IN THE COURT OF APPEAL [1994] QCA 551

SUPREME COURT OF QUEENSLAND C.A. No. 253 of 1994

Brisbane

BeforeFitzgerald P.
Pincus J.A.
McPherson J.A.

[R.v. Shaw}

T H E Q U E E N

v.

PAUL STUART SHAW (Appellant)

REASONS FOR JUDGMENT - FITZGERALD P.

Judgment delivered 21/12/1994

The appellant has appealed against his conviction for rape in the District Court at Cairns on 25 May 1994. The act of sexual intercourse occurred at Innisfail on 27 February 1992. The complainant is the appellant's sister-in-law. Part of the evidence, which was viewed by the jury at the trial and this Court on the hearing of this appeal, was a video-tape of sexual activity between the appellant and the complainant, which plainly included the insertion of the appellant's penis into the complainant's vagina. The video-tape also revealed that the complainant participated in the sexual activity, without the application or threat of any physical force by the appellant.

The issue for the jury was whether the complainant had consented

to the sexual intercourse or, perhaps more accurately, whether her participation in the act of intercourse, although consensual, had been obtained by the appellant "by means of threats or intimidation of any kind": Criminal Code s.347.

The case against the appellant was substantially based on the evidence of the complainant, although two police officers also gave evidence of an audiotape recording of a telephone conversation between the complainant and the appellant, a search conducted at the appellant's residence in Innisfail and a police interview of the appellant.

It is necessary to set out the complainant's evidence in some detail.

She was born on 29 June 1973, and has one brother and four sisters, all of whom except one sister are older than her. One sister, Rebecca, is about four years older. The complainant first met the appellant in about 1985 or 1986, when he "was ... going out with" Rebecca, who was living with the complainant and their parents and other family members at Newborough in Victoria. Subsequently, the appellant commenced to occupy a caravan at the complainant's parents' residence, and after a time Rebecca moved in with him. They later shifted to a caravan park "about 10, 15 minutes" away by car.

The complainant visited them there from time to time, sometimes for the purpose of horseriding. Both the appellant and Rebecca

had an interest in horses and the appellant owned a horse. On one occasion when the appellant was about 14 - "We got back from riding horses. We were in the caravan and Paul got a phone call so I went and laid on the bed on my stomach just waiting and when he finished the phone call, he leant over me and I asked him to get off and he wouldn't and he said to 'just do it here and now' and I said no and he was trying to pull me over onto my back, but I held onto the side of the bed and then he let go and we got up and we drove back to Mum and Dad's place."

A short time later, the appellant and Rebecca went to live at Woomera in South Australia. They subsequently returned to Victoria and were married, then went back to Woomera. A son, Colin, was born in about September, 1989. At the time, the complainant was still at school at Newborough.

Early in 1990, she was "not doing particularly well" at school, and it was arranged that she would go and live with the appellant and Rebecca in Woomera, go to school there, and assist Rebecca with her infant child. Rebecca was working as a barmaid, "doing mainly nights", and the appellant was working for the fire brigade. The complainant remained at Woomera "until the end of 1991".

On one occasion during that period, Rebecca and Colin were absent for about two weeks, visiting the complainant's parents. "... about the second night, Rebecca had gone, I had gone to bed and I can't remember what time it was, but it was - I think it

was early in the morning, I was asleep in bed and Paul had come in and he tape and he got on top of me, tried putting the tape over my mouth, but I pulled the tape away. He told me to take off my underpants and I would not so he forced my underpants to one side and put himself inside of me". The complainant said that she did not consent.

The complainant said that a similar incident occurred while Rebecca was still absent, on a subsequent occasion while Rebecca was in the house, "asleep in bed", and on other occasions until the appellant and Rebecca left Woomera for Innisfail about September 1991, where the appellant commenced work at the Innisfail Ambulance Centre.

The complainant did not tell her parents, Rebecca or the police of the appellant's behaviour. She "thought they'd believe him over me", and the appellant had said "that if I didn't do anything he wanted me to do, he'd hurt me."

In about February 1992, the complainant and her parents went to Newcastle, where the complainant's grandfather had recently died. While she was there, Rebecca asked her to come to Innisfail. "Rebecca was having some trouble and she called my grandfather's place and asked me if I wanted to go back and I said, 'I don't know.' And she booked a plane ticket and mum told me to go back to help her and I went back up there to help."

The appellant again began to molest the complainant. "I think it

was the second day I was there. Rebecca had gotten home from work and went to bed. I think it was about 11.00, went to bed, went to sleep and then - I dunno what time it was in the morning. I work up and felt someone in the room. I was on my stomach. And it was Paul. ... he got down and I turned around and he said, 'I've got you back now.' And he, he told me to get undressed and I didn't want to, and then he forced himself into me." The appellant had intercourse with the complainant, and there were "further incidents like that."

The complainant did not want to stay at Innisfail, and she told Rebecca that she wanted to go home because she was getting homesick. She did not tell Rebecca what had been happening because she thought she would believe the appellant rather than the complainant and she did not want to break up their marriage. Rebecca "had a ticket and she rang the airlines to arrange for me to go home". The appellant found out that the complainant wanted to go home and had a conversation with her. "He said that if I wanted to go home I had to do a video, and I told him that I didn't want to do it. And he said, 'Well, if you don't do it you don't go home.' I wanted to go home, so I ended up doing it so --".

