

HONG KONG / JUDGMENT

HKSAR v. LI KIM CHING

COURT

Court of Appeal

DECIDED

12 July 2007

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Before : Hon Stuart Moore, Tang VPP and Suffiad J in Court Date of Hearing : 6 June 2007 Date of Judgment : 12 July 2007

J U D G M E N T

Stuart Moore and Tang V-PP and Suffiad J (giving the judgment of the Court) : The applicant was convicted after trial before Pang J and a jury of rape (count 1) and buggery (count 2) and was sentenced to imprisonment for 5 years on each count. 2 years of the sentence on the 2nd count was ordered to be served consecutively, making a total of 7 years imprisonment. The applicant now seeks leave to appeal against conviction. Important considerations concerning recklessness in the context of rape arose from the 3rd ground of appeal. The facts The prosecution s case depended entirely on the evidence of the complainant PW1 who, at the time of these offences, worked as a hostess at the Golden Age Nightclub in Jordan Road, Kowloon. PW1 testified that her work was to accompany customers at the nightclub and at times to sing with them. She said she was not required to perform sexual favours or to have sex with any customers as part of her work and she did not do so. During the afternoon of 5 November 2004, PW1 was called upon to join other hostesses inside Room 811 of the nightclub to serve the applicant, a client known as Lung . At about 5 pm, she escorted him to the toilet and waited for him outside. It was the practice of the nightclub for hostesses to do this in case a client left through a back door without paying. However, when the applicant came out of the toilet, she said that he grabbed her by the hand and pulled her into Room 830 of the nightclub which was empty at the time. Inside Room 830, the applicant told PW1 that he was fond of her and that she should not be concerned about her grudge with Barbie (another hostess at the nightclub). The applicant then tried to force PW1 to remove her underpants. When she refused his advances, he purported to make a telephone call to somebody telling him to grab all the tools and call all the people . The applicant then urinated

into a dustbin in the room. Thereafter, the applicant pinned PW1 down on a sofa in the room and removed her underpants. She said that she cried and shouted for help and she alleged that the applicant then forced her to have sexual intercourse with him. The applicant also buggered her and then forced her to have oral sex with him. Finally, she alleged that he forced her to have sexual intercourse with him again. Throughout this time, they were the only two persons in Room

830. All that was done by the applicant inside Room 830 was alleged to have been done in spite of PW1's refusal of his advances which was demonstrated by her crying, shouting for help and her attempts to resist him. After the applicant had finished, PW1 went to the toilet to wipe herself with tissue. At that stage, she noticed blood and what appeared to her to be semen on the tissue. PW1 then returned to Room 811 where there were other hostesses. At that time PW1 was still crying. A mama-san by the name of Shan came into Room 811 and took PW1 to Room 810 where she asked PW1 why she was crying. PW1 told Shan Ma what Ah Lung had done to her. Shan Ma then called another mama-san named Coco into the room and spoke to her. Coco Ma then left the room. PW1 also left Room 810 and went into the common room for female staff. There she saw other hostesses of the nightclub including Cheung Ching (PW2). When PW1 was alone with PW2 in the staff common room, she told PW2 what Ah Lung had done to her in Room

830. Some time later, Coco Ma came into the room and handed PW1 a \$1,000 banknote. This was said by Coco Ma to have been thrown onto the floor by the client. Coco Ma said that she had taken the banknote as medical fees. PW1's evidence was that she had refused the \$1,000 note but that after she had left the nightclub with PW2 and had gone to a drugstore to buy some morning-after pills, she found a \$1,000 banknote inside her wallet. She did not know how it had got there. Later in the evening, having consulted Wong Ming (PW3), a male friend of hers, PW1 sought medical treatment at the Caritas Medical Centre. She was accompanied by PW3. The doctor there found that her injuries consisted of a recent abrasion on the inner surface of the inner lip of the vulva and two recent shallow split wounds on the back part of the anus. PW1 admitted in her evidence that the story she had told the doctor at the Caritas Medical Centre about how her injuries had been caused by having sex with a boyfriend was untrue. PW1 explained that she had lied in this way because at that time she had not yet decided to make a report to the police and did not want her husband to know that she had been raped. After she left the Caritas Medical Centre, PW1 decided to make a report to the police. At that stage, she handed the \$1,000 note she had found in her wallet to the police. The evidence given by PW2 covered, amongst other things, PW1's possession of the \$1,000 note. PW2 said that at some time after 5 pm on 5 November 2004, she entered the female staff common room of the nightclub and found some of the staff gathering round PW1 who was crying. She asked PW1 what had happened but PW1 did not answer. After the others had left the common room and when she was alone with PW1, PW2 repeated her question. She said that PW1 told her that she had been raped in Room 830 by a customer who had also forced her to have oral sex and anal sex. The two of them then went out of the room intending to leave the nightclub. However, they were

