[2002] QCA 152

COURT OF APPEAL

de JERSEY CJ
McMURDO P
ATKINSON J

CA No 15 of 2002

THE QUEEN

v.

LYELL GRANT MEIZER Appellant

BRISBANE

..DATE 26/04/2002

JUDGMENT

THE CHIEF JUSTICE: On the 8th of September 2000 the appellant was convicted by a jury of a range of sexual offences committed upon female complainants named Birt, McLellan and Reading. The jury acquitted him on charges relating to a complainant Pearce and could not agree on charges relating to the present complainant Hill. He was subsequently tried in relation to the charges concerning Ms Hill, which were rape and gross indecency, and was on 11 December 2001 convicted on those counts.

He appeals against those convictions. He is represented here by a solicitor, Mr Bennett, of the firm Forest Lake Lawyers who has conducted the case on a pro bono basis. He has conducted the case very well and for his involvement on that basis he is to be commended.

The appellant also seeks leave to appeal against sentence. Following conviction on 8 September 2000 for offences including two instances of rape, three indecent assaults and two instances of gross indecency, he was sentenced to an effective term of 18 years' imprisonment, reduced though to 13 years and 10 months to allow for time already served on remand.

Sentencing him on the 11th December 2001 in respect of the offences committed upon Ms Hill, the learned District Court Judge took the view that had the appellant been convicted of those offences on the 8th of September 2000 the sentencing

Judge would then have imprisoned him for 20 years not 18 years. In the result the Judge sentenced the appellant on the 11th December 2001 in respect of the offences committed upon Ms Hill to 12 months imprisonment to be served cumulatively upon the sentences imposed on 8th September 2000.

At the trial which resulted in the convictions on 8th September 2000, the evidence of all five complainants was admitted as relevant to the proof of the respective counts on the so-called similar facts basis discussed in Pfennig v. The Queen (1995) 182 Commonwealth Law Reports 461.

In appealing against the convictions recorded on 8th September 2000 the appellant challenged the admissibility of the evidence on that basis. The Court dismissed his appeal on the 19th June 2001 (The Queen v. Meizer [2001] Queensland Court of Appeal 231), upholding the trial Judge's admission of the evidence on the similar facts basis. In the primary judgment, Williams JA comprehensively analysed the evidence of the respective incidents, concluding that there was such striking similarity between the circumstances of the offences allegedly committed against the complainants, that upon the trial of the counts in respect of one of them, the evidence of the others could be admitted.

In view of the comprehensive treatment given to the issue in the judgment of 19th June 2001, there is need for extensive further analysis now only if there was material variation

between the evidence given at the earlier and later trials. In my view there was not, and I consider this Court should likewise conclude that the evidence of the witnesses Birt and McLellan was admissible as part of the proof of the charges concerning Ms Hill. The grounds of appeal contend that the evidence was not admissible and that the verdicts are, in any event, unsafe.

The complainant's evidence was that on 1st January 1997, at a time when she was 26 years old, she was working at night as a prostitute on Brunswick Street, Fortitude Valley. A male person driving a green Magna vehicle called her over but she waved him off. She later approached and got into his vehicle. There was discussion as they drove off as to services and prices. The driver said that he had somewhere he would like to go.

As they passed the Fortitude Valley Police Station the driver said "they were friends of his - acquaintances", and that if the complainant behaved herself she would be all right. He also spoke of arranging protection for her. He said his name was Eric. When the complainant spoke of being frightened the driver said that she had no reason to be frightened of a policeman.

He took her to an area off Scanlan Street and dealt with her in the following way. He fondled the complainant's breasts roughly, asked her if she liked anal sex and attempted to

penetrate her anus with his penis, penetrated her vagina from behind, pinched her nipples and asked her to pinch his really hard, which she did, asked her to bite his nipples, pushed her down and forced his penis into her mouth and ejaculated and then appeared to dial a number on his mobile phone saying into it, "Hi John. I have one and she's behind this warehouse". Telling her that a man would pick her up in five to 10 minutes and that she was not to go anywhere, he left.

