R v Fa'aoso

Supreme Court
Hampton CJ
Cr No.520/95

12 & 13 February, 1996

Criminal law - rape - complainant not give evidence
Criminal law - grievous harm
Criminal law - confession - sufficient in itself
Evidence - crime - confession sufficiency.

The accused was charged with rape and grievous bodily harm. The complainant was not called as a witness.

Held:

1. An offence of causing harm is necessarily included in a charge of causing grievous harm.
2. A wound is an injury which severs the continuity of the whole skin.
3. A confession in itself may be sufficient evidence to justify a conviction. And indeed held to be sufficient even if retracted on oath by the accused and there is no other evidence at all of the commission of the offence.
4. A court may convict of any crime (including murder) on a confession alone provided that that is free and voluntary, direct and positive, and properly proved. Where effectively the only evidence is of something the accused has said, that something must be convincingly proved and it itself must be cogent and satisfactory evidence. This is a stringent test. A judge should consider the reliability of the confession anxiously before deciding whether such a case should go to a jury.
5. The statements of the accused here in interview and subsequently, had been satisfactorily proved, convincingly proved, and were cogent and satisfactory evidence. The confession could be relied on and had real probative value and worth and weight. And there were indications from other evidence, outside of the confession, which supported it.
6. The rape charge was found proved; but the bodily harm charge (whether reduced from grievous harm or not) was not proved as to the element of wilfully and without lawful justification causing the harm.

[Note: An appeal was taken against conviction and sentence; and the report of that appeal follows immedidately]

Statutes considered : Criminal Offences Act

Counsel for prosecution : Ms Weigall
Counsel for defence : Mr Tonga

Judgment

The accused here faced an indictment containing two counts, one of rape and one of grievous bodily harm. At the commencement of the trial the indictment was amended by consent correcting the spelling of the accused's name.

The count of rape is an allegation that contrary to section 118 of the Criminal Offences Act he did on or about the 29th of November, rape (named). The Crown rely on the following sub-sections of section 118 namely 1(a) and/or 1(b) and I will give consideration as well to sub-sections 3 and 4.

I will read those provisions so it is evident that the essential ingredients of the charge of rape are before me and in my mind.

> Sub-section 1 provides: Any person committing rape that is to say any person who carnally knows any female (a) against her will or (b) being aware that she is in a state of insensibility (whether due to sleep, intoxication or any other cause) shall be liable to penalty.
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> Sub-section 3 provides: for the purposes of sub-section 1 a man commits rape if at the time of sexual intercourse with the woman, he knows that she does not consent to the intercourse, or he is reckless as to whether she consents to it.
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> Sub-section 4 provides: that at a trial for a rape offence, if the jury (and I substitute myself here because the accused has elected trial by judge alone), if the judge has to consider whether a man believed that the woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter for which the judge is to have regard in conjunction with any other relevant matters in considering whether he so believes.

Perhaps while I have that part of the Act in front of me, I go on to refer to section 119 and in the circumstances here under sub-section 1 I make the following order:

> "It is an order directing that the identity of the complainant shall not be published in the Kingdom in a written publication available to the public or be broadcast in the Kingdom."

The second count is an allegation of grievous bodily harm founded on section 106 of the Act and alleging that the accused on about 29th November '94 caused the complainant grievous bodily harm. Section 106 sub-section 1 creates an offence of a person who wilfully and without lawful justification causes grievous harm to any person in any manner or by any means whatsoever, and grievous harm is defined in sub-section 2.

I refer at this stage also to section 107 which is in identical terms to 106 except it refers to causing harm rather than grievous harm. Harm is likewise defined in sub-section 2 of that section. I refer to section 107 because I take the view that that offence is necessary included in an alleged offence under section 106, having regard to the provision of section 42 sub-section 3 of the Criminal Offences Act.

As this is a judge alone trial I remind myself of several fundamental matters. The most important of which is, of course, the fact the onus of proof lies on the Crown at all

times and it is to the standard of proof beyond reasonable doubt in relation to the charges and every constituent element of the charges. There is no obligation on the accused to proved anything, nor is there any obligation of any sort for him to call evidence or give evidence himself. Here he chose not to give evidence but there is no significance in relation to that. The onus and the standard are unchanging and rest on the Crown throughout. I remind myself that I must judge the matter only on the evidence which I have heard in this Court; if the Crown chooses not to call all its potential witnesses then so be it. On the basis of the onus and standard I have already mentioned, they stand or fall on the evidence which they choose to call before me.

