SUPREME COURT OF QUEENSLAND

CITATION:	*R v Endicott* [2019] QCA 204
PARTIES:	**R** **v** **ENDICOTT, Michael Ambrose** (appellant)
FILE NO/S:	CA No 55 of 2019 CA No 56 of 2019 DC No 1878 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 8 March 2019; Date of Sentence: 11 March 2019 (Clare SC DCJ)
DELIVERED ON:	Date of Orders: 17 April 2019 Date of Publication of Reasons: 4 October 2019
DELIVERED AT:	Brisbane
HEARING DATE:	16 April 2019
JUDGES:	Sofronoff P and Morrison JA and Wilson J
ORDERS:	**Date of Orders: 17 April 2019** **1. Appeal against convictions allowed.** **2. Set aside the convictions entered in respect of counts 1, 2 and 7 on 8 March 2019.** **3. Set aside the sentences imposed on 11 March 2019.**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – INDECENT ASSAULT AND RELATED OFFENCES – EVIDENCE – where the appellant was convicted of three counts of indecent dealing in 2019 – where the conduct constituting the offences occurred between 1975 and 1981 – where the appellant was a teacher at the school where the complainant was a student – where offending involved the appellant taking photos of the naked complainant – where the appellant was charged under s 210 of the *Criminal Code* (Qld) as at the time of the offences – where the provision made it an offence if a person "unlawfully and indecently deals with" a boy under 17 years – where the provision defined "deal with" as including an act which would constitute an assault – where there was no evidence that the appellant directly or indirectly touched the complainant – whether conduct that does not involve touching is sufficient to amount to "dealing with" – whether

the evidence is capable of constituting the offence

Criminal Code (Qld), s 210, s 245

Drago v The Queen (1992) 8 WAR 488; [1992] Library 920462, applied
Fairclough v Whipp (1951) 35 Cr App R 138; [1951] NZPoliceLawRp 11, not applied
R v Eldridge (2005) 16 NTLR 112; (2005) 194 FLR 287; [2005] NTSC 59, cited
R v P [2000] 2 Qd R 401; [1999] QCA 411, considered
R v S [1996] 1 Qd R 559; [1995] QCA 328, cited
Wheeler v The Queen [1998] WASCA 99, explained

COUNSEL: D A Holliday for the appellant/applicant
D Balic for the respondent

SOLICITORS: Robertson O'Gorman Solicitors for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** In March 2019 the appellant was found guilty by a jury of three offences that arose from things he had done on three particular days between 1 January 1975 and 31 December 1981 while he was a teacher at a boys' school.

[2] The first of the counts arose from the following facts as recounted by the complainant. During a school camping trip the appellant invited one of the schoolboys in his care to come and help him get some water from a creek. The boy was then in year 4 at the school. While they were at the creek the appellant suggested that he would take some photographs of the boy and asked him to stand and pose in the water of the creek. The boy removed all but his swimming togs and stood in the water. The appellant asked the boy to lower his togs. The appellant then said that the togs were causing a reflection and asked the boy to take them off. The boy did so. The appellant then took pictures of the naked boy in the creek, posing while lying in the fork of a tree and while lying on his back on a rock slab.

[3] The second of the counts arose from events when the boy was in year 8. On this occasion, while at school the appellant asked the boy to accompany him to a tower on the roof of a school building on which there was a flagpole. While on the tower the appellant once more asked the boy to remove all of his clothes. He did so and the appellant then took photographs of the naked boy.

[4] The third of the counts arose from things that happened when the complainant was in year 10. This time the appellant asked the boy to come with him into a changing room near the school swimming pool. Again the appellant told the boy to remove his clothes and to pose, this time under a running shower, while the appellant took photos of him.

[5] At no point did the appellant touch the boy.

[6] The relevant provision of the *Criminal Code* (Qld) was s 210:[1]

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[1] The section was amended in 1975. Prior to the amendment the offence related only to boys under14 years of age. The amendment raised that age to 17 years but provided for different sentences depending upon the age of the boy concerned: see *Criminal Code and Justices Act Amendment Act* 1975 (Qld) s 6.

> "Any person who unlawfully and indecently deals with a boy under the age of seventeen years is guilty of a crime and is liable to imprisonment with hard labour for five years.
>
> If the boy is under the age of fourteen years, he is liable to imprisonment with hard labour for seven years.
>
> The term "deal with" includes doing any act which, if done without consent, would constitute an assault as hereinafter defined."

[7] Section 245 of the *Criminal Code* defined "assault" in terms that include touching, any application of force and also any threatened touching or application of force. Section 210 in its original form as drafted by Sir Samuel Griffith used the expression "indecently deals with" and also contained the inclusive definition.

[8] The appellant's point on this appeal is a simple one. He submits that the terms of s 210 preclude the possibility of any offence being committed without the appellant's touching of the complainant. For the following reasons that submission must be accepted.

[9] The expression "deals with" is not defined in the *Criminal Code*. The research of counsel has not discovered any case which supports the proposition that "deals with" can be constituted by the acts of an accused person that do not include any touching of the complainant and the point in issue in this case has not been the subject of any direct consideration in any case. However, there has been some consideration of the offence that bears indirectly upon the issue.

