[2002] QCA 292

COURT OF APPEAL

McPHERSON JA
MACKENZIE J
HOLMES J

CA No 48 of 2002

THE QUEEN

v.

PAUL JAMES HEENAN

BRISBANE

..DATE 06/08/2002

JUDGMENT

McPHERSON JA: I will ask Justice Mackenzie to give the first judgment.

MACKENZIE J: The appellant was convicted of an offence of assault occasioning bodily harm but acquitted of entering a dwelling house with intent to commit an indictable offence. He appeals against conviction and seeks leave to appeal against a fine of $1,000 imposed upon him.

The events leading directly to the assault which indisputably occurred were that after the appellant's daughter had been dropped off at her home by the complainant who had collected her and his own daughter from school, the appellant's wife suspected that she had been smoking.

When the appellant came home and learnt of this he disciplined the girl who was aged 13 at the time. Although the complainant's evidence suggests that the assault with which we are concerned occurred on the same day initially, all other witnesses said it was not until the evening of the following day when it happened. If there is a discrepancy in the complainant's evidence in that regard, it was not an issue in relation to the question of guilt or otherwise as the trial was conducted.

In any event, according to the appellant's daughter, on the evening following the discovery that she had been smoking, the appellant asked her if the complainant had ever touched her in any way. She said he had not. However, after further

conversation with her mother, the girl told the appellant that the complainant had suggested that she might come to his place when there was no-one but him there for a smoke and a chat.

The appellant became enraged and left immediately, went to the complainant's house and assaulted him. The conviction of assault occasioning bodily harm arose from that incident. There was no inconsistency between the verdict of guilty on that ground on the acquittal on the count of entering a dwelling house with intent to commit an indictable offence because the evidence was somewhat vague as to whether the assault commenced outside or inside the dwelling house.

There was a dispute as to whether the complainant actually invited the girl to visit him. The girl maintains that he had. He denied it. Whether the invitation was or was not issued is a side issue in respect to the conviction since it was the fact that the girl said that it had occurred that caused the appellant to react in the way in which he did.

The truth or otherwise of the allegation neither added to nor subtracted from the issues relating to the appeal against conviction except in a way which will be discussed shortly.

The assault was unlawful because no authorisation, justification or excuse under the Criminal Code applied to it in the circumstances in which it occurred. The defence of provocation was not open on the facts and counsel for the defence raised whether the defence of extraordinary emergency

under section 25 might be left.

However, it was not applicable firstly because section 25 is subject to the express provisions of the Code relating to provocation, self-defence and compulsion and secondly because there was no sudden or extraordinary emergency sufficient to satisfy that description in the facts.

The sole ground of appeal is that defence counsel was wrongly precluded from putting in evidence that the complainant had in 1999 been committed of offences of indecently dealing with and unlawful carnal knowledge of a girl under 16.

So far as can be gleaned from the record, these offences were committed in relation to a girl with whom the complainant had found himself alone while camping. At the time of the assault the appellant had no knowledge of this aspect of the complainant's history so it was not a factor in his deciding to commit the assault.

It seems plain from the record that the defence strategy was to adduce that part of the complainant's history in the hope that the jury may acquit notwithstanding the absence of a defence in law. The question of admissibility of evidence of convictions was raised in the absence of the jury before the evidence commenced.

Defence counsel submitted that he should be allowed to ask questions about previous convictions and it would then be for

the Crown to object if it wished.

I interpolate that that course would have ensured that the jury would immediately have been aware of the convictions whether the evidence was admissible or not. It was also submitted that since there was a dispute as to whether the conversation alleged by the girl had occurred and as to the details of the assault, the previous convictions were relevant to credit and as something akin to propensity evidence supporting the girl's evidence about what was said.

The learned trial Judge ruled the evidence inadmissible. Notwithstanding the ruling, in cross-examination of the complainant counsel asked if he had ever had a sexual attraction towards girls under 16. This was immediately objected to and ruled inadmissible.

Defence counsel also asked the complainant whether he had withdrawn his complaint initially but later reinstated it. He said that he had because of, to use his words, "his past". This was objected to and the answer disallowed.

Then when the complainant's 14 year old daughter was giving evidence, she was asked whether since 1999 her mother had been very careful about letting her father stay with her friends unsupervised. This too was objected to and ruled inadmissible.

The content of these questions has no evidentiary value but

for defence counsel to pursue those lines of questioning in light of the learned trial Judge's ruling, no doubt in an attempt to plant the seeds of suspicion in the jury's mind, bordered on an attempt to circumvent his ruling, which the experienced trial Judge dealt with with commendable restraint.

I turn now to the issues of principle with respect to cross-examination. A witness may be asked any question relevant to the issue or the witness's credit. In Hally v. Starkey ex parte Hally [1962] QdR 474 at 478 Mr Justice Gibbs with whom Mr Justice Hanger and Mr Justice Stable agreed said the following:

> "It is an elementary rule of the law of evidence that in cross-examination a witness may be asked questions which tend to impeach his credit, although they deal with matters not relevant to the issue."