A few days before the complainant left Innisfail, in the middle of the afternoon while Rebecca was at work, the appellant set up a video camera in his bedroom, at the end of the bed. The video camera was on a tripod, and was controlled by the appellant by a remote control. The videotape shown to the court depicted a

variety of sexual activity commencing with the complainant removing her dressing gown and lying naked on the bed. The complainant performed in accordance with the appellant's instructions, including sucking his penis and permitting him to penetrate her vagina with his penis. The sexual activity lasted for "about an hour", in the complainant's estimation. Her evidence included the following questions and answers:

"You took part in the video?-- Yes.
Why did you take part in it ?-- Because I wanted to go home.
And what did he say would happen if you didn't take part in the video ?-- He said if I didn't, I wouldn't get to go home.
Did he give you any instructions before the video started ?-- He said to - that if I didn't do it right, I had to do it over and over again until it was right."

Although the complainant left Innisfail "a day or so later", the appellant again had sexual intercourse with her without her consent before she left. "I was in the kitchen doing the dishes and Paul come in and he said that he wanted to - he said that I had to do it again. I said to him that he told me if I done the video he would leave me alone for ever and that he would let me go home and that he lied. ... he told me to go into his bedroom. He was laying on the bed and he come - he told me to give him a head job and I said to him that I didn't want to. And he told me to get on the bed and that he put himself into me again."

The complainant went back to Victoria, where she lived for a period with her parents and then moved into a flat. About May, 1992, she received a letter from the appellant, which she ripped up. She received another letter from the appellant about 24 September 1992, as a result of which she went to her parents and

to the police. "I went the day I got the letter". It will be necessary to come back to that letter, but first it is desirable to make some reference to the cross examination of the complainant.

She was asked why she had not told Rebecca about the appellant's behaviour and repeated that she thought that Rebecca "would believe him over me." She acknowledged that, on the occasion when Rebecca was asleep in the house, she would have heard the complainant if she had yelled, and said that she did not do so because she was afraid of the appellant. She also thought that Rebecca "... would blame [her] for everything and say that it was your fault too", and she did not want to break up their marriage.

She was asked whether she told her parents and the police "about what happened in the video" because of the letter of 24 September 1992, and said "No.".

"What made you decide to tell everybody about it then ?-- Because he said to me that if I had done the video, he would have left me alone forever and then that letter come and I couldn't take anymore.

. . .

... and I'll suggest that any sexual activity that has happened between you at any time, that's any time at all between you and Paul has been where you have been a willing participant, where you were happy to have sex with him ?-- No.

...

And I'll suggest that when you got to Innisfail, that when you first had sex with Paul that that was - again, it was consensual ?-- No.

And that it started with the mucking around and you ended up

going to bed together ?-- No.

And I'll suggest that you were - the two of you were watching an x-rated video and the accused suggested that you could do that and you said, 'Okay, let's' ?-- No.

And this was on the Wednesday ?-- No.

And that he said he had to make arrangements to get a video camera ?-- No.

And I suggest that when you - the time came to make the video, that was on Friday. Would that be right ?-- No.

Do you know what day it was ?-- Not sure.

Well, on the day, whichever it was that the video was made, I'll suggest that you agreed to do the video ?-- No.

And that you were a bit shy during the filming of it ?-- No.

And not completely happy to be depicted on a video tape ?-- No.

Well, you weren't happy to be on video, were you ?-- No, I wasn't.

And I'll suggest that after the video was made that you both sat down and watched the video together ?-- No.

And agreed that it wasn't very good ?-- No.

And I'll suggest that Paul has never threatened you in any way at any time ?-- Yes.

... You think the whole incident went on for over an hour ?-- About an hour, yes.

Okay. And you say from time to time on that video you were refusing to do certain things or hesitating ?-- Yes.

And you were having to be told what to do ?-- Yes.

Did you cry at all on the video ?-- He said if I cried I had to do it again.

So you didn't cry ?-- No.

I am going to put to you - Well, I put it to you that you were a willing participant in the act of sex shown on the video ?-- No.

And now that you have seen the video, I can put it to you there

is a point there where you are having oral sex with Paul and - sorry, Paul is having oral sex with you. Do you understand what I mean ?-- Yes.

And you begin having oral sex with him. Do you recall that yesterday ?-- Yes.

He obviously didn't tell you to do that - You just did it ?-- He did.

You say he told you to do that ?-- Yes.

And there is another point where he is having oral sex with you and the camera is taken from behind his head. Do you understand the position I am referring to ?-- Yes.

Your start moving your hips around ?-- He told me to do.

I suggest he didn't tell you to do that at all. He was otherwise occupied ?-- Yes, he did.

I suggest that at the end of the video there, towards the very end of the video, you were apparently enjoying what was going on ?-- No.

Now you weren't very happy about being videotaped ?-- No.

But I suggest that you were more than happy to engage in sexual activity ?-- No.

... you have seen the video now ?-- Yes.

And you were there when it was made ?-- Yes.

I suggest you were embarrassed about the thought of other people seeing what was in that video ?-- No.

Isn't that why you went to the police ?-- I went to them because I wanted everything to stop.

Okay, well I suggest the real reason why you complained of an allegation of rape in the course of the video is because you didn't want everyone to know what you did in that video was a consensual act ?-- No.

I suggest that you were worried that Paul was going to show the video to people and then you would be in trouble with your family and with Rebecca ?-- Yes.

Do you agree with that ? Do you agree you were worried about Paul showing the video to family ?-- Well, I didn't want

anybody to see.

And I suggest the reason why you didn't want anybody to see it is because you didn't want them to think that you had done what was in the video voluntarily, that you had agreed to do it ?-- Yes.

And that in fact is the truth, you had done it voluntarily ?-- No.

And you made up this allegation of rape to cover up the fact that you had done it voluntarily ?-- No.

... ."

The only other matter which emerged from the cross-examination of the complainant was that she had not previously told any person of the further sexual incident which she said occurred between the time the video recording was made and the time when she left Innisfail.

