IN THE COURT OF APPEAL [1999] QCA 246

SUPREME COURT OF QUEENSLAND

CA No 21 of 1999

Brisbane

[R v C]

THE QUEEN

v

C

Appellant

McMurdo P
McPherson JA
Atkinson J

Judgment delivered 9 July 1999

Separate reasons for judgment of each member of the Court, each concurring as to the order made.

APPEAL AGAINST CONVICTION DISMISSED.

CATCHWORDS: CRIMINAL LAW -- APPEAL AND NEW TRIAL -- PARTICULAR GROUNDS -- UNREASONABLE OR UNSUPPORTABLE VERDICT -- APPEAL DISMISSED - whether reasonable jury could have been satisfied beyond a reasonable doubt of appellant's guilt based on inconsistencies between complainant's accounts and versions of mother and teacher

Evidence Act 1977 s 93A

Jones v The Queen (1997) 191 CLR 439

CRIMINAL LAW -- APPEAL AND NEW TRIAL -- SUMMING UP - whether judge's summing up of inconsistencies in and reliability of complainant's testimony adequate

CRIMINAL LAW -- EVIDENCE -- STANDARD OF PROOF -- DIRECTION TO JURY -- REASONABLE DOUBT - lies - whether jury has to be satisfied beyond a reasonable doubt that the accused lied - whether lie was indispensible link in chain evincing accused's guilt

Edwards v The Queen (1993) 178 CLR 193

CRIMINAL LAW -- APPEAL AND NEW TRIAL -- PARTICULAR GROUNDS -- IRREGULARITIES IN RELATION TO EXHIBITS - where transcript of s 93A audio tape inadvertently sent to jury room - whether judge erred in not calling mistrial - whether directions to jury were adequate when transcript discovered

R v Hibbins CA 276 of 1998; 3 November 1998

CRIMINAL LAW -- APPEAL & NEW TRIAL -- PARTICULAR GROUNDS -- MISDIRECTIONS AND NONDIRECTION - whether judge's warning to jury on hearing s 93A tape again sufficed to balance any prejudice to accused - whether judge erred in failing to revise all complainant's cross examination and inconsistencies

R v Hibbins CA 276 of 1998; 3 November 1998

Counsel: Mr B G Devereaux for the appellant
Mr M J Byrne QC for the respondent

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

Hearing Date: 27 April 1999

REASONS FOR JUDGMENT - McMURDO P

Judgment delivered 9 July 1999

1 The appellant was convicted of two counts of indecent dealing with a child under the age of 12 years who was under his care. He was sentenced to 18 months imprisonment.

2 The appellant was married to the complainant child's mother. The complainant child was born on 3 June 1989. She was aged eight at the time of the offences in June and August 1997 and was nine and a half at the time of trial. The complainant had a younger brother. Between 29 June 1997 and 30 August 1997 the family were staying together in a motel room on the Gold Coast. The prosecution case was that on one day between these dates whilst the complainant's mother was out and the complainant's brother was in the shower, the appellant touched and kissed the complainant in the area of her vagina (count 1) and then placed the complainant's hand on his exposed penis (count 2).

Ground 1: Unsafe and unsatisfactory verdict

(a) Inconsistencies

3 The appellant's first ground of appeal is that the verdict was unsafe, unsatisfactory and against the weight of the evidence.

4 The prosecution case relied largely on the complainant's evidence which comprised in chief an audio and a video tape admitted as evidence under s93A *Evidence Act 1977*. She also gave oral evidence and was extensively cross-examined.

5 The police first interviewed the complainant on an audio tape on 17 November 1997 at her school. The complainant said:

> "... he touched my private bit and he - he - when I tried to go then he pulled me over and he pushed my hand into his private.
>
> All right. And where were you when this happened ? --
>
> Well, my brother was in the shower and I was laying on the bed ... - and then after he did that I ran into the bathroom until my mummy came home ...
>
> Okay. And when you said Daddy touched you on the private parts, can you explain to us how ? ---

Well, he kissed it ---

...

Did you have any clothes on ? --- No, because I got wet.

How'd you get wet ? -- Well, when I was turning the shower on I had a bit of trouble.

Oh, so you were showering your little brother, were you ? ---

No, I wasn't showering him, I was --- well, I washed a little bit of his hair but I had to turn the tap on and everything for him.

