SUPREME COURT OF QUEENSLAND

CITATION:	*R v Jones* [2011] QCA 19
PARTIES:	**R** **v** **JONES, Gordon Francis** (appellant)
FILE NO/S:	CA No 168 of 2010 DC No 645 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Mt Isa
DELIVERED ON:	18 February 2011
DELIVERED AT:	Brisbane
HEARING DATE:	3 February 2011
JUDGES:	Chief Justice, Fraser and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. The appeal is allowed** **2. The conviction below is set aside** **3. A re-trial is ordered**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – where the appellant was an ambulance officer – where the appellant was found guilty of indecent assault while performing an electrocardiogram on the complainant – whether the trial judge erred in directing the jury that the appellant's intention was irrelevant in determining whether the assault was indecent *Criminal Code* 1899 (Qld), s 23, s 245, s 246, s 352, s 352(1)(a) *Criminal Code Act Compilation Act* 1913 (WA), s 23 *Drago v R* (1992) 8 WAR 488; (1992) 63 A Crim R 59, cited *Harkin v R* (1989) 38 A Crim R 296, considered *R v BAS* [2005] QCA 97, cited *R v Court* [1988] 2 WLR 1071; (1988) 87 Cr App R 144, cited *R v McBride* [2008] QCA 412, cited

COUNSEL: K Prskalo for the appellant
D R Kinsella for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Qld) for the respondent

[1] **CHIEF JUSTICE**: I have had the advantage of reading the reasons for judgment of White JA. I agree with the orders proposed by her Honour, and with her reasons.

[2] **FRASER JA**: I have had the advantage of reading the reasons for judgment of White JA. I agree with those reasons and with the orders proposed by her Honour.

[3] **WHITE JA**: On 9 June 2010 the appellant was found guilty after a trial of one count of indecent assault on 21 October 2008. He was acquitted on the other count on the indictment of being in a dwelling with intent to commit an indictable offence, the indictable offence being the sexual assault. Through his counsel, Ms Prskalo, the appellant was given leave to substitute, in lieu of the grounds in his Notice of Appeal, the following as his sole ground of appeal without objection from the respondent:

> "There was a miscarriage of justice because the learned trial judge erred in directing the jury that the appellant's intention was irrelevant in determining whether the assault was indecent."

This appeal raises a narrow point but one of some importance involving the interplay between "indecent" and s 23 of the *Criminal Code*.

[4] The appellant was a 45 year old paramedic employed by the Queensland Ambulance Service (QAS) in a country town in October 2008. On Sunday, 19 October 2008 the complainant, who was a woman of 33 years, was at home with her partner when she experienced pains in her chest and lung area. An ambulance was called and the appellant attended at the house after midnight. The appellant, who was working alone, took the complainant's blood pressure and then carried out an ECG (electrocardiogram). The complainant was then wearing a shirt, shorts and underclothes and sitting on the lounge. The appellant placed two sticky tabs or patches, one on either side near her collar bones and two under her shirt on her ribs some two to four centimetres below her breasts. In order to place the lower pads he pulled the complainant's T-shirt out and put his hand under the shirt. Electrodes were attached to the pads. He read the tape and told the complainant that the reading was such that he decided that she should be admitted to hospital. The appellant carried out another ECG in the ambulance which provided a satisfactory reading but nonetheless the appellant decided that she should go to the hospital. The complainant said that she was quite comfortable with the procedure carried out that night. At the hospital ECG tabs were put on different areas of her body by the emergency nurse. In the course of the procedures the appellant came in several times to ask how she was going. After one to two hours the readings were said to be satisfactory and the complainant was transported home by the appellant with advice from the treating doctor that she should be seen later in the week at a private medical centre.

[5] On Tuesday, 21 October 2008 the appellant attended at the complainant's home in the early afternoon wearing his ambulance uniform. He told the complainant that

she needed to have another ECG done and asked if he could come in. The complainant's evidence was that the appellant said to her:

> "I needed to have another ECG. He didn't want to scare me but he'd never seen anything like it and he had shown it to other people and they hadn't seen anything like it either and that a doctor had asked him to come back and do another ECG."[1]

Relying on that representation the complainant agreed and the appellant collected his equipment from the ambulance. The complainant sat on the lounge chair. She was wearing a singlet top without a bra and a pair of shorts. The singlet top had thick straps, a low round neck and was fitted. The appellant knelt in front of her, slightly to the right and placed the two top pads on her chest but near the neckline of her singlet. This placement was lower than on the first occasion. The complainant described them as being on breast tissue. The lower two, according to the complainant, were:

> "… actually right sort of half on the bottom side of my breast and half sort of the middle part of the dot was actually right in the crease. So I had sort of the top half on my breast and the bottom half under."[2]

She said:

> "… He pulled, literally, sort of pulled my shirt up and actually looked under and placed the two under the breast."[3]

[6] The appellant placed the first pad on the left side and after doing so brushed her left breast with "his outside wrist area". The complainant corrected that subsequently to the inside of the wrist. She was asked whether there was any pressure in the contact or simply a brush and no pressure. She answered:

> "It was more than just sort of a feather brush but it wasn't an actual sort of, like, grab or anything like that."[4]

She agreed that her breast shifted position.