Except insofar as it was encompassed in the suggestion, rejected by the complainant, "that Paul has never threatened you in any way at any time", the complainant's version of the conversations which preceded the sexual activity which was videotaped was not directly challenged. Further, no attempt was made to suggest to the complainant that the statements which she said that the appellant had made were not credible threats and could not reasonably have induced her to participate in sexual intercourse unwillingly. Submissions to that effect which were made on behalf of the appellant in this Court should be seen in the context of the letter which the complainant received from the appellant on about 24 September 1992, the telephone conversation between them which was tape recorded by the police, and a

document found by the police when they searched the appellant's home listing what he proposed to do when the complainant returned to Innisfail in compliance with the threats contained in the letter.

The letter was in the following terms:

" MAKE SURE YOU READ ALL OF THIS LETTER

TIFFANY

How is the SEX VIDEO STAR, done any videos lately?
I have just been wondering if Robert likes to watch SEX VIDEOS, maybe I should send him the one of you and me. I think he would like to see you on your back getting fucked, I put sound to it and it makes you look like you are enjoying it.

YOU DON'T WANT ME TO SEND IT TO HIM DO YOU TIFFANY

Well I have an idea of how you can save your ASS and CUNT and get me from between your legs. If you do what I want I will give you something to stop me trying to get in you again.

Here is what you have to do, YOU WILL COME UP TO ME FOR ONE OR TWO WEEKS, while you are here you will do and say anything I want as soon as you get off the plane but I will tell you what I want when you ring me from a public phone reverse charges on 070 616537.

IF YOU DON'T DO IT OR YOU TELL ANYONE THIS WHAT I WILL DO

I will send it to Chris and tell him to show his mates fuck movie and then give it to ROBERT so he can watch you on your back getting fucked and you sucking my cock like its the only one you have had in your mouth. He would like that don't you think TIFFANY?

SO YOU WILL COME UP WON'T YOU TIFFANY OR ELSE

This is what you tell every one that a girl friend from Woomera wants you to be in her wedding and that she is getting marred in Brisbane and that she is paying your fare up and that you will stay with her and fly home on the Sunday after the wedding.

SO IF YOU DON'T WANT TO HAVE TO LAY ON YOUR BACK FOR EACH

TIME YOU GET A BOYFRIEND YOU WILL COME UP WON'T YOU.

Also I wan"t [sic] you to write on the back of this letter everything that I have listed below.

THE GUYS THAT HAVE HAD YOU IN ANY WAY FROM THE FIRST TO LAST HOW THEY HAD YOU, WHAT THEY DID, WHAT YOU DID TO THEM HOW OLD YOU WERE WITH EACH ONE, IF THEY CAME IN YOUR MOUTH, YOUR CUNT OR ON YOUR AND WHERE THEY HAD YOU. Then you have to post it back to me as fast as you can so that I know you have read this letter SO DON'T MAKE ME WAIT OR ELSE.

Post it back to me at PO Box 127 INNISFAIL QLD 4860 and put your name on the back.

CAN'T WAIT TO HAVE YOU AGAIN REAL SOON VIDEO SEX STAR."

In the course of his conversation with the complainant after she telephoned him, the appellant threatened that, unless the complainant came to Innisfail, he would send, or deliver, the videotape to a named male person. The transcript of the audiotape of the conversation includes the following passages:

"He said, 'Otherwise I send it down. Simple as that.'
She said,'You. You've. You've raped me Paul.

He said,'I'll send it down.'
She said,'No.'

He said,'Yep.'
She said, 'No you wont.'

He said, 'Yes I will. You ought to see it now its got some sound to it.'
She said,'Yeah well. You've put the sound to it cause you knew I didn't want to do it.'

He said,'Yeah well it makes it look like you are doing it.'
She said,'Yeah well.'

He said,'Every bit of it,'
She said,'Oh well.'

He said,'You want to come up.'
She said,'No, I'm not coming up.'

He said,'Oh well. I'll send it down. And then I'll be

down there on the um, 9th of November.'
She said,'Do you want me to be your slave.'

He said,'You just do what I want you to do while you're up here.'
She said,'No.'

. . .

She said,'You're not getting what you got before.'

He said,'I'll get whatever I want.'
She said,'No you wont.'

He said,'You know I will.'
She said,'No you wont.'

He said,'Well what am I gunna get then.'
She said,'You're not going to get anything.'

He said,'Aren't I.'
She said,'No.'

. . .

He said,'I'll post it on Monday.'

She said, 'No you wont.'

He said,'Yes I will.'
She said,'Why did you rape me in the first place.'

He said,'Because you wouldn't let me.'
She said,'Let. Let you do what.'

He said,'You know.'
She said,'N. No what.'

He said,'Are you gunna. Are you gunna do it properly or what.'
She said,'No. I'm not going to do anything.

He said,'Oh well, I'll just keep, keep sending 'em down to ya. There's only one way you're gunna get the main tape.'
She said,'Have you made copies.'

He said,'I can make a copy any time I like. Now its up to you whether you come up or not.'
She said,'Why did you rape me.'

He said,'I'll talk to you when you come up here.'
She said,'No. I'm not coming up.'

He said,'Oh well. I'll send. Like I said, I'll send it down.'
She said,'No.'

. . .

She said,'Why don't you just tell me now the reason why raped me Paul.'
He said,'No. I'll talk to you when you come up.'
She said'I'm not coming up.'

. . .

He said,'Because if you haven't got anything else to say I'm just gunna hang up and I'll send it down on Monday.'
She said,'What are you going to do if I come up.'

He said,'If you come up and do whatever I want you'll be right. You'll get the video and you'll get something else as well.'
She said,'No. You said if I done the video in the first place you'd leave me alone forever. And you'd.

