

THE DECISION



PAUL BIRCH

“We’ve got to make a decision,” said No. 1. “Did she or didn’t she?”

“Did she what?” asked No. 7.

“Consent.”

“She said she didn’t,” said No. 2.

“He said she did,” said No. 3.

No. 2 pushed back her mannish hair with an impatient gesture. “As if we believed *him*!”

No. 3 shrugged his shoulders. “Well, why not? He seems honest enough.”

“He’s a *man*, that’s why!”

The foreman of the jury sighed. It was going to be a long night. It had already been a long day, from the formalities of swearing in and the reading of the indictment to the judge’s far-from-helpful summing up. And after that, a decision. Such a simple decision, you’d have thought. In fact, that’s just what he *had* thought. Such a tiny little decision — half an hour at most. He’d reckoned without the rest of the jury. It had taken almost that long to decide whether to have tea or coffee, and whether they should ask for chocolate biscuits.

“Now look,” he said, with forced patience. “Let’s go over what we know and see if we can’t sort it all out calmly and rationally.”

“He raped her,” said No. 2. “He forced her to have sex.”

The foreman groaned. He did so hate these feminists. Especially No. 2. She seemed incapable of getting the simplest thing into whatever it was she was using instead

of a brain. “We don’t know that. All we know is that they had sex. They both admit that.”

“All sex is rape.” No. 2 wasn’t letting go.

Bloody hell! The foreman bit off his reply — the middle-aged housewife at number 10 was gearing up to speak.

“Oh, I ... really ... I don’t think ... my husband ...”

“That’s right, you don’t think!” No. 2 still had the bit between her teeth. “Don’t you know you’ve been brain-washed? You’re exploited. Look at you. A mouse. A miserable mouse!”

“No, really, I’m quite happy, really ...”

“Happy ...!”

The men raised eyes to heaven and let them get on with it. The foreman wondered, not for the first time, why sex was ever supposed to have advantages over vegetative propagation.

The arrival of the tea *and* coffee put an end to it while twelve good men and true (if only it *had* been twelve good *men*, he thought) sorted out who got which and then worked out how to pass the sugar and then discovered that there were only twenty-three chocolate biscuits — and then almost caused a mistrial by wandering out into the corridor to look for the missing one.

“We know they had sex,” he said, carefully not looking at No. 2, “because they both say so, but we don’t know if it was consentingly ... consensual ... whatever the word is.”

“Consensual,” said No. 4, tapping his pipe on the edge of his chair.

Libertarian Fictions No. 2

ISSN 1361-7761 ISBN 1 85637 396 7

An occasional publication of the Libertarian Alliance, 25 Chapter Chambers, Esterbrooke Street, London SW1P 4NN
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FOR LIFE, LIBERTY AND PROPERTY

“Consensual? Are you sure?”

“Quite sure. Consensual sex.”

“Sounds more like both feeling the same thing.” He supposed the man knew what he was talking about — No. 4 was some sort of teacher.

“Or consensual sexual intercourse, if you prefer.”

“I’d prefer a good fuck,” muttered No. 5.

Nos. 6 to 8 guffawed, and No. 2 bridled.

“Right now I’d prefer a good sleep,” the foreman put in hastily to avert an explosion. “So, she might have consented, or she might not.”

“She didn’t!” That was No. 2 of course.

“She might have done.” That was No. 3.

“... vowing she would ne’er consent, consented ...” No. 4 seemed to have gone off into a world of his own.

“Well, I do realise that young people nowadays ...” This was the housewife. “Well, I mean, even so, they didn’t even know each other. They’d hardly ...”

“Oh, wouldn’t they? You should see my students. At it like rabbits sometimes.”

The foreman found himself considering the teacher’s pipe in the nature of a Freudian whatnot. Just in time he stopped himself querying the implied promiscuity of rabbits. “I think we have to accept that ... er ... one-night stands ... are far from unusual in today’s world. Even if they’d only just met —”

“They had,” said No. 3. “It’s in the evidence. They met at that night club.”

“All right. They still might have decided to ... do it.”

“Fuck.”