told by others that the customer was making a scene outside and were advised not to leave just yet. There was some talk of making a report to the police but PW1 was hesitant about this and, for this reason, no report was made at that time. Instead, PW1 and PW2 went back into the common room to wait. PW2 described how, some time later, Shan Ma came into the room with a \$1,000 note to give to PW1 and said that this was all the money the client would give. She asked PW1 to keep the money and to forget about the matter. At first PW1 refused to take the money, saying that it was not enough and that she wanted \$5,000 or \$6,000. However, finally PW1 took the \$1,000 and put it in her dress pocket. By that time it was about 8 pm. Later, PW2 accompanied PW1 when she left the nightclub. Before parting with PW1, PW2 advised her to report the matter to the police but PW1 said she had an appointment with someone and had to discuss this with her friend first. Some time after they parted, in the early hours of the next morning, PW1 telephoned PW2 and asked PW2 to meet her at the Sau Mau Ping Police Station. PW2 did so. About eight months later, on 7 July 2005, the applicant was located by police. He made no admission of any kind and stated that he was unable to recall where he had been on 5 November 2004. He denied knowing the Golden Age Nightclub or anything about a rape allegation concerning that nightclub. On 14 July 2005, the applicant was formally arrested after he had been identified by PW1 at an identification parade as the customer she had referred to as Ah Lung. On 15 July 2005, the applicant was further interviewed under caution but again he made no admission and denied that he had ever been to the Golden Age Nightclub. It was an admitted fact at trial that the applicant had, without using a condom, had sexual intercourse with PW1 inside Room 830 at the nightclub and that the semen sample found inside PW1's vagina matched the applicant's DNA. Defence case The applicant did not give evidence and no witnesses were called on his behalf. However, a bar bill for just over \$4,000, issued by the nightclub, was exhibited (Exhibit D-1). This was intended to demonstrate that the applicant had remained on those premises from 2.10 pm on 5 November 2004 until 1.10 am on 6 November 2004. However, the bill did not bear his name and could not be connected directly to him. In cross-examination of PW1, regarding the allegation of rape, it was put to PW1 that she had consented to sexual intercourse with the applicant. As regards the charge of buggery, it was put to PW1 that no such act ever took place. These suggestions were both denied by PW1 as was the suggestion that she had made up these allegations to extort money from the applicant. Grounds of appeal Three grounds of appeal were put forward by Mr Raffell on the applicant's behalf.

- (1) and (2) Complaint of lurking doubt arising from analysis of PW1's credibility The 1st ground was that the conviction was unsafe or unsatisfactory in that, on the evidence as a whole, there existed a lurking doubt about the safety of the conviction. The substantive basis for that general ground was elaborated upon more precisely in the 2nd ground of appeal which Mr Raffell subdivided into six sub-paragraphs. It is therefore, convenient to deal with Grounds 1 and 2 together, focusing on the sub-paragraphs contained in the 2nd ground which, in combination, it was submitted gave rise to a grave cause for concern over PW1's credibility. In sub-paragraphs (i) and (ii), which are closely linked, Mr Raffell emphasised