He said,'Well, I'm going to leave you alone forever. You. You want the video and you want proof of me doing what I did to ya well you come up.'
She said,'What do you want.'

. . .

He said,'What do you. What do you mean what do I want.'
She said,'What do you want.'

He said,'You know what I mean.'
She said,'Well you're not going to get it. I'm sick and tired of what you've been doing to me.'

He said,'Alright. If that's it, that's it. It comes down Monday.'

. . .

He said,'You. You come up. You get the video. Copy of the, the video. And I'll give you something else as well.'
She said,'Yeah. And what's that.'

. . .

He said,'I'll give you a sign, signed letter.'
She said,'A what.'

He said,'Signed letter.'
She said,'Saying what.'

He said,'Hey'
She said,'Saying what.'

He said,'Telling who. At. Um. Whatever what I did.'
She said,'What did you do.'

He said,'What did I do to you.'
She said,'Rape.'

He said,'Hey.'
She said,'You raped me. Are you going to write that in it.'

He said,'I might. If you come up.'
She said,'If I have sex with you one more time will you leave me alone.'

He said,'If you come up here for the week. Yeah.'
She said,'One. Just one more time. Not for a week.'

He said,'For a week.'
She said,'No.'

He said,'You do what I want you to do while you're up here.'
She said,'One more time.'

He said,'No. You do what I want you to do while you're up here. For the week. Otherwise it's no good you coming up. Is it.'
She said,'What do you want me to do.'

He said,'I'll tell you when you get up here.'
She said,'Tell me now.'

He said,"You know what I want you to do. Basically.'

. . .

He said,'Ah. Well what are you going to do.'
She said,'I'm not going to let you rape me again.'

He said,'Well don't. Don't do it again. You just let me.'
She said,'No.'

He said,'If you want it.'
She said,'It's against. No. I don't want it.'

He said,'Well then. You know. You just. Consider it you're being, your paying, buying a video.'
She said,'Oh.'

He said,'And an insurance.'

She said,'Yah. But it's all against my will Paul. You know that. You know you've, you've raped me. You know what you've done to me.'

He said,'Uhhuh. Well if you want it finished and you want this tape you want a letter for it, you come up.'

. . .

She said,'What can I do with the letter.'

He said,'What letter,'
She said,'You.'

He said,'I'll give you for up here.'
She said,' Yeah.'

He said,'You just keep it. Put it in the Bank and keep it. Then if I ever come at you again you've got a letter to show Becky. Haven't you.'
She said,'What will it say.'

He said,'It will say whatever you want it to say when you get here.'
She said,'SNIFFING.'

He said,'But you've got to do whatever I want. Starting from when you get off the plan.'
She said,'Will it say you raped me.'

He said,'Whatever you want it to say.'
She said,'Will it say you raped me. Yes or no.'

He said,'No. I'm not going to tell you over the phone.'
She said,'Why. No-one can hear me.'

He said,'I'm not taking that chance.'
She said,'I'm not coming.'

He said,'Well what are you going to do.'
She said,'I'm not. I'm not coming up if you don' tell me now. SNIFFS. You know you raped me.'

He said,'Uhhuh.'

. . .

She said,'I need it all to be over Paul.'
He said,'.... if you want it all over, come up for a week. Do what I want. And you get the letter and it's finished.'
She said,'I don't want to do it and I never have.'

He said,'Alright.'
She said,'And you know that.'

He said,'I know that.'
She said,'The only reason why you think. Oh.'

He said,'Huh. Well, what are you going to do.'
She said,'Why aren't you happy with other, other women. Why did you have to.'

He said,'Because I wanted you.'

. . .

He said,'Now come on, I can't talk for too long on this phone. Well give me an answer now and then ring me again some, Sunday at home. And then I'll tell you what, what we've got to do when you ring up.'
She said,'Will. Will you force me to have sex with you.'

He said,'Hey.'
She said,'Will you force me to have sex with you.'

He said,'I won't force you, you will do it.'

SIREN IN BACKGROUND (QUEENSLAND)

She said,'You wont force me to do it.'

He said,'No, because you'll be doing it. You'll be wanting to do it.'
She said,'No, I don't want to do it.'

He said,'You can think it's forcing you but I'll. I'm saying that you'll be doing it.'
She said,'No.'

He said,'Because you want to.'
She said,'No. I wont do it Paul. You're not getting.'

He said,'Because you want the tape and that.'
She said,'No. You're not getting your way.'

He said,'Well that's it then. I send it down Monday.'
She said,'Who to.'

He said,'Well I'll send it to Chris first. And he'll, he'll do what he wants with it.
She said,'NO.'

He said,'And he'll give it to your Robert.'
She said,'No.'

He said,'Yep.'
She said,'BI.'

He said,'And I'll also send it to a mob in Sydney who sell em. That should'
She said,'But. Yeah. But what happens if Chris ah, decides this video and ah shows the Police. Huh.'

He said,'Well you know.'
She said,'You're gunna be. You're gunna be stuff.'

He said,'I'm stuff any rate aren't I.'
She said,'How.'

He said,'Yeah.'
She said,'How. How are you stuffed.'

He said,'Well you know. If you. If you dob on me I'm stuffed any rate. But you've been. Me and you have been having it off for a long while.'
She said,'Yeah, but it's all, all against my will and you damn well know that.'

He said,'And you keep coming back for more.'
She said,'No. That's because mum forced me to go over there to help you and Rebekah with Colin because you couldn't afford a baby-sitter.'

He said,'Uhhuh. But that's the way it looks like.'
She said,'That's the only reason why. That's the only reason why I went back.'

. . .