[7] Once the pads were in place the appellant carried out an ECG.

[8] The complainant's partner arrived home for lunch towards the end of the procedure. Seeing the ambulance parked outside, he was alarmed and asked the complainant if she were "okay" and if she had rung the ambulance. She told him that the doctor had asked the appellant to do another ECG. He left the room and the appellant packed up to leave. The appellant told her that the test was fine and "they" were unsure whether there was a problem with her or with the machine and that was why he had been asked to re-do the test. He told her to make an appointment to see the doctor that week and invited her to call him if she had any problems and left. The complainant described the appellant's demeanour on arrival as calm but after her partner arrived home he packed up quickly and departed leaving the sticky pads on her. There was evidence that to do so was not unusual as they were not reused and allowed the patient to remove them when ready. The complainant discussed what

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1 AR 21. The appellant did not give evidence at his trial but in his police interview denied that he said that a doctor asked him to take another ECG.

2 AR 22.

3 AR 22.

4 AR 23.

had occurred with her partner and they decided to speak to the local officer in charge of the Ambulance Service. In due course the complainant was notified that officers of the CIB wished to interview her about the incident.

[9] In cross-examination the complainant agreed that the top pads were placed partly but not fully on the breast tissue area. She accepted that on two previous occasions, in her statements to police the day after the incident and at the committal, she had said that the pads were placed above the breast tissue area. She further agreed that she had not previously said in either her statement to police or at the committal hearing that parts of the pad were touching the breast tissue area. She regarded the procedure as intrusive. She did not think it legitimate and became concerned when the appellant raised her shirt and looked up to put the patches on. She had not previously told anyone else about the appellant lifting her shirt so that her chest was exposed and she had not told the officer at QAS to whom she had spoken. She did, however, explain that the shirt was held up for the entire time when the lower pads were being placed and the wires attached.

[10] The complainant's partner said that the complainant had explained, in the presence of the appellant, that he had had been sent by the doctor because of the unusual earlier ECG reading. The appellant neither raised his head nor acknowledged the partner's presence. The complainant told her partner that she was concerned, indicating where the pads from the ECG machine had been placed on her. He said:

> "At that point she lifted her shift [sic] up and said, 'Look'. I could see that the pads were attached under both breasts where the breast tissue joins the chest wall and two pads on the top of her chest where they were on the fleshy part of the breast, just above the nipple. So there was one on each side – on the breast and then underneath each breast there was one."[5]

His more detailed description had the upper pad just millimetres above the areola around the nipple. He said the skin fold of the breast had "actually" fallen over the top of the sticky pad. The complainant then removed the pads.

[11] On Thursday, 23 October, the appellant approached Robert Shepherd, an advanced care paramedic with the QAS and local officer in charge. He had about 20 years experience in performing electrocardiograms. The appellant showed him some ECG strips to discuss the symptoms of the subject patient and the nature of the results describing them as "unusual" or, possibly "weird". They were described by another witness as showing artefact or interference. Mr Shepherd agreed that there was an unusual rhythm on the strips and was also intrigued at what they revealed. The appellant told Mr Shepherd that he had decided to go back to the house and that he had told the complainant that a doctor had sent him. Mr Shepherd recalled the appellant saying words to the effect "Gee, she's got good looking tits", adding that he could have looked at them all day but "Andrew came home". He agreed ("absolutely")[6] in cross-examination that sometimes when two men are working together comments such as those are made.

[12] Mr Shepherd was a long-standing friend and colleague of the appellant. He regarded him as very professional in the way he conducted himself and that he had a particular interest in ECG readings. The appellant had been instrumental in

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5 AR 48-49.

6 AR 72.

having Dr Julie Verran come to the ambulance station on a number of occasions to give some advanced courses in the use of the machine. Mr Shepherd accepted that normally the pads would be placed below the breast line towards the bottom of the rib cage closer to the side than to the front. In his experience the upper pads were normally put on the clavicles and could be placed as far out as the wrists. Mr Shepherd said that in his experience ambulance officers rarely followed up on treatment with patients although a follow up might take place for educational purposes, with the doctors or nurses. Other senior officers gave similar evidence.

