[1995] QCA 328

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

C.A. No. 124 of 1995
C.A. No. 223 of 1995

Brisbane

[R. v. S]

THE QUEEN

v.

S
(Appellant/Applicant)

Fitzgerald P.
McPherson J.A.
Helman J.

Judgment delivered 4/08/95

Joint reasons for judgment by McPherson J.A. and Helman J. Separate concurring reasons by Fitzgerald P.

APPEAL AGAINST CONVICTION DISMISSED AND APPLICATIONS FOR LEAVE TO APPEAL AGAINST SENTENCE REFUSED.

CATCHWORDS **CRIMINAL LAW - INDECENT DEALING - Whether act can amount to dealing if it did not constitute an assault - Whether act can constitute an assault if it was accompanied by willingness on the part of the complainant to perform it - Section 216 Criminal Code.**

Counsel: S. Hamlyn-Harris for the appellant
L. Clare for the respondent

Solicitors: Legal Aid Office for the appellant
Queensland Director of Public Prosecutions for the respondent

Hearing Date: 25 July 1995

REASONS FOR JUDGMENT - McPHERSON J.A. & HELMAN J.

Judgment delivered the 4th day of August 1995

In appeal no. 124 of 1995 the appellant was convicted at his trial in the District Court of seven counts of indecently dealing with the complainant D. The offences were committed on different dates between January 1977 and February 1979 at a time when the complainant was between about 6 and 8 years of age.

The appeal is directed only to the convictions on counts 4, 5 and 7. For present purposes it sufficiently describes them to say that the charge on each of counts 4 and 5 was that D had at the appellant's request sucked his penis; and on count 7 that she had at his request rubbed his erect penis.

The notice of appeal in its original form contained the standard complaints that the appellant's legal representatives at the trial had not followed his instructions and that the verdicts were unsafe and unsatisfactory. However, at the hearing those grounds were on instructions withdrawn, and the only matter pursued before us was that the acts of the appellant alleged and proved in relation to each of counts 4, 5 and 7 were incapable in law of constituting the offence of indecent dealing. This was the subject of ground 4 which the appellant sought leave to add.

Essentially, the argument in relation to each count is that there was no "dealing" with the complainant girl. Reliance was placed on *R. v. Cook* [1927] St.R.Qd. 348 and *R. v. Bromby* [1952] Q.W.N. 32. In the first of these two cases Macrossan S.P.J. is reported as having directed a jury in Toowoomba as follows:

> "Dealing with a girl indecently means touching her, putting hands on her, or being in a position to do so, threatening to do it in an indecent manner. 'Dealing' is the same as an act of assault. Assault does not necessarily involve the actual touching. But if one touches a person against his will that would be an assault, possibly an assault of a technical nature, and the fact that a girl consents makes it none the less an assault under this section, an assault in the sense of indecently dealing with her."

In *R. v. Bromby* the directions given by Philp J. included the following:

> "Indecent dealing means an act which if done without consent would be an assault and which is indecent."

Neither direction is sufficient to dispose of the question raised on this appeal. Section 216 of the Criminal Code, in the form in which it stood at the time of the offences charged against the appellant, provided:

> "**216. Indecent treatment of girls under [sixteen].** Any person who unlawfully and indecently deals with a girl under the age of [sixteen] years is guilty of a misdemeanour, and is liable to imprisonment with hard labour for five years.
>
> If the girl is under the age of [fourteen] years he is liable to imprisonment with hard labour for [seven years] with or without whipping.
>
> It is a defence to a charge of the offence defined in this section to prove that the accused person believed, on reasonable grounds, that the girl was of or above the age of [sixteen] years.
>
> * * * * *
>
> The term 'deal with' includes doing any act, which, if done without consent, would constitute an assault as hereinafter defined."