Oh, yeah. So when you got wet, what happened ? -- Well, Daddy sent to this - I was going to get a change of clothes and he said, 'Just take your clothes off (indistinct) until [your brother] is finished his shower'.

Mmm ? -- and then he told me come up and give him a hug so I gave him a hug.

Where was daddy when you gave him a hug ? -- He was on the - on the - on bed and I - he told me to come up and sit with him and give him a hug.

Mmm. And when you say that he touched you on your private parts, can you tell me what that is ? ... I don't know what you mean by your private parts ? --- My vagina."

She said that it happened only on one occasion and the appellant told her not to tell anybody or he would hurt her.

6 A video recorded interview followed later that day and the complainant largely repeated that version. Despite the submissions by the appellant's counsel to the contrary, after viewing the video tape on several occasions I can see no significant inconsistencies with the audio tape.

7 During cross-examination the complainant said the appellant put her hand on his penis and rubbed it up and down. He did not try to put her private parts on his private parts. She was asked:

> "He never ever licked you in the private parts, did he ? -- Yes, he did.
>
> He did ? -- He kissed it.
>
> Kissed it ? -- Mmm.
>
> You know the difference between a kiss and lick, don't you ? -- Yes.
>
> He never ever licked you in the private part, did he ? -- Uh-uh.
>
> You never went and hid in the closet, did you ? -- No.

You know what a closet is, don't you ? -- Yes.

And you know the difference between a closet and a wardrobe, don't you ? -- Yes.

Was there a closet where you were in the motel ? -- Not that I can remember. I don't know. Can't remember.
He didn't ever put you on the bed, did he ? -- No.

And it wasn't after your shower, was it ? -- No."

She denied that the appellant said after touching her "No. This is wrong". She agreed the appellant did not put her hand on his penis a few days later and smelly pussy stuff came out. She did not like the appellant; he hit her when she was naughty and she wanted him to go away so she could just be with her mum. When he married her mother (which occurred before these offences) she started to like him a little bit.

8 She did not tell the teacher that the appellant tried to put her private parts on his private parts; nor that he put her on the bed after the shower. She did not tell the teacher the appellant touched her and licked her in her private parts, although this was true. She did not make up something about the appellant to make him get

out of the house. She told the teacher and her mum and the police the truth. On a couple of occasions she told the appellant she was sore in the vagina but not on the day this happened.

9 After being reminded of her evidence in the Magistrates Court she agreed that the appellant did not put her hand on his penis and move it up and down. She then said she did not understand the question and the appellant did put her hand on his penis and move it up and down. She agreed that at the Magistrates Court she had said the appellant did not touch her around the vagina but that the appellant had in fact done these things.

10 In re-examination she said that when the appellant kissed her on the vagina she could feel his tongue.

11 The appellant was interviewed on 27 December 1997 and denied the allegations but the prosecution relied on the interview as showing lies amounting to implied admissions. He said that the "only time I can recall going anywhere near [the complainant's] vagina" was on a school day when the family were living at the Gold Coast in a bedroom with an ensuite:

> "... one day she came home from school ... and she had been bitten by something. And we spoke about it earlier - myself, [the complainant's mother] and [the complainant] spoke about it earlier - and I don't know where [the complainant's mother] went. She went somewhere, any way, [the complainant] said it was sore and it was swelling up or something, she asked me to have a look, and I had a look, and - I don't think we had any cream, we spoke about going to the doctors about it, but the next day it was fine."

12 The complainant's mother had no recollection of ever discussing with the appellant the complainant's groin area; had there been such a conversation she would have remembered it. On occasions the complainant had been sore in the vaginal area and she had inspected the area and decided to wait to see what it was like in the morning before going to the doctor. She was adamant that "under no circumstances was there a time he ever said to me that [the complainant] came to him with a bite at all".

13 After the police interview the complainant told her mother she was sorry she got Daddy in trouble and said:

> "when you'd gone to get your methadone I'd been in the shower and had a sore mooty and Dad said 'hop on the bed and I'll have a look' ... He put his mouth on my mooty and then quickly moved away and said 'No, this is wrong'."

She then cried and later added:

> "I can't remember if it was the next day or a couple of days when you went to see [the doctor] Daddy put my hand on his penis, moved it up and down and smelly pussy stuff came out".

