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U2064 136/97 MSG-G2

LOCAL COURT
HORNSBY

MAGISTRATE: CATER-SMITH

TUESDAY 24 JULY 1990

DIRECTOR OF PUBLIC PROSECUTIONS V SIMON ANTHONY JACOBS

EXTRACT - Magistrate's Decision

BENCH: Well I now must consider the matter under s 416 of the Justices Act and as it's been indicated to me if I am of the opinion that having regard to all the evidence before me a jury would not be likely to convict the defendant of an indictable offence then I must order the defendant to be discharged.

When looking at the evidence under this particular subsection of section 41 a different test applies to that under s 412. I rely, of course, on Chids Case which clearly sets out the duties, responsibilities and the manner in which the evidence should be examined at this stage.

The evidence that I have before me is the evidence that I had before me when considering the matter under s 412 as the defendant has chosen not to give any evidence, not to make any statement, nor to call any witnesses. I only make that comment to indicate that the evidence is in the same state so far as the actual quantity of evidence that is before me is concerned.

The test now of course differs and I must look at that evidence, looking at the credibility of the witnesses, the weight that I should give to the evidence and other matters as I referred to before. Such as the lack of complaint in this case and the lack of corroboration and various other matters that I have been referred to by both of the counsel appearing before me.

Firstly I should look at the evidence of BYC perhaps in a little more detail, and now referring to those point that were raised by Mr Shields in his submission as to the variations in evidence that were given by Shields. That is variations between the time when he gave evidence in August of last year and yesterday when the matter continued on a part heard basis and also some matters in which he was shaken in cross-examination.

Mr Shields carefully set those out for me. He indicated such matters as the fact that BYC junior, indicated that he had not spent time away from home in 1987. Whereas his parent indicated that he did. The fact that he gave evidence of the incident that occurred in REDACTE's garage, he gave evidence of the actual commission of anal intercourse upon him, but that he did not give evidence of the fact that he then had anal intercourse with the defendant. It was put to him that that was in his statement but that he had failed to give evidence of it in his oral

~24/07/90

U2064 136/97 MSG-G2

evidence. It does seem to me that that is a reasonably significant point.

He also gave evidence that he saw the photograph that he said the defendant took of him during one of these incidents but then was unable to recall, when pressed, as to what was in those photographs regarding what those photographs depicted. It would seem to me that one would imagine that a person would recall what was in the photographs, particularly when he indicated that he had seen them at the time. 5
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Other matters that came up in his evidence related to the time that one of the incidents took place and also the distance from the home at Bowral where he says the defendant and he walked before the incident there took place. Of one occasion he said that he could not recall but then he agreed with some 15 or 20 minutes. On the second occasion he said that he couldn't recall but then agreed that it was 200 yards. So it did seem that he was agreeing somewhat for the sake of agreeing. 15
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But they are fairly minor matters. Mr Chennells has put that to me in her submission. I do think that they were fairly minor matters, except perhaps for the matter that I have already indicated and that is the incident in Mrs REDA's garage. 25

Therefore when I look at his evidence I think that the evidence certainly is such that I should put the usual amount of weight upon it. Taking into account the fact that these incidents did occur a very long time ago. 30

I then must look at the records of interview that were taken with the defendant and also the conversation that the defendant had with Detective Sanderman. It was put to me by Mr Shields that such records can be exculpatory as well as inculpatory and certainly that is so. I think I must take into account the fact that Mr Jacobs throughout denied all of the accusations that were put to him. In fact he said he knew nothing of it and expressed surprise when first spoken to by the detective. That is certainly something that I should take into account when considering the matter under this subsection. 35
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A further matter that I should taken into account is the defendant's character which has been raised and I am informed that he is some 36, although I think the charge sheets indicate 38 years of age, and that he has had no prior convictions of any sort. No issue has been taken with that. 45
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Further when the detective went to the defendant's home the search was conducted, no photographs were found and in fact no material of an inculpatory nature was found at the home. The defendant appears to have agreed to the home being searched and made no complaint in that regard. 55