“What?”

“Fuck!” said No. 5. “It’s called fucking.”

“Or consensual sexual intercourse,” added No. 4.

“Aargh!” He felt like banging his head on the table. “It doesn’t *matter* what it’s called. You can call it New Age basketball for all I care. Or hoggy-woggy-willy-woo! Whatever it’s called, they might have done it.”

“They did do it,” said No. 3.

“She seems such a nice girl,” said No. 10. “It must be terrible for her, standing up in front of all those people and talking about ... you know. She couldn’t do that unless it really happened. No woman could. She’d be too ashamed.”

“Bah, don’t talk wet.” For once No. 2 was making sense. “If she hated him enough she could.”

“But why should she hate him?” No. 4 looked puzzled. “She’d only just met him.”

“So he wasn’t much cop in bed and she got pissed off,” said No. 5, “Or *she* wasn’t much cop and he told her so.”

“... hell hath no fury, like a woman scorned ...”

“Or maybe she just hates men,” suggested No. 3.

“Possible,” said the foreman. He tried not to look at No. 2. “There are such women, certainly.”

“... a misquotation actually ... it should read, ‘Heaven has no rage, like love to hatred turned, Nor hell a fury, like a woman scorned’ ...”

“Magna Carta says you can’t arrest anyone on a woman’s say-so for the death of anybody apart from her husband,” put in No. 7. “Me and the wife were down in that Runnymede place last Saturday. I noticed that bit particularly, what with our Ethel. Chapter 54, it was. Or 55. Or maybe 45. One of them, anyhow.”

They looked at him. “What’s all that got to do with it?”

“Well, er ...” No. 7 frowned. “Well, she’s a woman, isn’t she? And he’s not her husband actually, is he? I mean.”

The foreman rubbed his forehead with both hands. This was impossible. “And nobody’s dead either! Do let’s stick to the issue!”

No. 4 bit the stem of his unlit pipe. “He does have a point, you know. We need to be very sceptical of this woman’s accusation.”

“Sexist pig,” exploded No. 2. “Just like a man!”

The foreman sighed. He seemed to be spending half his time sighing. These people! Couldn’t they ever keep from going off at a tangent?

“All right, all right, I admit it.” No. 4’s pipe clattered across the varnished table, the foreman’s glazed eyes following it absently. “We can be sceptical of the man’s testimony too. All the same, women are undeniably more likely to make false and malicious accusations.”

“Says who?”

“Says Magna Carta!” insisted No. 7. He nodded vigorously. “That’s why it’s there. The bit about ignoring them, I mean.”

“Well, yes, in a manner of speaking.” No. 4 seemed disposed to lecture. “The phenomenon has indeed been recognised from antiquity, and probably owes its origin to the well-known physical weakness of the human female, as compared to the male. There are undoubtedly far more accusations of rape than actual occurrences, though naturally only a minority proceed to trial.”

“Who’s Ethel?” No. 11 had been silent for so long they all stared, as if wondering where he’d suddenly appeared from. No one answered his question.

“So we’re all agreed we’ve got to be careful,” said the foreman, desperate to move things along. What a wonderful institution the jury would be, if it weren’t for the people on it. You could say much the same for the whole flippin’ world.

“I still say she’s too nice a girl to do anything like that,” said No. 10. “You can tell just by looking at her.”

“Oh, bugger that!” No. 5 was scornful. “She’s nothing but a lying bitch.”

No. 10 looked stubborn. “Well, I believe her, anyway, and you won’t change my mind, whatever you say.”

“Up straight!” No. 2 thumped the table, making the empty cups rattle on their saucers. “Us girls must stick together.”

The other women on the jury didn’t agree. “I don’t trust her,” said No. 9.

“She reminds my of my husband’s cousin Emily,” said No. 12.

The foreman buried his face in his hands. Was there *any* way of getting these argumentative numbskulls to agree a verdict, or would they all be there till kingdom come?

