IN THE HIGH COURT OF

GELICHEV

v.

THE QUEEN

REASONS FOR JUDGMENT

Oral *Judgment delivered at* SYDNEY

on WEDNESDAY, 9th DECEMBER 1970

GELICHEV

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ORDER

Appeal allowed. Conviction quashed and accused discharged.

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JUDGMENT

(ORAL)

BARWICK C.J.

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The applicant was indicted in the Supreme Court of the Northern Territory on the first count for rape and on the second count for indecent assault. He was acquitted of rape but convicted of indecent assault. He was sentenced to imprisonment for a period of 15 months.

He now appeals to this Court against his conviction and seeks leave to appeal against the sentence imposed upon him.

The grounds of his appeal include the following, namely, that there was no evidence to support the conviction for indecent assault, that the trial Judge failed adequately to direct the jury in connection with the count for indecent assault as to the dangers of acting on the uncorroborated evidence of the woman alleged to have been indecently assaulted, that the trial Judge failed to direct the jury that it was upon the Crown to negative consent to the indecent assault, that the trial Judge failed properly to explain to the jury the function of the evidence of a complaint in the proof of the charge of rape.

The course which was taken in the trial in relation to the count of indecent assault was scarcely satisfactory and

no doubt contributed to the paucity of the summing up upon that count. The prosecutor, in opening to the jury, told them that the main charge was rape but that they may have to decide - and I quote what he said - "... whether, apart from the rape or instead of the full offence of rape, whether there was an assault on Margaret Ann Sanders at the same place and the same time; an assault by the accused accompanied by circumstances of indecency". That ends the quotation from the prosecutor's opening.

The prosecutor illustrated an indecent assault as - and I quote him again - "a grabbing of the upper part of a woman's leg or fondling her breasts may be an assault if she does not consent to it", pointing out that on the other hand such conduct can be regarded as loveplay, "a courtship preliminary" - that the jury may have to decide which it was. It is quite clear that the issue fought at the trial was whether or not the woman had consented to all that had taken place between her and the accused on the afternoon in question. The woman maintained that she had resisted from beginning to end, a course which involved, as she said, an attempt to kiss her, to remove her pants and to have intercourse with her.

The accused, though conceding that when he attempted to kiss and fondle the woman she had said, "Oh Stevie please don't" stated that she had not at any stage resisted him and, indeed, in substance, said she co-operated with him.

No attention appeared to have been given during the taking of evidence to acts which could be said to constitute indecent assault. So much so, apparently, that the trial Judge

gathered the impression that the Crown had abandoned the second count. In opening his summing up to the jury the trial Judge said this:

> " Gentlemen of the jury, the accused stands before you charged on two counts: one of rape and one of indecent assault. The Crown has abandoned the charge of indecent assault.
>
> The Crown Prosecutor has said that this is rape, or nothing: that he is not relying any longer on the charge of indecent assault and therefore, I do not propose to say anything further to you about it, except to say that when you are asked to return a verdict, you will be asked whether you find him guilty or not guilty on the charge of indecent assault, but as the Crown has abandoned that charge, you will say: 'Not guilty'."

As a result, the summing-up, until its first conclusion, dealt only with the first count. However, upon that conclusion the prosecutor addressed his Honour as follows:

> " If the Court pleases, with respect, I did not entirely abandon indecent assault. I put to the jury the only hypothesis I could see which was available to them."

Thereupon, his Honour gave a direction with regard to indecent assault. This direction was as follows:

> " Well, gentlemen, I have to give you a direction with regard to indecent assault. There again, you have an assault on a woman of an indecent nature accompanied by circumstances of indecency. And it is against her consent.
>
> Well, I have explained to you, shortly - I hope clearly - that merely submission is not consent, that there must be a real consent, and if you accept the accused's statement, of course, there was complete consent - if you accept the woman's statement, there was no consent.
>
> If you are left in a state of reasonable doubt about it, then again, you must find the accused not guilty of a charge of this nature.

> But, gentlemen, I would think from what the Crown Prosecutor said to you that you will not find yourselves greatly troubled with this particular charge."

The deficiencies of this direction are obvious. In dealing with the count for rape his Honour had said:

> "Now, in a case which is generally known as a sexual case, which is a term that covers quite a number of crimes, in sexual cases or sexual crimes there is this which should be told to a jury always, and that is, that it is dangerous to act upon the uncorroborated evidence of the woman who alleges that the crime has been committed against her."

However, the relevance of that direction to the separate circumstances of an alleged indecent assault antecedent to the alleged rape, there being no dispute in this case as to penetration, was not brought home to the jury, nor in my opinion was the earlier direction adequate to satisfy the need for a direction as to corroboration with respect to the second count.

Again, though reference was made in the summing-up as to indecent assault to the consequence of a reasonable doubt, his Honour saying,

> " If you are left in a state of reasonable doubt about it, then again, you must find the accused not guilty of a charge of this nature."

a specific direction as to the onus of negativing consent was not given.

Lastly, it was in my opinion at least advisable, if not indeed necessary, to assist the jury by a sufficient reference to the evidence in the case to identify that act which could be regarded in the circumstances as an indecent assault independent of the act of intercourse.