Ms Birt gave evidence of working as a prostitute in The Valley on the evening of 6th September 1994. She was then 16 years old. She overheard her friend Amanda ask the driver of a blue Ford vehicle whether he was working for the police. The driver, who was the appellant, said, "No, not tonight."

In response to the appellant's invitation Ms Birt entered his vehicle and he drove off. He told her that he was a police officer. He took her to the location in Scanlan Street and proceeded to deal with her in this way. He squeezed Ms Birt's nipples very hard, told her to bend over and touch her toes, placed his thumb in her anus and pulled it in and out, put his fingers in her vagina, placed his penis in her vagina from behind, got her on to her knees and told her to suck his penis, which she did, whereupon he ejaculated in her mouth. He then went to his car and spoke into the mobile phone describing Ms Birt's height, weight and eye colour and saying that "he'd found another one".

Ms McLellan gave evidence that on the 11th of June 1996, when she was 24 years old she was, together with her friend Lesley Reading, in The Valley area for the purpose of earning money from prostitution. A green Magna, driven by the appellant, pulled over and Ms McLellan jumped into the car. The appellant told her that he was a police officer and there were many police officers going up and down the road and that she should think herself lucky he had picked her up and that he would take her home.

As they were driving around the block to collect Ms Reading, the appellant grabbed at Ms McLellan's breasts and lower areas and when she asked him to stop he told her to shut her mouth and listen or she would do six months for soliciting. The appellant told her that his name was Eric. Ms McLellan directed the appellant to the flat where she was staying at Red Hill which they entered.

The appellant asked for a cup of tea. While Ms McLellan was making the tea the appellant took Ms Reading across the room and ordered her to take her clothes off. He took his own clothes off. He called Ms McLellan in and ordered her to take her clothes off. The appellant had both women bite his nipples and squeeze them really hard. He made Ms McLellan get on to her knees and give him oral sex while Ms Reading touched him and he touched her roughly.

He changed the women around and Ms Reading gave him oral sex.

He then bent Ms McLellan over the couch and placed his fingers in her anus. He lifted her off the ground until she fell forward losing her balance. He also inserted his penis in her vagina from behind. After committing the offences the appellant appeared to make a phone call on his mobile phone saying, "I've got two here for you."

Williams JA took the view that the striking similarities between the circumstances of those offences and of the others led in evidence at the trial which concluded on 8th September 2000 "included the representation that the offender was a police officer, the combination of acts, involving the sexual activity and the use of the mobile phone at the conclusion of the incident".

The central issue at the trial of the appellant, which concluded on 11th December 2001, was the identity of the offender. The appellant did not give evidence. The Crown case depended substantially on the admissibility of the evidence of Ms Birt and Ms McLellan as demonstrating the requisite striking similarity, because the complainant Ms Hill could not give evidence clearly identifying her attacker as the appellant, a matter in respect of which the learned Judge gave comprehensive directions which were not criticised.

Mr Bennett, for the appellant, emphasised, as was done at the previous appeal, that many features of the encounters with the

three women would be commonplace in situations of prostitution. For example, the location, the approach by lone males in cars, requests for oral sex, requests for anal sex, roughness et cetera, but as Williams JA pointed out in the previous appeal judgment, "Whilst sexual activity of that kind may not be uncommon between prostitute and client, it is the collocation of that conduct considered in the context of the other features, such as claiming to be a police officer and the unusual use of the mobile phone, which satisfies the test here."

I likewise consider the signature which, on the evidence, reasonably excluded any innocent explanations for the event of 1st January 1997 arose from the aggregation of these features common to the instances of offending: the obviously unusual aspect of the offender presenting himself as a police officer; in two instances the aspect of the same location for the commission of the offences; the combination of the focus on heavy pressure to nipples, interest in anal intercourse, actual vaginal intercourse from the rear and oral sex with the complainant on her knees; and the intimidatory final use of the mobile telephone to call an apparent accomplice with what was said having a common thread. Those aspects, if proved to the satisfaction of the jury, as they plainly were, sufficiently established the appellant's indelible print on all of these offences and the jury was appropriately instructed accordingly.

