IN THE COURT OF APPEAL [1998] QCA 097

SUPREME COURT OF QUEENSLAND

C.A. No. 20 of 1998

Brisbane

[R. v. F; ex parte A-G]

THE QUEEN
v.
F

REFERENCE BY ATTORNEY-GENERAL OF QUEENSLAND
PURSUANT TO SECTION 669A OF THE CRIMINAL CODE

Davies J.A.
McPherson J.A.
Shepherdson J.

Judgment delivered 19 May 1998

Separate reasons of each member of the Court, each concurring as to the answers given.

IN ANSWER TO THE QUESTIONS RAISED IN THE REFERENCE PURSUANT TO SECTION 669A OF THE CRIMINAL CODE:

1. THE TEST STATED BY THE LEARNED TRIAL JUDGE WAS WRONG . THE CROWN MUST PROVE BEYOND REASONABLE DOUBT THAT THE ACCUSED HAD THE CAPACITY TO KNOW THAT HE OUGHT NOT TO DO THE ACT WHICH HE DID.

1A. EVIDENCE OF SURROUNDING CIRCUMSTANCES INCLUDING CONDUCT CLOSELY ASSOCIATED WITH THE ACT CONSTITUTING THE OFFENCE MAY BE CONSIDERED FOR THE PURPOSE OF PROVING THE RELEVANT CAPACITY IN RELATION TO THAT OFFENCE INCLUDING WHERE, AS IN THE PRESENT CASE, THAT CONDUCT MAY CONSTITUTE THE COMMISSION OF ANOTHER OFFENCE. SUCH CONDUCT MAY INCLUDE ASSERTING A FALSE ALIBI, RENDERING A VICTIM INCAPABLE OF IDENTIFYING THE ACCUSED OR PREVENTING A VICTIM FROM SUMMONING ASSISTANCE DURING THE COMMISSION OF THE OFFENCE. ALTHOUGH EVIDENCE OF THE ACCUSED'S AGE ALONE CANNOT REBUT THE PRESUMPTION MADE BY S.29(2) OF THE CRIMINAL CODE, INFERENCES CAPABLE OF REBUTTING THE PRESUMPTION CAN BE

DRAWN FROM THE ACCUSED'S AGE WHEN CONSIDERED TOGETHER WITH EVIDENCE OF THE ACCUSED'S EDUCATION OR OF THE SURROUNDING CIRCUMSTANCES OF THE OFFENCE, OR WITH OBSERVATIONS OF THE ACCUSED'S SPEECH OR DEMEANOR.

1B. THERE IS NO NEED TO ANSWER THIS QUESTION BECAUSE IT IS ANSWERED BY THE ANSWER TO QUESTION 1A.

2. THE CROWN IS PERMITTED TO NEGATIVE THE PRESUMPTION BY EVIDENCE OF PREVIOUS DEALINGS BY THE ACCUSED WITH POLICE OF THE KIND SOUGHT TO BE PROVED HERE, AND ALSO OF PREVIOUS CONVICTIONS IF PROBATIVE OF CAPACITY, EVEN THOUGH THE EVIDENCE OF THOSE DEALINGS AND CONVICTIONS WOULD NOT ANSWER THE DESCRIPTION OF SIMILAR FACT EVIDENCE OR BE ADMISSIBLE ON SOME OTHER BASIS; BUT IN SOME CASES, WHICH WILL BE RARE, THE COURT MAY EXCLUDE SUCH EVIDENCE BECAUSE ITS PREJUDICIAL EFFECT WILL EXCEED ITS PROBATIVE VALUE.

CATCHWORDS: **CRIMINAL LAW - Reference of points of law by Attorney-General pursuant to s.669A(2) of the Criminal Code - criminal responsibility of a person under the age of 15 years - presumption of doli incapax - test for evidence required to rebut the presumption in s.29(2) - whether the surrounding circumstances of the commission of the offence in question are admissible as evidence of the relevant capacity of the accused to rebut the presumption - whether a child accused's previous convictions and dealings with police are admissible in evidence to rebut the presumption even though those convictions and dealings would not answer the description of similar fact evidence or be admissible on some other basis.**

