DCQ492 378/97 LJ-E1

THE DISTRICT COURT
OF NEW SOUTH WALES
CRIMINAL JURISDICTION

JUDGE J B PHELAN

WOLLONGONG: WEDNESDAY 22 OCTOBER 1997

97/42/0056 - IN THE MATTER OF THE APPEAL OF JOHN GERARD NESTOR

JUDGMENT

HIS HONOUR: The appellant appeals from a conviction in the Local Court on a charge that in 1991 he indecently assaulted a fifteen year old youth, in circumstances of aggravation.

When an appeal comes from the Local Court to the District Court it is heard again from the beginning. The Court does not have presented to it as evidence the transcript of the trial before the Magistrate. Parts of what was said by witnesses have been referred to in the course of the trial before me by the appellant's barrister in cross-examination. Otherwise I do not know what was said in the Local Court. In particular I remain ignorant of the reasons why the Magistrate convicted the appellant. I am thus not in a position of reviewing his reasons, but have to determine for myself whether the appellant is guilty or not guilty.

There are some fundamental principles which apply to every criminal trial; first of all the accused, or in this case the appellant, has a right to silence. Nobody can criticise him for exercising a right that each one of us has. Furthermore, there is a presumption of innocence. An accused person is presumed innocent until his guilt is proved and a verdict returned accordingly. Thus it is that an accused person does not have to prove anything. Indeed

he does not have to say anything, such is his right to silence.

The Crown, which brings the charge, must prove the charge, and it must prove the charge beyond a reasonable doubt.

That high standard of proof is said to reflect the desire of the law to ensure that the innocent are not wrongly convicted. It is said that the law would prefer to see ten people who are possibly guilty, go free, than have an innocent person wrongly convicted.

In some circumstances where a verdict of not guilty is returned it reflects the fact that the Court thinks that the accused is innocent. There may be in other cases a number of suspicious circumstances. Those suspicions might evolve into a situation where there is an attitude on the part of the court that a person is probably guilty. Even if a court accepts a complainant's version, but considers that the accused's denial remains as a reasonable possibility, it still must acquit. Thus a verdict of not guilty does not mean that the complainant is necessarily disbelieved, or that the accused is necessarily innocent, though the presumption of innocence in law remains undisturbed in that event.

The alleged victim is the eldest of REDACTED children. His family visited a friend in the seminary some time in the late 1980's and met the appellant, who was then a student priest. The appellant was ordained in 1989. The family and the appellant became friends. The complainant, his brother, and sometimes their sister, used to go bush-walking, starting when the appellant was a Deacon at Moss Vale, and

continuing after his ordination when he was at Dapto. On a number of occasions the boys stayed overnight in the presbytery at Dapto where the appellant lived alone in a small house.

It was said by the complainant that on the last of these occasions, shortly after the death of his grandfather on 22 July 1991, that the offence is said to have occurred.

According to the complainant they had been bush-walking somewhere on the escarpment. On the way back they had got some videos, showered, had tea and watched the videos. This they did from two mattresses which were placed, according to the complainant, on top of each other. He said that he and his brother were wearing flannelette pyjamas and the appellant was wearing boxer shorts and a white singlet. One of the videos was 'Parenthood', described in other evidence as a 'family type movie'. The complainant went to sleep. He awoke in the middle of the night by something prodding him in the crack of his backside. He said the appellant's hand was on his lefthand hip and "He was thrusting his groin into my backside. He then started to try to pull down my pyjama pants". The complainant resisted that and then he says the appellant grabbed his left hand and pulled it round to touch his erect penis. He pulled his hand away and then the appellant slipped his hand down the fly of his pyjamas and started fondling his genitals. The complainant said he did nothing because he was scared. After breakfast the next morning he says the appellant sent his brother for a shower and told him that if he ever told anyone that no-one would believe him.

In around September/October 1995, that is to say four

years after the event - and this according to his mother, because he himself said that the complaint took place some months after that - the complainant was talking to his mother at an emotional period for the family when his parents had temporarily separated. She had returned from counselling. She told him that she had been molested when young and he said the same thing had happened to him. He gave no details, but told her it was the appellant, before being interrupted by his siblings returning from school.

There was further delay in reporting the matter until the end of April of the following year when Father Schmitzer of the Unanderra Catholic Church was informed, and he contacted the police immediately.

Judge are required, in cases where a criminal trial proceeds with a jury, to warn juries in cases such as these, that a failure or delay in complaining does not necessarily indicate that the allegation is false. The Judge must inform the jury that there may be good reasons why a victim of sexual assault may hesitate or fail to make a complaint. The Crown here points to the complainant's youth, his lack of sexual experience, his embarrassment, the fact that he regarded the appellant as like a second father, the fact too that it was a big decision to lay such a serious complaint against the status of a Priest, and the fact that when he told his parents the appellant was absent in America.