It was submitted that the effect of this provision, read in the light of the two cases referred to, was that an act could not amount to a dealing within s.216 unless it constituted an assault; and that, on the authority of the English decision in *Fairclough v. Whipp* [1951] 2 All E.R. 644, followed in *D.P.P. v. Rogers* [1953] 1 W.L.R. 1017; and *R. v. Sutton* [1977] 3 All E.R. 476, an act did not constitute an assault if it followed an invitation from the complainant to carry it out, or at least if it was accompanied by willingness on the complainant's part to perform it. Strictly speaking, however, at common law, an assault was a gesture that aroused on the part of the victim an apprehension of imminent violence; or, put more shortly, a "hostile act". If physical contact or touching occurred, it constituted a battery. *Kenny's Outlines of Criminal Law* §164 (16th ed.), at 165-166. In Queensland these two concepts have been amalgamated in s.245 in a single act called "assault".

Section 216, which is headed "Indecent treatment of girls ...", does not define the term "dealing" as an assault, but provides that it includes doing any act which would constitute an

assault, as defined, if done without consent. It is a provision which appeared in s.216 of the Code as originally enacted, although it was not in cl.223 of the draft Bill. The expressions "deal" and "deal with", which in this context have the meaning "to have to do with", "to act towards" or "to treat (in some specified way)" (*Oxford English Dictionary*), are plainly capable of a wide application, which is not confined to, even if it includes, an assault as defined.

Quite apart from that consideration, s.245 of the Code provides, so far as material here, that:

> "A person who strikes, touches, or moves, or otherwise applies force of any kind to, the person of another, either directly or indirectly, without his consent, or with his consent if the consent is obtained by fraud ... is said to assault that other person, and the act is called an 'assault'."

In defining the word "assault", s.245 expressly includes touching a person either directly or indirectly; that is to say, a battery at common law. In placing her mouth on the appellant's penis, the complainant touched him, as she also did when she rubbed his penis with her hand. Equally, however, in each of these incidents his penis touched either her mouth or her hand. Indeed, it is impossible to dispute that at one and the same time they touched each other.

It was submitted that this was to ignore the effect of the words "or otherwise applied force of any kind" in s.245. But it is not legitimate to regard that expression as controlling the words that precede it, or as requiring that there be an element of force or even necessarily of volition in the act of touching. At common law touching amounted to battery regardless of the degree of force used. Matters going to volition are accommodated by the provisions of s.23 of the Code. A person who falls or is pushed against another would not ordinarily be criminally responsible for touching that other person without his or her consent; but that is because of the exculpatory provisions of s.23, and not because there is no touching or "assault" as defined in s.245. None of the acts done by the appellant could, in terms of s.23, be said to have occurred independently of the exercise of his will, or to have been an event

that happened by accident. The appellant asked her to perform them. The jury, as they were plainly entitled to do, found the acts done were "indecent" within the meaning of s.216.

In the present case, there is no doubt that, in relation to counts 4 and 5, the appellant's penis touched the complainant's mouth; and, as regards count 7, that his penis touched her hand. Those were acts which, if done without her consent, would each constitute an "assault" as defined in s.245 of the Code. They would not involve an assault at common law. But that is because s.245 assigns to the term "assault" a different meaning from the meaning it has at common law; and, in defining the term "deal with", s.216 includes an act which, if done without consent, would constitute an assault as so defined. The English decisions referred are applicable because of the way assault is defined in s.245.

It was said that, if all this was so, the complainant herself had committed an assault on the appellant. But her touching him as she did took place with his consent and so could not have amounted to an "assault" under s.245 by her on him. It nevertheless constituted a dealing with her by him. Section 216 made it an offence to deal indecently with a girl under the age of 16. She could scarcely be said to have "dealt with" herself. If it is said that she nevertheless assisted him to commit that offence on herself, the answer is that the complainant was at the time of all of the offences under 10 years old. She was born on 6 August 1971. Under s.29 of the Code, she could not at that age be criminally responsible for any act or omission.

In the course of the summing up, the trial judge referred to the appellant's having procured the complainant to do the acts constituting the offences on counts 4, 5 and 7. It seems to have been thought that the appellant's criminal responsibility in some way depended on s.7 of the Code. That is not the view we take of the matter, but the appellant could not have been prejudiced by his Honour's remarks on that topic. In arriving at their verdicts the jury must necessarily have been satisfied of all the facts required to establish the appellant's

guilt under s.216. There has been no miscarriage of justice and the appeal against conviction must fail.

