IN THE COURT OF APPEAL [1998] QCA 276

SUPREME COURT OF QUEENSLAND

C.A. No. 201 of 1998

Brisbane

[R. v. Millar]

THE QUEEN

v.

ALEXANDER SAMSON MILLAR
(Applicant) Appellant

McMurdo P.
McPherson J.A.
Ambrose J.

Judgment delivered 15 September 1998

Separate reasons for judgment of each member of the Court; each concurring as to the orders made.

A. ON INDICTMENT NO. 449/98 IN THE DISTRICT COURT AT BRISBANE:
(a) APPEAL AGAINST CONVICTION DISMISSED;
(b) APPEAL AGAINST SENTENCE ALLOWED; SENTENCE IMPOSED BELOW VARIED BY REDUCING IT FROM IMPRISONMENT FOR 3 YEARS TO IMPRISONMENT FOR 18 MONTHS.

B. ON INDICTMENT NO. 1020/98 IN THE DISTRICT COURT AT BRISBANE, APPEAL AGAINST SENTENCE ALLOWED; SENTENCE IMPOSED BELOW ON COUNT 1 VARIED BY REDUCING IT TO IMPRISONMENT FOR 2 YEARS. SENTENCES FOR COUNTS 2 AND 3 TO BE SERVED CONCURRENTLY.

C. SENTENCES IN PARAGRAPH B ABOVE TO BE SERVED CUMULATIVELY ON SENTENCE IN PARAGRAPH A ABOVE.

CATCHWORDS: **CRIMINAL LAW - Evidence - Credit - Whether judge erred in not allowing appellant to cross-examine complainant about her previous convictions - Whether prior offences relevant to an issue in proceedings - Whether to apply proviso - Whether Judge erred in failing to put issue of mistake to jury - Indecent assault - Breaking, entering and stealing - Sentence.**
ss. 3, 5 *Criminal Law (Rehabilitation of Offenders) Act 1986*; s. 16 *Evidence Act 1977*; ss.24(1), 668E *Criminal Code*; s.161B(3) *Penalties and Sentences Act 1992*; *Bugg v. Day* (1949) 79 C.L.R. 442.

Counsel: Mr B.G. Devereaux for the applicant/appellant
Mr P. Rutledge for the respondent

Solicitors:	Legal Aid Queensland for the applicant/appellant Director of Public Prosecutions (Queensland) for the respondent
Hearing Date:	2 September 1998

REASONS FOR JUDGMENT - McMURDO P.

Judgment delivered 15 September 1998

1 I agree with the reasons of McPherson J.A. and with the proposed orders.

REASONS FOR JUDGMENT - McPHERSON J.A.

Judgment delivered 15 September 1998

1 The appellant was convicted at a trial in the District Court at Brisbane of one count of indecently assaulting a young woman, with the circumstance of aggravation that he penetrated her vagina with his finger. He now appeals against that conviction, and seeks leave to appeal against the sentence of imprisonment for 3 years imposed in respect of it, and also against an effective sentence of 2½ years in respect of three other quite separate offences to which he pleaded guilty and was sentenced at the same sittings.

2 The evidence at the trial consisted of the testimony of the complainant, a high school student aged 16 at the time of the offence; that of a friend of hers, to whom she complained of the incident; and a police officer, who arrested the appellant. The appellant, who was 34 years old, boarded at the home of the complainant where she lived with her parents. On the night in question she returned home with a 700 ml. bottle of bourbon, which she and the appellant drank over the next few hours. After doing so, they began playing euchre in the lounge room for a couple of hours. Then she began to feel sick and went to the toilet where she vomited. Returning to the lounge with a bucket, she lay down in her clothes on the sofa, and went to sleep.

