Consent to Assaults Under the Queensland Criminal Code

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The recent decision of the Queensland Court of Criminal Appeal in *Lergesner* v. *Carroll*[1] determines an important issue in the criminal law which had been the subject of disagreement in earlier decisions of the same Court. It defines the relevance of a victim's consent to assault offences under the Criminal Code.

The appellant in this case had been convicted of unlawful assault occasioning bodily harm, contrary to s.339 of the Code. One ground of appeal was that the Stipendiary Magistrate had failed to give proper consideration to the issue of consent, an issue said to be relevant where, as here, there was evidence that bodily harm had been inflicted on the victim during the course of a consensual fight.

All members of the Court held that the appeal against conviction should be allowed on this ground. Shepherdson J. expressed his conclusion thus:

> I favour the view that in the case of assault occasioning bodily harm where consent to the assault is an issue and there is evidence capable of amounting to such consent the tribunal of fact in deciding whether the prosecution has proved beyond reasonable doubt that the assault was unlawful must decide whether the degree of violence to the person assaulted exceeded that to which consent was given.[2]

Cooper J. was of a similar view. He said:

> In my opinion, the presence or absence of consent to the application of force to the person of another is a matter for the jury to determine on a charge under s.339 of the Code. And, the consent is not one limited by law to a consent which is itself limited to an application of force which does not cause bodily harm.[3]

Both judges decided that as the Code in s.245 defined an assault as an application of force without consent,[4] failure to prove absence of consent was fatal to a charge of an offence, such as that in s.339, of which an assault was specified as an element. Kneipp J. agreed with the reasons published by the other members of the Court. In the result it is now established that consent operates as a defence to a charge of assault causing bodily harm.

This settles a division of opinion on the matter in other recent cases in the Court of Criminal Appeal. In *Raabe*[5] in 1985, Connolly J. had reached the opposite conclusion. He had accepted that s.245 standing alone imposed no limitation on the circumstances in which consent might be given but argued that some limitation was discernible in s.246, which first stipulates that an assault is unlawful and constitutes an offence unless it is authorised or justified or excused by law, and then in the following paragraph provides:

1 [1991] 1 Qd.R. 206.
2 *Id.* 212.
3 *Id.* 219.
4 Or an application of force with consent if the consent is obtained by fraud. This alternative formulation is not relevant to the present discussion.
5 [1985] 1 Qd.R. 115. For further discussion of this case see J.A. Devereux, 'Consent as a Defence to Assaults Occasioning Bodily Harm — The Queensland Dilemma' (1987) 14 *University of Queensland Law Journal* 151.

> The application of force by one person to the person of another may be unlawful, although it is done with the consent of that other person.

This paragraph, Connolly J. said, when read with s.245 made the Code ambiguous as to the effect of consent and it was therefore permissible to resort to the common law to resolve the ambiguity.[6] He then observed, citing the famous English case of *Coney*[7] as authority, that according to the common law at the time of the adoption of the Code, 'a blow struck in anger or likely or intended to do corporal hurt was an assault, being a breach of the peace and . . . consent was immaterial'.[8] Then, taking into account ss.245, 256 and 339 and the common law, Connolly J. concluded that 'the consent which may be given for the purposes of s.245 is to force which is not intended to and does not cause bodily harm as defined by the Code'.[9]

This construction, he noted, would bring Queensland law into line with the present law in England as expounded by the Court of Appeal in *Re Attorney-General's Reference* (No 6 of 1980)[10] and was preferable from the social point of view as discouraging violence. Consent to bodily harm would be irrelevant except in relation to properly conducted games and sports where, he said, 'there is nothing to deny the effect of the consent of the participants'.[11]

The approach of Derrington J. to the question of interpretation and his answer to it were quite different. He saw no ambiguity in the Code provisions and considered reference to the common law, whether at the time the Code came into force or later, to be impermissible.[12] Absence of consent, therefore, had to be proved in order to establish criminal liability, such consent being referable not to any application of force but to the degree of violence which actually caused bodily harm.

