KIDNAPPING BY DEECIT

R v Cort
[2003] 3 WLR 1300; [2004] 4 All ER 137 (CA)

1 Introduction

The nature of consent, and its ambit and operation as a criminal law defence, remains somewhat unclear (see De Wet *De Wet en Swanepoel Strafreg* 4ed (1985) 94). This is not surprising, given the fact that the assessment of whether consent is present is largely determined on the basis of public policy. Unlike other justification grounds which indicate that, all things considered, the conduct in question was the right thing to do (*eg* defence), consent "embodies a recognition that the autonomy of the other person ('victim') is involved, and that if that person agrees to the conduct there should be no offence" (Ashworth *Principles of Criminal Law* 3ed (1999) 331). Recognizing a defence of consent involves taking the individual will into account, in allowing individuals "to assume those consequences that they took into account when they adopted the decision; that is, in permitting them to incorporate these consequences into the course of their lives" (Nino *The Ethics of Human Rights* (1991) 180).

It is clear that the law allows a person complete right of disposal over her property, but does not recognize her consent to the taking of her life by another. More difficult questions arise in relation to whether there can be consent to a violation of bodily integrity, particularly in the area of sport and medical treatment (see Burchell *Principles of Criminal Law* 3ed (2005) 333-338). A particularly significant question, which is central to the discussion which follows, is when the apparent consent of the complainant can be excluded. Though it is settled law that consent induced by force or threats is not recognized for the purposes of the criminal law (Burchell 341), the position is not as clear with regard to whether consent induced by fraud will be excluded as a defence (Van Oosten and Labuschagne "Bedrieglike Voorstellings en Toestemming in die Strafreg" 1977 *De Jure* 80 81). This issue will be discussed below, in the light of the case of *R v Cort*.

A preliminary point may be of assistance. There is some disagreement amongst legal philosophers regarding the nature of consent:

> "'Subjectivists' hold that consent is a mental state … [and] that conduct or behaviour is needed as evidence of consent but should not be confused with consent itself. 'Objectivists' by way of contrast, believe that consent is conduct or behaviour; consent is no more of a mental state than is a promise" (Husak "Consent" in Gray (ed) *The Philosophy of Law – An Encyclopedia* (1999) 148 149).

The approach adopted in South African law is subjective, as it is based on the state of mind of the victim (Van Oosten and Labuschagne 1977 *De Jure* 90).

2 Facts

The accused made use of the same *modus operandi* on a large number of occasions: he stopped his car, invariably at bus stops, and falsely alleged to persons in the queue that the particular bus they were waiting for had broken down. He then proceeded to offer any women who were on their own a lift in his car to their destination. His offer was rejected on all but two occasions. In the first of these instances, the passenger changed her mind, and asked to be let out of the car, and the accused duly complied. On the second occasion the passenger was taken to her destination. There was no dispute that the accused had contrived this manoeuvre to attract women into his car.

3 Decision

Whilst the court acknowledged that this was not a conventional example of kidnapping, the accused's conviction on two counts of kidnapping (in respect of the women who agreed to go with the accused) and ten counts of attempted kidnapping (in respect of women who refused the accused's invitation) was confirmed by the Court of Appeal. Although certain items recovered from the accused's car were suggestive of, or at least capable of, use in nefarious circumstances, the court accepted that these items were unconnected with the accused's conduct. The accused denied any sinister motivation underlying his actions, and claimed that he merely wished to enjoy the company of the persons he approached.

In the course of its judgment, the court (per Buxton LJ) rejected the accused's defence that the complainants had consented to taking a ride in a car, holding that such conduct is not what the offence consists of, and was not the act with which the accused was charged. The court pointed out that the offence of kidnapping involved "taking away by fraud" and that this was not consented to (par 19). Furthermore, the court held that the conduct of the accused was not too trivial to be covered by the serious offence of kidnapping, and that a "proper social purpose" was served by the offence in the circumstances of the case (par 24). The court therefore dismissed the appeal. The relative lack of gravity of the accused's conduct was indicated by the sentence imposed in the court *a quo*: a community rehabilitation order, running concurrently on each count.

4 English law

An interesting feature of this case is the manner in which the court was required to reinterpret the authoritative definition of the crime of kidnapping as laid down by Lord Brandon in *R v D* ([1984] 2 All ER 449 HL 453 par 5):

> "First, the nature of the offence is an attack on, and infringement of, the personal liberty of an individual. Second, the offence contains four ingredients as follows: (1) the taking or carrying away of one person by another; (2) by force or fraud; (3) without the consent of the person so taken or carried away; and (4) without lawful excuse."