There are four aspects of the appellant's present contentions which warrant particular additional comment. First, Ms Hill gave evidence of aspects of the vehicle in which she was driven which were not characteristic of the appellant's vehicle: a digital speedo, electrically operated windows without winders and central locking. It is significant, however, that when pressed about those aspects at the trial she said that she "thought" the vehicle bore those features leaving open the possibility that she may have been mistaken in that aspect of her recollection.

Second, Ms Hill's attacker had unprotected sex with her. Ms Hill has hepatitis C. The appellant is not so infected, but the expert medical evidence was that the transmission of hepatitis C by vaginal intercourse was of "very low incidence". The Judge fairly described this to the jury as a red herring.

Third, when mentioning arranging protection for Ms Hill the offender spoke of his friend in the white ute. Ms Hill said that this was why he apparently wanted to get away from Brunswick Street quickly. As she pointed out, most "clients" do want to get away quickly, but this offender uniquely referred in that context to his friend in the white utility.

The matter derived significance from the circumstance that a police officer, while patrolling the area on the 22nd of October 1996 in an unmarked white utility and while talking to

a prostitute, noticed the appellant closely observing them. The police officer, having changed into a Camry sedan, subsequently intercepted the appellant who obviously recognised the police officer as the person he had observed earlier in the white utility. This was overall quite a significant piece of evidence.

Fourth, the appellant, through his lawyer, has emphasised that Ms Hill identified someone other than the appellant from the photo board. In fact the person she nominated was eliminated as a suspect. She described the offender, in her evidence, as about six feet tall, whereas the appellant is six feet, six inches tall. It must be noted, however, that the thrust of her evidence was that the offender was a big, powerfully built person, as apparently is the appellant.

As urged for the Crown, there were other aspects of the complainant's evidence which tended to support the involvement of the appellant. On her evidence brown shoes and glasses later found in the appellant's possession were similar to those worn by the offender, and the offender was circumcised and bore a scar near his pelvic bone as is the case with the appellant.

I do not consider that the additional matters raised by the appellant, just covered, excluded the admissibility of the evidence of Ms Birt and Ms McLellan on the similar facts basis. As I mentioned that the convictions are nevertheless

unsafe was raised as a separate ground of appeal by amendment of the notice of appeal this morning.

Having comprehended the overall extent of the evidence and carefully reviewed the summing-up earlier in the week, I should say that I would not consider that either those circumstances just mentioned, that is the four particular matters raised by Mr Bennet, or any other aspect of the case, renders the convictions in any relevant sense unsafe.

The appeal against conviction should, in my view, be dismissed. There is no basis for concluding that the learned Judge's approach to sentence in any respect miscarried. The application for leave to appeal against sentence should likewise be refused.

THE PRESIDENT: I agree. As the Chief Justice has demonstrated, the evidence of McLellan and Birt, combined with the evidence of the complainant and the remaining evidence at the trial, demonstrated not only that the offences were committed by the same person, but also that the offender was the appellant.

The principles established in Pfennig v. The Queen (1995) 182 CLR 461 at 482 to 483, R v. O'Keefe [2000] 1 QdR 564 and K R M v. The Queen (2001) 178 ALR 385, 390 [20] and following demonstrate that the evidence was correctly admitted. See also R v. Delgado-Guera: ex parte Attorney-General [2001] QCA

266, CA No 338 of 2000, 17 July 2001 and R v. Pryor: ex parte Attorney-General [2001] QCA 241, CA No 275 of 2000, 22 June 2001.

I agree with what has been said by the Chief Justice and with the orders he proposes.

ATKINSON J: I agree with the orders proposed by the Chief Justice for the reasons stated by the Chief Justice and the President.

THE CHIEF JUSTICE: Those are the orders.