the obvious flaws in PW1's evidence and the inconsistencies between the accounts given by PW1 and PW2 in relation to the evidence about the \$1,000 banknote. It was submitted that PW1's denial that she had taken the \$1,000 banknote after the alleged sexual misconduct and that she had wanted more money was contradicted by the evidence of PW2 which showed clearly that PW1 had been lying on those matters. In sub-paragraph (iii), emphasis was laid on the fact that PW1 had deliberately lied to the doctor at the Caritas Medical Centre when she told him that her injuries had resulted from having sex with her boyfriend. It was submitted that the explanation given by PW1 for the lies she told to the doctor, namely, that PW1 did not want her husband to know that she had been raped and was afraid that the doctor would make a report to the police, made no sense as PW1 made a report to the police shortly after leaving the Caritas Medical Centre. In sub-paragraph (iv), it was pointed out that whilst PW1 gave evidence about two occurrences which she said had happened inside Room 830 immediately before the applicant raped her, she had made no reference to them in any of her witness statements. The two events were that the applicant appeared to make a telephone call to someone in a way designed to intimidate her and that the applicant had urinated into a container in the room. It was submitted that if these two matters were true, there could be no proper explanation as to why they were not mentioned in any of PW1's witness statements, the last of which was given months after the alleged rape when it could no longer be said that PW1 was so upset or confused to have inadvertently omitted to mention them. In sub-paragraphs (v) and (vi), the point was made that PW1 had behaved in a cool and controlled manner on the night in question which was inconsistent with the allegations she had made. The judge, having earlier dealt with credibility as a general issue and having summarized the evidence given by the various witnesses, directed the jury in these terms: The case against the defendant is based entirely on the evidence of [PW1]. You must be very careful and exercise caution when you consider her evidence and decide whether she is a truthful witness. There was no mention by [PW1] of the following events in her statement to the police. First, the fake phone call by the defendant regarding the matter has not been settled [PW1] told us she told the police about this fake phone call but the police did not record it. That was her evidence when she was confronted by Mr. Raffell. There was no mention that the defendant had peed into the dustbin in Room

830. There was no mention that the mama-san picked up a \$1,000 note from the floor. [PW1's] evidence about not having asked anybody for compensation of any amount was in direct contradiction with PW2's evidence. You recall [PW1] told us she did not know how the \$1,000 note ended up in her wallet or cosmetic bag. [PW2], however, told us she saw [PW1] take the \$1,000 note and put it in her dress. [PW1] was insistent that she never asked for any amount of monetary compensation. Amounts of between \$2,000 and \$6,000 were mentioned by PW2 in her evidence. In fact, PW2 told us [PW1] said a certain amount was not enough \$1,000 was not enough. Also [PW1] admitted lying to the doctor at the Caritas Medical Centre when she was treated of her injuries. She told the doctor that she sustained injuries after having sexual intercourse with her boyfriend. The doctor, of course, did not believe her and suggested she should go and report to the police. Whether you wish to consider that

evidence I have said just now, is a matter for you, but you must be very cautious when you consider [PW1 s] evidence. (Appeal bundle pp. 26-27) Mr Raffell candidly conceded that the judge had given proper directions and an appropriate warning to the jury about the approach to be taken to PW1 s evidence. However, following the principles stated in *R v Cooper* [1969] 1 QB 267, 53 Cr App R 82 and *R v Lake*, 64 Cr App R 172, it was argued that nevertheless a court of appellate jurisdiction should quash the conviction if it felt that a lurking doubt existed. These cases, and one other, are referred to in Archbold 2007 (at paragraphs 7 - 47 and 7

- 48) as follows: In *R. v. Cooper* [1969] 1 Q.B. 267, 53 Cr.App.R. 82, Widgery L.J., delivering the judgment of the Court of Appeal, said that it was: a case in which every issue was before the jury and in which the jury was properly instructed, and, accordingly, a case in which this Court will be very reluctant indeed to intervene. It has been said over and over again throughout the years that this Court must recognise the advantage which a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing-up was impeccable, this Court should not lightly interfere. (W)e are charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe . That means that in cases of this kind the Court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such: it is a reaction which can be produced by the general feel of the case as the Court experiences it (at pp. 271, 85-86). See also *R. v. Pattinson and Laws*, 58 Cr.App.R. 417, CA, and *R. v. Lake*, 64 Cr.App.R. 172, in which Lord Widgery C.J. gave the Court of Appeal s judgment: In this Court the first matter we are concerned with is to see whether the rules have been obeyed and to see whether the trial judge has followed the rules of practice appropriate to the protection of the defence. Once you have decided that the rules of procedure were followed and there remains the only residual question of whether there is a lurking doubt in the mind of the Court, such doubts are resolved not, as I say by rules of thumb and not by arithmetic, but they are largely by the experience of the judges concerned and the feel which the case has for them (at pp. 175-177). The test applied by the Court of Appeal is different to that applied by the trial judge on a submission of no case : see *R. v. Arobieke* [1988] Crim. L.R. 314, CA. We may add that this court has also considered this topic in a number of appeals (see, for example, *HKSAR v Hung Wai-tak* [2000] 4 HKC 641). On Grounds 1 and 2 we were invited to take the view that a lurking doubt existed as regards the safety of the applicant s convictions having regard to the fact that they were based entirely upon PW1 s evidence when her credibility had been shown to be seriously flawed in the various ways illustrated in argument. In our opinion, however, these were all matters about which the jury was well aware. Not only had Mr Raffell, who also represented the applicant at trial, thoroughly gone into those matters in cross-examination, the jury was also properly reminded about them. Moreover, the judge had also warned the jury to approach the evidence of PW1 with caution when deciding whether she was a truthful witness. Having