B. v. R. (1958) 44 Cr.App.R. 1
R. v. M. (1977) 16 S.A.S.R. 589
R. v. B. (an infant) [1979] Qd.R. 417
R. v. Harris, Kirby and Johnson (unreported, New South Wales Court of Criminal Appeal, 203, 302 and 204 of 1985, judgment delivered 18 July 1986)
C. (a minor) v. D.P.P. [1996] 1 A.C. 1
R. v. Sheldon [1996] 2 Cr.App.R. 50
L. & Ors. v. D.P.P. [1996] 2 Cr.App.R. 501
A. v. D.P.P. [1997] 1 Cr.App.R. 27
G. v. D.P.P. (unreported, Queen's Bench Division Divisional Court, 14 October 1997)

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Hearing date: 26 March 1998

REASONS FOR JUDGMENT - DAVIES J.A.

Judgment delivered 19 May 1998

Pursuant to s.669A(2) of the Criminal Code the Attorney-General purported to refer to this Court as points of law that had arisen at the trial upon indictment of a person in relation to a charge contained therein, the following questions as amended:

> "1. Is the test of evidence capable of rebutting the presumption expressed in section 29 that stated by Her Honour, namely that the Crown 'must call strong and pregnant evidence that the accused understood that what he did was seriously wrong, not merely naughty or mischievous'?
>
> 1A. In a case in which the accused denied committing the relevant act, is the Crown required to call evidence by way of admission on the issue of capacity to negative the presumption made by section 29(2) of the Code or can that presumption be rebutted by inferences drawn from the following:
> (i) the accused's age and education;
> (ii) false denials of the accused, admitted without objection, which asserted a false alibi; and
> (iii) the surrounding circumstances of the offence including rendering the complaint incapable of identifying the perpetrator and/or summoning assistance during the commission of the offence?
>
> 1B. Is evidence of the circumstances surrounding the commission of the offence charged against an accused capable of proving that at the time of doing the act or making the omission charged the person had the capacity to know that the person ought not to do the act or make the omission within the meaning of section 29(2)?
>
> 2. Is the Crown permitted to negative the presumption by evidence of previous convictions and/or other dealings with police when those other convictions or dealings would not answer the description of 'similar fact' evidence?"

Those questions, if they arose as points of law at the trial of the abovenamed, did so in the following context. On 28 May 1997 F was arraigned on the following charges: assault occasioning bodily harm and breaking and entering with intent to commit that offence both

on 12 February 1996; and an armed robbery in company with personal violence and deprivation of liberty both on 4 May 1996. To each of those offences he pleaded not guilty and his trial proceeded. Having been born on 21 May 1981, F was 14 years and nine months old on 12 February 1996 and just three weeks short of his fifteenth birthday on 4 May 1996. At the end of the Crown case it was submitted on F's behalf that the prosecution had not proved that at the time of doing the acts constituting the above offences he had the capacity to know that he ought not to do those acts. That submission was based on s.29(2) of the Criminal Code which, at the relevant time, was in the following terms:

> "A person under the age of 15 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission the person had the capacity to know that the person ought not to do the act or make the omission."

The learned trial Judge upheld the submission on F's behalf and refused the prosecutor leave to re-open his case in order to lead further evidence on that topic. The Crown prosecutor then endorsed on the indictment that the Crown would not further proceed with it and the jury were discharged. The questions asked in the reference seek to challenge the legal basis for the learned trial Judge's conclusions that the prosecution had not proved that at any relevant time F had the capacity to know that he ought not to do the act the subject of a charge and that the Crown should not have leave to re-open its case to adduce further evidence.

The evidence adduced at the trial and relied on by the Crown to prove that F had the capacity, at the time of performing the acts the subject of each of the charges, to know that he ought not to do those acts was of three kinds: first, evidence of circumstances surrounding the commission of the offences on 4 May 1996, secondly evidence of a false alibi given by F and thirdly evidence of his educational standard together with the proximity of his age to that

of 15 years.

The evidence of events of 4 May 1996 proved that F and another young person entered the victim's house in the early evening whilst he was asleep, woke him, assaulted him, demanded drugs from him, bound and blindfolded him and warned him not to move for five minutes after they left. It was F who blindfolded him and presumably bound him and who probably issued the warning. One of the offenders, it is not clear who, cut the complainant's telephone cord before leaving.