3 She woke up to find the appellant lying on the sofa next to her, and she felt his hand with his finger in her vagina. Her evidence in chief about the incident was as follows:

> "Well, what happened when you woke up? --- I woke up and Sandy was lying next to me and ---
> Did you feel anything, see anything? --- I felt something., yes.
> What did you feel ? --- Something ---
> Could you speak up ? --- Something around my vagina.
> What did you feel around your vagina? --- Sandy's hand.
> Just around your vagina ? --- In it.
> In it ? --- Yes.
> You say Sandy's hand ? --- Finger.
> His finger ? --- Yes.
> You say it was in the vagina ? --- Yes.
> You could feel it in the vagina, could you ? --- Yes.
> Was it just in there ? Was it moving or --- ? --- It was moving.
> How do you know that it was Sandy's finger that was in your vagina ? --- Because he was lying next to me and I could see his arm across the bed going under the blanket.
> Were you still wearing clothes at this stage ? --- Yes.
> How was his hand in your vagina ? --- Down the front of my pants.
> What did you do ? --- I laid there - I rolled over and I laid there until he went to sleep.
> Was there any conversation with him ? --- He said, 'Come on', when I just ignored him.
> When did he say that ? --- When I rolled over.
> What happened after that ? --- Sandy went to sleep, then I went to my room and locked myself in there.
> Did you give him any permission or authority ? --- No."

4 In cross-examination, the complainant agreed that she had been touched around the vagina and that she had continued to lie there for about five minutes while the appellant had gone on touching her, before she rolled on to her side and went back to sleep. She said nothing to him at the time. Later, she got up and went to her bedroom, locking the door behind her. In re-examination, she confirmed that when she woke up she felt the appellant's hand "down in my pants and his finger moving in and out inside me".

5 The appellant did not give evidence at the trial, so the plaintiff's account, which has been set out above was not challenged in cross-examination and was not contradicted. The defence submission was essentially that there was material on which the appellant could in terms of s.24(1) of the Criminal Code have entertained an honest and reasonable belief that the complainant was consenting to his putting his finger in her vagina, and that the prosecution had failed to discharge the onus lying upon it of excluding the application of that provision. The learned trial judge rejected this proposition. He ruled that s.24 should not go to the jury, and it was not left to them in summing up.

6 His Honour's failure to direct the jury in terms of s.24(1) was one of the grounds of appeal to this Court. To sustain it, it is necessary for the appellant to show that there was material on which the jury could legitimately have entertained a reasonable doubt about that issue, which was whether the appellant honestly and reasonably believed that the complainant had consented to his inserting his finger in her vagina. What effectively precluded the existence of any such belief on his part was that the complainant had been quite specific in her evidence that she had felt his finger already in her vagina on waking up. It is true that she had not immediately put a stop to it, and it had continued for another five minutes until she rolled over. The jury were conscious of the relevance of this conduct because they asked the judge to re-direct on whether "retrospective consent" could be given. His Honour ruled that it could not, and he re-directed the jury accordingly.

7 There are many occasions on which sexual activity begins without any outward expression of consent to its taking place. It is in the nature of things rare for consensual conduct involving intimacy of this kind to be preceded by formal offer and

acceptance. In some instances, consent is capable of being inferred from acquiescence in the continuation of the activity. In this instance, however, the complainant testified that she had not consented to the act of penetration. In cross-examination she confirmed that, after waking up, she had lain there for about five minutes during which he had continued to touch her, without protest on her part, until she rolled over. But the act with which the appellant was charged was having put his finger in her vagina when she was asleep and so at a time when she was not capable of consenting to it.

8 In any event, it was not the failure to prove absence of consent that was relied on in the appeal. Instead, it was submitted that the judge ought to have allowed s.24(1) to go to the jury. However, if the appellant knew the complainant was asleep when he first inserted his finger in her vagina he can have been under no illusion that she was consenting to what he did. On the evidence at trial, there is no reason to doubt that when he did so he knew she was asleep. At no time has the contrary ever been suggested. It was nevertheless submitted that there were facts capable of raising a doubt about his state of mind at that time. She had, it was said, come home with a bottle of bourbon; she had invited the appellant to drink it with her and to play cards. Card-playing was a not uncommon past-time in the complainant's home, but it ordinarily took place at the table. On this occasion the complainant had, with the appellant's help, opened up the sofa, which was where the card game had then taken place. She had become drunk, was sick in the toilet, talked, and then fallen asleep with the appellant beside her.

9 For s.24(1) to be available, the belief must be reasonable. The events relied on by the appellant, whether considered individually or in conjunction, are plainly

incapable of being considered an assent or invitation to the appellant to insert his finger in the complainant's vagina. Even the most imaginative of minds would not interpret them in that way. And even if the appellant himself chose to construe them as meaning that the complainant was consenting, his belief could not in those circumstances have been regarded as a reasonable one. The trial judge was correct in declining to direct the jury to consider this matter.