Here, as I have already said, the accused has not given evidence, but I have before me as part of the prosecution's case, the notes of interview of the accused conducted by the police. And on two separate days the accused replied to two separate sets of charges that were put to him; together with the accused's conduct the day after the interview when he went to the scene of the alleged crime with the police officer in charge and other officers including a photographer.

I will come back to those matters of interview, of reply and of pointing out of scene in due course. They are matters that form part of the evidence and the weight that I put on them, the reliance that I am able or not to put on them, is a matter which must be looked at and judged in the light of all the surrounding circumstances. Sitting in a judge alone trial the probative value ultimately is a matter for me; whether I believe all or part of those interviews and replies as being true or not.

I have gone into those matters in some detail because the interviews are of importance here, the Crown relying on them as showing alleged confessions by the accused to the crime charged. Those matters take on special significance in a case such as the present one where the Crown has chosen not to call the complainant to give evidence. From what I was told at the Bar she is out of the Country.

That is unusual but not unique; unfortunately it is not unheard of for trials to take place, for example in murder and rape cases, where obviously no complainant is available. So it comes back to the basic matter of what evidence has been called in front of me, the weight I can put on that evidence and whether that evidence is sufficient to satisfy the reqquirement of proof, as I have already explained it, that is on the Crown at all times. I have listened carefully to the submissions of Mr. Tonga for the accused and have considered them with care.

I have heard evidence from 7 prosecution witnesses. Those witnesses included the following (the judge then reviewed the evidence, and then went on).

Grievous harm, as I have said is defined in s.106 sub-section 2. The Crown has chosen to rely on paragraph (c) of sub-section 2, "any severe wound", and point to that severe wound being the broken jaw. I take the view that wound bears the meaning that it has borne for many a year in this jurisdiction, and in the common law jurisdictions generally, namely an injury that carries with it the severance of the continuity of the whole skin. There certainly was such for the lips, the laceration of the lips, that has been described by a number of witnesses; but there is certainly no evidence to indicate that that was a severe wound. That broken jaw, on the evidence before me, cannot fall within the definition of "any severe wound". It may be that the Crown is in difficulty on this ingredient and cannot prove it in my view in any event because they have not called the doctor who could possibly give the appropriate evidence.

It seems to me however that the Crown's evidence can establish, not a grievous harm but, harm within section 107(2) as it is there defined, and I will return to that aspect when I come to consider count 2. (The judge then went back to a consideration of the evidence).

So, it seems to me that, this interview and the record of the interview is unchallenged. Indeed Mr. Tonga in submissions, in answer to me, said he did not dispute any of it. It has long been established in the United Kingdom, and followed in Australia and in New Zealand, that a confession in itself may be sufficient evidence to justify conviction. And indeed held to be sufficient even if that confession is retracted by the accused on oath (which has not happened here) and there is no other evidence at all of the commission of the offence. For some time juries in those jurisdictions I have mentioned, have been told that they may convict of any crime (including the most serious of all, murder) on a confession alone provided that that is free and voluntary, direct and positive, and properly proved.

In referring to these matters of law I am referring to the authorities in, and taking the propositions from, a New Zealand text, Adams on Criminal Law, Volume 2, pages 2.22 and 2.23. And I remind myself of the stringent test that Courts are enjoined to apply in such a situation which is namely this:

> **That where effectively, "the only evidence is of something the accused has said, that something must be convicingly proved and in itself must be cogent and satisfactory evidence."**

In judge and jury cases, judges are told that they should consider the reliability of the confession anxiously before deciding whether the case should go to the jury. I bear those cautionary words in mind but I go on to say, (i) given what I have heard; (ii) given the lack of challenge; (iii) given the care with which the questions and answers were recorded and signed; (iv) together with features such as a lack of cross-examination in the type of questions that were put in the interview; (v) plus the statements in reply to the charges on two distinctly separate days over a month apart; (vi) plus the directions and pointing out by the accused on a separate day when the photographs were taken; that all of those matters, and all the other matters which I have already mentioned in relation to the interview, lead me to the conclusion that the statements of the accused in interview and subsequently have indeed being satisfactorily, convincingly proved, and are "cogent and satisfactory evidence". The burden and standard of proof are clearly in my mind at all times but especially here, when the prosecution must of necessity rely on the confession to prove the crime of rape in particular.

So, I have approached the interview and its reliability or otherwise very anxiouly and very cautiously. If this were a jury case then I have no doubt in my mind, given the circumstances outlined and the evidence, that I would let the case go to the jury. And I go on to say, as I will find, that the confession in my view can be relied on; it has real probative value and worth and weight. And there are indications from other evidence, outside of the confession, which support it.

