(Bisson J)

519 NZ law Rep(2)

IN THE COURT OF APPEAL OF NEW ZEALAND

C.A.40/81

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THE QUEEN

v.

SONNY SHAW

Coram: Davison C.J.
McMullin J.
Somers J.

Hearing: 2 June 1981

Counsel: C J McGuire for Crown
M J Cameron for Applicant

Judgment: 29 July 1981

JUDGMENT OF THE COURT DELIVERED BY DAVISON C.J.

THE CHARGES

The applicant was tried on an indictment which contained two counts. They were expressed as follows:

The Crown Solicitor at Hamilton charges that:

Crimes Act 1961 Section 135(a) (1) Edward John Shaw otherwise known as Sonny Shaw at Hamilton on the 3rd day of November 1979 did indecently assault [redacted]

The said Crown Solicitor further charges in the alternative that:

Crimes Act 1961 Section 194(b) (2) The said Edward John Shaw otherwise known as Sonny Shaw at Hamilton on the 3rd day of November 1979 being a male did assault [redacted] a female.

THE FACTS

The applicant conducted his own defence. He elected to call no evidence.

The facts of the case may be summarized as follows. The complainant was a tree nursery worker living

at the YWCA in Hamilton. In November 1979 she had a phone call from a man who called himself Graham Yellop. A few days later she received another phone call from him. He asked her to go over to his place and to go out to tea with him. The complainant agreed to that, but not to his suggestion that she stay and watch rugby football on television afterwards.

She arrived at the applicant's flat. They did not go out to tea. They talked for some time and then the complainant said she wanted to go. According to the complainant, the applicant then picked her up and carried her shouting and screaming into the bedroom where the applicant said he wanted sexual intercourse with her. The applicant then allegedly indecently assaulted the complainant.

After a short time the complainant managed to escape and run to a nearby house where the householder took her inside and shortly afterwards telephoned the police. The police arrived. The complainant was interviewed. As a result of what she said, a police constable called at the applicant's address. The applicant was interviewed. He denied ever touching the complainant although he acknowledged that she had been to his flat earlier that night. He claimed that he had not forced the complainant into the bedroom, but said that when he told her in the bedroom that he was going to have sexual intercourse with her, she started screaming and yelling and carrying on and that she had then run out of the bedroom and out of the flat.

The jury believed the complainant's story and convicted the applicant on the first count alleging indecent

assault. No verdict was returned on the second count of common assault.

GROUNDS OF APPEAL

On behalf of the applicant, Mr Cameron raised three grounds in support of the application for leave to appeal:

1. The indictment alleged no crime.
2. The evidence proved no crime.
3. The verdict of the jury was unsupportable having regard to the evidence.

1 and 2: No crime alleged or proven:

Count 1 of the indictment was founded on s 135 Crimes Act 1961, which provides:

> " Everyone is liable to imprisonment for a term not exceeding seven years who:-
> (a) Indecently assaults any woman or girl of or over the age of sixteen years... "

The count, however, as framed made no allegation that the complainant was "of or over the age of 16 years".

Mr Cameron argued that that count in the indictment was defective in so far as it did not contain an allegation of an essential element of the offence, namely, that the complainant was of or over the age of 16 years.

Now the corresponding section of the earlier Act - s 208 Crimes Act 1908 - did not contain any reference to age of the complainant. It simply provided:

> " s 208(1) Every one commits an indecent assault and is liable to seven years' imprisonment... who -

(a) Indecently assaults any female person; or

(b) Does anything to any female person with her consent which but for such consent would be an indecent assault, such consent being obtained by false and fraudulent representations as to the nature and quality of the act. "

But when the 1961 Act was passed there were enacted three sections dealing with indecent assault in place of the one section in the earlier one. The relevant parts of the three sections are as follows:

s 133: Indecency with girl under 12 -

(1) Every one is liable to imprisonment for a term not exceeding 10 years who -

(a) Indecently assaults any girl under the age of 12 years.

(2) It is no defence to a charge under this section that the girl consented, or that the person charged believed that she was of or over the age of 12 years.

s 134: Sexual intercourse or indecency with girl between 12 and 16 -

(2) Every one is laible to imprisonment for a term not exceeding 7 years who -

(a) Indecently assaults any such girl.

(3) It is a defence to a charge under this section if the person charged proves that the girl consented and that he is younger than the girl:

Provided that proof of the said facts shall not be a defence if it is proved that such consent was obtained by a false and fraudulent representation as to the nature and quality of the act.

(4) It is a defence to a charge under this section if the person charged proves that the girl consented, that he was under the age of 21 years at the time of the commission of the act, and that he had reasonable cause to believe, and did believe, that the girl was of or over the age of 16 years.