The appellant was interviewed on 1 May 1996, and that interview was videoed and tendered in evidence. He admitted that he, together with the complainant and his brother had watched videos, and the fact they had slept together, as was usual when videos were being watched. Both the

complainant's brother and the appellant described the mattresses as side by side, and not on top of each other, which, on any view would have been extremely cramped, even if the mattresses were three-quarter size. The appellant denied any criminal conduct, or telling the complainant that he would not be believed.

The appellant did not give evidence. He did not have to, and no criticism or inference can be drawn against him for exercising the right to which I have already referred.

The Crown thus produced no evidence that tended to confirm or corroborate the complaint. It does not have to do so, but the Court may only convict if it is satisfied beyond a reasonable doubt that not only is the complainant an honest witness, but that his evidence is accurate. Moreover, the High Court has insisted upon the need for extreme care and close scrutiny of a case which relies on a solitary witness, where the word of that witness must be accepted beyond reasonable doubt.

The Crown in her submissions commenced by saying that these are difficult matters in the light of what the High Court has said. She was referring to those cases where the Crown has to persuade the Court that its essential witness must be believed to such a degree that the court has no reasonable doubt about the evidence of the complainant on the essential matters that have to be proved, and where the court must exclude the possibility of a mistake on the part of that witness.

This level of persuasion is made more difficult when the accused denies any guilt and raises prior good character. Good character clearly is no defence, but the

court has to take it into account, both on the question of guilt and what weight it gives to the word, in this case the denial, of the accused of any wrong-doing. The court must find for the appellant even if it thinks that the complainant is truthful if it remains of the view that what the appellant is saying remains a reasonable possibility.

The Crown concedes that there are a number of inconsistencies in the complainant's evidence. It says that given the circumstances of his youth et cetera, and the lapse of time, they are understandable, that they do not show that on essential matters he is unreliable. She points to the fact that it required a good deal of courage for him to speak up, to expose himself to examination by the Police, and then to subject himself to thorough cross-examination at the Local Court and at this hearing. It would not have been easy for a young man to speak about such sexually embarrassing matters, she submits, in a crowded court room. There is force in those submissions.

It is not suggested by the appellant's counsel that the complainant has wilfully brought any false charge against the appellant, that he has any grudge against him, that he seeks revenge, or that in some way he has a vendetta against the Catholic church.

Indeed my own conclusion about the complainant is reflected, I think, in most of his school reports. That is to say, he was a conscientious, caring and pleasant young man.

Indeed, in his submission, Mr Toomey's primary criticism of the complainant goes not to his belief as to what occurred, but its accuracy, or, put another way, its

reality. His first submission relates to the frank admission by the complainant that on three occasions he has seen ghosts. One of these was that of his grandfather, who spoke to him. The other occasions involved a shape in the doorway at his home, which, I might add, had been seen by his parents and other members of the family. On each occasion he was asleep and awoke to be confronted by the vision. He emphatically denied that they were part of his imagination. He readily admitted to having sexual fantasies in his sleep, and wet dreams. He denied that the event could have been a sexual fantasy.

It is unexceptional for youth to have sexual fantasies, whether asleep or awake, but it is less so for people to claim to have seen ghosts or visions. Such is often closely connected with religious experience, or with madness. But there remain otherwise rational people who are neither religious visionaries, nor mad, who claim to have seen ghosts. The church itself recognises in rites of exorcism that there are forces which exist that are not explicable according to ordinary human experience. So it is easy to belittle people who claim such experiences. On the other hand, the lines between human experience and experiences which are super-natural, are often blurred. In this case I do not wish to belittle the complainant in any way, but it does seem to remain a possibility that reality and imagination in his mind, may at times merge.

As against this is his assertion that the appellant told him the next day, when he was wide awake, that he would not be believed if he told anyone.

Mr Toomey makes the important submission that there was

no evidence from his brother confirming that the brother had been sent off to have a shower, having had one the night before, and after he had dressed. This would, in my conclusion, have been a critical piece of corroborative evidence.

Mr Toomey also disputes the complainant's assertion that the event wrecked his life, "making it a living hell for the past six years". The evidence shows that if anything the complainant's grades improved in 1991 and 1992. In 1993 he clearly lost interest in a number of subjects, though continued to do well in several that interested him. It is noteworthy that there was no criticism of his behaviour, which continued to be described as "pleasant and polite".

Having left school he got a job at the Novotel, which he kept for eighteen months. For the last two and a half years he has been in a relationship with a young lady. He is now doing an apprenticeship as an electrician. As against that he has lost weight and he has been sick, but no endeavour was made to put to the Court the reasons for those matters.

Of course what may appear on the surface may not represent tranquillity within. There may be much turmoil that does not expose itself. He clearly enough found these proceedings very upsetting.