Although there was indubitably a taking away by fraud on the facts (thus satisfying elements (1) and (2) of the definition of the crime), counsel for the accused argued that the crime had not been committed since element (3) of

the crime was not fulfilled, in that the complainants on the kidnapping charges freely got into the car to go to the place where they wanted to arrive, albeit that they did so under a misapprehension of the circumstances as a result of the accused's conduct (par 8). As the complainants were not mistaken as to the nature of the act (riding in a car to an intended destination), it was argued that, just as in the case of assault and rape, there ought to be a defence founded upon the consent of the complainants.

In answering this argument the court considered the position in the crimes of rape and assault, as authoritatively established in *R v Linekar* ([1995] QB 250 258), based on judicial pronouncements from *R v Clarence* ((1888) 22 QBD 23). In the case of *Clarence*, it was held that a man who had infected his wife with gonorrhea was not guilty of an assault, despite the fact that she had no knowledge of his condition, and would not have had intercourse with him had she known thereof. It was held that the only forms of misrepresentation which would exclude consent would be misrepresentations relating to the identity of the actor, or the nature and quality of the act (44, per Stephen J, hereafter referred to, for sake of brevity, as the *Clarence* rule). Following this authority, the *Linekar* court held that fraud as to the nature of an act vitiates consent (a similar approach was adopted in *R v Richardson* [1998] 3 WLR 1292 (CA)). Nonetheless, where (as in *Linekar*) a prostitute consented to intercourse, the fact that a client fraudulently indicated that he would pay her afterwards (which he then failed to do) did not exclude consent to the intercourse (*ie* there was no mistake as to the nature of the act). The approach adopted in Australia is in line with this view (see *Papadimitropoulos v R* (1957) 98 CLR 249; Gillies *Criminal Law* 4ed (1997) 335) – as Young (*The Law of Consent* (1986) 80ff) has expressed it, the misconception induced by the accused must go to the heart of the matter, and not merely be collateral in nature. The Supreme Court of Canada also relied on the *Clarence* rule (as well as the judgment in *Papadimitropoulos*) in the leading case of *Bolduc and Bird v R* ((1967) 3 CCC 294 (SCC)).

The court in the *Cort* case distinguished the position in kidnapping from the position in rape and assault however, by insisting that the unlawful conduct in the kidnapping offence consists of "taking away by fraud" (for another example of such conduct, see *R v Wellard* [1978] 1 WLR 921 (CA)), and that the complainant never consented to this occurring. Thus, the court concluded, given that fraud is an element of the definition of kidnapping (unlike the position in rape or assault), once taking by fraud is established the issue of consent does not arise. The court concluded that where an accused is charged with kidnapping by fraud there is probably no need to prove absence of consent (par 22). Any concerns that this approach could lead to the offence being rendered too broad could be met by the argument that almost inevitably proof of fraud would require establishing "positively misleading actions … and not just the suppression of the truth" (par 24). Moreover, it was held that *in casu* the offence served a proper social purpose, and could not be considered as trivial, as such conduct in other circumstances could potentially give rise to serious consequences (par 25).

Thus the Court of Appeal in the *Cort* case changed the English law relating to kidnapping.

5 South African law

The current South African law with regard to fraudulently induced consent appears to mirror the English law approach in respect of rape and assault. (Writers typically cite English sources in this regard, and as Snyman argues (*Criminal Law* 4ed (2002) 127 fn 179), courts will probably follow English law, being strongly influenced by English authority.) Thus, consonant with the *Clarence* rule, the only factors which can exclude consent are a mistake as to the identity of the person with whom the complainant was dealing (*error personae*), or a mistake as to the nature of the act in which she was engaging (*error in negotio*) (Snyman 127-8; Burchell 341). Both Strauss (*Toestemming tot Benadeling as Verweer in die Strafreg en Deliktereg* (1961) unpublished LLD thesis (Unisa) 125ff) and Van Oosten and Labuschagne ((1977) *De Jure* 86ff) are in substantial agreement with this position (although the latter writers also doubt whether *error personae* should exclude consent, albeit that they would hold an accused criminally liable on other grounds in this situation).

