A LEGAL ANALYSIS OF FRAUD VITIATING CONSENT IN SEXUAL ASSAULT CASES

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Abstract

According to Stephen J. in *R v Clarence*,[1] it is incorrect if the proposition 'fraud vitiates consent' is to be taken in its general understanding and applied without any limitation. He also said that many seductions would be considered as rapes, and so might acts of prostitution procured by fraud. This illustration appears to show clearly that the maxim 'fraud vitiates consent' is too general to be applied in the above situation even though it is absolutely true. Thus, to what extent does 'fraud vitiates consent' apply to sexual intercourse?

The Legal Implication

In the Canadian case of *R v Petrozzi*[2], the accused was charged with sexual assault of a prostitute. The evidence indicated that the complainant agreed that she would engage in sexual acts for $100 and for that purpose accompanied the accused to several locations. According to the complainant, the accused refused to pay her in advance of the sexual acts and turned violent and assaulted her on several occasions and forced her to commit various sexual acts. The accused in his testimony denied assaulting the complainant and also testified that he actually had no intention of paying her $100.

The trial judge directed the jury that the accused could be convicted of sexual assault on the basis that the accused had obtained the complainant's consent by fraud when he agreed to pay her $100 for sexual services but never intended to pay her anything. Section 244(3)(c) of the Canadian Criminal

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[1] (1888) 22 QBD 23.

[2] (1987) 35 C.C.C. (3d) 528.

Code provides that 'no consent is obtained where the complainant submits or does not resist by reason of fraud.' [3]

The Court of Appeal held that the type of fraud that may vitiate consent in sexual cases or assault is limited to fraud as to the nature and quality of the act or to the identity of the offender. However, it could not be said that the Parliament in enacting the new sexual assault provisions and in particular section 244(3)(c) intended to enable the courts to give a wide interpretation of the word 'fraud.' Thus, it is not any fraud that has a causal connection with the consent given which will suffice to vitiate the complainant's consent for the purposes of section 244(3)(c). Accordingly, in this case the trial judge had misdirected the jury and the conviction was quashed.

It is commented that *Petrozzi* could not have been convicted of sexually penetrating the prostitute without her consent. The prostitute was aware and conscious of the nature and quality of the act and no question of mistaken of identity arose. It follows that, for legal purposes, her consent to the sexual intercourse was freely and voluntarily given. The mere fact that she was deceived by *Petrozzi's* false pretence that his intention was to pay the agreed price of $100 for her services does not destroy the existence of her consent.

Similarly, in the English case of *R v Linekar*[4], the appellant agreed to have sexual intercourse with a prostitute for the sum of £25. The appellant did not have £25 with him at that time and after the intercourse had taken place he made off without paying. The prostitute claimed that she had been raped and the appellant was arrested and charged with rape. The prostitute's evidence showed that she would not have agreed to sexual intercourse unless she was being paid. The Crown claimed that the sexual intercourse had taken place without her consent.

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[3] Ibid. 532, the trial judge referred to Mewett & Manning on *Criminal Law* (1978), 471-472, where the author said: 'It should be noted that in indecent assault or rape (which are also non-consensual offences) consent is vitiated if there is a false and fraudulent representation 'as to nature and quality of the act', in sexual assault, consent is vitiated merely 'if it is obtained by fraud' without any requirement of the fraud having to go to the nature and quality of the act.'
[4] [1995] 3 All ER 69.

The judge directed the jury that if they found either that the appellant had forced himself upon the complainant or tricked her in as much as he obtained her consent to intercourse by fraud, namely by falsely pretending that he had originally intended to pay but, having had intercourse, he had then changed his mind, he should be acquitted. The jury found the appellant guilty and when asked the basis for the verdict, the foreman replied that the complainant's consent had been vitiated by fraud because the appellant had at no stage intended to pay.

The Criminal Court of Appeal held that where there was fraud either as to the nature of the act itself or as to the identity of the man who did the act, there was no consent and the man was guilty of rape, but where the woman consented to sexual intercourse in return for a promise that she would be paid, when in fact the man did not intend to fulfil such promise, the existence of fraud on his part did not mean that there was lack of consent on her part and therefore the man was not guilty of rape.[5] On the facts, the complainant had consented to the act of sexual intercourse with the appellant and that consent had not been destroyed by the fact that it had been induced by the appellant's false pretence that he intended to pay her. Accordingly, he was not guilty of rape and his appeal would be allowed and the conviction quashed.

