[2002] QCA 383

COURT OF APPEAL

de JERSEY CJ
HELMAN J
JONES J

CA No 129 of 2002

THE QUEEN

v.

RAYMOND YEO Appellant

BRISBANE

..DATE 25/09/2002

JUDGMENT

APPELLANT conducted his own case

MR M J COPLEY (instructed by the Director of Public Prosecutions (Queensland)) for the respondent

THE CHIEF JUSTICE: The appellant was convicted on two counts of indecent treatment of a child with a circumstance of aggravation - one offence on 6 May 2000 and the other on 17 May 2000 - and acquitted on three counts of indecent treatment of a child with circumstances of aggravation allegedly committed on 6 May 2000.

The grounds of appeal in the notice concerned alleged inconsistency between the verdict of conviction and acquittal and as to the acceptability of the complainant's evidence on the counts which resulted in conviction. The convictions relate to counts 1 and 5, the acquittals to counts 2 to 4.

The appellant met the family of the two male complainant children when both parties resided in different parts of the same caravan park in 1999. The offences subject to counts 1 to 4 were said to have occurred on Saturday, 6 May 2000. The appellant drove the complainant's mother and their elder brother to a park under the Indooroopilly Bridge. There they met with the complainants and their father, and the family proceeded to fish from a pontoon on the river bank.

Count 1 involved JA who was born on 3 May 1994. He was then just six years old. In a tape-recorded interview with the police tendered at the trial, the boy said that when he was

fishing the appellant touched him "in the nuts". He said his mother was next to him when this occurred. He was touched under his pants. The police officer who conducted the interview said that the boy pointed to his groin area.

The boy's mother said that on that day she, the boy and the appellant were all on the pontoon. At one point, the boy was sitting right beside the appellant and the appellant was cuddling the boy. It was not a cold day. At about 5.30 p.m., the fishing ended and JA travelled home in his parent's vehicle.

The second complainant, to whom I will refer as BL, and the eldest brother D travelled home with the appellant in his vehicle. The events in the appellant's vehicle on the trip home formed the basis of counts 2, 3 and 4.

BL was born on 30 October 1991. He was aged eight years old on 6 May 2000. In an interview the police conducted with the boy on 18 May 2000, BL alleged that on the way home from fishing he sat in the front seat of the appellant's vehicle and D sat in the back behind him. On three occasions during that trip home, the appellant touched him "in a rude part" which he further described as "the part where you do a wee out of".

Under cross-examination, BL agreed that the appellant touched him in the area of his "lap" when some cigarette ash fell into or onto his lap. He seemed to agree that if he was touched on

the "rude bits" that touching occurred when the appellant was brushing the ash out of his lap. Then, in re-examination, he said that the ash only went on his leg near his knee and that he scraped it off himself.

The elder brother D, in an interview which was tendered, said that BL sat in the front seat of the appellant's vehicle and he sat in the back behind BL. He said he saw the appellant feeling BL's leg and then "the front part". BL's shorts remained on and D thought the appellant touched his brother twice. Despite questioning in this interview, it would be fair to say that D did not really satisfactorily explain how he was able to see what he claimed to have seen given his position in the car.

Under cross-examination, D maintained that he saw the appellant's hand go onto BL's leg but he conceded or agreed that he did not see the appellant's hand touch BL's groin. He agreed that he only learnt about the appellant's allegedly touching BL's penis when BL told him of this a couple of days after the trip home.

There was evidence from the mother that BL complained to her about these incidents on 17 May 2000 after the appellant had left the family home. The eldest son D told his mother about what BL had told him.

The offence involved in count 5 occurred on 17 May 2000 when the appellant visited the family home. JA was asleep in his

room at about 6 p.m. when his parents went in and tried to wake him up. He went back to sleep. His mother left the room and went into the lounge room. Some time later, the mother saw JA walk out of his bedroom with the appellant following. The appellant said he thought he would wake the boy up and the mother replied that she had intended to let him sleep until the father returned from the shop.