Whilst there appears to be no direct authority governing kidnapping by deceit, in the light of the analogous legal position indicated above relating to crimes against the person, recently confirmed in the context of rape in *S v W* (2004 1 SACR 460 (C)), it would appear that consent would only be excluded where the victim was deceived as to the nature and quality of the act, or the accused's identity. Thus it would seem that Mr Cort would be acquitted in terms of South African law in that the complainants consented to a lift i.e. consented to his actual conduct, notwithstanding his ulterior motive and deception.

6 Difficulties in applying the *Clarence* rule

An alternative approach may however be adopted. First, it should be noted that it is more accurate to frame the enquiry in terms of whether there is consent or not, rather than whether fraud may "vitiate" or "nullify" consent (for an example of the latter approach, see Stephen J in *R v Clarence supra* 44; Williams "Can Babies be Kidnapped?" 1989 *Criminal Law Review* 473). As Beale has stated ("Consent in the Criminal Law" 1894-5 8 *Harvard Law Review* 317):

> "Fraud, it is true, does often vitiate consent, but this is a statement as to the effect of consent, not as to its existence; fraud does not negative consent. Consent exists, however acquired …"

The problem of consent obtained by fraud has arisen for consideration on a number of occasions in relation to sexual offences, but it is evident from numerous statutory formulations of kidnapping that the problem has also arisen for decision in this context (Napier "Detention Offences at Common Law" in Glazebrook (ed) *Reshaping the Criminal Law* (1978) 190 198 fn 72, citing the instances drawn from the state kidnapping statutes in the US Model Penal Code ss 212.1-212.4 Appendix (Tent. Draft No 11, 1960), as well as s 209(1) of the New Zealand Crimes Act 1961. Examples relating to both sexual offences and kidnapping will be addressed below).

As indicated above, the approach of the majority in the *Clarence* case has proved to be of enduring authority in such jurisdictions as England, Australia, Canada, as well as in South Africa. The difficulties of the *Clarence* rule have become evident however. First, there have been a number of cases where the court has chosen to circumvent the narrowness of the rule (such that fraud only excludes consent where it relates to the "nature of the act itself or the identity of the person who does the act") through reinterpreting the understanding of "nature and quality of the act". In the Canadian case of *R v Harms* ((1944) 81 CCC 4 Sask. C.A), the court found the accused, who had fraudulently misrepresented that he was a doctor and that sexual intercourse was necessary for the complainant's medical treatment, guilty of rape. The basis of the finding was that the consent to intercourse had been induced by fraud as to the nature and quality of the act. Similarly, in the South Australian case of *R v Johnson* ([1968] SASR 132) the court disregarded the consent of the schoolboy complainant to a caning upon evidence that the accused (a teacher) derived sexual satisfaction from the caning. Further, in the Canadian case of *R v Maurantonio* ([1968] 1 OR 145 (CA)) the majority of the court convicted a fake doctor, who falsely represented himself as being qualified and conducted "medical" examinations on this basis, of indecent assault. The majority (per Hartt J) held that there had been a misrepresentation as to the nature and quality of the act, as all circumstances had to be taken into account. As Stuart (*Canadian Criminal Law* 4ed (2001) 572) points out, this finding was in the teeth of the majority decision of the Supreme Court of Canada in *R v Bolduc* ((1967) 3 CCC 294 (SCC)), which adopted the narrow view in accordance with the *Clarence* rule.

In the cases of *Harms*, *Johnson*, and *Maurantonio* it is clear that the court sought to ascribe criminal liability to the accused, despite the consent of the victim in each case jarring with the *Clarence* rule. Mackenzie JA (*Harms supra* 9) found that the focus of the enquiry into the complainant's consent should not necessarily be restricted to a consideration of "her understanding of the intimate incidents preceding [the accused's act]" or "[the] usually natural consequences [of the accused's act]", but should particularly take account of

> "the purpose which rendered her submissive to [the accused's act] and…the effect she was moved by the prisoner [i.e. the accused] to believe would result therefrom."

Hartt J, in *Maurantonio* (*supra* 123) opined that the phrase "nature and quality of the act" should not be so narrowly construed as to only include the physical act, but

> "rather must be interpreted to encompass those concomitant circumstances which give meaning to the particular physical activity in question."