Certainly there was a camera found there which fitted the

U2064 136/97 MSG-G2

description of the camera that BYC indicated was used when one of these incidents is said to have occurred. But I think that there is little I can make of that. Many people do own Polaroid cameras. It certainly does not really go to corroborate the actual incident as described by BYC. But it is certainly something that I can further take into account. 5

So far as corroboration is concerned the evidence really is totally uncorroborated. There is nothing, I think, I could say that goes to support BYC outline of what he says occurred during that period of time. 10

Looking at the matter under s 412 I have already referred to the comment that BYC said that he made his father and BYC evidence in that regard. There was some comment made about the state of his underpants. BYD gave evidence, or had observed nothing in that regard. Certainly there has been evidence placed before me of opportunity. The fact of the matter is that BYC BYC was a member of CEBS, The Church of England Boys Society, as was the defendant and in fact that is where these two people met. 15 20

The defendant, it seems, drove BYC after CEBS meetings on a number of occasions. In fact on the evidence of BYD originally when BYC joined CEBS he was picked up by his parent, but later it became the norm for him to be brought home by the defendant. Clearly there was opportunity, clearly these two persons knew each other. The defendant was a friend of the family's and spent sometime in the home of the family. In fact the family used him as a babysitter or he acted as a babysitter, that's perhaps not the best way to put it. But he acted as a babysitter for Mr and BYD and that was the reason that he accompanied them to Young so that he could care for BYC and BYC sister while the parents attended a wedding. 25 30 35

Therefore clearly there was opportunity. There is no contest that the defendant went to Young and also went to Robertson. As I have said those two entries appear in Mr Jacobs's diaries. There is also no contest that when Mr Jacobs was in young he shared a room with BYC 40

There is some discrepancy in the evidence in that regard as to where the room was situated. Mr Jacobs saying in the record of interview that he thought the room was next door or a family room with the room occupied by Mr and BYD BYD saying that that was not her recollection, but clearly they were in the same hotel and the two male person, BYC and the defendant did share a room. 45 50

Mr Shields has put to me that I really cannot take that as any corroboration of the offence. Certainly I agree that I cannot put anymore weight on that other than to say that it does give the opportunity for the act to have occurred. But other than that really I am faced with the fact that there is no corroboration at all of these incidents and I would be 55

~24/07/90

U2064 136/97 MSG-G2

relying entirely on the evidence of BYC accepting that evidence in its entirety to say that these incidents occurred in the manner that he has outlined.

The main matter I think that has been stressed by both representatives for the Crown and for the defendant have related to complaint. In that regard it is quite clear that no complaint was made by BYC in fact until he spoke to a counsellor before he went to see Detective Sanderman. That was many years after this incident occurred.

The incidents, as I have said, occurred between, or are said to have occurred between 1977 and 1980. The person BYC went to a counsellor from 1981 intermittently until 1988. His evidence was that he did mention some of these incidents to a counsellor or a psychiatrist I think it was in 1987. There was then the attempt on his life and he did discuss the matters with another counsellor a Mr Brown in approximately 1988. Following discussions with Mr Brown it appears that he went to Detective Sanderman, although he said in his evidence that Mr Brown remained quite neutral and said it was a matter for him whether or not he decided to report the incidents or not.

However, clearly, there was no complaint made in the sense that he says nothing whatever to any person over the period of the three years that these incidents are said to have occurred or within any reasonably short time thereafter. I certainly do think that that is an important factor in this case. I have been referred to sections 405B and 405C by both counsel. Section 405B in relation to complaint and s 405C in relation to uncorroborated evidence and 405B was enacted after these incidents occurred. Further it is agreed that this is not one of the prescribed offences set out in that section. It has therefore been put to me that I must look at the law prior to the enacting of that section to satisfy myself as to what the position is in relation to this lack of complaint.