In the course of a video recorded interview with police on 29 May 1996 F said that he was in another suburb with some people whom he named from about three o'clock on the afternoon of 4 May 1996 until well after the time that the offences of that day were committed. He denied being at the victim's house on that night. It may be accepted for the purpose of this reference that his alibi was false.

Finally the prosecution relied below on evidence of F's educational qualifications. He was educated to Grade 9 standard and in addition he had done what he described as some other educational programmes which appear to be trade programmes; instruction in the use of laser machinery and nickelling machinery.

The prosecution did not rely below on the video recording of F's interview with the police in order to show his level of comprehension and maturity and consequently the relevant capacity. Plainly that was evidence upon which the jury could have relied for that purpose.

Before this Court the Attorney accepts that it is not sufficient, in order to refer to this Court for its consideration and opinion a point of law that the evidence to which I have referred was sufficient to be capable of proving that F had the relevant capacity at the relevant time: R. v. Lewis; ex parte Attorney-General [1991] 2 Qd.R. 294 at 299. Implicit in questions 1, 1A and 1B is the submission that her Honour applied wrong principles in

concluding, as she did, that the evidence was not capable of proving the relevant capacity.

Question 1

As this question indicates, her Honour said that, to rebut the presumption in s.29(2), the Crown must call strong and pregnant evidence that the accused understood that what he did was seriously wrong and not merely naughty or mischievous. In expressing the test in that way her Honour was paraphrasing what Lord Parker L.C.J. said in B. v. R. (1958) 44 Cr.App.R. 1 at 3. However that is not a correct statement of the principle in s.29(2) for at least two reasons. First, the section is concerned with capacity to know rather than, as the common law appears to be, with actual knowledge: R. v. McGrath C.A. No. 252 of 1986, judgment delivered 20 November 1986; R. v. B C.A. No. 369 of 1997, judgment delivered 6 November 1997. Secondly the phrase "strong and pregnant evidence" tends to obscure the fact that what s.29(2) requires, and no more, is that the Crown prove the relevant capacity beyond reasonable doubt. It is unnecessary to consider whether the position is any different in this respect under the common law but I note that, in C. (a minor) v. D.P.P. [1996] 1 A.C. 1 at 38 Lord Lowry thought that the emphatic tone of directions such as this were due to the court's anxiety to prevent merely naughty children from being convicted of crimes and in a sterner age to protect them from the draconian consequences of conviction. This may also explain the phrase "seriously wrong". It is preferable in my view, if the phrase "that the person ought not to do the act" needs to be paraphrased, and I doubt if it does, to use the phrase "that the act was wrong according to the ordinary principles of reasonable man": R. v. M. (1977) 16 S.A.S.R. 589 at 591.

It is true that the passage from Lord Parker's judgment, in which a statement to the above effect appears, was cited with approval by the Court of Criminal Appeal in R. v. B. (an infant) [1979] Qd.R. 417 at 425. But the context in which it was cited was the need for the

calling of proper and admissible evidence on the question and the absence, in that case, of any evidence on it. It is perhaps unfortunate that the passage was cited at all but its citation should not be taken as acceptance of the need for guilty knowledge - the court expressly stated that what was necessary was capacity to know - or for any gloss upon the standard of proof.

In paraphrasing the test stated by Lord Parker her Honour therefore erred in each of the two respects mentioned, in both of which the burden upon the Crown was stated too highly. And her Honour, in concluding that "it cannot be said in this case that there is strong and pregnant evidence that the accused understood what he did" applied that erroneous test to reach the conclusion which she did.

It follows that I would express my opinion on this point of law by saying that the test stated by her Honour was wrong and that the Crown must prove beyond reasonable doubt that the accused had the capacity to know that he ought not to do the act which he did.

Questions 1A and 1B

The amended version of point 1B is somewhat repetitive of point 1A. They can conveniently be considered together.