Further evidence of reasoning employed to escape the constraints of the *Clarence* rule may be found in the argument of Scutt that where "moral consent" (*ie* consent relating to the moral implications of the act) was absent as result of fraud, then the defence of consent is not available to the accused ("Fraud and Consent in Rape: Comprehension of the Nature and Character of the Act and its Moral Implications" 1975-6 18 *Criminal Law Quarterly* 312, but see Strauss 129 for a contrary view). Moreover, the Canadian Law Reform Committee (in its *Report No 10: Sexual Offences*

(1978) 52) has recommended replacing "nature and quality" with "character" and "identity", in order to circumvent potential problems (in the context of precedent following the *Clarence* rule) by allowing for the criminalization of consensual touching where the character thereof is misrepresented (as when an otherwise appropriate gynaecological examination is performed for sexual purposes). (Stuart 572 fn 101 doubts the utility of this suggestion in the light of the usage of these terms in preceding cases however.) Furthermore, in the case of *R v Tabassum* ([2000] 2 Cr App R 328) the court dismissed an appeal against indecent assault convictions against the accused, who induced the complainants to allow him to examine their breasts, in the mistaken belief that he had medical qualifications. The court circumvented the defence assertion that the complainants consented to the examination by drawing a distinction between the nature and the quality of the Act (337A):

> "They were consenting to touching for medical purposes not to indecent behaviour, that is, there was consent to the nature of the act but not its quality."

The difficulties inherent in strictly applying the *Clarence* rule, along with the policy concerns underlying the acquittal of an accused who uses deceitful means to achieve his objective, have also prompted dissenting academic views.

Burchell (341) argue that the consent defence ought to be excluded where the complainant consents to the nature of the act, but not to the risks involved in the act (*eg* where the complainant consents to intercourse but not to the risk of contracting a deadly virus such as HIV). Citing Innes CJ's dictum (in *Waring and Gillow Ltd v Sherborne* 1904 TS 340 344), Burchell point out that knowledge, appreciation and consent are required with regard to the risks (342). Thus fraud vitiates consent to assault (and also kidnapping) whenever it induces subjective consent and the fraud is material in the sense that the harm inflicted is substantially greater than the harm (if any) expected (Burchell 343 – this view is in direct conflict with the *Clarence* rule). Further authority for this approach may be found in the judgments of Cory J and L'Heureux-Dubé in the Canadian case of *R v Cuerrier* (1998) 127 CCC (3d) 1 (SCC).

Hogan crisply formulates the question underlying this approach ("On Modernising the Law of Sexual Offences" in Glazebrook (ed) *Reshaping the Criminal Law* (1978) 174 183):

> "When the [accused] relies on the victim's consent as a defence to a charge, why should he be allowed to do so when, as he knows full well, the victim would not have consented to the contact but for his deceit?"

Indeed, could it not be said that the approach where the focus is on the victim's assent to the contact, rather than on whether the victim would have agreed in the circumstances concealed from her by the accused, is too narrow (Hogan 183)? It seems that this question was alive to the drafters of both the New Zealand Crimes Act of 1961 (s 209), as well as the drafters of the US Model Penal Code (§ 212.1) in respect of the crime of kidnapping. Both sections exclude fraudulently obtained consent as a defence. Similarly, in applying the kidnapping provision in the erstwhile Canadian Criminal Code (s 247(1) of the 1970 Code (c. C-34)) the court in *R v Metcalfe* ((1983) 10

CCC (3d) 114 (BCCA)) held that where the victim was induced to accompany the accused by fraud, rather than by force, the crime was committed. (For further examples of this approach, see the Canadian case of *R v Brown* (1972) 8 CCC (2d) 13 (Ont CA) and the US case of *State of North Carolina v Gough* (1962) 126 SE 2d 118 124).

It has been argued elsewhere (Hoctor "Re-examining the Rationale of Kidnapping" 1999 *Obiter* 391ff) that the appropriate rationale of kidnapping is the deprivation of the victim's liberty (as opposed to the more narrow deprivation of liberty of movement), which value is buttressed by the right to freedom and security of the person (s 12 of the Constitution Act 108 of 1996). Such right is broadly defined to encompass any wrongful invasion of the physical integrity of the individual; and the infringement of the victim's liberty can take place even where the victim is for some reason unaware of such infringement (see the English case of *Meering v Graham-White Aviation Co Ltd* (1919) 122 LT 44). Thus, as in *Cort*, where the victim has been fraudulently induced to accompany the accused, such that her consent cannot be regarded as real, the crime is established once the victim's liberty is infringed, despite her ignorance of the purpose of the accused's actions. As noted above, the issue of consent is bound up with that of autonomy, and the very fact that the victim's accepting the lift was not consensual is sufficient to identify the taking away as a serious violation of the victim's autonomy.