A further submission of Mr Toomey's goes to the time when this incident occurred. It is fixed in the complainant's mind that it occurred soon after his grandfather's death on 22 July 1991, and more particularly on a weekend after a memorial Mass for him. Meteorological

records from the Wollongong University show that there was no Saturday around that time that showed any rainfall, although there were small amounts of rain on 24 and 31 August. Mr Toomey submits that the Court should approach the delineation of time in the charge with caution.

The bush-walk, which took some hours, took place somewhere on the escarpment. The complainant himself could not remember exactly, voicing the possibility that it had been Mt Kembla or Mt Keira, and other evidence suggested that it could have been Summit Tank, going towards Robertson. The weather was described as wet. It seems dubious to me that such a bush-walk would have taken place in the middle of winter on the escarpment over a period of some hours in rain. It is sometimes the case that it rains on the escarpment and not below, and this may be the explanation for the lack of rainfall records.

He also points to the possibility that the videos, including the one 'Parenthood' were more likely to have been taken out at an earlier time, when the records suggest that there was rain in summertime. Again, the evidence of Mrs Hurst, who is the proprietor of Civic Videos, as to the sequence of the taking out of videos, was reversed between the time of the Local Court hearing and the hearing before me. The evidence was left in an unsatisfactory state because of Mrs Hurst's sudden change in evidence.

There is also the curious cessation by the family of attending Mass at the very time this matter is said to have occurred, even though the complainant kept the matter to himself over a four year period.

In the end result I do have a doubt about the framework

of time within which this offence is said to have occurred.

I also note that the complainant described the appellant as wearing boxer shorts and a singlet. Again this was in winter, and although the appellant himself admitted that that was the way he might have been dressed, the complainant's brother said that the appellant was in winter pyjamas, which seems rather more likely at that time of year.

If the time frame is wrong Mr Toomey submits that there is a fundamental problem about the reliability of the complainant's evidence.

There are some further points that I wish to touch upon. If the appellant had a guilty passion for the complainant there is no suggestion that it was shown on any other occasion, when the opportunity might have been available. Moreover, the complainant's brother was always present, so that if the complainant had reacted to a sexual advance in a noticeable way there would have been corroborative evidence available against the appellant. So that on any view it would have been a risky thing to have done.

The Crown suggests that this event could have been a stage in which the appellant was sounding out the situation, and this remains a distinct possibility.

There were two other aspects of the evidence that deserve comment - they relate to the appellant sleeping on the same mattresses as the two boys. This, the Crown submits, was imprudent. There is merit in this submission. But inappropriate conduct does not prove that a criminal offence took place. The dictates of prudence should have

been clear to the appellant in his priestly position, and this is the more so when the appellant himself told the police that he suspected that the complainant could have been the past victim of sexual molestation of some sort. On the other hand they had slept on the mattress watching videos before, according to the evidence. It appears that the complainant's mother learnt, following the weekend, that they had watched videos and gone to sleep on the mattress, and saw nothing exceptional about it. When questioned by Detective Beck it is noteworthy that this matter was not put to the appellant.

The other matter was a reference by the appellant in his interview to a suspicion that the complainant had suffered a traumatic psychological experience when younger, including the possibility of sexual assault.

Section 409B of the Crimes Act prevents any cross-examination of a complainant about prior sexual experience.

The inflexibility of this prohibition has been criticised by the High Court, and the New South Wales government is considering whether the law should be changed.

The appellant went on to say that he had mentioned his fear to Father Leo Stephens, the Priest of the Unanderra Parish - where the family lived. Father Leo Stephens is said to have confirmed the appellant's assertion.

Whilst the Crown submits that it may have been a defensive reaction by the appellant, it was risky for him to mention it if the matter could not be checked and confirmed with father Stephens.

Finally, there is the undisputed fact that the

appellant is a person of good character.

In the circumstances thus I am not persuaded that the Crown has established beyond a reasonable doubt that the offence has been made out and there must be a verdict of acquittal, so that I uphold the appeal.

QUESTION OF COSTS

TOOMEY: Your Honour I wish to make an application for costs under the Costs in Criminal Cases Act.

COUNSEL ADDRESSED ON COSTS

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HIS HONOUR: This is an application by the appellant for costs pursuant to the Costs in Criminal Cases Act. The Court may grant a certificate if in its opinion the prosecution had before the proceedings were instituted been in possession of evidence of all the relevant facts, such that it would not have been reasonable to institute the proceedings.

The Court has to put itself in the interesting position of imagining that it is the Crown at the beginning of the proceedings with all the information at the end of the proceedings - in other words with benefit of complete hindsight - and decide whether, given all of those now known circumstances the prosecution would have been brought.

I have been referred to **R v Longman** which I suppose underscores what the Crown said yesterday at the commencement of her submission, that these cases are always

difficult.

It seems to me in this case that whilst the appeal has been upheld that it was not unreasonable to bring the proceedings in the light of all of the information that has been presented to the Court, and therefore I reject the application.

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