[13] There was evidence that each attendance upon a patient generated an incident report and there was none for the visit to the complainant's residence on 21 October 2008. The appellant said in his police interview that this was because no treatment was given.

[14] Mr Colin Nash, the Regional Operations Supervisor with the QAS had particular expertise in the field of intensive care and the administration of ECGs. Normally, he said, the pads were placed on the clavicles and below the ribs away from large muscle masses. If they were placed too high on the rib cage the diaphragm could generate interference described as artefact. The electrodes could be moved further apart if there were problems accessing a particular area and could be placed on the arm or the hips or even on the legs.

[15] Mr Nash opined that the position of the upper pads on the 20 October test were appropriate but that if the bottom electrodes were placed too high on the ribs that would produce artefact and should be positioned further down to avoid this. Nash said that on the complainant's evidence in court, the top electrodes were placed too low over the muscle mass so that there would be an artefact and in placing the lower leads too high the same interference would occur. He said:

> "The idea when you're monitoring is to extend the leads as far apart as you possibly can so you get a picture of the actual electrical current through the heart. So if they're too close, whilst you'll get it, there is a possibility that it won't be clear and accurate as if you place them further apart."[7]

Placing the top electrodes near the nipple area was not legitimate because they would be too close together making it difficult to pick up the flow of the current through the heart. The causes of artefact were many including fault in the equipment, interference from clothing or muscle tremor including shivering. There was some evidence that the complainant, at least by the time she got to the hospital, was shivering. He agreed that it was possible in attaching the electrodes that an ambulance officer might have some contact between the officer's hand and the patient's breast.

[16] The appellant showed the ECG strip to Karen McKintosh and Dr Runne, who were on duty at the hospital, commenting on the unusual rhythm. Numerous attempts were made by the hospital staff to get a good trace rhythm from the complainant. She was placed on a monitor and observed for over an hour before being released. Because there were no taxi cabs available the appellant transported the complainant home. Ms McKintosh agreed that the appellant seemed to be a person who was very caring and concerned about his patients, continually seeking further information and self-education. She found him a helpful workmate and had never had any problems with his professional behaviour.

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[7] AR 92.

[17] Dr Julie Verran, the Medical Superintendent at the hospital, had been approached early in the year by the appellant to arrange further training on taking and interpreting 12 lead ECG tests. On several occasions she had attended at the ambulance station to give training. From time to time the appellant would ask her to review rhythm strips at the hospital when he brought someone in. Dr Verran thought that the complainant's ECG readings on 20 October were abnormal showing a fast heart rate and follow up was required. It was not hospital policy to request QAS officers to perform follow up. Dr Verran was less prescriptive about the positioning of the electrodes than the QAS witnesses. While she said it was better not to place the upper electrodes on the breast tissue there was nothing wrong with placing the bottom electrodes under the breast itself; although she would place them on the sides of the ribs it was not necessarily an improper position with the more limited machine the appellant was using to place them under the breast. She saw no indication that the electrodes were incorrectly placed from reading the strip from 21 October.

[18] The appellant was interviewed by police on 23 October 2008. He said that he would normally conduct an ECG by placing the top electrodes near the collar bone and the bottom electrodes just beneath the ribs. At the time he performed the ECG on the complainant on 20 October he did not think she was having a heart attack but he was worried because the reading was "weird" and he did not know what it meant. The 12 lead ECG performed at the hospital similarly was unusual. He said that on Tuesday he approached the complainant for another ECG because the follow up was part of learning for him. He did not document the visit because he did not give her any treatment. He told police that he planned to show the strips to Dr Verran when he next saw her; that he did not think he was doing anything wrong; and that he had followed up with other people in the past. He denied that he had told the complainant that a doctor had sent him and that he had made comments to Mr Shepherd about the complainant's breasts.

Discussion

[19] The prosecution particularised the sexual assault as "the whole transaction" of placing the ECG electrodes on the complainant's person, not just the wrist brushing the breast. The particulars of the burglary charge were the appellant being in the complainant's house with the intention of committing the indictable offence of sexual assault. The appellant complains that the primary judge ought to have directed the jury that when considering whether the assault was indecent, the appellant's intention or motive was relevant.

[20] Section 352(1)(a) of the *Criminal Code* provides that any person who unlawfully and indecently assaults another person is guilty of a crime. The definition of "assault" in s 245 is thus imported into s 352. It provides, relevantly:

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

By s 246 an assault is unlawful and constitutes an offence unless it is authorised or justified or excused by law.

