[2002] QCA 363

COURT OF APPEAL

WILLIAMS JA
HELMAN J
JONES J

CA No 136 of 2002

THE QUEEN

v.

PAUL JOSEPH VICKERY

BRISBANE

..DATE 17/09/2002

JUDGMENT

JONES J: The appellant was indicted on two counts of assault of the complainant, namely unlawful and indecent assault aggravated by digital penetration of her vagina. Secondly, unlawful assault occasioning bodily harm.

The events occurred at Hervey Bay on 20 December 2000. The first count alleged an assault which occurred at the appellant's residence in circumstances where the complainant had her 20 year old friend named Michael who were visiting the appellant and his wife Peta.

The parties had been drinking during the course of the afternoon and into the early evening. The complainant who had been sitting in the lounge room at one stage decided to go to the toilet. At about the same time, the appellant's wife left to go to nearby shops and Michael decided to go with her.

When the complainant emerged from the toilet, she was intercepted in the hallway by the appellant who took hold of her wrists and dragged her into the main bedroom. There he pushed her on to the bed and lay half on and half off her. She screamed out Michael's name, but the appellant then placed his hand across her mouth and said, "There's no use yelling out because Michael and Peta have gone to the shops."

The complainant says he then put his hand down the front of her pants inside her underwear and inserted his finger into her vagina. Whilst doing this, the appellant said, "Stop screaming, or else I'll stick it into you." She told him he

would get blood on his hands because she was having her menstrual periods. This information did not cause him to stop immediately, however he did so when he released the complainant and left the room.

The complainant after a short interval came out of the bedroom where she saw Michael and Peta in the lounge room. The appellant said and repeated "I didn't do anything to her" to which the complainant said of him, "He's a liar." She then left the residence, ran towards the house where she was staying with her former stepmother and Michael's father. At some point in this journey she was overtaken by Peta and then by the appellant. She claims that the appellant then punched her in the face and head, which is the subject of count 2.

Michael gave evidence that he accompanied Peta to the shops and upon his return to the residence, the complainant came out the door upset and screaming and said of the appellant, "He tried to rape me." She was in an obviously distressed state. The appellant by this time was sitting on a couch in the lounge. The complainant left the house and the appellant began repeating, "I didn't touch her and I didn't do anything."

Michael then went outside the house where he heard the complainant calling out, "You're a liar, you're a fucking liar." Michael followed the complainant, who was with Peta and being pursued by the appellant. When the complainant and Peta stopped at the top of the hill, some 300 metres from

where the complainant was staying with Michael's family, Michael did not stop with them, but instead ran ahead to ask his father to lend assistance. When Michael returned to where the other three were standing, the complainant ran past him towards the residence and the appellant walked away in the other direction. Michael did not see any assault of the complainant by the appellant at that point, nor did he see the complainant fall, as the appellant later alleged she had done.

The medical evidence as to the terms of the complainant's initial complaint, and as to the circumstances of her injuries, were quite sketchy. The medical practitioner, Dr Jones, who attended the complainant, had returned to the United Kingdom and was not available to give evidence. Instead, what was led by the Prosecution were the contents of Dr Jones' clinical notes and explanations of some of the terms.

The notes included the following relevant information:

1. The complainant had complained of being punched in the face three times. She was cramped around the mouth, with some bleeding from her lip, she had haematoma on the jawline on the left side.

Secondly, the note of her complaint about the first assault was that the assailant "attempted to put his hand in her clothes, disturbed by patient's friends."

The jury had the opportunity of seeing photographs depicting the injuries which were taken the following day.

The complainant undoubtedly had facial injuries as observed by Dr Jones. The issue in relation to the second count was whether those injuries were because she was assaulted, as the complainant alleged, or as a result of falling, as the appellant suggested.

Her own evidence before the jury included a concession that in the committal proceedings, when asked the question of whether she fell over and hit her head on a fence, she replied, "I think I ran into something, but I don't know what."

In her evidence before the jury, she denied that she had run into a fence, but she may have run into Michael. There were questions also about the amount of alcohol the complainant had drunk and the reliability of her testimony due to that fact.