had the advantage of reading the transcripts of PW1 and PW2 s evidence, and after careful examination of the judge s summing up, we are satisfied that this is not a case which falls into a lurking doubt category. The issue of credibility was fully and fairly canvassed and the jury had every opportunity of making its assessment of PW1 s evidence in the light of the discrepancies which were highlighted. Accordingly, these grounds fail.

- (3) Recklessness The complaint under the 3rd ground of appeal was that the jury were misdirected by the judge on the issue of recklessness. It was submitted that he had used the classic direction on recklessness instead of following the decision in *R v G & Anor* [2004] 1 AC 1034 as to the meaning of recklessness which had been followed in Hong Kong by the Court of Final Appeal in *HKSAR v Sin Kam Wah & Anor* [2005] 8 HKCFAR 192. The judge directed the jury as to the meaning of recklessness in this way: What is the meaning of reckless ? The defendant was reckless as to whether [PW1] consented to sexual intercourse if you are sure that he did not know and did not care whether she was consenting or not and carried on regardless. In other words, that his state of mind - that is, the defendant's state of mind - was that he could not have cared less. (Appeal bundle p. 7) Subsections (3) and (4) of section 118 of the Crimes Ordinance, Cap. 200 are relevant. They provide that:

- (3) A man commits rape if-

- (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and
- (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it.

- (4) It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed. Subsections (3) and (4) of section 118 are based on subsections (1) and (2) of section 1 of the Sexual Offences (Amendment) Act 1976 (the 1976 Act). The 1976 Act was enacted following *DPP v Morgan* [1976] AC 182; [1975] 61 Cr App R 136. As Bristow J explained, when delivering the judgment of the English Court of Appeal in *R v Satnam and Kewal* 78 Cr App R 149 at 153, the purpose of subsections (1) and (2) of section 1 of the 1976 Act was to clarify the law governing intention in rape cases. Section 1(1) was enacted to avoid possible doubt that recklessness was not a sufficient basis for a conviction of rape, although in *Morgan* at 215 and 151 of the respective reports (and cited by Bristow J at 153 in *Satnam and Kewal* s case) Lord Hailsham had said: I am content to rest my view of the instant case on the crime of rape by saying that it is my opinion that the prohibited act is and always has been intercourse without consent of the victim and the mental element is and always has been the intention to commit that act, or the equivalent intention of having intercourse willy-nilly not caring whether the victim consents or no. (Emphasis added) Section 1(2) was enacted so that the jury would not be told that a belief, however unreasonable, that the woman