10 The other ground of appeal raises a different question. It was the subject of a ruling in the absence of the jury at the beginning of the trial. Counsel for the appellant said he wished to cross-examine the complainant about the fact that she had "two convictions for dishonesty, stealing and receiving", which were said to have occurred some ten months or so before. He submitted it was a matter that went to credit. In objecting to that course, counsel for the Crown relied on s.5 of the *Criminal Law (Rehabilitation of Offenders) Act 1986*, which provides as follows:

> "**5.(1)** It is declared that a conviction that is set aside or quashed and a charge are not part of the criminal history of any person.
>
> **(2)** A person shall not be required or asked to disclose and, if so required or asked, shall not be obliged to disclose for any purpose a conviction that is not part of the person's criminal history or of the criminal history of another person or a charge made against the person or another person.
>
> **(3)** Subsection (2) does not apply where the requirement or request to disclose a conviction or charge therein referred to is made -
>
> (a) for the purpose of an inquiry being conducted pursuant to authority conferred by or under an Act; or
>
> (b) in criminal or civil proceedings before a court if the fact of the conviction or charge is relevant to an issue in the proceedings or the court has granted permission for the requisition or request to be made."

11 The expression "criminal history" is defined in s.3 of the Act to mean "the convictions recorded against that person in respect of offences". The word "charge", which appears in s.5(2), is defined in s.3 to mean "an allegation formally made in court that a person has committed an offence where -

(a) ...

(b) a conviction is not recorded by a court in respect of the allegation ..."

The two convictions in the case of this complainant had been sustained in the Children's Court, and, so far as appeared, had not been recorded. After hearing submissions, the learned judge ruled that he would not under s.5(3)(b) of the Act allow defence counsel to put those questions to the complainant.

12 It has long been the rule that in cross-examination counsel are entitled to put to the witness that he or she has sustained a conviction or been guilty of some other discreditable conduct in the past. The Bar has ethical rules limiting the extent to which this course may properly be pursued, and the courts have a discretion to restrict questioning of this kind if it threatens to become oppressive. See, generally, *Hally v. Starkey*, *ex p. Hally* [1962] Qd.R. 474, 478; *Evidence Act 1977*, s.20; *Cross on Evidence* §10.7 (3rd Aust. ed.); *Phipson on Evidence* §12-22 (14th ed.). Subject to such restrictions, s.16 of the *Evidence Act* confers the right to question a witness as to whether he or she has been convicted of an indictable or other offence. If the witness denies the fact or refuses to answer, the party so questioning is permitted to prove the conviction. The provision, first enacted in England in 1853, displaced the common law rule, said to have been that a conviction sustained by 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 "weaken confidence in the credit of the witness, that is to say in his character or trustworthiness as a witness of truth". See *Bugg v. Day* (1949) 79 C.L.R. 442, 467 (Dixon J.).

13 Contrary to the submission of counsel for the appellant, it is to my mind clear that the complainant's convictions or prior offences were in this instance not relevant to "an issue in the proceedings" within the meaning of s.5(3)(b) of the *Criminal Law Rehabilitation of Offenders) Act 1986*. The "issue" in these proceedings was whether the appellant had put his finger in the complainant's vagina and had done so without her consent. Her prior offences of or convictions, whether recorded or not, for stealing and receiving were quite unrelated to either of those questions. An answer confirming that she had committed those offences would not have tended either to prove or to disprove against the appellant the charge of indecently assaulting the complainant. Stealing and receiving, being offences involving dishonesty, it is possible they might have been considered as affecting her character or trustworthiness as a witness of truth. If so, permission might have been granted under s.5(3)(b) to ask her about them. His Honour's refusal to grant such permission is the other ground of appeal against the appellant's conviction.

14 The power of a court acting under s.5(3)(b) to grant permission to ask a person to disclose a conviction that is not part of a criminal history is not, where it is not relevant to an issue in proceedings, in terms confined to allowing questions going to credit. The discretion conferred by the second limb of s.5(3)(b) is unlimited. But is it difficult to conceive of any basis other than credit to which such questions might be directed, and it was for that purpose that, it was said, permission ought to have been granted in the present case. Broad as the statutory discretion undoubtedly is under

s.5(3)(b), it ought, I consider, to be considered as starting with the common law attitude that such questions are designed to weaken confidence in the character or trustworthiness of a person as a witness (*Bugg v. Day* (1949) 79 C.L.R. 442, 467), rather than that their scope is at large. Such an approach would be consistent with the most recent authority in which the equivalent of s.16 of the *Evidence Act* has been considered in England: see *R.v. Sweet-Escott* (1971) 55 Cr.App.R. 316, 320. *Phipson on Evidence* §12-23 (14th ed.).