She asked the complainant why she had not told her about it earlier and recounted that the girl "said 'Because Daddy had said that it would make Mummy mad and we'd get a divorce' and so she was too scared to tell me and she broke down and cried again".

14 On Friday evening 14 November 1997 at a school disco a teacher noticed that the complainant was crying and had a number of children around her. The complainant told the teacher:

> "I am not supposed to tell anyone but my Daddy said things to me that Daddies shouldn't say. He says that I came out of him and I'm his and he put me in his bed after my shower and touched me and licked me in my private parts, and he tried and tried to put my private parts on his private parts but I got away and hid in the closet till Mum got home. I'm not supposed to tell anyone but I told Joshua ... Please don't tell anyone."

The teacher made notes of the conversation about 15 or 20 minutes later.

15 The appellant did not give evidence.

16 The appellant submits that the combined effect of inconsistencies within the evidence of the complainant child and the difference between the complainant's evidence and the accounts the complainant gave to the teacher and to her mother means that a reasonable jury could not accept one account of the complainant and reject the other, nor would a reasonable jury have been satisfied of the guilt of the appellant beyond reasonable doubt.[1]

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1. See *Jones v The Queen* (1997) 191 CLR 439.

17 The complainant was generally consistent in her evidence given in the tapes tendered under s93A *Evidence Act 1977* and in her testimony at trial that the counts as alleged in the indictment occurred, that is, the appellant touched and kissed her vagina and placed her hand on his penis. Many of the alleged inconsistencies are not significant, for example whether the appellant licked or kissed her vagina or whether he did both. The inconsistencies between her evidence at trial and that at committal are on one reasonable view explicable as the

confusion of a nine and a half year old giving evidence of events 18 months past, in stressful circumstances. The inconsistencies between her evidence and the versions she gave to the teacher and her mother when she was in a distressed state are similarly explicable. Another plausible explanation may be that the complainant was minimising the appellant's conduct in her version to the police and at court so as to partially protect him whilst still reporting his conduct: feelings in a complainant of guilt and of sympathy for the perpetrator are not unusual in such cases. The jury observed the complainant who was cross-examined carefully and at length. The cross-examination which covered about 30 pages of transcript, took place over two days and formed the major part of the evidence at trial. The inconsistencies were emphasised by defence counsel in his address. The jury were told by the judge that they must be satisfied of the truth of the complainant's evidence beyond reasonable doubt before they could convict.

18 His Honour told the jury in his summing up

> "if you accept [the complainant] as an honest and reliable witness in so far as her evidence about what she says happened to her on this occasion is concerned, you can convict the accused of each of the

> offences charged. I can also say this: that if as a result of considering her evidence you have a reasonable doubt, a doubt based on reason and common sense, as to whether you can regard her as both honest and reliable in so far as those important matters are concerned then you would have to find the accused not guilty of each of the offences."

His Honour reminded the jury that the complainant was only nine years of age and was recalling something she says occurred when she was about eight. He said:

> "When considering her evidence you must look at it very, very carefully before deciding whether you would accept it as honest and reliable.
>
> As I said to you before lunch unless you are satisfied that her evidence is honest and reliable when she told you what happened to her at the hands of the accused, that he touched her in the area of the vagina and kissed it, subsequently took her hand and placed it on his penis which is the subject of the second charge, you would have to find him not guilty."

19 His Honour referred to the inconsistencies in her evidence and the inconsistencies between her testimony in court and what she told her mother, the police and the teacher and stressed the need "to assess her evidence very, very carefully". His Honour again highlighted these inconsistencies when summing up the defence case for the jury. The complainant's evidence as to the offences was

uncontradicted by other sworn evidence. Although there were inconsistencies, these were emphasised to the jury by the judge and defence counsel. The complainant was consistent that the offences occurred as particularised. The jury were entitled to accept the complainant's evidence and to find the inconsistencies were explicable by her youth, the passage of time since the events occurred, confusion and misunderstanding. It was plainly open to the jury on the whole of the evidence to be satisfied of the appellant's guilt beyond reasonable doubt.

(b) Lies.

The appellant next submits that the verdict was unsafe as the trial judge should have directed the jury they could only be satisfied the appellant had lied if they accepted beyond reasonable doubt the evidence of the complainant's mother that on no occasion did the appellant tell her that the complainant came to him with a bite in the groin or vaginal area.