[21] It was uncontroversial that placing the four electrodes on the complainant's body would amount to an application of force. If the jury were satisfied that the

appellant's wrist brushed against her breast, his Honour told the jury, that would constitute both the application of force and a touching.

[22] There was ample evidence for the jury to conclude that the complainant's consent to the procedure was obtained by the appellant representing that he had been asked "by the doctor"' to follow up and take another ECG. His Honour described this as the crucial issue in respect of count two. His Honour told the jury that if the encounter happened as described by the complainant it was unlawful conduct. On the element of "indecent" his Honour directed the jury:

> "'Indecency' is not a technical term. It has its ordinary meaning of something that offends against currently accepted standards of decency. There must be something sexual about the act and it must involve serious wrongdoing. But it's important that you bear in mind that questions of the motive of the accused in performing the act are not relevant to whether it is indecent. It's not a question of whether the accused did it for the purpose of sexual gratification, whether the accused did it because he was sexually interested in [the complainant]."[8]

His Honour again said that the appellant's motive was irrelevant and

> "[w]hat is indecent is concerned with the actual nature of what occurred. Did it involve some sexual aspect or feature because of the nature of what the accused did, and in the light of time, place and surrounding circumstances, and subject to that the question of what is indecent is a matter of community standards and therefore a matter for you."[9]

His Honour emphasised that the test of indecency was objective and did not depend on what the complainant thought and whether the appellant did it to obtain sexual gratification.

[23] His Honour explained the burglary count: if the appellant intended to carry out a sexual assault while in the complainant's house before he actually started administering the ECG then he would be guilty of the offence of burglary. The jury acquitted the appellant of burglary.

[24] The jury sought re-direction on "indecent" on two occasions during deliberations.[10] In discussion with counsel his Honour said that in his view the issue of indecent had nothing to do with motive. In redirecting the jury he said:[11]

> "There must be something sexual about the act. It must involve serious wrongdoing. It's not a question, though, of whether the accused did it in order to obtain sexual gratification. You're not concerned with the motive of the accused. You are concerned with the objective character of the act. And, therefore, it's not relevant, in deciding whether the act was indecent, to take into account evidence which suggested that there was some sexual interest on the part of the accused in [the complainant]."

He emphasised that it was not a question of whether the complainant thought it was indecent or

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8 AR 189.
9 AR 189.
10 At AR 211 and AR 222.
11 AR 212.

> "… for that matter what the accused thought about it … the fact that he might not have thought it was indecent at the time doesn't assist him. The test is objective."[12]

[25] The jury then were allowed to go home for the night.

[26] The following day, just after noon, the jury sought redirection on "serious wrongdoing" with respect to the indecent assault charge. In his discussion with counsel the primary judge said that he had in mind the observations in *R v McBride*[13] where it was said that conduct had to be more than "merely unbecoming or offensive to common propriety or impolite", the dictionary definition. Counsel did not demur from that approach. His Honour re-directed the jury in conformity with those comments and added:

> "So that it's a question of whether you as a jury, applying ordinary community standards, think that what was done was sufficiently serious – sufficiently serious departure from current accepted standards of decency to justify treating it as a criminal offence, to impose a criminal sanction on that conduct, and that's pretty much a matter of community standards."[14]

[27] His Honour's conclusion that motive was irrelevant derived from the following statement by Lee CJ in *Harkin*:[15]

> "It is in my view clear that if there be an indecent assault it is necessary that the assault have a sexual connotation. That sexual connotation may derive directly from the area of the body of the girl to which the assault is directed, or it may arise because the assailant uses the area of his body which would give rise to a sexual connotation in the carrying out of the assault. The genitals and anus of both male and female and the breast of the female are the relevant areas. Thus, if the appellant intentionally touched the breast of the girl Elizabeth, it is my view that **if there is nothing more**, **and there is not**, that in itself is sufficient to give to the assault the necessary sexual connotation and to render it capable of being held to be indecent, and it is then for the jury to determine whether in the case of a mature man of 38 and a girl of 11 years and nine months that should or should not be regarded as conduct offending against the standards of decency in our community. The purpose or motive of the appellant in behaving in that way is irrelevant. The very intentional doing of the indecent act is sufficient to put the matter before the jury. But if the assault alleged is one which objectively does not unequivocally offer a sexual connotation, then in order to be an indecent assault it must be accompanied by some intention on the part of the assailant to obtain sexual gratification." [16] [emphasis added]

Referring to the English decision of *Court*[17] Lee CJ observed:[18]

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12 AR 215.
13 [2008] QCA 412.
14 AR 223-4.
15 (1989) 38 A Crim R 296, decision of the Court of Appeal of New South Wales adopted in Queensland in *R v BAS* [2005] QCA 97 per Fryberg J at [16]-[17] with whom Davies and McPherson JJA agreed.
16 At 301.
17 [1988] 2 WLR 1071; (1988) 87 Cr App R 144.
18 At p 302.