15 Once this is accepted, it is difficult to identify any respect in which the complainant's character or trustworthiness as a witness was challenged at the trial. It is no doubt true that the "credit" of a witness is not to be confined to honesty or veracity, but extends to all matters affecting his or her reliability as a witness. In cross-examination at the trial some questions were directed to testing the accuracy of the complainant's recollection. They were related to events on other occasions quite distinct from those of the night in question. Cross-examination of that kind is, of course, a common forensic tactic for suggesting infirmities in testimony more directly related to the issue. But, unless it is likely to bear ultimately on the weight of testimony going to a question in issue in the proceedings, it serves no legitimate or useful purpose. Given that, in the present case the defence refrained from challenging the complainant's testimony concerning either penetration or consent, it is difficult to see that her reliability as a witness was being challenged with respect to any of the elements of the offence that were in issue. That left only the defence reliance on s.24(1), which as, I have said, encountered the fundamental problem that the complainant's uncontradicted and unchallenged evidence was that she felt the appellant's finger was already in her vagina when she woke up, coupled with the

inescapable inference that it must have been inserted while she was asleep. On that matter, the reliability of her evidence could not have been prejudiced in the minds of the jury by the knowledge that she had been charged with offences of stealing and receiving some 10 months before. To have approached her credibility on that basis would have been irrational.

16 The learned trial judge was therefore correct in exercising his discretion under s.5(3)(b) to refuse permission to question the complainant about her two unrecorded convictions. It may be, as was suggested in the course of argument, there were other forms in which the question could have been asked without contravening the prohibition in s.5(2). But the question was not formulated or put to her in that way at the trial. It may be also that it would have been preferable if a ruling on the matter had been deferred and given, not at the beginning of the trial, but at the stage in cross-examination at which the impact if any on the credit of the complainant could have been more adequately assessed. For reasons already given, that point in the proceedings was never in fact reached.

17 Even, however, if this might mean that the decision to exclude the question was premature, it would not have the consequence that the appellant's conviction for this offence should be set aside. It is true that, as Mr Devereaux of counsel submitted, the right to cross-examine prosecution witnesses is regarded as fundamental to a proper trial at common law; and that attempts to impose restrictions on it should be closely scrutinised. It was accordingly submitted that the appeal was not one in which it was possible or appropriate to apply the proviso to s.668E(1), which is now s.668E(1A) of the Code. The appeal is, however, not founded on the wrongful exclusion of evidence constituting a "wrong decision of any question of law" within

the meaning of s.668E(1) of the Criminal Code. On what I have said, the right, such as it is, to ask questions about convictions which are not part of a witness's criminal history is removed by s.5(2) of the Act, and replaced by a discretion on the part of the court on application under s.5(3) to grant permission for such a question to be asked. Since, in exercising his discretion under s.5(3), the trial judge is not shown to have made any wrong decision of law, the appeal can succeed only if the appellant succeeds in establishing that "on any ground whatsoever there was a miscarriage of justice" in terms of s.668E(1). The case is not one in which the Crown is obliged to invoke 668E(1A) in order to sustain the conviction by showing that there has been no miscarriage of justice; but is akin to one in which the appellant must expose a miscarriage of justice in order to establish a ground of appeal: cf. *Maric v. The Queen* (1978) 52 A.L.J.R. 631; *Webb v. The Queen* (1994) 181 C.L.R. 41, 90; and *R. v.Cranston* [1988] 1 Qd.R. 159, 166.

18 In my opinion, no such miscarriage of justice has been shown. The appeal against conviction therefore fails, and no question of applying s.668E(1A) falls to be considered.

