Raine, J 686

IN THE SUPREME COURT)
OF PAPUA NEW GUINEA)

CORAM: PRENTICE, J.
Monday,
10th July, 1972.

REG. v. PETER BALIME.

1972
July 11,
KUNDIAWA

Prentice, J.

This is a charge of rape. I remind myself that I must be satisfied beyond reasonable doubt as to each element of the charge against the accused. Actual intercourse involving penetration by the accused's penis has been admitted by the accused and the principal issue tendered is one of consent or non-consent to the act. A subsidiary issue was tendered by defence counsel at the conclusion of the Crown's closing address - a defence of mistake of fact viz., in the existence of consent being given by the prosecutrix (under Sec.24). The Crown also asks that failing a conviction for rape it should be entitled to a conviction of an alternative nature under Sec. 578.

Two opposing stories are told. The prosecutrix avers that the accused, having got rid of her younger sister on an errand, induced her to go with him up a pathway (a course to which she was agreeable, she says, because she thought he was on a friendly relationship with her sister); and thereafter he threw her to the ground and while forcing her head upwards by thrusting his clenched fist against her chin so that she could not call out - and by forcing her dress up and her legs open - had intercourse with her 3 times. She tried to make him desist by saying she'd had "a sickness on her leg". She tried 3 times to push him up. She struggled. She did not agree - her "thread" (by which I take her to mean her hymen) was broken. He ejaculated. She did not help him. She did not kiss him. She did not ask for money. She did not say she would not report. She hit him twice. She did not lift up her dress. The accused made a statement to the police that day in which he admitted intercourse. His statement to the police to my mind is capable of carrying the inference that she had consented to what happened. It does not appear to support the element of non-consent. He gave evidence on oath in this court. His version was that he suggested to the girl that they go to his house and stay overnight -she agreed. That they held hands in the street after she had beckoned him towards her. That she waited by the bamboo while he went and found his father's house locked. That he sat down

1972
REG. v.
PETER BALIME

Prentice, J.

by a track - she sat beside him. They "told stories" - she approached and they kissed - she held him tight. Then he was "tempted to hop on her" (he explained later - he felt an erection) he held her breasts. She laid down - he took off his shorts. She lifted her dress. She said nothing during the intercourse. Later she mentioned the "sickness on the leg". She asked for money and said she was baptised; so he "released her" and desisted from further intercourse. There was the one act - his penis went half in, it went in easily. She said she'd not report. They walked together back to the road. She did not "fight" him. He thought she was big enough to marry.

I was impressed by the collected way the prosecutrix gave her evidence. If she is 13 or 14 as Dr. Farrell estimated she has considerable bodily and personal maturity. But the uncontroverted evidence is that she must have been virginal at this coition. I was impressed by her as a witness.

The accused was not impressive in the witness box. But his obvious nervousness is explicable I consider, by his age (17) the seriousness of the charge and his surroundings in the court; and by his understanding that he had done moral wrong. He was cross examined as to the motivation of his questioning witnesses in the committal proceedings. I am satisfied that a possible explanation of his line of questioning lies in a belief that what he had done was certainly morally wrong, and could involve him in trouble with the Government.

Shortly after the incident the prosecutrix spoke to a Committee saying, while crying, "a boy named Peter came and had sex with me, we go and find him." She and the committee looked for him and then went to the police. In her talk with the committee it does not appear that she said directly the intercourse was against her will.

About 4.30 in the afternoon, to the Cadet-officer of police Korus, she described the intercourse and said she was struggling and "broke up" from the accused - that he'd grabbed her, put her on the ground, and tried to open her legs and dress. She was feeling pain during intercourse. She told this officer that the incident happened <u>after</u> she sat on the ground (the prosecutrix denied this in the box).

At about this time Inspector Sanders also saw her - she looked upset and agitated. At about 7 pm he saw her again, still very agitated, but calmer.