Derrington J., unlike Connolly J., considered the second paragraph of s.246 to be irrelevant to the question of construction. He said:

> This does not say that the application of force is unlawful in every case, nor does it say that where the absence of consent is an element of an offence, that provision is overridden. A general provision such as this could not, without more, so affect a specific one. It merely makes it clear that those offences involving the application of force to a person where the absence of consent is not made an element, e.g. murder or grievous bodily harm, are indifferent to consent and remain unlawful despite its presence and the absolving effect of that presence in the case of assault.[13]

Thomas J., the third member of the Court in *Raabe*, expressly reserved the question of construction.[14] Thus this case left the question undecided. Then in *Watson*[15] in 1987, McPherson J. cited *Raabe* as authority for the proposition that the law does not recognise the consent of the victim as a circumstance capable of depriving the act producing bodily harm of its criminal character as an offence under s.339 of the Code.[16] Confusion was made worse confounded by the fact that Derrington J., who in *Raabe* had appeared to say quite the opposite, expressed his agreement with the judgment of McPherson J.![17] However, the observations of McPherson J. were obiter and related not to a consensual fight

6 *Id.* 118, 119.
7 (1882) 8 Q.B.D. 534.
8 *Raabe* [1985] 1 Qd. R. 115, 119.
9 *Ibid.*
10 [1981] 1 Q.B. 715.
11 *Raabe* [1985] 1 Qd.R. 115, 119.
12 *Id.* 125, 126.
13 *Id.* 126.
14 *Id.* 123.
15 [1987] 1 Qd.R. 440.
16 *Id.* 444.
17 *Id.* 450.

but to circumstances where the accused, a member of the Palm Island Aboriginal community, had inflicted a knife wound on his de facto wife, also a member of that community, allegedly as a form of domestic discipline. She died as a result of the wound and he was convicted of murder. Thus the construction of any assault provision, such as s.339, was not in issue. Moreover, where, as happened in this case, the application of force causes wounding, consent is irrelevant. The offence of unlawful wounding in s.323(1) is not defined in terms of assault.

Following these unsatisfactory authorities the unanimous decision of the Court of Criminal Appeal in *Lergesner* v. *Carroll* is welcome. It makes certain the application of Code provisions which *Raabe* and *Watson* had rendered quite uncertain. If the offence involving an application of force is defined in terms of assault, then in the words of Cooper J. in *Raabe*, 'the presence or absence of consent is determinative of the criminality of the application of force'.[18] If the offence is not so defined consent is immaterial. Thus on this analysis consent does not serve to relieve from criminal responsibility a person who applies force resulting in wounding or grievous bodily harm where the charge is unlawful wounding or unlawfully doing grievous bodily harm.[19] On the other hand where the charge is unlawful assault simpliciter or some form of aggravated assault such as unlawful assault occasioning bodily harm, the failure to prove absence of consent beyond reasonable doubt must result in an acquittal because an element of the offence, the assault involving application of force without consent, has not been established.

The judges in *Lergesner* v. *Carroll* generally adopted the reasoning of Derrington J. in *Raabe*. The second paragraph of s.246 did not, they said, introduce any ambiguity into the definition of assault in s.245 and accordingly the common law relating to assaults could not affect its construction.

Cooper J. was also influenced by another consideration. He referred to a decision of the draftsman of the Code, Sir Samuel Griffith, in June 1897. In *R.* v. *Schloss and Maguire*,[20] Griffith, then Chief Justice of Queensland, construed a provision of *The Criminal Law Amendment Act of* 1891, s.21, which provided as follows:

> It shall be no defence to a charge of indecent assault on a young person under the age of 14 years to prove that he or she consented to the act of indecency.

Griffith C.J. described the language of the section as 'faulty'[21] because, he observed:

> The term assault of itself involves the notion of want of consent. An assault with consent is not an assault at all.[22]

In s.252 of the draft Criminal Code[23] which he presented to the Attorney-General a few months later, in October 1897, and which became s.245 of the Code as enacted in 1901 the term 'assault' was defined in the same way, i.e. as involving absence of consent. The definition remains unchanged to the present day. This sequence of events suggests, as Cooper J. indicated,[24] that an 'assault' as Griffith referred to it in the Code was to be understood in the same way. However, it is instructive to note also what Griffith said about the matter, not in his judicial capacity in *Schloss and Maguire*, but as the draftsman of the Code. In his explanatory letter to the Attorney-General in October 1897, he wrote that the rules stated in his Draft relating to assaults and personal violence were for the

18 [1991] 1 Qd.R. 206, 218.
19 S.320.
20 (1897) 8 Q.L.J. 21.
21 *Id.* 22.
22 *Ibid.*
23 For the text of the Code and Griffith's letter to the Attorney-General explaining it see *Queensland Parliamentary Papers* CA 89-1897.
24 *Lergesner* v. *Carroll* [1991] 1 Qd.R. 206, 218, 219.

most part founded on the English Draft Code of 1879 (the work of Sir James Stephen and other distinguished Royal Commissioners) and he believed them to be 'except when otherwise stated, correct statements of the Common Law'.[25] He reiterated this in a footnote to the relevant Chapter.[26] Furthermore, in a marginal note to s.252, he stated that it represented the common law and referred to s.196 of the Draft Code of 1879 as its source. The latter provision is in very similar terms to s.252, but with the striking difference that it does not specify absence of consent to the application of force as an element of assault.