In the interview with the police, JA said that he woke up when the appellant tapped his shoulder and then the appellant touched his genitals through his shorts. JA complained about this incident to his mother and the police attended the family's house on the evening of 17 May 2000.

The evidence given by the appellant in relation to these matters was, as to count 1, that a boat's wake caused the pontoon to shake severely as he sat beside JA and he put his arm around the boy through concern for his safety. He had no recollection of touching the boy's groin and, if that occurred, it was entirely accidental.

As to counts 2, 3 and 4, he said that when he drove BL and D home he was smoking cigarettes. On two occasions during the trip, ash from his cigarette blew across and into BL's lap. On each occasion, he reached over with his left hand and brushed the ash away.

As to count 5, the appellant's evidence was that, having become aware that each of JA's parents had not been able to

wake up JA he, the appellant, on his return from the toilet entered the boy's room as he was concerned there may have been something wrong with him. He put one hand on the boy's shoulder and the other on his hip and he shook the boy. He said, "Are you awake?" The boy said "yes", and the appellant informed him his father had gone to the shop. The appellant then left the room. When he put his hand on the boy's hip, he may accidentally, he claimed, have touched the groin area.

There is reason why the jury could have been satisfied beyond reasonable doubt on the evidence of JA to convict on counts 1 and 5 but to have entertained a reasonable doubt on the basis of the evidence of BL and D as to counts 2 to 4. The jury was properly instructed as to separate consideration of the counts and the prospect of differential verdicts. The verdicts of not guilty are, as the Crown points out, probably attributable to the fact that BL's evidence was unsatisfactory in that he seemed to concede that the touchings may have been accidental. However, JA's evidence was not affected by that sort of qualification. He made no concessions such as may have caused a jury to doubt his reliability. The appellant's particular explanation in his evidence for his presence in JA's room would presumably not have impressed the jury.

The different verdicts, therefore, would presumably have been arrived at on the basis the jury simply had doubts as to the reliability of BL given his answers under cross-examination whereas the position was different with JA. That sort of analysis of the conjunction of the verdicts of guilty and the

verdicts of not guilty is orthodox in light of the approach described in Mackenzie and The Queen (1996) 190 Commonwealth Law Reports, 348 at 367 to 8.

As to the second ground of appeal, the evidence given by JA in relation to counts 1 and 5 was clear and precise. The events were clearly particularised. His mother's evidence to some extent supported his, and it could not be said that a reasonable jury should not have accepted JA's evidence and proceeded to convict.

The appellant before us here orally today raised some inconsistencies in the evidence and they were, in fact, summarised in a one page document provided to the Court in advance. We have examined those. In my view, none of them warranted rejection of the Crown case.

He also complained before us that a video had not been put into evidence, that is, a video of an interview between the police and one of the complainants. The Court should, in my view, proceed on the basis that the Crown did put before the trial Court the relevant evidence. It is also important to note that the appellant was represented at his trial by counsel. If there had been a problem in relation to such a matter, the Court should proceed on the basis that it would at the trial have been raised by his counsel.

In my view, none of the grounds of appeal against conviction having been sustained the appeal against conviction should be dismissed.

The appellant applied separately for leave to appeal against sentence. He was sentenced to two years' imprisonment to be served cumulatively upon the sentences to which he was currently subject. His prior criminal history in this regard is extremely significant including convictions on 17 November 1995 for sodomy of a person not an adult leading to three years' imprisonment and, on 5 April 2001, convictions in respect of 13 counts of indecent treatment of a child for which he was again imprisoned for three years.

The conviction of 5 April 2001 to which I have referred was for offences which occurred between 19 June 1999 and 3 October 1999 and the applicant was on bail in respect of those charges when he committed the offences involved in the instant counts 1 and 5. Even though these offences involve misconduct at the less serious end of the range, this cumulative imprisonment of this order was in my view warranted given his prior offending.

I would refuse the application for leave to appeal against sentence.

HELMAN J: I agree.

JONES J: I agree.

THE CHIEF JUSTICE: The appeal against conviction is dismissed. The application for leave to appeal against sentence is refused.