* * *

The court was hushed, expectant, like weary travellers on Platform Five watching their train pulling into Crewe in the early hours of the morning, when even the naked bulbs in the waiting room seem to be nodding off and the fluorescent lights in the bookstall only make the emptiness bleaker. Legally, it was still the previous day, for the clocks had been stopped at one minute to midnight three hours ago. Biologically, it was a time in limbo, adrift in an out-of-body-like unreality.

“Members of the jury,” intoned the judge, “have you reached a verdict?”

“We have, Your Honour.”

Surely the whole court could hear his relief, thought the foreman. Surely they must share it! Now, just the reading of the verdict and they could all go home. To sleep, perchance not to dream. Bed, bed, bed, thrice blessed bed!

“In the matter of an alleged rape by one Joseph Naylor of Croxstead Green, Littlehamforth, against one Elizabeth Tritte of the same parish, and in the charge of actual sexual assault against the first-named, and in the counter-charge of false and malicious accusation against the second-named, we find the evidence insufficient to convict. We hereby declare the case against both defendants *not proven*.”

The foreman smiled. A decision at last. A decision — to make no decision.

EDITORIAL NOTE

by Libertarian Alliance Editorial Director
Brian Micklethwait

This issue of Libertarian Fictions involves a compromise, which is that Paul Birch has attached to his story a quite long Afterword. Ideally, I would say, such explanations of meaning work best when seamlessly embedded in the story itself. However, the worst possible arrangement is for such explanations to be unseamlessly embedded in the story, and Birch at least avoids that horror. And when he wrote the story, of course, he had no idea that I’d want it for the LA. Future creators of Libertarian Fictions should not get the idea that explanatory postscripts are necessary, or even welcome. Ideally, as I say, the story should explain itself.

AFTERWORD

The Decision is a short story I wrote for a competition — which incidentally it won — that may nevertheless contain some points of interest to libertarians. In it a jury of twelve men and women have to make a difficult decision in a rape case, in what the careful reader will perceive is not *quite* present-day England, but is only a few small hops sideways in time. They end up deciding to make no decision at all; that is, they decide that the evidence is simply insufficient for them to decide what actually happened; they render a verdict vis-à-vis *both* parties of *not proven*. This isn’t just chickening out; it’s the just decision.

One of the weak points of our system of justice is its reliance upon only two verdicts: *guilty* and *not guilty*. Implicit in this is the belief or assumption that fair judgement can always be rendered, that the court can always determine the truth. But of course it can’t. Very often there isn’t anything like enough evidence one way or the other; or there’s lots of conflicting evidence but we can only guess which set is the more reliable. Courts should be like scientists, not afraid to say we don’t know! and ever ready to admit that the data are inconclusive. Even the wisdom of a Solomon is not infallible (he’d have looked a right idiot if both women had agreed to chopping the baby in half).

The principle *innocent until proven guilty* is an attempt to get around this problem, but it’s all too easily overlooked, perverted or forgotten — and anyway it’s a fudge. Most acquitted defendants are actually guilty — we all know this. We recognise it, in ordinary conversation, when instead of saying they were found not guilty, we say they got off. Once upon a time a Scottish jury, with more nouse than the average, realised this and rendered a principled verdict of *not proven*. They didn’t know whether he’d done it or not — and they said so. To this day the *not proven* verdict is accepted in Scottish courts, though it is treated as identical in law to a verdict of not guilty.

It is clear that for most purposes *not proven* must have the same effect in law as *not guilty*. Certainly it must not attract any judicial penalty. Nevertheless, its regular use would have several beneficial aspects. It would underline the inevitable fallibility of the courts, without bringing the law into disrepute by promoting standards of jurisprudential perfection that cannot be maintained. It would encourage the impartial treatment of evidence nowadays more common in science than in the courts. And it would permit the unequivocal exoneration of truly innocent defendants, who today can seldom entirely live down the calumny of a false indictment: There’s no smoke without fire! they say.

However, the lack of a meaningful *not proven* verdict is today also instrumental in the rise of a new and gross injustice in the treatment of cases of rape, sexual harassment, marital violence, child abuse and the like. Increasingly, these are being tried as if they were mere civil disputes; that is, as if all that counts is whether the jury is more inclined to believe the accuser or the accused. Increasingly, defendants are being found guilty *without*

proof, that is, without being proved guilty beyond reasonable doubt. Lack of hard evidence is being ignored.