Although the learned trial Judge referred to the fact that the accused was, as she put it "towards the outer end to which the section applies", by which she meant close to 15 years of age, and to the accused's "false denials of his involvement", she went on to say that the Crown had not called any evidence to specifically deal with the issue of s.29(2). Her Honour made this last statement after referring to a statement by Lord Lowry in C. v. D.P.P. supra, to the effect that there must be clear positive evidence not consisting merely in the evidence of the acts amounting to the offence itself. It seems that this led her Honour to exclude consideration of the surrounding circumstances of the offences and even of the false denials

to which she referred. Having so ruled, her Honour reconsidered the matter the following morning in the course of which she referred to L. & Ors. v. D.P.P. [1996] 2 Cr.App.R. 501 and A. v. D.P.P. [1997] 1 Cr.App.R. 27 in which, as her Honour put it, "there was no direct evidence as to the accused's state of mind" but said that she had some difficulty in reconciling those decisions with C. v. D.P.P. Consequently she said that she was not finally persuaded that she should alter the ruling that she had made the previous day. Her Honour's difficulty in reconciling L. & Ors. v. D.P.P. and A. v. D.P.P. with C. v. D.P.P. supports the view which I have taken of her Honour's earlier reasoning; that she thought it necessary that there be direct rather than circumstantial evidence of the accused's capacity to know that he should not do the acts which constituted the offences. That is also plainly the view which the Attorney took of her Honour's reasoning and explains the way in which the points of law are stated in paragraphs 1A and 1B.

Her Honour's difficulty in reconciling L. & Ors. v. D.P.P. and A. v. D.P.P. with C. v. D.P.P. appears to result from a misunderstanding of the effect of Lord Lowry's statement, which her Honour quoted, that, for the presumption to be rebutted, there must be positive evidence not consisting merely in the evidence of the acts amounting to the offence itself.

What his Lordship was saying, as applied to this case, was that, viewing each offence in isolation, the mere act of committing it was not evidence capable of proving the relevant capacity though, as his Lordship also said, the older the accused is and the more obviously wrong the act, the easier it will generally be to prove the relevant capacity. But his Lordship was distinguishing between proof merely of the doing of the act charged, on the one hand, and the surrounding circumstances of the commission of that act on the other. The surrounding circumstances were, he said, of course relevant to that issue; and he said that what the accused said or did before or after the act may go to prove that capacity. So in R. v.

Sheldon [1996] 2 Cr.App.R. 50, a case of attempted murder, the court took into account on this issue the fact that the accused led his victim to a deserted place before assaulting her and that he later lied about seeing an assailant. And, in the present case, though proof that the accused tied his victim up after committing the armed robbery in company with personal violence would not go to prove the relevant capacity in relation to the offence of deprivation of liberty, it would go to proof of capacity in relation to the armed robbery for it would tend to show, together with the warning given to the victim against moving until after the offenders had left and the severing of the telephone cord, a capacity to know that it was necessary to effect a safe escape before the alarm was raised or the police were contacted. And the warning, together with the severing of the telephone cord, were relevant to the accused's capacity in respect of all of the offences committed on that evening.

In L. & Ors. v. D.P.P. Otten L.J. at 504-5 expressed the view that Lord Lowry in C. v. D.P.P. was not laying down the principle that the prosecution was required to adduce evidence of knowledge (or, in the present case, capacity) independent of the facts of the events and from an independent source such as a teacher or psychiatrist. Similarly in A. v. D.P.P. Lord Justice Pill at 33-4 emphasized that Lord Lowry was speaking of the "mere commission" of the act but that that does not prevent consideration, for the purpose of determining knowledge, of the circumstances in which the act was committed including consideration of conduct closely associated with the act.

This misunderstanding, in my view, led her Honour to the incorrect conclusion that evidence of the kind to which I have referred could not be considered in order to prove capacity.

I would therefore express my opinion with respect to paragraph 1A that evidence of surrounding circumstances including conduct closely associated with the act constituting the offence may be considered for the purpose of proving the relevant capacity in relation to that offence including where, as in the present case, that conduct may constitute the commission of another offence. Such conduct may include asserting a false alibi, rendering a victim incapable of identifying the accused or preventing a victim from summoning assistance during the commission of the offence. Although evidence of the accused's age alone cannot rebut the presumption made by s.29(2) of the Code, inferences capable of rebutting the presumption can be drawn from the accused's age when considered together with evidence of the accused's education or of the surrounding circumstances of the offence, or with observations of the accused's speech and demeanor.

