ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

BARKER

V.

THE QUEEN

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Tuesday, 16th April 1957

W. M. HOUSTON, Govt. Print., Melb.

C.1978/55

BARKER

v.

THE QUEEN

ORDER

Appeal dismissed.

BARKER

v.

THE QUEEN

JUDGMENT

DIXON C.J.
McTIERNAN J.
TAYLOR J.

BARKER

v.

THE QUEEN

This is an appeal by leave from a conviction upon indictment before the Supreme Court of Papua and New Guinea. The appellant was tried and convicted by the Chief Justice (Sir Beaumont Phillips) without a jury upon a charge under sec. 210 of the Criminal Code of Queensland which is adopted as part of the law of the Territory. Sec. 210 provides that any person who unlawfully and indecently deals with a boy under the age of fourteen years is guilty of a crime and is liable to imprisonment with hard labour for seven years. The section defines the term "deal with" as including doing any act which, if done without consent, would constitute an assault as defined in the Code. The charge was that the appellant on or about 11th June 1956 unlawfully and indecently dealt with Reginald John Gilbert, a boy under the age of fourteen years. It appears that at that date the appellant had spent three weeks at Lae during which he had from time to time gone to a swimming pool where he had become known to some boys who also went there. At the pool there are dressing sheds which include cubicles containing shower recesses. The recesses are not large, about four feet six inches by five feet six inches. To each there is a door, which while not reaching to the ground is about six feet high. The appellant and some of the boys, including Gilbert, were in one of the cubicles together naked after swimming and playing in the pool. He had some soap with him which he used upon the boys or some of them; according to his testimony only upon their shoulders and back. The case made against him was that he indecently handled the private part of Gilbert and of certain other boys, one after another. Gilbert was not quite nine years of age. The case was proved by the unsworn evidence of Gilbert given pursuant to sec. 22 of the Oaths Ordinance 1912 (Papua) by the

unsworn evidence of another boy aged about nine years and eight months and by the sworn evidence of a third boy nearly twelve years of age who had climbed up to the top of the partition of the cubicle from the other side and looked over it. There was some supporting evidence given by an adult bather who had seen the appellant and a number of boys frolicking in the water, and had heard the noise afterwards from the shower recess, seen the boy or boys on top of the partition, heard some cries of "Oh! Wally" (the Christian name of the appellant), followed by the appellant's voice telling the boys to be quiet, and seen the boys and the appellant emerge. As to an unidentified boy he added some particulars of what he noticed, which might be significant. The boy who gave sworn testimony had not given the same direct incriminating evidence in the proceedings before the committing magistrate, owing, he said, to being frightened.

Phillips C.J., in a very careful summing up of the case which he made before pronouncing his conclusion, adopted the view that the boys should be treated as accomplices whose evidence required corroborating. Sec. 632 of the Code provides that a person cannot be convicted of an offence on the uncorroborated testimony of an accomplice or accomplices. It was not that his Honour thought that the boys could be accomplices in the offence charged. But giving effect to the ruling of Philp J. in R. v. Sneesby, 1951 Q.S.R. 26, the Chief Justice was prepared to treat the boys as accomplices to the offence created by sec. 211 of indecent practices among males. The learned Chief Justice, however, considered that the evidence of the boys was corroborated by that of the adult witness who had been at the pool.

The argument in support of the appeal centred on the contention that the finding of guilt was essentially based on the view that this witness's evidence afforded corroboration. The argument then denied that it could in law amount to corroboration. The consequence, so it was said, is that the finding of guilt could not stand.

We think, however, that it is clear that, exercising every proper caution, the learned Chief Justice was completely convinced of the truth of the boys' evidence in its essential particulars and of the guilt of the appellant. His Honour at the same time held, following the decision of Philp J. in R. v. Sneesby, that corroboration was necessary and found in the adult witness the confirmation which, in his view, fulfilled the requirement. For our part, we think that on the facts in proof in the present case there is insufficient ground for the inference that these very young children were any more than the unwilling victims of the appellant. It must be remembered that Gilbert's capacity to know that he ought not to do whatever act or make whatever omission is regarded as amounting to complicity must be proved positively before he could be an accomplice: see sec. 29 of the Code. But apart from such a consideration, for all that appears the occasion in question may have been the first on which the appellant behaved indecently towards the boys. It does not appear that they knew and understood what was about to happen and insufficient reason exists for an inference that Gilbert or either of the other boys was in any way particeps criminis. It seems unnecessary to consider in this case the correctness of the view expressed in R. v. Sneesby, 1951 Q.S.R. 26, at p. 29, or whether it is consistent with Davies v. Director of Public Prosecutions, 1954 A.C. 378 at pp. 400-2. That view is that it is enough on a charge under sec. 210 if the witness could be charged as an accomplice to an offence arising on the same facts under sec. 211. For we think that there is nothing to show that the boys in question were accomplices to an offence under sec. 211. It should perhaps be added that the boy looking from the top of the partition had refused to take off his bathing trunks and had left the appellant's company. He, of course, could not be considered from any point of view an accomplice and his evidence afforded ample corroboration. The learned Chief Justice,

however, was unwilling so to use it owing to the boy's not having told his full story before the magistrate.

We think that it is not correct to interpret the reasons given by Phillips C.J. as meaning that the conviction depended altogether on corroboration being found in the testimony of the adult witness. The conviction was based on his Honour's assured belief in the guilt of the appellant. The decision that this evidence constituted corroboration satisfied a legal requirement. We think that it is unnecessary for us to discuss whether that particular evidence in itself was enough to afford corroboration. For in the first place we are of opinion, for the reasons given, that corroboration was not a legal necessity. In the second place we think that if all the evidence other than that of the boy Gilbert is taken together there is sufficient corroboration. In the third place we think that the learned Chief Justice scrutinised the evidence of the boys with great care and exercised every caution before relying on it in combination with the other evidence as warranting a finding of guilt.

We think that the appeal should be dismissed.