I have been referred to a number of cases by both counsel. The first case that I was referred to was Lillyman's Case and I have been referred to a number of subsequent case, Osborne's Case, Kilby's Case and another case that I was referred to Chamilla's Case. Quite clearly what I am looking at is consistency of conduct and credibility of the witness in looking to see whether or not, well in looking to see the significance of whether or not a complaint was made.

It was said, I think in the earliest of those cases, that proof of complaint is a most material element. That is because of the fact that it does go to then person's credibility. It is somewhat unusual to find a situation where a person is complaining of incidents such as this and yet says nothing whatever about that situation for the period of time that BYC has said nothing about these particular matters.

When I look at s 405B it is there indicated that the judge

U2064 136/97 MSG-G2

shall give a warning to the jury to the effect that absence of complaint or delay does not necessarily indicate that the allegation alleged to have been committed is false and that there maybe a good reason why no such complaint was made. As I have already said of course, that section was enacted after this particular incident. But Mr Chennells has asked me to look at that section, look at the intention of the legislation and consider this matter in that light. She has also put to me that the question of consent is not in issue here.

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Certainly that is so, but I think that the manner in which I must look at the question of complaint is, as I have already said, from the two aspects of consistency of conduct and the credibility of the witness. So far as the credibility is concerned it does seem to me to be somewhere extraordinary, one might say, that nothing was said by the witness before 1988. I say that, taking into account, the reasons that he gave in his evidence for making no complaint and also taking into account the fact that he had been to counsellors consistently over that period of time. The reasons that he gave were that he thought it was okay, I think was the reason he gave in respect of the very first incident, the one at Young. After that he said that he was scared and that Simon had a temper and referred to incident that occurred at CEBS of the horse bites and yelling.

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So far as it was okay reason given in respect of the Young incident is concerned it seemed to me that that would be a difficult reason to accept, if in fact the end result of what occurred was as described by BYC and I would have thought that it would have been the sort of thing that he would have spoken about immediately to his parents. He did say that he thought that they had intended something like that to happen, but again, I can't see any basis for such a comments. So far as the scared and the temper are concerned BYC was really unable to give very credible evidence of that. He did, as I've said, refer to these incidents, but I would not have thought that they were sufficient to stop somebody who was concerned about what was happening to them mentioning that to their parents or to some other person who was close to them.

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So far as saying nothing to counsellors is concerned, again I would have thought a person, given the opportunity of seeing a counsellor as early as 1981, which is still twelve months or some number of months anyhow, after the last incident occurred, a person supposedly skilled in personal relationship so that he would have indicated to that person exactly what it was that was concerning him. Of course that is a matter for the jury but I do make those comments in respect of the credibility of his evidence and specifically of the reasons that he has given for making no complaint. Coming back to the cases that is the crux of each of those cases, that that is what one looks at.

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So far as the corroboration is concerned that is provided for in s 405C, again a section enacted after these incidents have said to have occurred. 405C (3a) specifically looks at

~24/07/90

U2064 136/97 MSG-G2

the situation prior to the commencement of that section. Therefore one would apply the ordinary rule of law. But clearly a direction would have to be given to the jury that it would be unsafe to convict on the uncorroborated evidence of a person.

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Mr Chennells has indicated to me that I should look at s 405C differently to 405B because of the fact that there is that subsection indicating that one should look at the situation prior to the commencement of the section differently. But I have already commented on 405B and the fact that it seems to me to be applicable or to apply is the common law that was in existence before that section was enacted.

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However quite clearly there would have to be directions given to the jury at the trial. Mr Shields has put to me that there would have to be three such directions given and Mr Chennells agrees with at least two of those direction. The first is the direction regarding corroboration. Secondly Mr Chennells has indicated that in his view a direction would have to be given regarding the evidence of infants because of the fact that when these incidents are said to have occurred the person BYC was in infant, he was 11 years when the first incident is said to have occurred. That the jury would have to be given some direction in that regard. Miss Channel has disagreed with that.