The clearest possible admissions of sexual intercourse in my view are contained in those answers, and of full sexual intercourse with penetration of the vagina of the complainant by the accused's penis. That sexual intercourse without her consent, she possibly being unconscious with no question of the accused believing that she was consenting, let alone any possible question of reasonable belief, in the circumstances, that she might be consenting. It is ridiculous to suggest such a possibility given the description

the accused himself gave to the police officers.

Ridiculous also to suggest given for example, his actions thereafter. As soon as he realised that she might be regaining consciousness and that she might recognise him, he tried to knock her out so she could not identify him.

I find I can rely on the record of interview, the questions and answers.

I find it to be a true account and a confession in all senses of the word. It has very considerable probative value and worth indeed. Answer 39, I find puts any question of consent, or rather lack of consent or alternatively a belief in consent, beyond any doubt at all. There was no consent, there was no belief in consent and I find the charge, count 1, proved beyond reasonable doubt.

It seems to me in the circumstances as described in the confession that either or both paragraphs (a) and (b) of sub-section 1 of 118 applied. That is, it was against her will or she was in a state of insensibility, and that the accused, I find proved, knew that that was the position.

I find all the elements of rape as contained within section 118 made out beyond reasonable doubt and that notwithstanding the cautions which I gave myself earlier on in this judgment.

Perhaps I can add to that, the fact that when the accused was charged with rape and assault on the 6th of December, the accused's reply is not insignificant. The two charges, but especially the rape were put to him in full and his reply was "yes, I committed the crime". And, as I have already said, in addition, the next day he pointed out the areas where this event had taken place.

I turn to the second count, that is the count of grievous bodily harm. I do not find that as clear cut and nor do I find it as clear cut even if I were to amend it to the lesser charge, which is included, that is the bodily harm charge. It is clear that the complainant suffered a broken jaw and other injuries and I can infer from all the evidence I heard (and it would be a rational and proper conclusion, sufficient to allow proof beyond reasonable doubt) that those injuries occurred at some stage during this evening, after the complainant left her cousin and before she went to the neighbouring place where she awakened the other young woman.

Leaving aside then the issue of whether this was grievous bodily harm or just bodily harm, I turn to the real issue that is inherent in both the two charges under ss.106 and 107, namely proof of wilfully and without lawful justification causing the harm. I have already read out the significant question and answer from the interview No.14, where the accused described riding his cycle straight in to the containers and the girl's side of her forehead hitting the container.

On that account, and that is the only account because the Crown is forced to rely on the confession, can it be said to be proved that the accused wilfully and without lawful justification caused the harm? That is intentionally, riding into the container with the intent that the complainant would thereby be injured. I could not find, whether under ss.106 or 107, that element proved beyond reasonable doubt based on that question and answer in that interview. The Crown as I understand it however rely, over and above that question and answer, on what was said by the accused on the 5th of January 1995 when he was charged with charges under 106 and 107. There, as I understand it, he said this in answer "yes, I did hit her. The seriousness of that will be finalised in the doctor's opinion after examining the girl. I think this happened while we were still on the bike and I pushed

the girl's head with my hand against the container on the right. I did not mean for it, to be this serious, this was before we had sex." I stress the words, "I think this happened" which are used in that answer. In my view that answer does not do away with the doubt which I have already expressed in relation to this charge. I cannot, on the evidence, find proved an intentional causing of harm and I have doubts in relation to whether the harm that has been proved could have been caused in the collision of that bike with the container, rather than a blow from the accused to the complainant.

I accept that it seems he deliberately rode into the container really to make her fall off, so that he could then try to have his way with her. But I do not, and cannot, find it proved that he did that deliberately to knock her out and injure her, as it were, so that he could then have sex with her.

So whether I deal with the matter under ss.106 or 107 I have reached the same conclusion that the Crown cannot prove either of those charges, one necessarily contained within the other, beyond reasonable doubt. Nor do I find it appropriate that I should contemplate amending to a simple common assault. I have reservations in any event, as I have previously expressed, whether a charge of common assault, being a summary offence, is applicable or appropriate in this Court.

The accused's statement leaves me in a state of some equivocality. He must be given the benefit of the doubt. That count will be dismissed; he will be found not guilty of it. There is, of course, quite clearly a subsequent assault, that is after the rape when he tried to knock her out again, but that is not and never has been (in this Court) the subject of a count.