Part of the problem is that juries are not being instructed that *accusation is not evidence*. Indeed, the media are continually telling them exactly the opposite. Lawyers and judges too have conveniently forgotten it. To point out that a woman who cries rape may be lying is politically incorrect. To remark that not all children are angels is to call down wrath from on high. To imply that a feminist complainant may be motivated by malice is to risk vehement excoriation (oh, look it up!).

As a matter of course, all such cases should be presented in the form of charge and counter-charge; that is, not only should the accused be indicted for the alleged offence, but the accuser should also automatically face an indictment of false and malicious accusation. Jeopardy should be a two way street. That is how the matter was treated in my story. Unfortunately, at present it is possible to bring such an accusation with little or no risk. Occasionally, a frivolous complaint may invite a charge of wasting police time, but this is a minor matter; a charge of perjury, which would be more serious, is seldom brought.

We need to understand the gravity of false accusation. It is not venial or trivial. It is a crime equal in enormity with the offence alleged to have been committed. Look at it this way. The sentence for rape (or any other crime) is in some sense *equivalent* to the crime itself. So the wrongful imposition of such a sentence is also equivalent to that crime. If falsely accusing someone of a crime puts him in danger of a ten year prison sentence, say, then upon conviction the false accuser should also face ten years in prison (assuming similar probabilities of conviction).

In effect, malicious accusation is merely a variant upon the basic offence, rather like being an accessory before, during or after the fact, aiding and abetting the commission of the offence, conspiring to commit the offence, and inciting to commit the offence. We can even imagine second and third order variants; for example, being an accessory to a false accusation of incitement ...

Where we have charge and counter-charge in this way there are nine possible verdicts, of which three are easily understood (*A* guilty, *B* not guilty; *A* not guilty, *B* guilty; *A* & *B* not proven); the remaining six may be appropriate in exceptional circumstances (e.g. *A* & *B* not guilty — it was all a misunderstanding).

Suppose that Abishag (that's a real name!) accuses Bartholomew of rape. It's her word against his. Case not proven. Nobody goes to gaol, but Abishag has to pay costs for both of them (serves her right for bringing a case without evidence). She brings incontrovertible proof of sexual congress. Still no good; he says, sure we had sex but she agreed to it. She supplies proof it was rape — say, the tape from a security camera. Bartholomew is guilty. He pays costs and goes to gaol. Abishag is cleared and goes free. Aha! but what if Bartholomew can prove she *faked* the tape? Now it's the other way round. Abishag is adjudged guilty, pays costs and goes to gaol. He goes free.

With *restitutional* justice we can do rather better. Instead of gaol, the penalty is a fine, so the victims of both rape *and* false accusation can now be compensated. Let's assume that rape has a monetary equivalent of say £100,000 (in reality, there is rape of varying degrees of severity). If Abishag is not guilty she gets £100,000 plus costs. If Bartholomew is not guilty *he* gets £100,000 plus costs (remember, he's just as much a potential victim as his accuser). If the case is not proven, *both* of them get £100,000 plus costs. This money comes firstly from the courts own coffers, but in the long run it must be extracted from convicted defendants. If either Abishag or Bartholomew is found guilty the fine is the £100,000 (plus costs) multiplied by the improbability of conviction, though if they plead guilty up front they only have to pay the straight £100,000 (plus costs).

That may be a little difficult to grasp. The point is that rapists will on average have to pay £100,000 per rape; and false accusers will *on average* have to pay £100,000 per false accusation. In other words, you need have no fear appealing to the courts if you're honest, even if it proves impossible to determine the actual truth in your particular case. It all comes right in the end.

How far we are from such justice today! The perversion of the legal system by political power is actually encouraging the growth of false accusation; the accused are stripped of their rights, while malicious accusers are not penalised but protected. If only more juries had the honesty and courage of the jury in my story — to strike a blow for justice and for freedom!