[10] By s 52 of the *Offences Against the Person Act* 1861 (UK), a person who "indecently assaulted" a female was guilty of an offence. In the case of males, s 62 of the Act made it an offence to commit "any indecent assault" upon a male person. For this offence, s 1 of the *Criminal Law Amendment Act* 1922 (UK) made consent of a boy aged under 16 years immaterial. Making the nucleus of the offence an assault created problems. In *Fairclough v Whipp*[2] the English Court of Criminal Appeal held that an indecent assault on a female could not be constituted by the female's touching of the penis of the accused at his invitation. Lord Goddard observed that, having regard to the need to prove an assault, it was immaterial that the girl's touching of the accused was something that she did against her will for it could not be said that the appellant had assaulted her. In light of this case,[3] New South Wales enacted an offence constituted by "an act of indecency" in which the relevant act does not have to be an assault.[4]

[11] In *Drago v The Queen*[5] the Court of Criminal Appeal of Western Australia was concerned with the meaning of the word "indecently" in s 189(1) of the *Criminal Code* (WA). The section made it an offence, *inter alia*, to "indecently deal with" a certain class of persons or to "procure such a person to do deal with" the offender or another person or to permit such a person to "so deal with" the offender. Section 189(7) replicated the inclusive definition that appears in s 210 of the *Criminal Code* (Qld) and s 222 replicated the Queensland definition of "assault". Murray J said:

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2 (1951) 35 Cr App R 138.
3 and another similar case, *Director of Public Prosecutions v Rogers* (1953) 37 Cr App R 137.
4 *Crimes Act* 1900 (NSW) s 61E(2); *cf Saraswati v The Queen* (1991) 172 CLR 1, at 19-20 per McHugh J.
5 (1992) 8 WAR 488.

> "It is evident therefore, that having regard to s 189(7) and s 222, an act of dealing must be an act which itself applies force to the person of another, or attempts or threatens to do so in circumstances where there is an apparent ability to achieve that purpose."[6]

[12] Nicholson and Wallwork JJ did not consider that question and Murray J's *dictum* was *obiter*.

[13] The question remains whether *Fairclough v Whipp* would have been decided the same way under the *Criminal Code*. The answer is in the negative. In *R v S*[7] a unanimous Court of Appeal decided that an indecent dealing can be constituted by a complainant's touching of the offender.[8]

[14] In *R v P*[9] the appellant had been convicted of a count of indecent dealing constituted by his request to the complainant that she remove her clothes so that he could have sexual intercourse with her. The complainant refused to do so. It was held that this exchange was incapable of constituting an offence.[10] The case leaves unanswered the question whether an offence would have been committed if the complainant had removed her clothes without any touching on the part of the appellant.

[15] Finally, in *R v Eldridge*[11] Mildren J doubted whether an offence expressed in similar terms could be constituted without any touching.

[16] Ms Balic, who appeared for the respondent, submitted that *Wheeler v The Queen*[12] is a decision that supports the conviction. That was a case in which the indecent dealing was said to have been constituted by the complainant's washing of the appellant's back in the shower after he had asked her to wash his penis. She had refused to do the latter. In the course of summing up, the trial judge had directed the jury that "there are some things which might amount to an indecent dealing or a dealing with that may not involve actual touching". The judge gave the example of an offender taking indecent photographs of a naked child. The correctness of the direction was not the subject of any consideration. The appeal was dismissed because it was held that the acts as related by the complainant, notwithstanding that there had been no touching of the appellant's penis, were capable of constituting the offence. The case is not, therefore, an indication by an appellate court of approval for the proposition that an indecent dealing need not involve an actual touching.[13] It is, however, an indication that the provision is *capable* of bearing the construction that no touching need be involved.

[17] Having regard to the origins of the offence in the concept of an indecent assault, it is better to conclude that an offence of indecent dealing under s 210 must be constituted by a touching, whether initiated by the accused or by the complainant, and whether the touching constitutes an assault or not. The inclusive definition and the use of the word "deal" instead of "assault" are thus explicable as ensuring against a result like that in *Fairclough v Whipp*.

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6 *supra,* at 502.
7 [1996] 1 Qd R 559.
8 *supra*, at 560 per Fitzgerald P and 562 per McPherson JA and Helman J.
9 [2000] 2 Qd R 401.
10 *supra*, at [18] per Thomas JA and Chesterman J.
11 (2005) 194 FLR 287, at [10].
12 [1998] WASCA 99.
13 Ms Balic also directed the Court's attention to a jury direction given by Healy DCJ in *R v Johnstone* [2002] WADC 43, in which his Honour directed a jury in similar terms.

[18] That was certainly the view of the legislature. In 1989 s 210 was amended. The original offence of "indecent dealing" was retained but additional offences were created. Relevantly, s 210(f) made it an offence to taken any indecent photograph of a child under the age of 16 years without legitimate reason. In addition, it became an offence wilfully and unlawfully to expose such a child to an indecent act by the offender or another person.

[19] For these reasons I joined with the other members of the Court in quashing the appellant's convictions and substituting verdicts of acquittal.

[20] **MORRISON JA:** I agree with the reasons of Sofronoff P.

[21] **WILSON J:** I agree with the reasons of Sofronoff P.