The appellant also seeks leave to appeal against his sentence, which was 2½ years on each of the seven counts, to be served concurrently, imposed on 16 March 1995 in respect of all the offences against D of which he was convicted (C.A. 124 of 1995) at the trial in March 1995. He was later charged with a further five offences of indecently dealing committed against another girl A. In those proceedings, which were tried before a different judge in May 1995, he was convicted of three counts of that offence after two of the counts were withdrawn, the trial judge having, in reliance on *Fairclough v. Whipp,* ruled that there was in law no case to go to the jury. The sentence imposed on that occasion was imprisonment for three years on each of the three counts, to be served concurrently but cumulatively upon the sentences previously imposed in March, 1995. He also seeks leave to appeal (C.A. 124 of 1995) against this later sentence.

The offences against both girls were all committed during the period between January 1977 and December 1979 at a time when both of the complainant girls were between about 6 and 8 years old. The appellant was a trusted friend of A's parents and a visitor to their home, which was next door to the house where the complainant D lived. An impression of the general nature of three of the offences has already been given in discussing C.A. 124 of 1995. The other offences against D involved placing a finger in her vagina; having her suck his penis, and licking her vagina while, at his request, she took photographs of him doing so; and on one occasion going so far as to ejaculate in her mouth. In the case of A, the three offences consisted of touching her vagina; placing his penis on her inner thigh and rubbing her vagina; and touching her vagina by placing his fingers on the outside of her under clothing.

The appellant is now 50 years of age, married, with three children. He had good educational opportunities, and has a satisfactory work record. He has no criminal record of any relevant kind. The offences were committed many years ago, but they have had lasting effects on the attitudes and outlook on life of at least one of the complainants. Both girls were

very young; the offences were serious and persistent; and involved an abuse of the trust that the parents had placed in the appellant as a friend. The submission that, if the appellant had been sentenced for all the offences against both girls, he would have attracted a lesser overall sentence is, we consider, not well founded. His actions were, as the sentencing judge said, not isolated incidents but involved the systematic corruption over a lengthy period of two different little girls. Having put them each through the ordeal of a trial, he cannot now claim to have shown any remorse for his actions. Whether viewed separately or cumulatively, it is not possible to say that the period of imprisonment imposed is excessive.

The appeal against conviction (no. 124 of 1995) is dismissed. The applications for leave to appeal against sentence in nos. 124 of 1995 and no. 223 of 1995 are refused.

REASONS FOR JUDGMENT - FITZGERALD P.

Judgment delivered 04/08/1995

I agree with McPherson J.A. and Helman J. that the appeal against conviction and application for leave to appeal against sentence should both be dismissed.

As I understood it, the appellant's argument against conviction started from the proposition that sexual activity between another person (an "adult") and a girl under the age of 16 years does not involve an indecent dealing with the girl by the adult unless the adult performs an "... act which, if done without consent, would constitute an assault ...". It was argued from that foundation that an adult who is passive, i.e., does not act to touch the girl, but is sexually touched by her, albeit at the instigation of the adult, does not perform an act in the material sense. (Logically, it would not seem to matter if the girl touched the adult willingly or unwillingly, e.g., under duress.)

As emerged during the course of argument, the appellant's hypothesis has inherent limitations, requiring as it does an extremely subtle and theoretical analysis of the acts of the respective parties, and the attribution of active and entirely passive roles. However, it is unnecessary to discuss that further. The meaning which the appellant wishes to have attributed to s. 216 of the Code as it stood at the material time is not required by its language and would produce a result which would be inconsistent with a plain legislative intention to

protect young girls. In the circumstances, there is no reason for reading into the section the limitation contended for by the appellant. In my opinion, where an adult and an under-age girl engage in sexual activity at the instigation of the adult, the adult indecently deals with the girl as a matter of ordinary language.

Subject to those observations, I have nothing to add to what has been written by McPherson J.A. and Helman J.