There is no marginal note to s.253 (now s.246) indicating Griffith's source for this provision and there is nothing in the English Draft Code which specifically corresponds with it. However, the English Draft Code does contain a general provision saving 'all rules and principles of the common law which render any circumstances a justification or excuse for any act or a defence to any charge'.[27]

Griffith did not include any such provision but he must have been aware from cases such as *Coney* that at common law consent was not always recognised as a defence to assault, and perhaps consistently with his plan to reproduce the common law in his Code statement of assault offences he may have included the second paragraph of s.253 to indicate this qualification to the general rule. In short, he may have sought to accomplish the same result as the English Draft but by a different method. The alternative view is, of course, that preferred in *Lergesner* v. *Carroll*. The second paragraph refers to applications of force other than offences defined to include an assault as an element. If this is so one wonders why the paragraph appears in a section relating to assault and which itself immediately follows the section defining that term, instead of in later Chapters containing offences such as unlawful wounding to which it would, according to this construction, apply. It is submitted that the meaning of this paragraph is not nearly as plain as the Court of Criminal Appeal asserted it to be.

However, *Lergesner* v. *Carroll* is now an authoritative decision on the point and obviously had a wider application than to an assault occasioning bodily harm in the course of a brawl which was the factual context of that case.

It would appear that the reasoning would apply to any consensual fight, whether a brawl or a boxing match or, indeed, to any physical contact sport in which, at least impliedly, the participants consent to the application of force of a kind and degree authorised by the rules of that particular sport. Whether it would apply generally in other situations in which bodily harm is inflicted with the consent of the victim remains to be determined. If so, the Code would certainly diverge from the common law. Both *Coney* which related to blows struck in the course of a prize fight, and *Donovan*[28] which concerned flagellation for sexual gratification, made plain that at common law bodily harm intentionally in-

25 *Supra* note 23, XI. The one deliberate departure from the common law was s.276 (now s.269) making provocation an absolute defence in certain circumstances.

26 *Supra* note 23, 107.

27 S.20. The *Crimes Act* 1961 (N.Z.) which is ultimately based on the English Draft Code, contains the same provision (s.20) and also a definition of assault in s.2 which is very similar to s.196 of that Code. The Act thus appears to incorporate the common law learning relating to consent in cases of assault. See Garron and Caldwell's *Criminal Law in New Zealand* (6th ed., Wellington: Butterworths, 1981), 37-39 and F.D. Adams (ed.) *Criminal Law and Practice in New Zealand* (2nd ed., New Zealand: Sweet & Maxwell, 1971), paras.[606], [608]. The *Criminal Code Act* 1924 (Tas.) which has the same derivation has very similar provisions in ss.8 and 182(1). However, the common law rules which would otherwise apply have been codified in s.182(4) as follows: 'Except in cases in which it is specially provided that consent cannot be given, or shall not be a defence, an assault is not unlawful if committed with the consent of the person assaulted unless the act is otherwise unlawful, and the injury is of such a nature, or is done under such circumstances, as to be injurious to the public, as well as to the person assaulted, and to involve a breach of the peace.'

28 [1934] 2 K.B. 498.

flicted could constitute assault notwithstanding consent. The grounds for those decisions are not entirely clear[29] but, as explained by the Court of Appeal in *Re Attorney-General's Reference* (No 6 of 1980), they are really specific applications of a general rule that consent will not be recognised as a defence where such recognition would be inimical to the public interest. In the lastmentioned case which related to a consensual fist fight in public, it was held that the public interest rendered consent irrelevant.

Thus the common law permits the Court to decide, case by case, whether recognition of consent would be injurious to the public interest. This makes for uncertainty because, as Professor Fisse has recently observed, 'the scope of liability is governed more by indeterminate paternalistic sentiment than by legal definition'.[30] In any event, there is now, according to *Lergesner* v. *Carroll*, no warrant for applying this qualification under the Code. If the relevant conduct is punishable at all it is not as an assault offence but only as some other offence which does not in terms refer to consent such as affray,[31] unlawful wounding or unlawfully doing grievous bodily harm.

29 See J.C. Smith and B. Hogan, *Criminal Law* (5th ed., London: Butterworths, 1983), 358-361 and B. Fisse, *Howard's Criminal Law* (5th ed., Sydney: The Law Book Company, 1990) 147-152.

30 Fisse, *supra* note 29, 152.

31 S.72.