Provided that proof of the said facts shall not be a defence if it is proved that the

consent was obtained by a false and fraudulent representation as to the nature and quality of the act.

(5) Except as provided in this section, it is no defence to a charge under this section that the girl consented, or that the person charged believed that the girl was of or over the age of 16 years.

s 135: Indecent assault on woman or girl -

Every one is liable to imprisonment for a term not exceeding 7 years who -

(a) Indecently assaults any woman or girl of or over the age of 16 years.

Although the element of indecent assault is common to all the offences established under the three sections above referred to, the offence of indecent assault has been divided into age groups because of the different applications of the defence of consent relevant to each.

Under s 133 consent is no defence;

Under s 134 consent is a defence in two restricted instances;

Under s 135 consent is a defence to a charge of indecent assault.

It was submitted by Mr McGuire for the Crown that the offence created by all three sections is that of indecent assault and a mere allegation of indecent assault is, without reference to the age of the complainant concerned, a statement of a crime. The references to age in the three sections are, it was said, merely to fix the punishments for the offences in relation to the ages of the complainants, and the references to consent in s 133 and s 134 are to limit the application of the defence of consent when girls under 16 are involved.

We do not agree that these three sections of the Act can be treated in this way. When the Legislature re-enacted the Crimes Act in 1961, it chose to expand the former s 208 (Crimes Act 1908) into three new sections 133, 134 and 135, each of which creates a substantive offence and refers to a different age group of complainants. In such case it is necessary in framing an indictment to indicate clearly into which age group the complainant falls and such being our view, the references to age in sections 133, 134 and 135 are essential ingredients of the crime. That conclusion recognises the natural meaning of the words used in each section and reflects the importance of the averment as to age which serves notice to an accused as to the availability of defences relating to consent.

The indictment in the present case did not refer to the age of the complainant (whatever that may have been) but there was placed alongside the count in the margin a reference to the statutory provision under which the charge was laid: in this case - Crimes Act 1961, s 135(a).

It was submitted on behalf of the Crown that such reference was an indication that the Crown alleged that the complainant was over the age of 16 years.

There is no requirement in New Zealand such as that contained in the Indictment Rules 1971 Rule 6 (England), requiring a reference to the statutory provisions under which the charge is laid, in the case of statutory offences. It has, however, in this country become the common practice to insert such a reference in the margin opposite to each count. The only statutory reference to the use to be made

of a statutory provision inserted in that way is to be found in the Crimes Act 1961 s 329(5) which reads:

> " A count may refer to any section or subsection of any enactment creating the crime charged therein, and in estimating the sufficiency of any such count the Court shall have regard to such reference. "

There may be some doubt, however, as to whether a reference to a statutory provision in a margin is a reference in a count to which that subsection applies. Adams however at para 2599 observes that whilst a marginal note is not strictly within the subsection there appears to be no reason why such marginal notes should not be taken into account.

There appear to be no decided cases in New Zealand as to the way in which the Courts will apply subs (5). The only case which has come to our attention which is remotely relevant in this connection is Sayer & Anr v Police [1963] NZLR 221 which was decided not under the Crimes Act but under the Summary Proceedings Act 1957 which does not contain any provision corresponding to s 329. In his judgment McCarthy J. said at p 222:

> " In my view, the statutory reference endorsed on the information was not strictly part of the charge. It is true that the form of information set out in the second schedule to the Summary Proceedings Act 1957 calls for a reference to the section on which the charge is based and to that extent the reference is part of the information; but I have always understood it to be endorsed mainly to assist those reading the information to turn rapidly to the section which provides the offence. This was also the view of Gresson J. in Jamieson v Wilton [1956] NZLR 329, 331,

> of a similar practice then in operation in relation to informations laid under the Justices of the Peace Act 1927. "

If we were to accept that a reference in the margin alongside any count to a section or subsection of any enactment creating a crime is not strictly part of the charge - as a reference to s 329(5) would appear to indicate - then the Court would nevertheless appear to be entitled to have regard to such reference in estimating the sufficiency of any such count. Adams on Criminal Law (2nd ed) para 2599. If it comes to the view that a defendant has not in any way been misled or prejudiced by the way in which a count was framed, it might consider whether it was appropriate to grant an amendment to any defective count by applying s 335.

Looking then at count one as framed and observing the marginal note, it would on its face be apparent to a reader that it is laid under s 135(a) Crimes Act 1961, and a reference to that section would show it refers to a "woman or girl of or over the age of 16 years". The defendant, in our view, could have been left in no doubt as to what was being alleged against him in that count.