The issue at the basis of this appeal against conviction on the count of indecent assault is that the verdict is unsafe and unsatisfactory because it is inconsistent with the verdicts of acquittal in relation to the circumstance of aggravation and the assault, the subject of count 2.

Reliance is placed by the appellant on the principles enunciated in McKenzie v. The Queen (1996) 190 CLR 348 and R v. P (2000) 2 Queensland Reports 401. In that latter case, the Court of Appeal after reviewing other decisions of

the High Court, particularly M v. The Queen (1994) 181 Commonwealth Law Reports 487 and Jones v. The Queen (1997) 191 Commonwealth Law Reports 439 established the test which is expressed in the judgment of Thomas, Justice of Appeal and Chesterman Justice in the following terms:

> "The test, in the end, is whether there is a sufficient possibility that an innocent person has been convicted. There will be such a possibility if the jury's verdicts cannot stand together in the sense that differing verdicts demonstrate that the jury could not reasonably have come to the conclusion it did. It is not to be concluded that verdicts are inconsistent and for that reason it is not lightly to be concluded that verdicts are inconsistent and for that reason unreasonable. There must be no discernable rational basis for the differing verdicts."

In this case, I am satisfied that there is a rational explanation why the jury did not return a verdict of guilty based on the circumstance of aggravation, namely the digital penetration.

This resulted, in my view, from the terms in which the complainant gave the details of the assault to Dr Jones. Her words, as recorded in the clinical notes were, "attempted to put hand in clothes."

This inconsistency between the record of her complaint and her own evidence attracted the attention of the jury. Prior to the commencement of the second day's hearing, the jury raised a question about the inconsistency and inquired whether she in fact told the doctor about the appellant putting his finger into her vagina.

The passage of the complainant's evidence on what she told the doctor was read over to the jury, which included the question whether she told the doctor about the appellant's act and she responded, "Yes, I'm pretty sure I did, I'm sure I did."

For that conflict between the doctor's notes and the complainant's evidence, it is reasonable for the jury to be left in some doubt about whether the circumstance of aggravation was proven beyond reasonable doubt. But the point was raised again when the jury sought redirections about the possible verdicts open to them in relation to count 1.

The summing-up had proceeded on the basis,(though not actually expressed to the jury in terms) that it was an all or nothing situation and if they were not satisfied of all the elements, including penetration, were established beyond reasonable doubt, then they would have to acquit.

When the jury sought clarification, the re-direction correctly

identified the alternatives of finding an indecent assault with a circumstance of aggravation and an indecent assault simpliciter.

Her Honour's re-direction was appropriate in allowing the alternative verdicts.

These two queries raised by the jury at different times indicate clearly enough that they gave close attention to the evidence concerning digital penetration. The verdict shows the jury was not satisfied beyond reasonable doubt about that circumstance. There is a perfectly rational explanation why that would be so having regard to the terms of her complaint as recorded by Dr Jones.

The acquittal on count 2 relates to an incident which was an entirely separate assault, removed in time and place from the assault referred to in count 1. The jury's acquittal on this count shows that they were not satisfied beyond reasonable doubt of the appellant's guilt, which would have to have been based entirely on the evidence of the complainant.

The assault was not witnessed by Michael, and the facial injuries could have resulted from the earlier incident. But that does not necessarily mean that her credibility was impugned with respect to the first count.

In relation to the second count, there is again a rational explanation for the jury not being satisfied beyond reasonable doubt, and that explanation is found in the fact that the complainant's evidence was inconsistent with an answer that she had given during the committal proceedings referred to above.

Faced with the inconsistency in those answers, the jury could quite rationally have come to the view that they could not be

satisfied beyond reasonable doubt of the second assault and this would not necessarily result in a general rejection of the plaintiff's evidence in respect of the other charge.

Having come to this view, I am not able to conclude that the verdicts were inconsistent or unreasonable. In my view the conviction of the charge of indecent assault should stand.

WILLIAMS JA: I agree.

HELMAN J: I agree.

WILLIAMS JA: The order of the Court is appeal dismissed.
