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

CORAM: KELLY, J.

Friday,

11th December, 1970.

THE QUEEN v. YOKA KIOK

1970

December 9, 10 & 11

MT. HAGEN

Kelly, J.

The accused is charged with committing rape on Babi Mabeda on or about 30th August, 1970. The prosecutrix says that she was gathering firewood when the accused came up to her and pulled her by the wrist into a fenced garden. She says that the accused had a knife and threatened to cut her with it if she called out and that he then took her into a small piece of bush, pushed her on to her back on the ground, pushed aside his genital covering and tried to insert his penis, which was then erect, into her vagina. Medical evidence given by Dr. Balzer shows that what was done by this action was to push forward to the extent of a millimetre or so the soft tissue at the entrance of the vagina but the hymen was not ruptured. On examination some hours later this soft tissue was bloodstained and the parts were swollen and the fluid which was present was also bloodstained. The prosecutrix says that the accused's penis was too big and he tried it and it caused her pain in her vagina. The prosecutrix is a small girl whose age is stated by her mother to be nine years and in the opinion of Dr. Balzer is between eight and ten years. The prosecutrix says that she did not want to have intercourse with the accused. The evidence given by the prosecutrix as to the exact positions of the accused and herself when the act occurred is not altogether clear, but from what she says it would seem that the accused initially lay on top of the prosecutrix but he then adopted a kneeling position leaning forward and with his hand under the prosecutrix's buttocks pulled her towards him on to his thighs. The prosecutrix was wearing a piece of cloth like a dress with no underclothes and the accused a type of lap-lap covering his genitals and also a belt and had tankard leaves covering his buttocks.

The prosecutrix says that after the accused had completed the act he went away, apparently only briefly, and returned. The prosecutrix jumped over one fence and was about to jump over another fence when the accused grabbed her. She called out and he let go and ran away. The prosecutrix was then crying and went to her mother's house where she told her mother Tina that the accused had had intercourse with her. At this time she was still crying. Tina noticed a bit of sperm and blood on the prosecutrix's singlet and also on her groin

near the vagina. Tina and the prosecutrix returned to the place where the incident had occurred and there Tina noticed sperm on the ground and also that the grass had been crushed down. Later Tina and the prosecutrix went to the police station and subsequently to the hospital where Dr. Balzer examined the prosecutrix.

Later the same day the accused was interviewed by Assistant Inspector McCombe at Mount Hagen police station. The record of interview sets out that the accused admitted having put his penis into the vagina of the prosecutrix but denied having used any threat to the girl and when asked "Did this girl consent to the intercourse" he is recorded as having replied "No, I forced her".

The accused gave evidence in which he admitted having had intercourse with the prosecutrix but said that he thought she wanted to have intercourse and that what caused him to think this was that when he met her she looked at him with her eyes looking into his eyes and he did the same. He said that the prosecutrix asked him "Where are you going" and he replied "I'm just going around the bush" and that this was the only conversation which took place. The accused said that the prosecutrix herself lifted her dress up, put her legs on top of his thighs and with her right hand took hold of his penis and guided it into her vagina. He denied that he was carrying a knife and that he threatened her with it.

The accused also claimed that he does not fully understand pidgin and that when in the interview with Assistant Inspector McCombe he was asked questions in pidgin by the police constable who acted as interpreter he merely said "Yes" although he did not understand what he was being asked.

There is a rule of practice that corroboration is necessary in rape cases by which is meant corroboration in some material particular by other evidence implicating the accused person, that is, evidence which confirms the commission of the offence and the identification of the accused person as its perpetrator; it is not necessary that it should confirm the prosecutrix in every detail of the crime. In this case corroboration is provided not only by the accused himself but also as to some of the elements by the evidence of Dr. Balzer and of Tina. There is a further reason for corroboration in this case, namely, the fact that the prosecutrix is a young child.

Another material matter in rape cases is whether there has been fresh complaint as failure to do so provides evidence of consent, although, on the other hand, the fact that fresh complaint is made is not evidence of non-consent and such complaint does not provide corroboration of the prosecutrix's story. In this case what the prosecutrix said to her mother was a fresh complaint made at the first reasonable opportunity but it is of use only to the extent that I have indicated.