He said,'Do you think you can come up here for a week without anyone knowing where you're going.'
She said,'What if. What if um. What if you send the video, I'll go the Police.'

He said,'Hey.'
She said,'If you send the video I'll go to the Police.'

He said,'Well you know. I you do it. You do it.'
She said,'And then.'

He said,'Everybody else will see it before them.'
She said,'And then ah. You're. You're stuffed.'

She said,'Well so are you.'
He said,'How.'

He said,'Cause.'
She said,'Cause how.'

He said,'Because you'll be stuffed too.'
She said,'And.'

He said,'Nobody will believe you at everythink.'
She said,'You'll be up for rape.'

He said,'Nobody will believe everythink you say. Just hang on a tick.''

The appellant's list, which the police located at his residence, was in the following terms:

"Re Film Tiffany each time we fuck in all fucking and sucking positions.
Make sure she talks and moans like shes enjoying it.
Film Tiffany getting fucked up ass.
Film Tiffany on beach walking, running, swimming, fucking.
Fuck Tiffany in car park at Airport when she arrive and when she is leaving.
Make sure Tiffany is not wearing panties and bra at all times and no clothes in house.
Make Tiffany flash cash up town to all.
Finger her in public and fuck her too if possible.
Make Tiffany fuck others and film it. Only boys (....)."

One complaint made was that the complainant's evidence of the history of her sexual relationship with the accused generally, and particularly her evidence of the first occasion when the appellant sought sexual activity with the complainant, should have been excluded from evidence as irrelevant or in the exercise of the trial judge's discretion because "its prejudicial value far outweighed any probative value it may have had."

It is not easy to imagine a case in which evidence of the history of the parties' sexual relationship would be more

relevant, or in which the proper exercise of the trial judge's discretion would have required him to admit such evidence. The critical issue for the jury was whether or not the complainant's participation in sexual activity, and more specifically sexual intercourse, on a particular occasion in particular circumstances was voluntary or induced by the appellant's "threats or intimidation". It would have artificially limited and distorted the basis for the jury's resolution of that issue to exclude the evidence in question.

It was further argued for the appellant that his letter to the complainant, which she received about 24 September 1992, should have been excluded from evidence in the trial judge's discretion "as its prejudicial value far outweighed any probative value it may have had." This submission is without substance. The letter was not only necessary to explain the complainant's belated complaint in relation to the videotaped sexual activity, but bore directly upon the nature of the parties' relationship at the time when that activity occurred and thus on the central issue of whether or not the complainant had consented, and if so why, to the sexual intercourse which occurred.

The tape-recording of the telephone conversation between the appellant and the complainant after she had received the letter on about 24 September 1992 was objected to as "inadmissible in that anything capable of being an admission which was contained therein was equivocal as to whether it was an admission to the offence alleged upon the indictment or other offences." This

argument is based upon a factual assertion which seems to me incorrect, and also to ignore the relevance of the telephone conversation to the jury's assessment of the parties' relationship irrespective of whether the appellant's statements in the course of that conversation related to the act of sexual intercourse the subject of the charge. In any event, whether or not the appellant's statements in the course of that conversation related to the act of sexual intercourse the subject of the charge was, at best for the appellant, a matter properly left to the jury.

It was also argued that the tape-recording should have been excluded in the exercise of the trial judge's discretion (i) "as it was obtained in circumstances unfair to the accused" and (ii) "as its prejudicial value far outweighed any probative value it may have had." It is a sufficient answer to these grounds, which were not enlarged upon in argument, to conclude, as I do, that it was well within a proper exercise of the trail judge's discretion to admit the evidence of the telephone conversation.

The list found by the police when they searched the appellant's residence was also objected to as "inadmissible and irrelevant", and it was further submitted that it should have been excluded in the exercise of the trial judge's discretion "as its prejudicial value far outweighed any probative value it may have had." The materiality of the list to the parties' relationship and the willingness or otherwise of the complainant's participation in sexual activity with the appellant is obvious.

The list is prejudicial to the appellant because of its probative value in connection with the charge against him; it is a further indication of not only his attitude to the complainant but also his belief in involving her submission to his sexual demands and domination irrespective of, and it might reasonably be inferred contrary to, her wishes.

Ground 11 of the appellant's notice of appeal was that the trial judge "erred in leaving" the letter, tape-recording and list "to the jury as matters capable of corroboration. In his written submissions, counsel for the appellant contended that the material in question 'was so tenuous as to not be capable of constituting corroboration". As emerges sufficiently from what I have already said, I disagree.

Ground 12 was not pressed, but grounds 13 and 14 were. They provided:

"13.His Honour the Learned trial Judge erred in not directing a verdict of "Not Guilty" be returned upon a submission of no case to answer.

14.The conviction is unsafe and unsatisfactory given the state of the evidence and it would be dangerous in the administration of the justice for the conviction to stand."

One possible basis for such submissions seemed to lie in the exclusion of the evidence which I consider was properly admitted. That aside, it was, at least at one point, the

appellant's case that a perusal of the video-tape of the sexual activity between the appellant and the complainant would leave us, and would have left any reasonable jury, with at least a reasonable doubt as to whether the complainant had become a willing participant by the time the act of penetration occurred even if initially unwilling. My reluctant viewing of the videotape left me unpersuaded that there was any substance in this submission.

Section 347 of the Code presents difficulties: see, for example, Howard's Criminal Law, 5th ed., p. 183. Although it was not submitted, either at trial or in this Court, that the trial judge misdirected the jury, brief reference to the summing-up seems appropriate because of the unusual circumstances which have led to the appellant's conviction.