It would appear that only the statement to C/O Korus could be regarded as a "complaint" as understood in sex cases. No allegation of compulson appears directly from the conversation with the Committee; but it may be that it should be inferred from the circumstances.

It is stated in Judge Carter's Commentary on the Queensland code that "although corroboration is not required as a matter of law under the Section (347) there is a rule of practice falling short of a rule of law which makes such corroboration highly desirable." He points out that in R. v. Adams, & Ross, Mack, J. stated "it has been a rigid rule of practice in Queensland that corroboration is necessary in rape cases." I note the reference to Lawson v. Lawson. (1). His Honour continues that juries must be warned of the danger of acting on the complainant's evidence unless corroborated. In other states of Australia the courts follow a similar rule. It would be a very exceptional case indeed, in which I should be prepared to act without corroboration of a prosecutrix's case.

The Crown suggests that corroboration is to be found in the mental state of the girl when talking to the Committee and to the police, and in the fact of and nature of, the early complaints.

I do not think I could be satisfied beyond reasonable doubt that the mental state of the prosecutrix arose necessarily from the fact of rape. It is explicable in terms of the pain and dissatisfaction of a first intercourse and a fear of discovery, if genuine. It could be simulated following upon a request for money and a refusal, as deposed to by the accused. I do not consider I could safely rely on it as corroboration.

As to the fact of complaint; it has for some years been stated that fresh complaint (1) is not evidence of non-consent; (2) it is not corroboration of non-consent. See R. v. Potter Mackenzie (2) and R. v. Hinton. (3). In a recent decision, Reg. v. Kilby (No.2) reported in 91 W N 849 - the Court of Criminal Appeal in N.S.W, in a strongly argued judgment, appear to have refused to follow either of these propositions. In an article in the Queensland

---

(1) 1955 A.E.R. (1) 341
(2) 1959 Q.S.R. at 384
(3) 1961 Q. R. 17

Law Society's Journal for July 1971 Sir Harry Gibbs of the High Court seems to suggest that the Court of Criminal Appeal of N.S.W may be correct in one respect but not another. I rely on my recollection as to these matters. I have not been referred by Counsel to these cases or this article and have not had the advantage of their assistance by submissions on these authorities. Accordingly, being on circuit, and required to come to a decision, I regret I must do so without full argument being heard as to which stream of authority I should follow. I note that in R. v. Eade (4) the High Court in a sex case held that a child of tender years' complaint could not be corroboration of her testimony within the meaning of Sec 418 of the N.S.W. Crimes Act.

In the absence of full argument I feel I should follow that line of authority which appears to have been followed in this Court, viz that of the Queensland Supreme Court, in this regard. I propose to do so, without suggesting that my decision should be regarded as a precedent, and with doubt as to the correctness of the stream I follow.

I rule therefore that the evidence of complaint in this matter should not be regarded as corroboration of the prosecutrix's evidence. I can see no other element in this evidence which could to the proper degree of proof, amount to such corroboration. I consider therefore it would be far too dangerous for me to convict the accused on the evidence alone of the young girl. I acquit him of rape.

I have given consideration to whether the accused should alternatively be convicted of an offence under Sec. 578, viz "unlawfully and indecently dealing with a girl under the age of 16 years" (assuming that section to have been inferentially amended by the 1971 amendment to Sec. 216).

Dr. Farrell gave evidence in his opinion the girl was 14 or 15. An xray or examination of teeth, would seem to be necessary in his opinion to estimate more accurately. He has examined very few Chimbu girls of established age. He agreed it was possible she could be 16 years of age. He was not asked whether she could be 17. The girl was very well formed and mature, and while aware that I may determine the question of age upon my own sight of the girl, under Sec.20B of the Evidence Ordinance

---

(4) (34 C.L.R. 154)

(N.G.) 1934, I should be loath to do so against this accused. The girl appeared in Court in traditional dress. It appears to my eye and mind which are even less tutored perhaps than Dr. Farrell's that she could well be even 17. I decline to convict the accused of the alternative charge.