There is no need to answer question 1B because it is answered by the answer to question 1A.

Question 2

After noting that she had a discretion to allow the Crown to re-open its case to rebut the presumption arising from s.29(2) her Honour refused the request saying:

> "In my view, the evidence sought to be called by the Crown in re-opening the case by way of evidence of prior convictions or prior dealings with police should not be admitted as it does not, as the Crown fairly concedes, amount to similar fact evidence. I, therefore, with regret, refuse the Crown application to re-open the case."

There is no doubt that the evidence sought to be admitted did not amount to similar

fact evidence. It consisted of the following:

(i) an interview with the police on 20 September 1993 in which F admitted to housebreaking and stealing on 15 May 1993;

(ii) an interview with police on 9 June 1995 in which he admitted to trespass on school grounds on 18 February 1995;

(iii) a plea of guilty of 11 September 1995 to the offences of insulting words and obstructing police on 9 September 1995;

(iv) an interview with police on 12 March 1996 in which he admitted to wilful damage on 17 November 1995 and in which, when asked whether he knew what he was doing was wrong, he said: "Yeah, did not realise it at the time 'cause lost my temper";

(v) a portion of the interview in relation to the offences the subject of the present charges, which had not been led because it related to the possession of cannabis, in which he admitted that he would not have smoked cannabis in the presence of his parents or police and said: "If my parents were there, Mum or Dad were there and I was smoking it in front of them, I'd get my arse kicked and if youse were there and I was smoking it in front of youse I'd be put in the back of a cop car".

None of this evidence sought to prove previous convictions though its effect would be equally prejudicial. Though the prejudicial effect of this evidence may be much the same as evidence of previous convictions, its probative value on the question of capacity, consisting as it does of admissions of the commission of offences and, in two cases, of knowledge that he ought not to have done the act, is likely to be greater than evidence of a conviction obtained after a trial on disputed facts.

In reaching the conclusion that she should not permit the Crown to re-open its case to adduce this evidence the learned trial Judge referred to some passages from the speech of

Lord Lowry in C. v. D.P.P. which, in my view, are equally applicable to evidence of admissions of and pleas of guilty to prior offences as to evidence of convictions for such offences. After expressing the view that if "the primary facts are disputed, my own opinion is that ... a child defendant ought not to be put in a worse position than an adult by having evidence of his previous convictions admitted unless they can be admitted under a generally applicable principle" his Lordship went on at 35 to state more generally:

> "But I do not think it right ... to admit non-similar fact evidence which would be inadmissible on issue 1 for the purpose of proving the prosecution's case on issue 2. If the prosecution's case must sometimes fail because some or all of the probative evidence cannot be given, that is not a unique situation and it must be borne with fortitude in the interests of fairness to the accused."

His Lordship seems to have had in mind, as the reason why evidence of previous convictions should not be admissible to prove, in that case, knowledge, was its prejudicial effect irrespective, it would seem, of its probative value on the question of knowledge. Her Honour's reference to those passages and to the fact that the evidence sought to be adduced was not similar fact evidence indicates that she reached her conclusion in reliance on the above views of Lord Lowry.

His Lordship's views on this question were not necessary for the conclusion which he reached and were not agreed in or commented on by any other of their Lordships each of whom wrote short separate judgments. Moreover in R. v. B. [1979] 1 W.L.R. 1185, referred to by Lord Lowry, the Court of Appeal held that a child's previous convictions were admissible in evidence to rebut the presumption. A similar approach to that taken by the Court of Appeal was taken by the Full Court of South Australia in R. v. M. (1977) 16 S.A.S.R. 589 and by the Court of Criminal Appeal in New South Wales in R. v. Harris, Kirby

and Johnson (unreported, 203, 202 and 204 of 1985, judgment delivered 18 July 1986). In the first of those cases at 594 Bray C.J. said:

> "The rule excluding evidence of past misbehaviour yields when that evidence is relevant to prove one or more of the elements of the crime in issue, and I think this was so relevant, or, rather, I think that evidence of his admissions during the course of his interrogations about his past crimes was so relevant, and that evidence could not be given without disclosing the commission of other crimes."

His Honour then went on to deal with the question whether the learned trial Judge was bound to exclude the evidence in the exercise of her discretion and held that she was not.

