

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 18/05/2010

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

TONDERAI CHAKWANA

Before: MORGAN LCJ, HIGGINS LJ AND COGHLIN LJ

MORGAN LCJ (delivering the judgment of the court ex tempore)

[1] The applicant was charged with one count of rape contrary to common law in that on the 18th July 2008 he had unlawful sexual intercourse with A who at the time of the said intercourse did not consent to it, he either knowing that A did not consent or being reckless as to whether she so consented. He was further charged with possession of a class C drug (cannabis) on the 18th July 2008 contrary to s. 5(2) of the Misuse of Drugs Act 1971.

[2] He was arraigned at Belfast Crown Court on the 16 January 2009. He pleaded guilty to the possession of drugs charge and not guilty to the count of rape. He was tried by HH Judge Babington sitting with a jury from 2 - 6 March 2009 and convicted by a majority verdict (10 - 1).

[3] On 3 April 2009, the applicant was sentenced by HH Judge Babington to six years imprisonment. The judge also directed that Article 26 of the Criminal Justice (NI) Order 1996 should apply, disqualified the applicant from working with children for an indefinite period and required indefinite registration on the Sex Offenders Register. The applicant was also fined £50.00 in respect of the drugs charge.

[4] The complainant is a woman who was living on her own in a house in Belfast. She became acquainted with the applicant who was a good friend of her boyfriend, S, whom she had been seeing on a casual basis since September 2007.

[5] The applicant and complainant spent a day in each other's company before Christmas 2007. At the end of the night the complainant was drunk and the applicant drove her home. When she awoke the next morning they were in bed together. She was naked from the waist down and he was completely naked but wearing a condom on his penis. The complainant asked him if they had sex but he told her "no, you were too drunk". The complainant had subsequent conversations with the applicant and told him she was not interested in a relationship with him.

[6] The complainant did not see the applicant again until May 2008. On Sunday 13th July 2008, the applicant came to the complainant's home to assist S with his car. The applicant invited the complainant to come with him on a drive to the airport and then to a friend's house. The applicant drove the complainant home at 10pm. The complainant told the applicant that she was in love with S and not interested in anyone else. The applicant suggested to her that he would like to have children with her but she said she was not interested. The applicant said he would ask S how he felt about the complainant.

[7] On Thursday 17th July 2008 the complainant returned to her home around 5.15pm with some friends and they were having a few drinks. The other friends left gradually until only the complainant and a female friend, CH, remained. The complainant drank 7 bottles of Stella Artois lager and a large vodka and 'red bull'. Her boyfriend, S, and the applicant arrived at her house around 1.00am. The complainant shared her second vodka and 'red bull' with the applicant and then sat with S. The complainant had no further recollection of what happened that night.

[8] CH stated that when the applicant arrived he was smoking a joint and he gave her 6-7 draws of it. She was not sure if the complainant had any of the joint or not. CH said that the complainant went upstairs around 2.00am and got into bed with her clothes on. The two men left and S said he would be coming back. CH went upstairs and chatted for a short time with the complainant. The complainant was coherent and "not out of it drunk". CH then left the house.

[9] The complainant woke at 9.55am on Friday 18th July. She found her mobile phone in pieces in the bed and when she put it together noticed a text message saying "you sleeping chick" from the applicant sent at 2.55am. She went to get out of bed and noticed she was naked from the waist down. She felt that her vagina and top of her legs were wet and sticky and smelt of semen. She saw dry semen on her skin and pubic hair. She had cramp like pain in her abdomen and when she went to the toilet saw semen mixed in with her urine. She felt disgusted and had a sudden flashback of the applicant's face on top of her and her saying "no stop it, get off" during the

night. She realised that the applicant had raped her and became very distressed.

[10] The complainant ran downstairs and opened her front door. She shouted at a neighbour's child to ask her mother to come over. The neighbour arrived and found the complainant was crying uncontrollably and gagging as if she was going to be sick. The complainant told the neighbour that the applicant "had been at her" and kept repeating "I don't know". The neighbour's sister arrived. The complainant told her that she couldn't remember what had happened the night before except pushing the applicant off her. The sister gave her a diazepam tablet to calm her down as she was so upset and advised her to call the police. The complainant's friend CH then arrived and described the complainant as inconsolable. The complainant said she couldn't remember what had happened but had a flashback of the applicant on top of her and telling him "No, get off me." In a later telephone conversation with her ex partner the complainant was crying and told him that she had gone to sleep and her next recollection was that the applicant was lying on top of her and she was trying to push him off and telling him to get off. She couldn't believe the applicant had done this to her because they were such good friends.

[11] The complainant's social worker called at her house at 2.45pm and found her crying and upset. The complainant told her that she could not remember a lot about what happened but that the applicant had broken into her house and she had woken to find him on top of her in bed. When she woke up she discovered she had no clothes on the bottom half of her body and she had a flashback of the applicant being on top of her. She felt sore and there were stains on the bed sheets. She said that the applicant had been a friend and that she never wanted to have sex with him and would never have had sex with him.