However, after having sought on an earlier occasion some information as to a piece of evidence in the case, the jury returned once again to seek a further direction on the charge of indecent assault. His Honour then directed the jury as follows:

> Gentlemen, I understand you would like a further "direction on the charge of indecent assault. Gentlemen, the meaning of assault, in law, is unjustifiably laying one's hands upon another person. And unjustifiably means that - not if you put out your hand and shake hands with a person or anything like that - it means you have got no justification to do it. In the case of an indecent assault, it means laying your hands on another person in an indecent way, under circumstances of indecency.
>
> For example, if a man were to put his hands up a woman's clothes, towards her private parts, that would be an act of indecency and would be an indecent assault, unless she consented to it. As in the case of rape, consent is a defence to a charge of indecent assault. I told you earlier that consent meant more than submission. Consent means that there must be a real willingness to have the particular act that is being done, done.
>
> Now, as regards the story of the girl. She says at no time did she consent to having her garments interfered with and to having anything done in the neighbourhood of her private parts. As far as the accused is concerned, his statement is a denial that anything he did was done without her consent, except, gentlemen, that there is in his examination-in-chief by Mr. Barker, this. Perhaps I had better read the whole few lines from the top of p. 85. The thongs that she had on her feet were mentioned.
>
> 'Do you know what she did with them?---When she come in the car she kick them off from the legs'. 'And did she at any stage scream out?---No'. 'Or resist you in any way? Did she try and fight you off in any way?---No.'
>
> Now this is the part in which possibly you may say that he was making some sort of an admission - but that is a matter for you to decide. 'Did she do anything which would lead you to think that she did not want to have sexual intercourse with you?---No. She just say,'Well, come on Stevie, please don't' just like this'. 'When was that?---When we start to kiss and she say, 'Oh, come on Stevie, don't do that'.
>
> Well, gentlemen, if this occurred at the stage when he was interfering with her clothes in the neighbourhood

> of her private parts, that may be an indication that at that stage she was not consenting to that being done. It may be consistent with her simply objecting to being kissed.
>
> And, of course gentlemen, you can have this type of case where a girl at the start of proceedings does object to being interfered with and may well be objecting, in the early stages, but at a later stage, after she has been worked up by this interference, she may submit. So that you may have a case where she has not consented to the early interference, but at a later stage, she consents to the full intercourse, because she has been worked up as a result of the earlier experience she has gone through.
>
> Now, I do not know whether there is any question you would like to ask me further on that. But as far as I can see these are the relevant matters to be considered on this charge of indecent assault."

The deficiencies of which I spoke in connection with the first direction on the second count are equally apparent in what his Honour secondly told the jury. Indeed, in this instance, the statement that consent was a defence with no clear direction as to the onus of proof and no warning as to the danger of acting in relation to this charge on uncorroborated evidence, was clearly unsatisfactory and inadequate and amounted in my opinion to a misdirection.

Having regard to the opinion I have formed as to the insufficiency of the directions given as to the second count, and as to the course which I think this Court ought to take, I refrain from expressing any view as to whether there was in this case any evidence to support a charge of indecent assault.

In my opinion, for the lack of a proper direction as to the onus of proof, and as to the danger of acting in such a case on uncorroborated evidence, the summing up in relation to the indecent assault was fundamentally inadequate and the conviction on the second count must, for that reason, be quashed.

There remains the question whether a new trial should be ordered. The accused, as I have said, was acquitted of rape. The substantial issue of consent or no consent in that connection was not found against him. The woman's account of the afternoon's events was not that she had been won over by acts amounting to an indecent assault, and it would be in my opinion quite unreal to attempt to try a single count of indecent assault divorced from the intercourse which actually took place between the parties. To try such a count with all the circumstances of that intercourse evidenced and yet maintain the acquittal on the charge of rape and what that acquittal might imply, would, to say the least in my opinion, be unsatisfactory.

In my opinion, in the circumstances, I would not order a new trial. In my view the conviction should be quashed and the appellant discharged with no other order.

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(ORAL)

McTIERNAN J.

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I agree in substance with what the Chief Justice has said.

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MENZIES J.

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At the trial, the charge of indecent assault, although not formally abandoned, was disregarded until the conclusion of the trial when it was then treated both by the Crown Prosecutor and by the learned judge as of trivial importance. It was in these circumstances that his Honour, upon the half-hearted request of the Crown Prosecutor, did give some direction upon that charge. The direction then given was, as the judgment of the Chief Justice has shown, less than sufficient.

In the whole of the circumstances of this case I think this Court should now do no more than quash the conviction.

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JUDGMENT
(ORAL)

WINDEYER J.

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I do not think that it can be said that there was no evidence at all to sustain a conviction of indecent assault, as a separate incident notwithstanding the acquittal on the charge of rape, difficult though such a finding must be on the facts of this case. But I do think that, as a result of the course which the trial took and the attitude of the prosecution, the jury were not adequately instructed in relation to the charge of indecent assault; and that a new trial could not be satisfactorily had.

I therefore agree with the proposal of the Chief Justice.

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I agree with the order of the Chief Justice for the reasons given by his Honour.