I am satisfied beyond reasonable doubt that the accused was the person who did the acts to the prosecutrix of which she complains and that the condition of her genital organs as observed by Dr. Balzer was brought about by their contact with the penis of the accused. In order to prove its case the Crown must also satisfy me beyond reasonable doubt that what the accused did amounted to carnal knowledge of the prosecutrix, that is, that there was actual penetration. Sec. 6 of the Criminal Code is as follows -

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

Whilst the Code does not define penetration, common law authorities are of assistance in determining the meaning of the term. The effect of these authorities is that any, even the slightest, penetration will be sufficient to amount to carnal knowledge. Injury to or rupture of the hymen is not necessary (see R. v. Russen (1); R. v. Hughes (2)). I would therefore consider that to constitute penetration within the meaning of Sec. 6 any entry of the penis, however slight, into the genital organs of the girl is sufficient and the fact that the hymen was not ruptured is irrelevant. The evidence here shows that there was entry by the penis into the soft tissue at the entrance of the vagina and, small though this entry was, in my view it amounts to penetration so that I am thus satisfied beyond reasonable doubt that the accused had carnal knowledge of the prosecutrix.

It is then necessary for the Crown to establish the absence of consent. The defence seeks to rely on Sec. 24 of the Code and sets up the existence of an honest and reasonable but mistaken belief on the part of the accused that the pro-

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(1) 1 East P.C. 438
(2) 2 Mood 190

secutrix was consenting to having intercourse with the accused, whether in fact she did so consent or not. If, as is the case here, there is some evidence of such a belief, the onus is on the Crown to establish beyond reasonable doubt that the accused did not have such a belief.

For the purpose of considering the evidence on the issue of consent and of the accused's belief on that matter I propose to disregard the statements contained in the record of interview with Assistant Inspector McCombe. In doing so I cast no aspersions on either Mr. McCombe or Constable Timothy Inkung who acted as interpreter and I am quite satisfied that the document tendered in evidence so far as it contained statements attributed to the accused accurately records Constable Timothy's understanding of what the accused said. I do not accept the evidence given by the accused that he merely said "Yes" to questions asked of him. However, I am not satisfied that his knowledge of pidgin was such that he was able to express himself adequately in that language and I therefore do not consider that it would be fair to use against him what he said on that occasion in the sense of placing reliance on particular phrases used. I shall therefore proceed on the basis of the evidence given before me both by the prosecutrix and by the accused.

I do not find credible the evidence given by the accused that the prosecutrix took the initiative in the way in which he said she did, namely, by lifting her dress, placing her legs on top of his thighs and then guiding his penis into her vagina. The prosecutrix is a little girl of nine who she said had not had intercourse before, which I accept as being the fact, and I find it quite impossible to believe that without prompting by the accused or even any word from him she would have acted as he said she did. Her own evidence is to the contrary and I accept it. I also accept her evidence that the accused had a bush knife with which he threatened her. On the evidence which I thus accept I am satisfied beyond reasonable doubt that the prosecutrix did not in fact consent to have intercourse with the accused.

The question then is whether the Crown has negatived beyond reasonable doubt the existence of an honest and reasonable though mistaken belief on the part of the accused that the prosecutrix was consenting to intercourse. As I do not accept his evidence to which I have just referred, as to the acts done by the prosecutrix immediately before the act of intercourse, the only matter upon which such a belief could be

grounded is the look given by the prosecutrix which Mr. Lindsay describes as a "come on look". I do not really think that the meagre evidence on the point justifies this description of it - all that the accused said was that the prosecutrix looked at him with her eyes looking in his eyes.

To come within Sec. 24 the belief which the accused professed to hold must be both honest and reasonable. Whether or not the belief is honestly held involves a subjective test and whether it is reasonably held involves an objective test, applying the standard of the ordinary native man coming from the accused's environment. It may be that the accused honestly held the belief that the prosecutrix wanted to have intercourse with him, although I very much doubt it and his action in threatening her with the knife seems quite inconsistent with his having honestly held such a belief. Be that as it may, I am quite satisfied that the belief was not a reasonable one having regard to the age of the girl and the fact that all the accused was relying on was the fact that this little girl looked into his eyes, without any words or gestures which might be taken to indicate that she was agreeable to having intercourse with him. As the Crown has thus discharged its onus of satisfying me beyond reasonable doubt that the accused did not have a reasonable belief that the prosecutrix was consenting to having intercourse with him it follows that, since for Sec. 24 to apply the mistaken belief must be both honest and reasonable, it has excluded beyond reasonable doubt the existence of an honest and reasonable but mistaken belief that the prosecutrix was so consenting.

As all the elements of the offence charged have been proved beyond reasonable doubt and as the defence under Sec. 24 fails, I find the accused guilty of rape.

Solicitor for the Crown : P.J. Clay, Crown Solicitor

Solicitor for the Accused : W.A. Lalor, Public Solicitor