Had we been able to do so we would have considered we should make an amendment to the count so as to add to it the necessary words identifying the allegation that the complainant was a woman or girl "of or over the age of 16 years", thus including in the indictment an essential part of a count alleging an offence under s 135. Our powers of amendment are contained in s 335(3) of the Crimes Act 1961:

> " If it appears that the indictment has been presented under some other enactment instead of under this Act, or under this Act instead of

> under some other enactment, or that there is in the indictment or in any count in it an omission to state or a defective statement of anything requisite to constitute the crime, or an omission to negative any exception that ought to be negatived, but that the matter omitted is proved by the evidence, the Court before which the trial takes place, or the Court of Appeal, if of opinion that the accused has not been misled or prejudiced in his defence by the error or omission, shall amend the indictment or count as may be necessary. "

It will be seen that one of the prerequisites to amendment is "that the matter omitted is proved by the evidence". There is, however, no evidence whatever which is before this Court, or which was before the jury, as to the age of the complainant.

We must have proof of age before we can make the amendment. See Stone [1920] NZLR 462, 467. To uphold the conviction on the charge of indecent assault laid under s 135(a) would be tantamount to accepting that the girl was over the age of 16 years and of that there was no evidence. Count one of the indictment is defective because of the omission of the reference to the complainant's age. We are unable to amend the count to conform with proof of age because there was no proof of age in the evidence at trial. There was in relation to that count (without amendment) no crime alleged and no offence proved by the evidence. The conviction on count one must be quashed.

However, we were invited by the Crown to exercise our powers under s 386 of the Act and to substitute a conviction on the second count in the indictment, namely, common assault.

This Court's powers to adopt such a course are contained in subs (2):

> " Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed as may be warranted in law for that other offence, not being a sentence of greater severity. "

Mr Cameron, however, submitted that this course should not be followed as the offence of assault was not necessarily included as an offence under secs 133, 134, 135. We do not agree with that submission. A jury in deciding whether or not there was an indecent assault must determine, first, was there an assault? Second, where consent is a defence - as it is in a charge of common assault and an alleged indecent assault of a girl over 16 years when an evidential basis for it is raised (Adams para 39) - that there was no consent. And, third, whether the assault was accompanied by an act or acts of indecency.

Now the first two elements amount to proof of the offence of common assault, but it was submitted by Mr Cameron that whatever may have been the position under s 208 of the 1908 Act, a crime of common assault is not necessarily included in a charge of indecent assault laid under the 1961 Act where the age of the complainant is not

stated because although common assault, to which consent is a defence, would be included in a charge of indecent assault under s 135 (where consent of the girl is a defence) it would not be included in charges of indecent assault under secs 133 or 134 where offences can be committed on consenting girls and therefore without committing a crime of ordinary assault. See Lamb [1959] NZLR 232, 234. We accept that this is the situation under the 1961 Act.

In the present case, however, no reference was made in count one of the indictment to the complainant's age. We were told from the bar by counsel for the applicant that the learned trial Judge made no reference in his summing-up to the age of the complainant. Age was not made an issue at the trial. In these circumstances, it is plain that the jury in returning its finding of guilty on the count of indecent assault, as laid, necessarily found an assault, no consent, and circumstances of indecency. The first and second of these elements constitute a common assault. The jury had to find a common assault on the way to the finding of indecent assault. The jury never had to consider the effects of consent under secs 133 and 134 so that they could not have found that the complainant consented and yet found an indecent assault. The jury's finding was simply that the two elements of common assault were established with the additional element of indecency. The jury must have been satisfied of facts which proved the applicant guilty of common assault.

So it is that in the unusual circumstances of this case, had the jury passed on to consider the second count

in the indictment then we have no doubt that, having regard to the manner in which the trial was conducted, it would have found the applicant guilty on the count of common assault.

3. Verdict of jury unsupportable:

This ground of appeal was virtually abandoned by Mr Cameron. During the trial the complainant gave a version of the facts which, if believed, would have supported a finding by the jury of common assault. The applicant called no evidence. The jury in returning its verdict on count one made it clear that they accepted the complainant's story. A defence of consent was not raised by the applicant, besides which there was no evidence on which a jury could properly have found that the complainant consented to the assault upon her. This ground of appeal must fail.

We propose therefore to grant leave to appeal and to set aside the verdict of guilty on the count of indecent assault. We substitute a verdict of guilty on the alternative count of common assault. The applicant will be convicted on that count. The applicant will be sentenced on the count of common assault and be fined $750.

Solicitor for the applicant: M J Cameron (Hamilton)

Solicitor for the respondent: Crown Law Office (Wellington)