The trial judge directed the jury that it had to be satisfied beyond reasonable doubt that (i) "prior to the intercourse, the penetration shown in that video, the [appellant] made a relevant threat or intimidated the complainant" and (ii) "the consent of the complainant to the intercourse shown in that video was obtained as a result of that threat or intimidation". Further reference to the second of these two matters is unnecessary, except to note that it was later expanded and clarified in the following passage:

> "If you consider there was a real possibility that she was consenting to the intercourse during the course of what occurred on the video tape and the effect of the threat was merely to obtain her consent to the video recording of that intercourse, then that is not

> sufficient to establish the vital ingredient which the Crown must satisfy you of beyond reasonable doubt and an acquittal would follow."

In discussing the threat or intimidation asserted by the prosecution, his Honour informed the jury that "the word 'threat' ... is a word of ordinary use ... a declaration of an intention to inflict harm or misery. ... intimidation is where a person is made timid or frightened or scared by a course of conduct or words, or by both".

Although that passage referred to both "threat" and "intimidation", the latter concept immediately disappeared from the summing-up, which proceeded in the footing that the prosecution case was a threat "not only to take the comparatively trivial step of preventing the complainant from going home but also ... a threat to keep her in the location in Innisfail where she would be available for sexual misuse at the hands of this accused".

While that passage is not entirely clear, I do not think that it would have been understood as suggesting a difference between a threat to keep the complainant in Innisfail and a "comparatively trivial" threat to prevent her from going home. Rather, the jury was told that the prosecution case was that the appellant's statements had implicit in them a threat that she would not only be unable to go home but would continue to be subject to "sexual misuse" by him.

The trial judge then continued, describing such a threat as a "threat to inflict misery", which seems to have been accepted by the appellant. His Honour said:

> "... the threat to inflict misery of the kind to which I have referred must have been real to the mind of the complainant. The fact that it would have been difficult to effect in objective reality is not the test. If you are satisfied beyond reasonable doubt that it was a real threat to the complainant, operating on her mind prior to that intercourse and it was a result of that threat that her consent was given, even if she made a mistake as to the actual effectiveness of the threat, then the Crown would have discharged its burden in respect of that particular aspect."

Emphasis was later added to the instruction that the jury's concern was with the subjective effect of the threat on the complainant in the following passages:

> "What the Crown submit to you in their analysis of that situation is that the events, if you accept them to have taken place to which she referred, resulted in a degree of domination of her by this accused and that was the expression that was used.
>
> ... there is limited evidence, indeed, as to whether the complainant considered the threat real or not. You may think again the Crown are saying there is a clear implication from her evidence, and indeed the only implication from her evidence, that she did consider it to be a real threat. ... Nor was it developed in any detail as to how she considered the threat would be carried out. You will remember in the passage I read to you it was said her sister had a ticket and she had rung the airlines to arrange for the complainant to go home and the arrangements had been started and a ticket had been booked for her apparently by the sister. There is no development of the circumstances in which the complainant thought that the threat could be carried out. It is said on behalf of the accused that she was at that moment in time an 18-year-old woman, that arrangements had been made through the sister and evidently were in place, that she was a person able to come and go apparently as she pleased in the house and presumably in the area of Innisfail in which she was. That there was a telephone in the house, that she was capable of

> telephoning her mother if she wished to do so and that there were other courses open to her other than to submit to the threat, as the Crown maintain she did.
>
> The Crown case again is that moment in time should be seen against the background which she said obtained and what the Crown would submit to you was a degree of domination and therefore you could be satisfied beyond reasonable doubt, they submit to you, the threat was real at that moment in time to the complainant herself and that, therefore, it was a threat which resulted in her giving consent to intercourse which was videotaped.
>
> The defence say to you if you look at the matters with a commonsense point of view you should be left in some doubt as to whether the threat could be in reality effected and therefore you should be left in reasonable doubt as to whether it was an effect which operated at all upon the mind of the complainant."

The last paragraph indicates that, at trial, the appellant accepted that his statements to the complainant, according to her evidence, could constitute a threat, and that, if the jury accepted that those statements had been made, the issue was whether the complainant's consent to intercourse had been obtained by those statements. There was no submission that the appellant's statements could not constitute a threat within the meaning of s. 347 of the Code because the consequence threatened would not have caused an ordinary person, acting reasonably, to consent to the appellant's demand for sexual intercourse; insofar as that consideration was referred to, it was used as a basis for a submission that the jury should doubt whether the complainant's consent was obtained by the appellant's statements. That course is understandable; there is little, if any, reason why a threat of future "sexual misuse" might not cause an ordinary woman, acting reasonably, to consent to sexual

intercourse to avoid that consequence.

In the circumstances, especially since there is a new Criminal Code proposed, I do not find it necessary to consider s. 347 of the Code further. If the law is to be amended, care should be taken not only to ensure that the law does not punish as rape conduct which ordinary members of the community would not place in that category; the law's protection should not be denied to women who are weak or vulnerable to domination and exploitation, whose consent to intercourse can be obtained by taking advantage of their condition, and is not a free and informed exercise of will.

I do not think the verdict in this case unsafe or unsatisfactory. In M. v. R. (High Court of Australia, unreported judgment delivered 13 December 1994), the majority stated at p. 5 that an appellate court ought conclude that there had been a miscarriage of justice and set aside a conviction if it considered there was a "significant possibility that an innocent person has been convicted"; cf. Davies and Cody v. R. where, at p. 180, the Court referred to "a substantial possibility that ... the jury may have been mistaken ...". However, it is plain that no change in the law was intended in M. There is no "significant possibility than an accused person has been convicted" in the sense meant by the High Court if "upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty": see M. at pp. 4, 5-6, and 6.

The appeal should be dismissed.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND C.A. No. 253 of 1994

Brisbane

[R. v. Shaw]

T H E Q U E E N

v.