> "Their Lordships in that case, however, were dealing with a case of the spanking of a little girl by a man of 26 years of age and they expressed a view, which I would summarise in this way, that where the alleged assault is one which is equivocal, in the sense that it may have a sexual import or it may not, then before the assailant can be convicted it must be shown that he intended it to have a sexual connotation, that is to obtain sexual gratification from it."

[28] Because the appellant placed the upper electrodes, on the complainant's evidence, on her breast tissue and the lower electrodes under the fold of her breasts, his Honour considered that the appellant's motive for doing so was irrelevant. This characterisation of the acts as "unequivocally" sexual failed to have regard to a not insignificant body of uncontested evidence that the appellant was an ambulance officer, very interested in his work, particularly in the administration of the ECG and the readings, and had discussed that interest in the past in relation to patients with his superiors. Furthermore, Dr Verran regarded the reading from 21 October as unremarkable which arguably excluded artefact from placing the electrodes inappropriately for a good reading.

[29] The body of evidence, if directed on motive, may have been sufficient for the jury to have a reasonable doubt about any sexual connotation in the assault. That might be so even if the jury accepted that the appellant obtained the complainant's consent to the further procedure by fraudulently representing that he came at the behest of a doctor. The lesser alternative of a simple assault was not left to the jury.

[30] In *Drago*[19] the Western Australian Court of Criminal Appeal considered the relationship between motive, as discussed in *Harkin* and *Court* impacting upon the characterisation of the act as indecent, and the provisions of s 23 of the *Western Australia Criminal Code,* in terms identical to s 23 of the *Queensland Criminal Code*. As Nicholson and Murray JJ both made clear, it is essential not to confuse motive or intention as an element of an offence under s 352 which, by s 23, has no role, and motive as a factor in characterising the assault as indecent or not.[20] Murray J observed:

> "…whether an act may be described as indecent because it offends against community standards of decency, may depend not only upon the nature or quality of the act in itself, but upon the motive or purpose of the actor. That would be so under the Code in my view, just in the same way as at common law."[21]

It is at that point that cases such as *Court* and *Harkin* become relevant. In *Court* Lord Griffiths said:[22]

> "Whether or not right-thinking people will consider an action indecent will sometimes depend upon the purpose with which the action is carried out. An obvious example is the examination of an unconscious woman's private parts. If carried out by a doctor for a proper medical purpose no-one would consider such an examination indecent. If carried out by a stranger for a prurient interest everyone would consider it indecent … The fact is that right-thinking people

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19 (1992) 8 WAR 488; (1992) 63 A Crim R 59.

20 Per Nicholson J at 70 and Murray J at 73.

21 At 73.

22 At 35.

> do take into account the purpose or intent with which an act is performed in judging whether or not it is indecent. If evidence of motive is available that throws light on the intent it should be before the jury to assist them in their decision."

Murray J, after quoting that passage, said:[23]

> "That in my opinion is precisely the position achieved by the Code, s 23. In commenting upon the facts of that case, Lord Griffiths (again at 35) said: 'If a juryman is asked to decide whether a man beating a young girl's bottom is acting indecently, the first question he is likely to ask is – why was he doing it?'"

His Honour continued:

> "But where the act in question was capable of being regarded as indecent, but was not necessarily to be so regarded in itself, the motivation of the actor might operate in one of two ways. It might of course confer the quality of indecency upon an act which might, differently explained, be held not to be so. On the other hand, the motive of the actor might render innocent an act which otherwise, without explanation, might be regarded as indecent."[24]

[31] Mr Kinsella for the respondent argued that if motive were relevant to this enquiry, the appellant had suffered no miscarriage of justice because, implicit in the jury's verdict, was their conclusion that the act was inherently indecent. The jury were clearly troubled by the need to consider the issue of indecency in a vacuum, as it were. They deliberated for over a day and sought redirection. Perhaps more telling is their acquittal on the burglary count, which indicated that they had a doubt about the "intention" of the appellant before he positioned the electrodes.

[32] The quality of "indecency" is pre-eminently a question for a jury and where there is evidence capable of casting doubt upon the sexual quality of the alleged assault, the motive of the alleged offender must go to the jury for their deliberation and decision. That did not occur here and the appellant has lost a real chance of acquittal. In that circumstance the conviction below should be set aside and a re-trial ordered.

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23 At 74.

24 At 74.