It is commented that the Court of Appeal in quashing the accused conviction was clearly influenced both by the policy and precedent. As for policy, the court was keen not to broaden the crime of rape by fraud to such an extent that men would be put at risk of being charged with this offence in seemingly trivial cases. A man who promises a woman a fur coat in return for sexual intercourse, with no intention of fulfilling his promise, should not be guilty of rape.[6] Likewise, a bigamist who 'marries' and subsequently has sexual intercourse with his second 'wife', whilst concealing from her that he is still

[5] The court also decided that an essential ingredient of the offence of rape was lack of consent by the woman to the act of sexual intercourse with the particular man in question and there could not be rape by fraud of this nature or false pretences, which should properly be charged as procuring sexual intercourse by false pretences under section 3 of the Sexual Offences Act 1956.
[6] [1995] 3 All E.R. 69 at p 72. This example was taken from the Criminal Law Revision Committee *Sexual Offences* Rep. No. 15 (London: HMSO, 1983) para 2.25.

married to another woman, should be charged with bigamy; but he should not be guilty of rape.[7] As for precedent, the Court of Appeal based its decision principally on two earlier rulings: (i). the key decision of the High Court of Australia in *Papadimitropoulus*[8], and (ii) the celebrated judgment of the Court for Crown Cases Reserved in *R. v Clarence*[9]. In *Papadimitropoulos*, the High Court quashed the conviction for rape of a man who had induced a woman to sleep with him by pretending that they were lawfully married. The court reasoned that the woman had consented to have intercourse and that the fraud as to their marital status was collateral matter which did not affect that consent.

The other case relied upon by the Court of Appeal was *Clarence*. This case held that the fact that the man knew he was suffering from gonorrhoea, and deliberately concealed this from the woman, did not mean that her consent to have intercourse with him was destroyed. In the course of giving his judgment in this case Willis J. said:

> '*That consent obtained by fraud is no consent at all and it is not true as a general proposition either in fact or in law. If a man meets a woman in the street and knowingly gives her bad money (counterfeit) in order to procure her consent to have intercourse with him, he obtains her consent by fraud, but it would be childish to say that she did not consent.*'[10]

By analogy, it is commented the Court of Appeal in *Linekar* reasoned that, although the accused had obtained the complainant's consent to have intercourse through fraud, 'it would be childish to say that she did not consent to the act.'

However, in the Canadian case of *R v S.I.M*, [11] the accused was a

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[7] Ibid. 78. See *Papadimitropoulus v Queen* (1957) 98 CLR 249, 261, where the High Court of Australia said: 'In the history of bigamy, the most heartless bigamist has not been considered guilty of rape.'
[8] (1957) 98 CLR 249.
[9] (1888) 22 QBD 23.
[10] Ibid. 27.
[11] (1994) 158 A.R. 81 (Prov. Ct) .

dancer and he taught a country-dance class in which the complainant was a student. During the lesson, the accused had stated that male partners had to ensure that they did not place their hands where their female partners might not want them to be. The complainant had made a comment that whether the woman would likely object or not would depend on the man she was partnered with. Later in the lesson, the accused offered to teach the complainant a sensuous country-dance with which the complainant was unfamiliar. In the course of the dance, the accused cupped the complainant's breast without warning. The accused was charged with sexual assault. He claimed that the complainant had consented to the touching.

The Alberta Provincial Court held that the complainant was unable to consent to engage in sexual activity when she did not know what was about to happen. If she did consent, her consent was obtained by fraud since she was not made aware of the nature and quality of the proposed act. The accused was convicted of sexual assault.

Fradsham, P.C.J. stated that consent means the voluntary agreement of the complainant to engage in the sexual activity in question. How can one be said to have consented to engage in a sexual activity if one did not know what was about to happen? This is not a situation in which the complainant knew that sexual intercourse was to occur but did not know that the other party was HIV positive as in *R v Ssenyonga*[12]. In S.I.M.'s case, it involves a person who did not know what was being asked out of her. She cannot be said to have consented to 'the sexual activity in question' when she did not know of any sexual activity that was being suggested.[13]

It is concluded that by virtue of S.I.M's case, the legal implication is that any consent given by the complainant to the accused in respect of the touching which forms the basis of the charge is vitiated by fraud as that term has been defined since 1888 i.e. *fraud as to the nature and quality of the act or to the identity of the offender*. In that case, though the identity of the person who was to touch the complainant was disclosed to the complainant, the nature

[12] (1993) 81 C.C.C. (3d) 257.
[13] (1994) 158 A.R. 81, 88.

and quality of the act was not. The accused simply referred to the proposed dance step as a 'T-Whip' and the complainant was not made aware of the nature and quality of the proposed act. Therefore, it is submitted that her permission was obtained by fraud and, as a result, it does not in law amount to consent.