consented entitled the accused to acquittal. However, in *Commissioner of Police of the Metropolis v Caldwell* [1982] AC 341 which was concerned with charges of arson under section 1(1) of the Criminal Damage Act, 1971, the House of Lords decided by a majority that the appropriate test to be applied in deciding whether the accused might be held to have been reckless was purely objective. (See also the judgment of Goff LJ in *Elliott v C* [1983] 1 WLR 939 at 949C.) The House of Lords departed from *Caldwell* in *R v G & Anor* [2004] 1 AC 1034. *R v G* was concerned with two boys, aged 11 and 12 respectively, who were charged with arson, contrary to section 1(1) of the Criminal Damage Act, 1971, in that they were alleged to have caused damage to property, being reckless as to whether such property would be destroyed or damaged. In the early hours of the morning, the boys entered the backyard of a shop where they found some bundles of newspapers. They set fire to some of the newspapers, threw them under a large plastic dustbin and left the yard without putting out the burning papers. The dustbin caught fire and the fire spread to the shop and adjoining buildings resulting in serious damage. At the trial, the defendants case was that they expected the burning newspapers to extinguish themselves on the concrete floor of the yard. It was accepted that neither of the defendants appreciated that there was any risk of the fire spreading. In accordance with *Caldwell*, the trial judge in *R v G* directed the jury that in deciding whether the defendants had been reckless as to whether the property would be damaged or destroyed, the test to be applied was whether they had done an act which in fact created an obvious risk that property would be destroyed or damaged, and whether, when they did that act, they had either not given any thought to the possibility of there being such a risk or had recognized that there was some risk involved and had nevertheless gone on to take it; and that the question whether there was an obvious risk of property being destroyed or damaged was to be assessed by reference to the reasonable man and not by reference to a person endowed with the defendants characteristics. The judge also told the jury that they could make no allowance for the defendants youth, their lack of maturity or any inability they might have to assess the situation. The House of Lords was unanimous in its decision to depart from *Caldwell*. Lord Bingham of Cornhill said at paragraph 33: It is neither moral nor just to convict the defendant (least of all a child) on the strength of what someone else would have apprehended if the defendant himself had no such apprehension. The certified question was answered (at paragraph 41) as follows: A person acts recklessly within the meaning of section 1 of the Criminal Damage Act 1971 with respect to -

- (i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk. In *Sin Kam-wah* (above), the Court of Final Appeal had occasion to consider the consequences of *R v G and Anor* for Hong Kong. Sir Anthony Mason NPJ said, with the concurrence of the other members of the court: 41. it is desirable to consider the consequences for the law of Hong Kong of the decision in *R v G & Another* [2004] 1 AC 1034. Hitherto the Courts of Hong Kong have followed *R v Caldwell* [1982] AC 341. In *R v Chau Ming Cheong* [1983] HKC 68, the Court of Appeal followed *R v Caldwell* and *R v Lawrence* [1982] AC 510, taking the principle to be that stated by Lord Diplock in *R v Lawrence* at

p.526EG as summarized in Archbold: Criminal Pleading, Evidence and Practice (41st ed., 1982) p.1008 paras.17-25 as follows: Recklessness on the part of the doer of an act presupposes that there is something in the circumstances that would have drawn the attention of an ordinary prudent individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section that created the offence was intended to prevent and that the risk of those harmful consequences occurring was not so slight that an ordinary prudent individual would feel justified in treating them as negligible. It is only when this is so that the doer of the act is acting recklessly if, before doing the act, he either fails to give any thought to the possibility of there being such risk or, having recognized that there was such a risk, he nevertheless goes on to do it. The same approach was taken in *R v Dung Shue Wah* [1983] 2 HKC 30 where the Court of Appeal held that the word reckless in s.118(3)(a) of the Crimes Ordinance bore its commonsense meaning as stated in *R v Caldwell* [1982] AC 341 and *R v Lawrence* [1982] AC 510. The two decisions of the Court of Appeal reflect the current understanding of the law on recklessness in Hong Kong, this understanding being based on *R v Caldwell* and *R v Lawrence*. 44. Henceforth juries should be directed in terms of the subjective interpretation of recklessness upheld in *R v G & Another* [2004] 1 AC 1034. So juries should be instructed that, in order to convict for an offence under s.118(3)(a) of the Crimes Ordinance, it has to be shown that the defendant's state of mind was culpable in that he acted recklessly in respect of a circumstance if he was aware of a risk which did or would exist, or in respect of a result if he was aware of a risk that it would occur, and it was, in the circumstances known to him, unreasonable to take the risk. Conversely, a defendant could not be regarded as culpable so as to be convicted of the offence if, due to his age or personal characteristics, he genuinely did not appreciate or foresee the risks involved in his actions. Thus, *Chau Ming-cheong* and *Dung Shue-wah* were overruled because in those cases the objective test regarding recklessness had been adopted, in the case of *Chau Ming-cheong* for manslaughter and in the case of *Dung Shue-wah* for rape. However, the directions given by the judge on recklessness in the present case were not based on any objective test. Indeed, they were consistent with a long line of English decisions on recklessness in rape. The English Court of Appeal in *R v Satnam and Kewal* decided (at 154) that any direction on recklessness in relation to rape should be made without regard to *R v Caldwell* or *R v Lawrence*: which were concerned with recklessness in a different context and under a different statute. The word reckless in relation to rape involves a different concept to its use in relation to malicious damage or, indeed, in relation to offences against the person. In the latter cases the foreseeability, or possible foreseeability, is as to the consequences of the criminal act. In the case of rape the foreseeability is as to the state of mind of the victim. Bristow J said earlier in the judgment (at 152): We turn now to consider the second ground, i.e. the direction as to recklessness. Strictly it may be said that this point has already been decided in *Bashir* (1983) 77 Cr. App. R. 59, 62 where Watkins L.J. said: As recently as the fifth of this month, Lord Lane C.J. in *Thomas* (supra) restated the definition of reckless as applied to the offence of rape. He said (1983) 77 Cr. App. R. 63, 66: A man is reckless if either he was indifferent and gave no thought to the possibility that the woman might not be consenting, in circumstances