21 It is conceded by counsel for the appellant that the direction given by his Honour as to the lie was in accordance with *Edwards v The Queen*.[2] The complainant's mother was adamant that at no time did she discuss a bite near the complainant's vagina with the appellant. As part of the *Edwards'* direction, the judge told the jury they must be satisfied that what the appellant told police was a lie. No redirection was sought as to the alleged lie. This was not a case where the lie was the only evidence against the accused or was an indispensable link in a chain of evidence necessary to prove guilt, requiring proof beyond reasonable doubt: see *Edwards*.[3]

22 The learned trial judge's direction as to lies was not flawed and did not result in any miscarriage of justice.

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2. (1993) 178 CLR 193.

3. Ibid, at 210.

Ground 2: The transcript of the audio tape tendered under s93A *Evidence Act 1997* in the jury room.

23 The second ground of appeal is that the trial judge erred in not aborting the trial upon discovery that a transcript of the complainant's evidence had been with the jury since the beginning of their deliberations.

24 The jury retired to consider their verdict at 2.58 pm on 12 January 1999. They were unable to reach a verdict that evening and at 10 am on 13 January requested "to view the audio-video evidence" which had been withheld from the jury room consistent with *R v Hibbins*[4]. After they listened to the audio and video tapes, counsel for the appellant below realised and informed the Court "that the jury have in error been given the transcript of at least the audio tape". The transcript of the complainant's audio tape was in the jury room whilst the jury considered their verdict from 3.01 pm until 7.30 pm when they were locked up for the evening and from whatever time they recommenced their deliberations on 13 January until about

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4. CA 276 of 1998, 3 November 1998.

10 am when their request was granted. Counsel for the appellant requested a mistrial.

25 At about 11 am all copies of the transcripts of the audio tapes were removed from the jury room. His Honour refused to order a mistrial and gave the jury the following directions:

> "... when you retired you appreciate the bailiff came and removed from your possession the transcripts of the two tape-recordings which you had. Strictly speaking, those documents shouldn't have been before you. That is just one of our rules of evidence. You'll recall that I said in the course of the trial that those transcripts weren't evidence and they were there to assist you in understanding what you heard and saw on the tapes and strictly speaking they should not go into the jury room."

The judge gave a similar direction to the jury when the transcripts were first provided to them to assist in following the tapes tendered as evidence. The jury's subsequent request to have the tapes played confirms they understood that direction. The jury retired again until the court reconvened at 2.17 pm when they informed the judge they were unable to reach a unanimous decision. His Honour

gave them the usual direction in accordance with *Black v The Queen*.[5] The jury retired again and returned guilty verdicts at 3.17 pm.

26 Although this is a salutary reminder of the care that must be taken by the judge, counsel, associate and bailiff to ensure that the correct material is with the jury during deliberations, it is plain that the jury understood the directions given them by the judge as to the limited use to be made of the transcript by their request, despite access to the transcript, to have the tape replayed. There is no reason to conclude any miscarriage of justice has resulted here from the presence of the transcript in the jury room.

Ground 3: Failure to balance the replay of the taped evidence tendered under s93A *Evidence Act 1997* by referring to the cross-examination of the complainant and to other inconsistent evidence.

27 The third ground of appeal relied upon is the failure of the learned trial judge to adequately refer the jury to the cross-examination of the complainant and the evidence of witnesses inconsistent with the complainant's evidence.

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5. (1993) 179 CLR 44.

28 After the jury heard and saw the complainant's taped evidence replayed at their request, the appellant's counsel at trial requested a redirection in accordance with *R v Hibbins*[6] where this Court held that:[7]

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6. CA 276 of 1998, 3 November 1998.

7. McMurdo P (Jones J agreeing) at [17].

> "If the jury request to hear the evidence of the complainant child a trial judge must deal with each situation on the facts as they arise ... The judge should also warn the jury that because they are hearing the evidence in chief of the complainant repeated a second time and well after all the other evidence, they should guard against the risk of giving it disproportionate weight simply for that reason and should bear well in mind the other evidence in the case. It is not in our view necessary in every case after replaying the video tape to remind the jury of the cross-examination and re-examination of the complainant from the judge's notes or transcript, where this is not requested by the jury. In many cases this may be wise but every case will depend on its own facts. The overriding consideration for the trial judge must be fairness and balance, something which can be difficult to achieve in emotive sexual cases which are particularly likely to arouse feelings of prejudice in the jury."