He went on to say that a Court has at common law a discretion as to the questions which may be asked in cross-examination. The Court may refuse to compel such questions to be answered when the truth of the matter suggested would not, in the opinion of the Court, affect the credibility of the witness as to a matter to which he is required to testify.

In Bugg v. Day (1949) 79 C.L.R. 442 at 467 Mr Justice Dixon said the following:

> "At common law a conviction of a witness for an offence could not be used for the purpose of discrediting him if the offence was not of such a nature as to tend to weaken confidence in the credit of the witness, that is to say, in his character or trustworthiness as a witness of truth."

He went on to say:

> "It is sufficiently obvious that if a party is shown by

> cross-examination or otherwise to have been guilty on previous occasions of the same kind of conduct as that alleged against him in the litigation, the tribunal of fact is likely to reason that what he would do once, he would do again. The danger is, of course, great that the rule against propensity to do a thing as a ground for finding that it has been done on a particular occasion will be disregarded.
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> The general discretion which at common law belonged to a Court ... provides, however, a safeguard against the use of convictions under the pretext of discrediting a witness for the substantial purpose of directly affecting the judgment of the jury upon the substantive issue."

The difficulty for the appellant in the present case is that while knowledge of the facts and circumstances of the complainant's convictions may have led the jury to accept the accused's daughter's account of the conversation with the complainant more readily it was not crucial to his case that her evidence be accepted on this point.

The trigger for the assault was not whether the girl's account was true but that the appellant, perhaps naturally, believed her when she said it was true.

There was also a dispute about the details of the assault. However, the fact that there was an assault which caused bodily harm was beyond dispute.

With regard to the allegation of kicking which the appellant denied, one of the complainant's daughters supported the allegation that the complainant was kicked as well as punched. Theoretically, if the evidence as to the complainant's previous convictions had been admitted and damaged his credibility on the issue of what was said to the complainant's

daughter, the credibility of his evidence that he was kicked may have been diminished in the eyes of the jury.

However, even if that were the case there was no rational basis upon which a jury could have acquitted of assault occasioning bodily harm. In the circumstances, no miscarriage of justice could have occurred. A jury acting according to proper principles would certainly have convicted even if the cross-examination had been allowed.

The accused did not lose a chance fairly open to him of being acquitted because the questions were not allowed. In the circumstances if the learned trial Judge erred in refusing to allow the cross-examination, it is a case where the proviso would apply.

Having said that, the matter is, in my view close to the borderline but since the jury's view of the credibility of the complainant's evidence denying the invitation to the appellant's daughter may have affected his credibility overall, cross-examination as to the convictions in 1999 should have been allowed.

It is fair to say that this may not have been obvious from the way the matter was initially argued at trial. For the reasons analysed earlier, the only effect of loss of credibility by the complainant on issues for determination by the jury could have been in respect of the dispute as to the extent of the assault not the fact that an assault had occurred.

Further, it would have been appropriate to give a direction as to the limited use to which the evidence concerning the 1999 incidents could be put and in particular that it could not be used to provide justification, authorisation or excuse for the assault that indisputably happened.

For the reasons given, in my opinion, the appeal should be dismissed.

With regard to sentence, it was for the learned trial Judge to form a view not inconsistent with the jury's decision as to the facts upon which he would sentence. No reason has, in my view, been demonstrated why he could not form the view of the facts taken by him on the evidence before him. The fine of $1,000 in the circumstances is not manifestly excessive.

The learned sentencing Judge noted that, in effect, the appellant had taken the law into his own hands on this occasion in circumstances where, no doubt, he felt a sense of grievance.

In my view, in all of the circumstances, a fine of $1,000 is plainly not manifestly excessive. The application for leave to apply against sentence should therefore be refused.

McPHERSON JA: I agree. The matter of disallowing questions going to credibility that are put in the course of cross-examination is now wholly or partly regulated by section 20 of the Evidence Act 1977. It makes the criterion in a case like

this of whether a question going to credit should be disallowed depend on whether the matter is of such a nature that an admission of its truth "would not materially affect the credibility of the witness".

In Hally v. Starkey [1962] QdR 474-480 Sir Harry Gibbs said that in that case the credibility of the two police witnesses there "was the vital question and it must not be likely assumed that the improper restriction of the cross-examination as to their credit did not affect the decision".

For that reason, it was held that it was impossible to say in that instance that there had not been a miscarriage of justice. I regard the error if that is what it was in this case in refusing to permit the cross-examination of the complainant as to his previous convictions as falling into a very different category.

It was in no sense vital to the decision of the case and is therefore fairly capable of being regarded as not having given rise to a miscarriage of justice. I agree with what Justice Mackenzie has said both on the question of the appeal against conviction and the applicant for leave to appeal against sentence.

HOLMES J: I agree with the reasons of both the presiding Judge and Justice Mackenzie and with the orders proposed.

McPHERSON JA: It is ordered that the appeal against

conviction be dismissed and the application for leave to appeal against sentence refused.