[12] The applicant was arrested by police at 8.45pm on the 18 July. He agreed to give intimate samples and stated that he had slept with the complainant. The account given by the applicant was that S had driven him back to the complainant's house around 3.00am because he thought he had left his keys at her house. He knocked the door and eventually the complainant came to the door. He said that she was wearing a black top but no pants although she had a quilt draped round her. He told her he had left his keys in her house and she let him come in. She went back upstairs to her bedroom and he looked downstairs for his keys. As he could not find them he went upstairs and spoke to her about where the keys could be. He went downstairs again and then returned to the bedroom and told her he had brought another joint with him. He sat on the bed and rolled the joint. He said he was cold and asked her to "warm him up". He got into bed fully clothed and held her on her tummy and said "Can I have some?" meaning "Can I have sex?" She replied "you will be like the rest of them". He said "No I

won't" and started to caress her tummy. She caressed him back and he touched her on her private parts. He said he would wear a condom; he took off his shoes, trousers and underwear and he put the condom on. She was lying on her back and they were kissing and had sexual intercourse. Then he asked her to turn around and had sex from behind. He ejaculated and the condom burst. He got up and went to the bathroom. He told her the condom had burst. She said she was OK. She asked him to tell S to come up to see her. He said he would ask but he didn't think S would come. He left her in bed and left the house. S was waiting outside in the car. He had been in the house about 15- 20 minutes. He did not tell S what had happened. His keys were not in the complainant's house but were found in S's house.

[13] In relation to his earlier visit to the complainant's house, the applicant said that when he arrived she was drinking vodka but was not drunk. She had smoked some of the joint he brought and also shared another joint with CH. He said that the complainant was a "seasoned drinker" who could handle more drink than he could. When he had left the house she was well - she had gone upstairs and S followed her; after a short time S came down and he left with him. He had drunk 3-4 large Stella Artois and had also smoked 2 cannabis joints before he arrived at the complainant's house and another 2 while he was there. On being asked what his state of mind was he replied "I knew what I was doing".

[14] The applicant agreed that he and the complainant were good friends and that on a previous occasion the complainant had confided her feelings for S to him and he agreed to speak to S to ask about his feelings for the complainant. He also said that he had previously asked the complainant to sleep with him and she had said no which he respected. On a previous occasion he had slept in the same bed with her but nothing happened between them.

[15] The application for leave is pursued on a number of grounds. First the applicant contends that there was no prima facie case to leave to the jury. Secondly the applicant submits that this is a case in which the second limb of *R v Galbraith* [1982] 2 All ER 1060 should be applied because the prosecution evidence is of such a tenuous character that it could not sustain a conviction. Thirdly the applicant complains that to leave the issue of the incapacity of the complainant to consent was not open on the evidence.

[16] It is clear from the judge's charge that he correctly identified that it was for the prosecution to establish beyond reasonable doubt that the applicant had sexual intercourse with the complainant, that she did not consent to that intercourse and that the applicant knew that she was not consenting or recklessly proceeded. The evidence of the complainant was that she had expressly informed the applicant on one occasion in December 2007 that she did not want to have intercourse with him and then informed him some days

before the alleged offence that she only wanted to have a relationship with her boyfriend. She further said that she could not have envisaged any circumstances in which she would have agreed to have intercourse with the applicant. Since it was admitted that sexual intercourse had taken place the issue for the jury was whether they were satisfied that the applicant had not subsequently consented by her conduct in participating as the applicant alleged or whether on the basis of that participation the prosecution had established that the applicant did not reasonably believe that she had so consented.

[17] In our view there was clearly a prima facie case that sexual intercourse had taken place without consent based on the evidence of the complainant. Her account that she had no recollection of the act of intercourse and the participation that the applicant alleged in respect of her were completely at variance and plainly irreconcilable with the applicant's account. This was a case which presented a stark choice and no issue of capacity arose (see *R v Wright* [2007] EWCA Crim 3473). Her case was that she had not consented and would not have consented. There was, however, a clear issue on the applicant's evidence as to whether she had done so and in cases of this sort those issues should normally be left to the jury (see *R v H* [2007] EWCA Crim 2056). The learned trial judge properly directed the jury on the issue of consent in circumstances where there is voluntary consumption of alcohol by the complainant in line with the leading authorities (*R v Bree* [2007] EWCA Crim 804 and *R v Coates* [2008] 1 Cr App R 52)

[18] Finally for the reasons we have set out above we do not consider that this was an incapacity case. The accounts by the applicant and the complainant were strikingly different. If the jury accepted the complainant's account it would inevitably lead to the rejection of the applicant's account. Capacity did not arise as an issue.

[19] The issue for us is whether the conviction is safe or whether we feel any sense of unease about it (see *R v Pollock* [2004] NICA 34). For the reasons set out above we are satisfied that this conviction is safe. The application must be refused so that the conviction stands.