COURT OF APPEAL

McPHERSON JA
THOMAS JA
MUIR J

CA No 455 of 1998

THE QUEEN

v.

ROBERT CECIL RUSSELL Appellant

BRISBANE

..DATE 24/03/99

JUDGMENT

THOMAS JA: The appellant was convicted by a jury in the District Court of indecent assault. He had been charged with two counts of unlawful and indecent assault with the circumstance of aggravation that he had inserted his finger in the complainant's vagina (counts 1 and 2), and with one of unlawful and indecent dealing in that he had flicked her nipple (count 3).

Count 1 was alleged to have occurred in March 1996 and counts 2 and 3 on 14 January 1997. The jury acquitted him of counts 1 and 3. They also acquitted him of the principal charge on count 2, but found him guilty of unlawful and indecent assault without the circumstance of aggravation.

The appellant is a part-time massage therapist who retired some years ago to Macleay Island. He has a small practice based mainly on referrals.

The complainant visited him on four occasions in all for massage treatment for injuries sustained from horse-riding. Three visits occurred in March 1996 and a fourth on 14 January 1997. On each of the four visits the treatment was a full body massage of the complainant whilst she was naked. She alleged that on each and every occasion the appellant inserted his fingers into her vagina in the course of the treatment. The appellant gave evidence admitting that he had given her a fully body massage while naked, but denied that he had ever touched her vagina.

According to the complainant's evidence such an assault occurred on her first visit in 1996. At an earlier trial in which he had been charged with such assaults on the first and second visits he had been acquitted by a jury of the charge relating to the first visit, and there had been a disagreement in relation to the charge relating to the second visit.

It is worth noting that the allegation was not just of a transitory insertion of a finger. Having started the massage with her lying face down the appellant asked her to turn over and after further massage was working on the area that the complainant described as "the juncture of my leg". Her evidence continued:

"He said that the injury to my knee was caused by a groin injury, that there was small muscles that go in through the back of the vagina and link with the big corded muscle on the inside of the thigh...

He showed me pictures in books and showed me the little tiny muscle that he said was causing the problem in my knee... He opened the lips of my vagina and placed his fingers inside and he was holding my vagina open with his right hand and pushing hard against the inside of the right lip of my vagina on the middle towards the juncture of my leg and I could feel his fingernails digging in. It was a bit painful."

Her evidence as to the second visit (on which the jury had not reached agreement in the earlier trial which became count 1 in the present trial) was that she took her eight-year-old daughter with her. Her daughter was with her during the massage, but was reading a book and

according to the complainant, "When you give her a book she forgets the world." Accordingly she claimed that her daughter did not see the ensuing assault which was similar to the one previously described.

During the third visit in March 1996 the complainant said that the same thing happened, but that particular matter was never the subject of a count on an indictment.

Counts 2 and 3 of the present indictment related to the fourth and last visit on 14 January 1997 following a further injury from horse riding. Once again the allegation was not of any mere transitory contact. It includes the following statements:

"He started to work down in the area of my groin again. He started to talk about rape. He was working on my groin, actually pushing on the outside of my vagina and he put his hand in a circle and as he spoke about rape he put his two fingers through his hand like that, and then went back to work on the area of my groin.

He opened my vagina and started to push hard on the inside of it again and he did that for a little while and then he said to me that there might be some soft tissue damage and he placed his fingers inside, actually inside my vaginal canal. He flicked my clitoris back and forwards a couple of times.

He said there may be a discharge. He wanted to feel my tail bone too to see if that was all right and he moved his fingers around in my vaginal canal."

Later she continued:

"He said he was checking for discharge and then put his face right close to my vagina and looked inside and then he said that there wasn't any discharge."

The jury found him not guilty of the principal charge, but as I have mentioned guilty of unlawful and indecent assault simpliciter.

The final count alleged the flicking of the nipple. The appellant denied this and was acquitted on that count.

There was evidence of some inconsistency between the complaints made by the complainant to her husband and those described by her in Court. However, it is not necessary for present purposes to pursue the details of the inconsistency.

The complainant was a 44-year-old married woman with two children. She had academic qualifications in classical studies and had suffered depression for many years. The essence of her complaint was that on each of the four visits the appellant had inserted his fingers as part of her claimed treatment.

The grounds of appeal are inconsistency of verdict and that the conviction is unsafe and unsatisfactory or as current preferred terminology would describe it - "unreasonable".

It is inescapable that the jury must have had serious reservations as to the truth or accuracy of the complainant's evidence. I find it impossible to find

any rational basis for a lesser verdict in this particular case. Counsel for the Crown upon the appeal relied upon the standard directions given by the trial Judge informing the jury that they could render lesser verdicts and that they could accept part of the story and reject the rest. However, their application of such a direction requires some rational basis.

The learned prosecutor submitted that the verdicts might be explicable in relation to count 1 through the jury not being satisfied beyond a reasonable doubt as to the reliability of the complainant on that count and having rejected her evidence. However, there is no rational basis for rejecting her evidence on count 1 and accepting it on count 2, the stories being so similar.

Alternatively, the Crown Prosecutor submitted that the jury may not have been satisfied beyond reasonable doubt that the count on which they acquitted was unlawful - that is to say without her consent - or alternatively they may not have been satisfied that it was indecent. Once again, however, it is difficult to see how a lesser verdict can be explained on any rational basis such as that suggested by the Crown Prosecutor.

In my view if not satisfied of the complainant's reliability as to the digital penetration on count 2 it is impossible to see how the appellant in this case could logically be convicted of something less. The

essence of her story was digital penetration, the jury rejected this. Sometimes there may be room for a jury to have a doubt about the full allegation of a complaint and still accept the basic story at less than the full alleged detail. That does not seem reasonably possible here.

I would hold that the verdict on count 2 was inconsistent with the other verdicts that were returned. No reasonable jury applying their minds properly to the facts in this case could have arrived at this combination of conclusions. The relevant cases have recently been reviewed by this Court in the Queen v. Maddox, CA299/98, 4 December 1998. Reference may also be made to the Queen v. Jones (1997) 191 Commonwealth Law Reports 439 where the High Court in the circumstances of that case found an acquittal on one of three counts, rationally inexplicable with their conviction on the other two.

Their Honours accordingly concluded that the conviction was unsafe and unsatisfactory.

It is unnecessary to canvass the balance of the evidence. Upon the whole of the evidence, the jury having rejected the main allegations, it was not open to them to be satisfied beyond reasonable doubt that the appellant was guilty of the offence of which he was convicted. The verdict should be regarded as unsafe and

unsatisfactory or unreasonable. I would allow the appeal and set aside the conviction.

McPHERSON JA: Yes, I agree. I do not see how anything was left of the charge on count 2 once the jury had reached the conclusion they did in respect of part of that charge. The appeal should, in my opinion, be allowed. The conviction and the verdict on count 2 in the indictment should be set aside. A verdict of acquittal should be entered on that count in the indictment.

MUIR J: I agree.

McPHERSON JA: The order will be as I have stated it.
