It was considered in the Victorian case of R. v. Burles (1). In that case it was held that the jury should only consider the possibility of the accused having acted on wrong belief as to the facts when there is some evidence that he did honestly believe at least that the necessary facts existed.

Mr. Rissen contended that, even if I rejected the reason the accused gave upon his belief that Gor was consenting, viz., that she actively co-operated in the sexual act, there was strong evidence that Gor was tacitly consenting, if for different reasons, and that the accused may well have had such a belief, even if it was a wrong belief, and he thus countered Mr. Gajewicz's argument, that the accused's own story, rejected as it is, leaves no room for this defence.

It is in this part of the case that the photographs became crucial evidence. It is true that in none of these is Gor shown smiling; even allowing for the effect of the flash bulbs, she is impassive. But following accused's directions, she knelt on her hands and feet, so that he could take photographs of her bosom, and she allowed him to touch her naked body, and place her in position lying on her back in the bed, and pulling apart her legs to expose her private parts. If she at first objected to her dress being removed and before he removed the underdress, he had to put his hand on her throat to stop her calling out, at no time as he continued taking the photographs, did she either call out or flee from his room. Part of the bed on which she was lying was immediately above his room, so that to stamp her feet on the floor would have been sufficient to attract her husband's attention. Further some statements she made in evidence bear on this point. She felt she was obliged to explain why she submitted to the accused taking photographs of her, while he was undressed except for a pair of

underpants. She had, of course, as she admitted, seen a camera being used for the taking of photographs, and I cannot accept her evidence that she believed this was the way Europeans took photographs.

She felt herself also obliged to give some explanation for allowing the accused to place her in position and submitting to the final photograph being taken as she lay naked. Her evidence on this part of the case was :-

"While I was on the bed, he held my hands and put his legs on my legs and pulled the skirt (under dress) off me. I was naked. I was very ashamed and tried to get up. The accused sat on my legs and took another photograph of me."

So she is trying to say that she was held down which she plainly was not.

Further, after the accused jumped on her, he had to use his hands to remove his underpants, and then she said he held her hands above her head and there was the delay while he was doing this, and endeavouring to penetrate her, before she called out, and he placed his hand on her throat either in passion or to prevent her calling out again.

Mr. Gajewicz says she was afraid of her husband and of her life at the hands of the accused. Well it may be so, but when a woman conducts herself as Gor did, remaining in the accused's bedroom for over an hour, with music playing, submitting to being undressed by the accused, himself practically naked, and to the accused handling her naked body as he placed her in sexual poses, and refraining either from calling out, when her husband was only in the room below, or from fleeing from the room, I have reached the conclusion that there is room for reasonable doubt that the accused man honestly and reasonably believed that having gone so far, she was consenting to the further step of him having sexual intercourse with her. As the Crown have not satisfied me beyond reasonable doubt that he did not have this honest and reasonable doubt, he is entitled to be acquitted, and I so acquit him.

Solicitor for the Crown : S.H. Johnson, Crown Solicitor
 Solicitor for the accused : G.R. Rissen, Esq. 204