where, if any thought had been given to the matter, it would have been obvious that there was a risk she was not, or, he was aware of the possibility that she might not be consenting but nevertheless persisted, regardless of whether she consented or not. He was in almost exact form repeating the definition of reckless in relation to rape which he had provided in the case of Pigg (1982) 74 Cr. App. R. 352. It will be noted that that definition allows of none other than a subjective approach to the state of mind of a person of whom it is said he acted recklessly in committing a crime. It was incumbent therefore on the trial judge in the present case to ensure that he provided the jury with this kind of definition of the word reckless (Emphasis added) It is important to emphasise that the test adopted by the English Court of Appeal in Satnam and Kewal's case for recklessness in rape was subjective and not objective. The conclusion in Satnam and Kewal (at 155) was that if the jury: came to the conclusion that [the defendant] could not care less whether she wanted to or not, but pressed on regardless, then he would have been reckless and could not have believed that she wanted to, and they would find him guilty of reckless rape. Thus, Dung Shue-wah, insofar as it adopted the objective approach favoured by Caldwell, was inconsistent with Satnam and Kewal. It does not matter that the decision in Satnam and Kewal, adopting the phraseology of Goff LJ in Elliott v C at 950G, constituted a gloss upon the definition of recklessness proposed by Lord Diplock in R v Caldwell. As the learned editors of Archbold 2003 expressed it (at paragraphs 17 - 58): In R v Satnam and Kewal, 78 Cr.App.R. 149, CA, earlier confusion was resolved If the jury are sure that he could not have cared less whether she wanted to have sexual intercourse or not, but pressed on regardless, then he would have been reckless and could not have believed that she wanted to. The direction in Satnam and Kewal's case remained valid in England until the repeal of the 1976 Act by the Sexual Offences Act 2003 which replaced recklessness in section 4(1)(d) with the formula: A does not reasonably believe that B consents. In R v G, which was decided on 16 October 2003 before the commencement, on 1 May 2004, of the Sexual Offences Act 2003, Lord Bingham had made clear that he was not addressing the meaning of reckless in any other statutory or common law context. In Archbold Hong Kong 2004, at paragraph 21 - 26, it is stated: As to recklessness in rape and attempted rape, see above para. 16-46. The word reckless does not have a special legal meaning in the context of rape: R v Dung Shue Wah [1983] 2 HKC 30, CA. At paragraph 16 46 in that edition of Archbold, with reference to Satnam and Kewal, the practical definition of recklessness in sexual cases is in these terms: if the jury were sure that the defendant had been indifferent to the feelings and wishes of the victim, aptly described colloquially as couldn't care less then that in law was reckless Lord Edmund-Davies, in his dissenting judgment in Caldwell said at 358D: But a defendant's admission that he closed his mind to a particular risk could prove fatal, for, A person cannot, in any intelligible meaning of the words, close his mind to a risk unless he first realises that there is a risk; and if he realises that there is a risk, that is the end of the matter: see Glanville Williams, Textbook of Criminal Law (1978), p. 79. In R v G, Lord Steyn, after saying (at paragraph 57) that Experience suggests that in Caldwell the law took a wrong turn, said: 58 That brings me to the question whether the subjective interpretation of recklessness might allow wrongdoers who ought to be convicted of serious crime to escape conviction.

