

CITATION: *Mojica v Northern Territory of Aust* [2005] NTMC 078

PARTIES: Elizabeth Mojica

v

NORTHERN TERRITORY OF AUSTRALIA

TITLE OF COURT: Local Court

JURISDICTION: Crimes (Victims Assistance)

FILE NO(s): 20410270

DELIVERED ON: 1st December 2005

DELIVERED AT: Darwin

HEARING DATE(s): 22nd November 2005

JUDGMENT OF: Judicial Registrar Fong Lim

CATCHWORDS:

Existence of offence – sexual assault – intention

Briginshaw v Briginshaw [1938] 60 CLR

Director of Public Prosecutions v WJI [2004] HCA 47

REPRESENTATION:

Counsel:

Applicant: Ms Tregear

Respondent: Ms Truman

Solicitors:

Applicant: Hunt & Hunt

Respondent: Halfpennys

Judgment category classification: C

Judgment ID number: [2005] NTMC 078

Number of paragraphs: 23

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20410270

BETWEEN:

Elizabeth Mojica
Applicant

AND:

Northern Territory of Australia
Respondent

REASONS FOR JUDGMENT

(Delivered 1st December 2005)

Judicial Registrar Fong Lim:

1. The Applicant applies for an Assistance Certificate to issue in her favour pursuant to section 5 of the Crimes (Victims Assistance) Act. The Applicant claims she was the victim of sexual intercourse without consent. The Respondent argues that the evidence produced to the court does not support a finding of an offence having been committed.
2. The Applicant relies upon her affidavit of the 15th September 2005 and the statutory declaration of Anne Whybourne from the Sexual Assault Reference Centre.
3. The Respondent conceded that if the Court should find that the offence occurred then the amount of the certificate should be in the amount of the statutory maximum.
4. The Applicant was out nightclubbing with two girlfriends, they got to the Discovery nightclub at about 11:00pm and were dancing together when the Applicant was approached by a man. The man started dancing with the

Applicant and talking to her. When they had finished dancing they retired to a couch in the nightclub where they engaged in some kissing and fondling. The Applicant states that she had not kissed a man before and that while she was actively involved in the kissing the fondling was all done by the man.

5. The Applicant then left the nightclub with the man and walked down to the Esplanade with him. They stopped at a grassed area near a brick wall and sat down facing the sea. The Applicant says that they talked for a while and then the man started kissing her again and feeling all over her body. When the Applicant felt the man try and put his hands down her pants she stopped him and said no. She says she told him that she was a Christian and didn't believe in sex before marriage. There was some further fondling and kissing with the man's passion becoming more heightened. During the course of this interaction there were times when the Applicant expressed her desire to stop but then allowed the man to continue.
6. The Applicant doesn't claim that the man was violent towards her, in fact she accepts that her was trying to arouse her through fondling and oral sex, in her statutory declaration to the police she says:

“I relaxed again then. He then started rubbing my side with his hand. I guess he was trying to get me in the mood.”

“I don't remember being into it but I don't remember being scared”

“He wasn't yelling at me. I think he wanted to show me what to do”

7. The Applicant gave a very detailed account of all of the actions taken by the man and her reactions to those actions. She claims that during the whole time on the Esplanade she was confused and didn't know what to do. The Applicant says that she felt disconnected. When the man asked her how to undo her body suit she:

“..didn't know what to do and thought I had better do what he asked. I undid my body suit and pulled it up around my waist.”

8. The Applicant describes the moments immediately before penetration and penetration as follows:

“he started touching my vagina again . He then lay on top of me and started thrusting himself on top of my vaginal area. My legs were open. I could feel his penis against me but it wasn’t erect. I guess he was trying to arouse himself. Again I said no and pushed him again. He said Just to with it. He also said he wouldn’t do anything unless I told him so.

By this time I just tuned off. I then felt him squeeze my legs together and he forced his penis inside my vagina. I hurt like nothing I expected. I knew right away what had happened. I screamed in pain. He stopped for a second then he thrust twice more and it hurt again and I screamed. I didn’t cry because I don’t cry. He stopped again and I said why did you do it I told you not to. He said I had to.”