29 In a separate judgment, Shepherdson J, with whom Jones J also agreed, said that in such a situation the judge should, inter alia:

"(d) ... warn the jury that because they are hearing (and seeing) the complainant's evidence-in-chief a second time and well after all the other evidence and they should guard against the risk of giving it a disproportionate weight or undue weight and should bear well in mind the other evidence in the case.

(e) To assist in maintaining a fair balance, the judge should after the reading of the s93A statement or the replay of the video tape remind the jury of the complainant's cross-examination and re-examination by reading from the transcript containing that evidence given in court - of course defence counsel may not require the jury to be so reminded."

30 The learned trial judge here declined to read the cross-examination of the complainant but gave the jury the following direction:

"There is an additional warning I should give you and that is this: that it is sometimes thought - and I think you'll appreciate it's common sense - that when you have either a document before you or you see again or hear again a video recording of conversations there may be a tendency to perhaps give undue weight to what you see and hear on that video or what you read on the transcript. I mean, that is only human nature.

So what I'm going to do now is to indicate to you that you should look at that evidence, consider that evidence but also consider it in the light of the cross-examination, the other oral evidence, which, of course, is not recorded on an audio or video tape. I particularly remind you of the cross-examination of the complainant girl ... where you may think that that indicated a number of inconsistencies in her

evidence. The Crown, of course, suggests that there were many consistencies and inconsistencies.

I also remind you of the evidence of the other two persons, particularly the complainant's mother and the school teacher . Compare their evidence with the evidence given by the complainant girl. As I have explained to you and I'll explain to you again, you must try to adopt a very fair approach and have regard to all of the evidence. Don't give undue weight to the evidence which you have seen and heard a second time without considering the cross-examination and re-examination which you haven't heard a second time.

Now having said that, I can indicate to you that if you request it any passage of the transcript can be read back to you if you need to be reminded of it. I'm not going to do it at this stage, but if you request it, in particular, the cross-examination of the complainant girl ... you will be brought back into court and that will be done.

So you might give that consideration. If you request any of the evidence, either her evidence or any of the other witnesses, be read back to you that can be done. Unfortunately, I'm not permitted to give you a copy of the transcript of the evidence to read for yourselves."

31 The appellant claims this direction was insufficient to restore balance to the trial after the jury had the advantage of hearing and seeing the complainant's evidence.

32 *Hibbins* does not give clear guidance to trial judges as to the procedure to be followed when a jury request to listen to or view a complainant's tape tendered by way of s93A *Evidence Act 1977*. The divergence in the views expressed by Shepherdson J and me was not resolved by Jones J who agreed with both. Unsurprisingly, I prefer the view I expressed in *Hibbins* at para 17. The trial judge has the conduct of the trial, understands its nuances and is best placed to ensure fairness and balance. It is desirable that the trial judge has a discretion in each case to determine the most appropriate course. Here, the trial judge declined to read the cross-examination of the complainant and the evidence of other witnesses which was inconsistent with that of the complainant. He reminded the jury of that evidence, however, in a general way. The evidence at trial was not complex and was in short compass commencing at 2 pm on 11 January 1999 and concluding at 11.01 am on 12 January 1999. His Honour's redirection to the jury on this issue was fair and balanced and highlighted the internal inconsistencies in the complainant's evidence and the inconsistencies between her evidence and the version she gave to her mother and her teacher more effectively than the reading of many pages of

transcript. He told them that any passage of the transcript in which they were interested could be read to them. His Honour's redirections sufficiently balanced the possibility of over-emphasis upon the replay of the complainant child's taped evidence as against other evidence in the case. There can be no justifiable complaint about his Honour's mode of dealing with the jury's request to replay the complainant's evidence by way of video and audio tapes tendered under s.93A *Evidence Act* 1977.

33 I would dismiss the appeal.

REASONS FOR JUDGMENT - McPHERSON JA

Judgment delivered 9 July 1999

1 I agree with the reasons of the President for dismissing this appeal against conviction.

REASONS FOR JUDGMENT - ATKINSON J

Judgment delivered 9 July 1999

1 I agree with the reasons of the President and the order she proposes.