Experience before *R v Caldwell* did not warrant such a conclusion. In any event, as Lord Edmund-Davies explained, if a defendant closes his mind to a risk he must realise that there is a risk and, on the evidence, that will usually be decisive: p 358D. In the present case, the judge used the expression *couldn't care less*, which was the expression used in *Satnam* and *Kewal*. In our view, it cannot be said of a person that he could not have cared less about consent unless he had at first realised that there was a risk of no consent. We return to *Sin Kam-wah* and in particular to Sir Anthony Mason's judgment at paragraphs 41 and 44. The overruling of *Chau Ming-cheong* and *Dung Shue-wah* has removed any difficulty about the apparent conflict between them and *Satnam* and *Kewal*, although, in practice, the *Satnam* and *Kewal* approach has been adopted here. We do not consider that *Sin Kam-wah* has cast any doubt on the correctness of *Satnam* and *Kewal* which is not inconsistent with *R v G*. *Sin Kam-wah* has highlighted the importance, in a case where because of the defendant's age or personal characteristics he might not have appreciated or foreseen the risk of the absence of consent, for the jury to be given directions that they have to be satisfied that the defendant, in the circumstances known to him, knew that it was unreasonable to take the risk. However, in the absence of such circumstances, we consider a direction based on *Satnam* and *Kewal* to be sufficient. On the facts of the case presently before us, it was, in our opinion, unnecessary for the judge to have directed the jury about recklessness. On the evidence of PW1, if the jury accepted her account, it was a clear case of non-consent on her part. Even if the evidence of PW2 as regards the \$1,000 note was preferred to PW1's account and also PW2's evidence as to PW1's request for more money, it has to be remembered that such evidence from PW2 as to the timing of these occurrences was that they occurred at about 8 pm, long after what had happened inside Room 830. Moreover, the \$1,000 note was brought to PW1 by one of the *mama-sans* of the nightclub and PW1 was told by Coco Ma that she had taken it from the floor where the client had thrown it as medical fees. It was only then, according to PW2, that PW1 had said it was not enough. There was never any suggestion that PW1 had discussed payment with the applicant at any time either before they entered Room 830 or when they were inside that room. It was entirely for the jury to decide whether they accepted or rejected PW1's testimony that what had happened inside Room 830 was done without her consent. By their verdicts, it is clear that the jury must have accepted her evidence. As we have already indicated, we consider that no direction on recklessness was strictly necessary but, in the circumstances of this case, the fact that the judge gave such a direction did not matter. As Mr Raffell was able to tell us from having represented the applicant at trial, when the judge indicated that he would be summing up recklessness to the jury he made no objection to this. It was, as Mr Raffell suggested, in the nature of establishments such as the one visited by the applicant that sexual services might be provided by some of the hostesses. Therefore, he considered, a verdict based upon recklessness might not be entirely without foundation and he could see no proper reason to attempt to persuade the judge not to deal with recklessness in the summing up. Furthermore, as we have said, we can find no fault with the actual directions given to the jury on this topic.

Conclusion

We shall give leave on the 3rd ground but, treating the hearing as the appeal, the appeal is dismissed. (M. Stuart-Moore) Vice-President (Robert Tang) Vice-President (A.R. Suffiad) Judge of the Court of First Instance Miss Mary Sin, SADPP, of the Department of Justice, for the Respondent. Mr Andrew Raffell, instructed by Messrs Johnny K.K. Leung & Co., assigned by Director of Legal Aid, for the Applicant. PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk 1udk O P Q R S T U V &`#\$ (#p# (#p# %0 %0 %0 %0 %0! %0" %0# %0\$ %0% %0& %0' %0(%0) %0* %0+ %0, %0- %0. %0/ %00 %01 %02 %03 %04 %05 %06 %07 %08 %09 %0: %0; %0< %0= %0> %0? %0@ %0A wVV5. wVV5 XxfW & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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