9. After the initial penetration that Applicant continued to have sex with the man in different positions she says she didn’t try to move away or try to stop him because she “figured what’s the point”.
10. The Respondent referred to the authority of Director of Public Prosecutions(NT) v WJI[2004] HCA 47 in which the elements of the offence of sexual assault without consent were considered. One of the questions before the court was whether the prosecution must prove beyond reasonable doubt that accused intended to have sexual intercourse with the complainant without the consent. The Court was required to analyse the application of section 31 and 32 to the crime of sexual intercourse without consent (section 192 of the Criminal Code (NT)). The appeal to the High Court from the Court of Criminal Appeal (NT) was on the basis that the Court of Criminal Appeal erred in confirming the directions given to the jury by the trial judge. The trial judge directed the jury that:

“The Crown must prove each of the elements beyond reasonable doubt.

The charge consists of the following three elements:

- 1.1 That on or about 27 January 1998 at Palmerston the accused had sexual intercourse with TRR,
- 1.2 That TTP did not give her consent to the accused having sexual intercourse with her.
- 1.3 That the accused intended to have sexual intercourse with TRR without her consent”

11. Further in relation to element 1.3 the trial judge directed:

“The accused knew TRR was not consenting or may not be consenting and proceeded regardless.

If the accused mistakenly believed that TRR consented to his having sexual intercourse with her, he will not have intended to have sexual intercourse with her without her consent The Crown must therefore prove beyond reasonable doubt that the accused held no mistaken belief that TRR consented to having sexual intercourse with him.”

12. Their honours Gleeson CJ, Gummow and Kirby found that the directions given by the trial judge were correct.

13. This Court does not have to be satisfied beyond reasonable doubt of all elements of the alleged offence. This Court must be convinced on the balance of probabilities and to its reasonable satisfaction (*Briginshaw v Briginshaw*) that all elements of the offence are proved.

14. There can be no doubt that there was sexual intercourse between the Applicant and the alleged offender. I am also certain on the balance of probabilities that the Applicant had not consented to the intercourse having shown her reluctance to do so during the whole time she spent with the alleged offender and at the time of actual penetration she says she had “tuned off”. Having tuned off she could not have been consenting.

15. The really contentious issue in these proceedings is whether the alleged offender intended to have sexual intercourse with the Applicant without her consent.

16. The Applicant's evidence of the course of events shows a couple of young people who had been out on the town drinking alcohol and got involved in sexual behaviour. The Applicant was a virgin who by her own words "Normally I don't like guys or interacting with them. Without being a lesbian I don't know anyone who is a bigger manhater than me." Her actions with the alleged offender in the nightclub did not show a woman who was a "man hater". The alleged offender was a young man who has had a night out on the town looking for female company, he finds the Applicant who in the nightclub seems quite willing to kiss and allow him to fondle her.
17. Once the pair leave the nightclub the sexual behaviour continues with the Applicant being confused about her own actions but clear on what the alleged offender wanted. From her statement the Applicant was clear in her own mind that the alleged offender wanted to have sex with her by his actions eg trying to get her clothes off and by what he said "I'm not going to hurt you, your going to like it". The Applicant knew that the alleged offender was trying to arouse her by massaging her vaginal area and licking her clitoris. The Applicant protests and says no three times but after each protest allows the alleged offender to continue to fondle her and place his fingers inside her vagina. There was no force used by the alleged offender on the Applicant to take off her clothes or to allow him to use his fingers on her vagina.
18. The question for this court is was there reasonable grounds for the alleged offender to believe that the Applicant was consenting even if he was mistaken in that belief. If there were reasonable grounds then the alleged offender cannot be found to have intended to have sexual intercourse without the Applicant's consent.
19. The Applicant was a confused virgin who was having her first sexual experience. She allowed the alleged offender to touch her intimately yet she says she is man hater. She doesn't know how to react to the man's sexual

advances so she goes along with what he wants, she talks to him about what she wants when he asks her to, she assists him to undress her, she allows him to lick her vaginal area, she asks him about sex eg why do men always finish first.

20. The man by his actions was trying to put the Applicant at ease and arouse her through foreplay he was constantly doing things which he obviously thought she would enjoy.
21. Given the above and on the basis of the standard set in Briginshaw v Briginshaw I cannot be reasonably satisfied that the alleged offender intended to have sexual intercourse with the Applicant without her consent. The evidence supports the view that he mistakenly believed she was consenting to the intercourse and that there were reasonable grounds for his mistake.
22. Accordingly the application for an assistance certificate is dismissed.
23. The issue of costs of the application are reserved to be listed for submissions upon application by either party.

Dated this 1st day of December 2005

Tanya Fong Lim
JUDICIAL REGISTRAR