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But the point that Mr Shields later clarified that he was making was that with the evidence of all children there is a possible distortion and that that distortion would still exist even though it is an older person now looking back at incidents that he says occurred when he was a child. It may well be that that distortion could exist. Although it seemed to me from BYC evidence that he was fairly clear about the evidence, except for those matters to which I have already referred but about the evidence that he gave.

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The third warning is in respect of the incident that he says occurred at Acron Oval when he had turned 14. There is the possibility that he could be charged as an accessory because at the time he was over 14 years of age and certainly it would seem that that is the situation and that it would be indicated to the jury that it is dangerous to convict on the evidence of an accessory unless there is corroborative evidence. With of course the rider, in respect of the corroboration that the jury otherwise must believe the person implicitly. But that comes back again to the situation that exists in this matter and that is that there is no corroboration at all.

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To return again to s 416 that section requires me to make some forecast of what a jury would be likely to do and Mr Shields has urged upon me that one should not take the attitude that these things should be left to the higher courts to decide. I quite agree with him there, clearly that is the whole purpose of spending a considerable amount of time on committal proceedings as this matter has been.

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~24/07/90

U2064 136/97 MSG-G2

The test is quite clearly set out and one must turn one's mind to that likelihood.

In this case to summarise, I think, what I have said I do think that the evidence of BYC from the manner in which it was given, did seem to me to be credible evidence. But that is as far as one can take this particular matter. One can only say that it seems credible in the manner that he gave it and in the fact that he was not substantially swayed in cross-examination. But of course it has been put to me that if somebody fabricates their evidence, convinces themselves of a particular set of facts then they are able to give evidence in that manner. So that one must go beyond that and look at the various other aspects.

Those aspects are anything that favours the defendant. I must take into account the character of the defendant and the fact that at all times he has denied these incidents. But more importantly I must look at the two major factors of corroboration and complaint. There is simply no corroboration whatsoever in this matters. Nothing at all that one can look to to objectively say "well yes there's something here that then does go to giving weight and credibility to the events that BYC has described." That is a major flaw, I feel, in the matter that I have before me.

The only things that are the things that I've referred to, the comment to the father, the sleeping in the same room, the opportunity, but they do not go to corroboration. They are merely factors that I look at and give such weight as they deserve.

The final matter to be looked at is the absence of complaint and despite what has been put to me quite strongly by Mr Chennells it does seem to me that that is of great importance. It goes, as I have said, to consistency of conduct, it goes to the credibility of BYC and particularly his credibility in view of the numerous matters that I have already referred to when I considered the matter of complaint a few moments ago.

Accordingly given the directions that would have to be given to the jury and given the state of the evidence as I see it I AM OF THE OPINION THAT A JURY WOULD NOT BE LIKELY TO CONVICT THE DEFENDANT OF AN INDICTABLE OFFENCE. ACCORDINGLY EACH OF THE EIGHT MATTERS THAT I REFERRED TO AT THE OUTSET IN RESPECT OF EACH OF THOSE EIGHT MATTERS THE DEFENDANT IS DISCHARGED. I HAVE ALREADY INDICATED THAT IN RESPECT OF THE OTHER EIGHT MATTERS THEY WILL BE DISCHARGED AND I WILL MARK THE PAPERS ACCORDINGLY.

EXTRACT CONCLUDED

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~24/07/90

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CERTIFICATION OF TRANSCRIPT

I, the undersigned being a Sound Reporter do hereby certify that the within transcript is a correct transcript of the depositions sound recorded at the Local Court HORNSEY in the matter of DIRECTOR OF PUBLIC PROSECUTIONS V SIMON ANTHONY JACOBS

DATE OF HEARING: 24/07/90

CHARGE: INDECENT ASSAULT, BUGGERY.

Dated at GOSFORD
this 11 day of AUGUST 1997

NAME	PAGES	SIGNATURE
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