19 This leaves for determination the appellant's application for leave to appeal against the sentences imposed. As to the offence of indecent assault, the learned judge observed that under the recent amendment introducing Part 9A into the *Penalties and Sentences Act 1992*, the offence is now a schedule offence classified as a "serious violent offence" and one for which the maximum penalty has been increased to imprisonment for life. His Honour was not, however, asked under s.161B(3) to declare the appellant to have been convicted of a serious violent offence, with the consequence of limiting his parole eligibility. Having regard to the duration

of the prison term imposed for this assault, the jurisdiction to do so would not have been exercisable here. The statutory classification as a serious violent offence and the new maximum penalty were factors to be borne in mind in sentencing this offender, but they were not overwhelming or decisive. The offence was one that involved a violation of the complainant's person and privacy but it was not otherwise accompanied by violence according to the ordinary meaning of that expression; nor, in the catalogue of offences of this kind, can it fairly be regarded as being at the more serious end of the range of offence. He did not attempt to persist in it once the complainant turned away; and he has no previous conviction for a sexual offence.

20 The appellant did not spare the complainant the ordeal of a trial, and she suffered distress when later she came to appreciate what had been done to her; but there is no reason to suppose that in this instance she suffered physical pain or permanent ill-effects as a result. Features that tend to exacerbate the offence are the difference in ages between the offender and the complainant, and that the appellant took advantage of her while she was drunk and asleep in her own home. Nevertheless, it is not as serious as it would have been if commission of the offence had involved an intrusion into the privacy of her own bedroom. Taking all these matters into account, the penalty imposed seems to me to be sufficiently high to justify interference, and I would substitute a sentence of imprisonment for 18 months.

21 Turning to the other three offences for which the appellant was sentenced, they involved: (1) breaking and entering the Wavell Heights State School by removing louvres and then smashing a window, before stealing a video cassette recorder, two computers and a compact disc player belonging to the Education Department and valued at $5,803. He also (2) stole a quantity of compact discs and audio cassettes

belonging to a named individual; and (3) stole a microwave oven and a further quantity of video cassettes belonging to another person. As all of this property, valued in total at $7,053.40, was stolen from the same place, it is perhaps to be inferred that the items (2) and (3) belonged to teachers at the school rather than the Department. The appellant was seen removing it in his vehicle. His fingerprints were found at the point of entry to the room. The offences are made worse by the fact that he used his knowledge of the school, where he had previously worked as a labourer, to plan and execute the break-in and theft. The point was made in the appellant's favour that the offences were committed some time ago in October 1994; but the fact is that, having been granted bail, he absconded in 1995 (for which offence he has been separately sentenced) and was apparently not located until he was arrested for the indecent assault in September 1997.

22 The appellant comes from a respectable background with a family who cares about and is to some extent still supportive of him. He has, however, a not inconsiderable criminal history, which began at a relatively early age and continued for some five years, during which he committed a variety of comparatively minor offences. Some of them involved dishonesty, but there have been none of that kind since about March 1983 until the break-in was committed in 1994. He has a problem with a back injury, which he suffered some years ago in the course of his work; but, before then, he had a good employment record.

23 No compensation has been paid or offered in respect of the property taken, and none can be expected. The sentences imposed on the subject indictment were (1) imprisonment for 2½ years for breaking, entering and stealing; (2) 12 months for the second stealing; and (3) a further 12 months for the third, to be served concurrently. The learned trial judge was, I think, justified in making the effective sentence in the indictment for breaking and stealing cumulative on the sentence imposed for the quite distinct and later offence of indecent assault. The overall impression remains that the appellant has not by any means been treated lightly. Although the effective sentence of 2½ years is close to the borderline, these were the first substantial offences of dishonesty committed by the appellant, and certainly the first since 1983.

24 In all the circumstances I would be disposed to make the following orders:

A. On indictment no. 449/98 in the District Court at Brisbane:

(a) appeal against conviction dismissed;

(b) appeal against sentence allowed; sentence varied by reducing it from imprisonment for 3 years to imprisonment for 18 months.

B. On indictment no. 1020/98 in the District Court at Brisbane, appeal against sentence allowed; sentence imposed on count 1 varied by reducing it to imprisonment for 2 years; existing sentences of 12 months imprisonment for counts 2 and 3 to be served concurrently with that sentence.

C. Sentences in para. B above to be cumulative on sentence in para. A above.

REASONS FOR JUDGMENT - AMBROSE J.

Judgment delivered 15 September 1998

1 I agree with the reasons of McPherson J.A. and with the proposed orders.