PAUL STUART SHAW (Appellant)

FITZGERALD P.
PINCUS J.A.
MCPHERSON J.A.

Judgment delivered 21/12/1994

SEPARATE REASONS FOR JUDGMENT OF FITZGERALD P, PINCUS JA AND MCPHERSON JA, ALL CONCURRING AS TO THE ORDER MADE.

APPEAL DISMISSED.

CATCHWORDS:CRIMINAL LAW - RAPE - Consent - appellant forced complainant to have sex with him and to allow him to video the act - complainant performed act after appellant threatened not to allow her to go home to her family in Melbourne - whether sufficient to constitute "threat" under s.347 *Criminal Code*

Counsel:S. Herbert Q.C. with him S. Lewis for the Appellant
M. Byrne Q.C. for the Respondent

Solicitors:Legal Aid Office for the Appellant
Director of Prosecutions for the Respondent

Date/s of Hearing:31 August 1994

REASONS FOR JUDGMENT - PINCUS J.A.

Judgment delivered 21/12/1994

I have read the reasons of the President and those of McPherson J.A.

The case appears to be of some importance in that it involves consideration of the proper scope of the definition of rape in s. 347 of the Code, insofar as that definition refers to consent obtained by means of threats; one of the questions is whether any threat which in fact induces consent is enough, even a threat of some slight disadvantage.

In the complainant's evidence there is mention of the reason for her actions in a number of places. She consistently said that she took part in what is to be seen on the video because she was told by the appellant that if not she would not go home.

At another point in her evidence, when asked why she had decided to tell everybody about the video, the complainant answered: "Because he said to me that if I had done the video, he would have left me alone forever and then that letter come and I couldn't take any more". This suggests that another inducement was offered by the appellant, to cause the complainant to participate.

As the case was explained in the judge's directions, the Crown relied on the threat that the complainant would not go home if she did not do what the appellant wanted; the jury were not invited to convict on the basis of an implicit threat contained in the passage I have referred to above - i.e. that unless the complainant did the video the appellant would not leave her alone forever. The questions then are whether a conviction on the basis put before the jury - i.e. that the threat was that the complainant

would not go home - is one falling within the definition of rape and secondly, whether the judge correctly explained to the jury what characteristics the threat must have to fall within the definition.

The evidence showed that the complainant told her sister, the appellant's wife, that she wanted to go home and that the sister had a ticket and rang the airline to arrange for the complainant to go home; there was no evidence that the appellant had anything to do with these arrangements or had any power to alter them. The way in which the appellant might have been thought able to prevent the complainant's return home was not touched on. This was a weakness in the Crown case, but not a fatal one, for it was open to the jury to infer that the complainant reasonably assumed that the appellant could prevent or impede her departure.

The judge gave the jury a definition of "threat", namely "a declaration of an intention to inflict harm or misery". He also directed them that the threat to inflict misery "must have been real to the mind of the complainant" and that "the fact that it would have been difficult to effect in objective reality is not the test". There is no local authority on the meaning of the relevant part of the definition; it is necessary to look at authorities elsewhere to see if any assistance can be gained from them.

But a convenient starting point is Professor Howard's comment on the definition in the Code, to be found at p. 183 of the 5th ed. of Howard's Criminal Law and in earlier editions of that work:

"The uncertainties in the law are conveniently embodied in the reference in the Queensland definition of rape to 'threats or intimidation of any kind' and in the Western Australian definition of sexual assault to 'force, threat, intimidation'. Both at common law and under the codes, notwithstanding the literal width of these words, there is room for doubt in four directions: first, whether threats or the actual application of force is limited to [the victim]; secondly, whether threats or intimidation are limited to serious bodily harm; thirdly, whether [the victim's] belief that she is being

> threatened need be reasonable; and fourthly, whether the threats need be immediate".

As to the second point, the work suggests that the indefinite wording of the Code is insufficiently precise to extend the law beyond negativing of consent by threat of bodily harm. If that were the proper construction then the present conviction could not stand.

It is certainly possible that a relatively minor threat, involving merely the prospect of some embarrassment or inconvenience, might in some instances induce consent; one would not expect that the Parliament intended to cover such cases. Then there are higher levels of non-physical threat, involving potential emotional harm, such as that mentioned by Smith and Hogan in their work on English criminal law (7th Ed) at p. 455:

"A woman may reluctantly submit to sexual intercourse only because her fiance threatens that he will break off their engagement if she does not. Such a case is very far removed from rape...".

A more general way of putting this problem is to ask whether a threat to do something which may lawfully and properly be done is enough.

Prior to the enactment of our Criminal Code a statutory offence was created in the United Kingdom by s. 3 of the *Criminal Law Amendment Act* 1885, a provision whose present-day counterpart is s. 2(1) of the *Sexual Offences Act* 1956; that makes it an offence "for a person to procure a woman, by threats or intimidation, to have unlawful sexual intercourse...". It seems that when this offence was created, proof that there was consent induced by a threat was not necessarily enough to found a conviction of rape; the position is informatively discussed by Dr Scutt in an article in vol. 13 W.A.L.R. p. 52 at p. 58. The provision in the English Sexual Offences Act 1956 seems now, however, to overlap the common law offence of rape, which has been defined as "sexual intercourse by force, fear or fraud": Morgan [1976] A.C. 182 at 210, Olugboja (1981) 73 Cr.App.R. 344.