In the second of them Street C.J. said at 3:

> "It has been held that in rebutting that presumption the prosecution can range comparatively widely over the lifestyle of the young person, even indeed to proving the committing of prior offences by the child (R. v. B., R. v. A. [1979] 3 All E.R. 460). Whilst at first sight this may seem a little surprising, nevertheless when the overall policy of the law regarding the prosecution of children for crimes is considered it can be recognised that the element of paternalism that properly enters into that policy carries with it the legitimacy of considering factual material which would far exceed the subjective material admissible where prosecuting an adult offender who does not have the benefit of the presumption that is referred to in B. v. R., nor of the paternal approach that pervades the administration of the criminal law in the case of children."

Moreover in G. v. D.P.P. (unreported, Queen's Bench Division, 14 October 1997) a Divisional Court consisting of Brooke L.J. and Gage J. held that magistrates were correct in admitting against a male child of 12, charged with indecent assault of a female child, evidence of a previous incident in which the child had been punished for allegedly interfering with another young girl. It was common ground in that case that the evidence was not similar fact evidence or admissible on any ground other than knowledge. Nevertheless Gage J. with

whom Brooke L.J. agreed, distinguished the above dictum of Lord Lowry in the following terms:

> "It is to be noted that this is a case where the Magistrates were admitting not evidence of criminal convictions but evidence of an allegation of an incident which we have been told the Appellant denied. The difference may be a fine one, but in my judgment, this was relevant evidence to show that it had been drawn to the Appellant's attention on a previous occasion that conduct such as this was serious conduct, and that it was evidence which showed that the Appellant would know thereafter that such conduct was wrong."

I mentioned earlier that the probative value of admissions is likely to be greater than evidence of a conviction obtained after a trial on disputed facts. But that was not relevant here where the facts were disputed and, in any event, Lord Lowry's dictum appears to require absolute exclusion of the evidence in a case such as this, irrespective of its probative value. So that, in purporting to distinguish Lord Lowry's dictum, the Divisional Court impliedly rejected it.

In my view the approach taken in these cases is correct. To adopt Lord Lowry's dictum in a case such as the present one would be to imply in s.29(2) limiting words which are unnecessary for its operation. I would therefore reject the application of that dictum to s.29(2).

No doubt evidence may always be excluded in a criminal trial where its prejudicial effect is likely to exceed its probative value. In such a case fairness to an accused may require its exclusion. But, for three reasons, that will rarely be the case where evidence of the kind sought to be adduced here is tendered to rebut the presumption under s.29(2). The first is that the evidence is highly probative, especially so in the case of the admissions that he knew that he ought not to have done the act. A second is that, in most cases of which this is one, having regard to the age of the accused and the nature of the offence, only slight evidence will be sufficient for that purpose and evidence of this kind may be either compelling or the only evidence of capacity. And a third reason is that, as we were informed by experienced counsel in this case, the course usually taken in such a case would be that the Crown would indicate to the defence, in the absence of the jury, its intention of adducing such evidence unless an admission of capacity were made; and any claim to the benefit of the presumption under s.29(2), could then be abandoned.

In any event as I have said, her Honour did not purport to exclude the evidence in the exercise of that discretion. Rather, following the dictum of Lord Lowry, she said that such evidence should be excluded unless it is admissible "under a generally applicable principle".

I would therefore express my opinion with respect to paragraph 2 by saying that the Crown is permitted to negative the presumption by evidence of previous dealings by the accused with police of the kind sought to be proved here, and also of previous convictions if probative of capacity, even though the evidence of those dealings and convictions would not answer the description of similar fact evidence or be admissible on some other basis; but in some cases, which in my view will be rare, the court may exclude such evidence because its prejudicial effect will exceed its probative value.

REASONS FOR JUDGMENT - McPHERSON J.A.

Judgment delivered 19 May 1998

I agree with the reasons of Davies J.A., which I have had the advantage of reading, and also with the answers which his Honour proposes to give to the questions in the reference by the Attorney-General.

REASONS FOR JUDGMENT - SHEPHERDSON J.

Judgment delivered 19 May 1998

I have read the reasons for judgment prepared by Davies JA.

I agree with the answers he proposes and the reasons he gives.