7 Submission

It is submitted that *R v Cort* was correctly decided, and it is hoped that South African courts would decide that the consent must relate to the act as a whole, including the consequences flowing from the act (De Wet 95, see also the dissenting judgment of Field J in *R v Clarence supra* 56ff). The application of this approach would operate as follows. First, it is clear that the question whether consent has been excluded by fraud is ultimately a factual enquiry. As indicated earlier, the better approach does not speak of fraud vitiating consent, but rather enquires whether there is consent to the specific conduct or not (it may be held that consent exists, but that "the act was not coincident with the act contemplated in the consent, either because it is different or includes additional elements" (Strauss 121 fn 2, citing 23 *Minnesota Law Review* 521 (1939))). There must therefore be a causal link between deception and harm, in that "the nature and execution of the deceit deprived the complainant of the ability to exercise his or her will in relation to his or her physical integrity with respect to the activity in question" (L'Heureux-Dubé J in *R v Cuerrier supra* par [16]; see Hogan 184; *Criminal Law Review* [2004] 65-6; Van Oosten and Labuschagne 1977 *De Jure* 90).

It is submitted that the adoption of the approach allowing fraud to exclude consent is beneficial for a number of reasons. First, this approach is in accordance with the subjective approach which focuses on the liability of the accused (Ashworth 344). Second, this approach fits with the way in which the problem of fraudulently induced action is dealt with in regard to other offences – the principles of deception as applied to offences against property should be equally applicable to kidnapping or sexual offences, as there appears to be no good reason to extend a greater measure of protection to an interest in the security of property than to an interest in the security of the

person (Hogan 183-4). Thirdly, this approach accords with autonomy – in order to maximize the protection of physical integrity and personal autonomy, only consent obtained without negating the voluntary agency of the complainant, is legally valid.

Was it indeed appropriate to use the serious crime of kidnapping to deal with the conduct which was the subject of the *Cort* case? The lesser offence of false imprisonment requires the complainant's freedom of movement from a particular place to be restrained (see Smith *Smith and Hogan Criminal Law* 8ed (1996) 446), and thus was inapposite on the facts. Had the events played themselves out in South Africa, there could perhaps have been an alternative charge of *crimen iniuria* (De Wet 250). Nevertheless, in both jurisdictions the conduct falls squarely within the definition of kidnapping. Ought conduct which on the face of it has given rise to little distress or harm be construed within the bounds of such a grave offence? It is submitted that (in line with *Cort*) it should be. Any intentional infringement of the liberty of another (even where the victim is unaware of such infringement) is *per se* serious. Corbett CJ stressed this point when he stated (in *S v Morgan* 1993 2 SACR 134 (A) 177g) that "kidnapping is always a serious offence since it involves deprivation of liberty, particularly freedom of movement, freedom to be where one wants to be, freedom to do as one wishes". The Model Penal Code Commentaries (§212.1; 222) state that

> "without a major offense of kidnapping, removal or confinement to facilitate another crime will be punished too leniently where the other crime is a lesser offense … minor penalties scarcely seem proportionate to the gravity of the defendant's conduct considered as a whole".

It is clear that the issue of dangerousness weighed heavily with the court in the *Cort* case (par 25). Whilst this is understandable on policy grounds, it is submitted that the essence of kidnapping is not the presence of physical violence or the potential for serious bodily harm, but rather the violation of the complainant's autonomy (*ie* the freedom and security of her person, and concomitantly, her dignity) contrary to her will. It is the violation of the complainant's liberty in this broad sense which justifies a criminal sanction, rather than the risk or degree of bodily harm involved (although the greater the risk or degree of harm, the more serious the sanction).

In conclusion, it is therefore submitted that a new approach ought to be adopted with regard to kidnapping (in accordance with *Cort*) that

> "we should no longer be concerned with whether there is consent and worry about whether it has been vitiated, but whether there has been submission or no resistance and worry about whether the reason for that submission or lack of resistance is fraud … [W]hat is relevant is not whether there has been any fraud going to the nature and quality of the act but whether there has been any fraud by reason of which the victim submitted or failed to resist ..." (Mewett and Manning *Mewett and Manning on Criminal Law* 3ed (1994) 789).

Shannon Hoctor
University of KwaZulu-Natal, Pietermaritzburg