In the United States the common law crime of rape has force as a necessary ingredient, according to vol. 65 Am.Jur. 2d p. 764, but "force" includes threatened force or violence. In the Maryland case of Rusk (1981) 424 A. 2d 720, the appellant was driven home by the complainant; then he got her car keys, took her upstairs to his flat and had intercourse with her. The case appears to be one of rape by detention and it is of interest to note that the court accepted that generally the victim's fear must be reasonably grounded (727). In Cassandras (1948) 188 P 2d 546, a Californian case, the appellant got the complainant in a room and told her that she would not get out of there until she undressed and went to bed; she did so and intercourse ensued. The relevant provision of the statute under which the charge was brought required proof that the complainant was "prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution" (549), and that test was held to be satisfied. A view less favourable to complainants was taken in somewhat similar circumstances in the Canadian case of Bursey (1957) 118 C.C.C. 219. There, the complainant was taken to a remote spot and the appellant said that if she did not do what she was told she might never get home; it was held that the resulting intercourse was no rape, for reasons which are not very clear; see also Cavanaugh (1916) 158 P 1053 and Montoya (1916) 185 S.W. 6. In the latter case, again, the complainant was taken to a remote spot and the threat was that if she and a companion did not submit to sexual intercourse, they would be left there. That was held not to be such a threat as might reasonably create a just fear of death or great bodily harm, and therefore rape was not proved.

The types of cases in which the threat has been one of creating for the complainant a problem in returning home illustrate the difficulty associated with holding that the reasonableness or proportionality of the reaction to the threat is irrelevant; if the threat not to take a complainant home is one which, if carried out, would cause her mere inconvenience or minor expense, but nevertheless induces consent, it would

seem odd that this should be treated as rape. In the present case the jury might rationally have arrived at the conclusion that the complainant's submitting to intercourse and the other acts involved was, considering her personal characteristics and situation, a response to the threat which one might expect such a young girl to make. The appellant's previous treatment of the complainant was such as to give the threat that the complainant would not go home a particular significance, referred to in the Crown's submission below, namely that of a threat to keep her in the location in Innisfail where she would be "available for sexual misuse at the hands" of the appellant. So that if, as I think one should, one reads the reference in the statute to consent obtained by means of threat as confined to instances in which the threat is one of substantial harm, the evidence is sufficient to support a conviction. Further, the judge's directions were sufficient to convey to the jury the notion that substantial harm must be threatened.

On aspects of the case other than those discussed above, I am in agreement with the reasons of the President.

Although the uncertainty of the scope of the relevant part of the definition gives reason for concern, I have with some hesitation come to the conclusion that the appellant's contentions should be rejected, and the appeal dismissed.

REASONS FOR JUDGMENT - McPHERSON J.A.

Judgment delivered the 21st day of December 1994

I agree with the reasons of the President for dismissing this appeal.

The critical question for the jury was whether the act of sexual intercourse between the appellant and the complainant

recorded on the videotape admitted in evidence constituted or was capable of constituting rape. Under s.347 of the Criminal Code rape is defined, so far as material, as carnal knowledge of a female without her consent "or with her consent if it is obtained by force, or by means of threats or intimidation of any kind ...".

The case for the Crown at this re-trial (as it was) of the appellant was that the complainant's consent to having sexual intercourse with him had been obtained by threats or intimidation. The particular threat alleged and proved by the Crown was that the appellant said he would not allow the complainant to go home to Melbourne from Innisfail, where she was staying with the appellant and his wife (who was her sister), unless she agreed to having sexual intercourse with him while being video taped. The complainant's evidence was that the appellant had told her in so many words, "Well if you don't do that you don't go home". She testified that she wanted to go home, "so I ended up doing it ...".

Her evidence that the threat was made was not challenged in cross-examination except in a very general way. It was simply put to her: "And I'll suggest that Paul has never threatened you in any way at any time?". Her answer was "Yes", meaning "Yes, he has". The appellant himself did not give evidence, so that her testimony on this and other matters was uncontradicted. In those circumstances, the jury were plainly entitled to conclude that the particular threat was made to her by the appellant.

The remaining question was whether her consent to the act of intercourse in question was "obtained by" the threat. As to that, her evidence was that she told the appellant she did not want to "do a video", but that she did it because she wanted to go home. Whether her consent resulted from the threat and so was obtained by means of it was essentially a matter for the jury to decide. In doing so they were entitled to consider her demeanour in the witness box and on the video-recording of the sexual intercourse.

The effect (if any) of the threat in bringing about her consent made the past relationship between the complainant and the appellant a relevant matter for consideration. "When it is a question of innocence or guilt as to the relations between a man and a woman who are not married", said Griffith C.J. in *McConville v. Bayley* (1914) 17 C.L.R. 509, 512, "the whole history of the relationship is necessarily involved". His Honour's statement in that case was made in the context of deciding whether or not adultery had recently occurred between two persons who had admittedly been lovers in the past; but, subject to what was said in *R. v. Beserick* (1993) 30 N.S.W.L.R. 510, 522, it remains apposite to circumstances like the present. The question here was not whether a woman of average fortitude, maturity, or determination would have ignored or resisted a similar threat if made to her, but whether the consent of this particular complainant was induced by the threat made to her by the appellant. Under s.347 it was sufficient for the purpose if the complainant's consent was in fact obtained by means of threats or intimidation "of any kind". The section does not

require that the threats or intimidation must, objectively speaking, be substantial. That is not surprising when it is borne in mind just how much human attitudes and behaviour may vary from one individual to another.

The fact that in the past the appellant may have achieved a measure of dominance over the complainant, if that is how the jury were disposed to view it, was relevant in assessing whether the complainant was likely on this occasion to have succumbed to a threat by him. Although later in time, the written list or "sexual agenda" (ex.4) located during the search of the appellant's residence on 25 September 1992 and evidently prepared by him in anticipation of her return to Innisfail, was evidence against the appellant of his own impression of the extent of his influence over her.

On these and other matters involved in the appeal I agree with what the President has written.