

01/08; [2007] VSC 494

SUPREME COURT OF VICTORIA

PARISH v DPP

Robson J

25 October, 29 November 2007 — (2007) 17 VR 412; (2007) 179 A Crim R 304

CRIMINAL LAW – ASSAULT – INDECENT ASSAULT – CONSENT – FEMALE TOUCHED BY DEFENDANT MALE WHILST IN A TRAIN AND ON AN ESCALATOR – ONUS ON PROSECUTION – DEFENDANT DIAGNOSED WITH ASPERGER'S SYNDROME – SUCH PERSONS HAVE A LESSER UNDERSTANDING ABOUT THE RULES OF SOCIAL BEHAVIOUR – INDECENT ASSAULT CHARGES DISMISSED BY MAGISTRATE – COMMON ASSAULT CHARGES FOUND PROVED – FINDING BY MAGISTRATE THAT PROSECUTION DID NOT BEAR THE ONUS OF PROVING THAT THE DEFENDANT WAS AWARE THE COMPLAINANT WAS NOT CONSENTING OR MIGHT NOT BE – WHETHER MAGISTRATE IN ERROR: *CRIMES ACT 1958*, S39; *SUMMARY OFFENCES ACT 1966*, S23.

In the case of common assault, a distinction should be drawn between contact of such a nature that if done to another person consent is no answer and those where the prosecution bears the burden of negating consent. In relation to the latter category where assault is being used to include battery, the definition of the offence is the actual intended use of unlawful force to another person without that person's consent or any other lawful excuse. Accordingly, in the prosecution of the defendant for assault, the prosecution had the onus of establishing beyond reasonable doubt that the defendant was not aware the complainant was not consenting or might not be. In failing to apply this principle, the magistrate made an error of law.

Obiter. In this case, the Magistrate found that the prosecution had not proved beyond reasonable doubt that the defendant was aware his touching of the complainant whilst on the escalator, including touching her on the behind, was without her consent or might not be. As the Magistrate made clear, this finding only arose from the evidence of the defendant's disability, his being a sufferer of Asperger's syndrome and the unfortunate impact that that has on the defendant's ability to deal with other people. It would be expected that in the case of a person who was not suffering from Asperger's syndrome or having a similar disability, that the prosecution would be able to easily establish the necessary awareness on the part of any person who did what the defendant did – that the complainant was not consenting or might not be. It is difficult to conceive of a person not beset by a similar affliction who would not know, in the circumstances of this case where the complainant said nothing, that she nevertheless was not consenting or might not be.

ROBSON J:

1. I have before me a Notice of Appeal under s92(1) of the *Magistrates' Court Act 1989* against the final order made on 27 March 2007 in the Magistrates' Court at Ringwood whereby the magistrate found there were two charges of unlawful assault made out against Phillip Charles Parish pursuant to s23(1)(b) of the *Summary Offences Act 1966*.

2. Section 92(1) of the *Magistrates' Court Act 1989* provides:

“A party to a criminal proceeding (other than a committal proceeding) in the Court may appeal to the Supreme Court on a question of law, from a final order of the Court in that proceeding.”

As will be seen below, the question of law raised in this appeal does arise from a final order in the Magistrates' Court.

3. On the appeal, Mr Theo Kassimatis of counsel appeared for the appellant, Mr Parish. Mr CJ Ryan SC appeared as Senior Counsel for the respondent, the Director of Public Prosecutions.

Grounds of appeal

4. The questions of law raised are as follows:

(1) Did the learned Magistrate err when he ruled at the conclusion of the evidence and submissions

that it was not an element of the offence of common or unlawful assault that the defendant -
(i) knew that or was aware of; or
(ii) was reckless as to whether
the complainant was not consenting?

(2) Did the learned Magistrate err at the conclusion of the evidence and submissions that the offence the subject of both charges had been proved?

5. The grounds of appeal are that:

(1) The learned Magistrate erred when he ruled at the conclusion of the evidence and submissions that it was not an element of the offence of common or unlawful assault that the defendant -
(i) knew that or was aware of; or

(ii) was reckless as to whether the complainant was not consenting.

6. Mr Parish was charged with:

Charge 1: Indecent assault contrary to s39(1) of the *Crimes Act 1958*;

Charge 2: Unlawful assault contrary to s23 of the *Summary Offences Act 1966*;

Charge 3: Unlawful assault contrary to s23 of the *Summary Offences Act 1966*; and

Charge 4: Indecent assault contrary to s39(1) of the *Crimes Act 1958*.

7. The alleged indecent assault involved the defendant, Mr Parish, assaulting a 15 year old girl. The Magistrate accepted the complainant's evidence, which was to the following effect. She said that on 6 January 2006 at about 5.00 o'clock in the afternoon she took a train from the city to Box Hill after spending time in the city with her boyfriend. Prior to entering the train, she noticed Mr Parish looking at her. On entering the carriage, Mr Parish sat diagonally opposite her in the typical four seat arrangement, that is, two seats on either side, facing her. There were very few other people in the carriage. Very soon after the train started its journey, Mr Parish pushed his calf against her calf. She tried to move her leg away from his. He also changed positions and sat directly in front of her, with his hands over his knees. He then placed his hands on top of her knees. At this stage she was looking out the window, trying to ignore him. He then rubbed his hands on top of her knees. She did not speak to him or attempt to change seats.

8. When she got to Box Hill, she waited back and allowed Mr Parish to alight first. She then stood beside the train to make sure that Mr Parish was away from her. She then proceeded to take the escalator at Box Hill Station to go up to where buses are and, as she was riding up the escalator, she felt a hand on top of her hand. She turned around and noticed that it was Mr Parish. Mr Parish was standing on the step below her and, as the escalator was going up, he rubbed her lower back and her upper buttocks. She said that she was scared and was unable to move through the people surrounding her on the escalators. Again she said nothing to him.

9. After finishing the escalator ride, she went looking for her sister who worked at the Baker's Delight at the Box Hill station, and broke down into tears when telling her sister what had happened. Subsequently, on the recommendation of family members, she made a complaint to the police. Mr Parish was identified from CCTV photographs obtained from the Transit Authority.

10. On being interviewed, Mr Parish denied any recollection of the events on 6 January and said he had no recollection of the alleged incident with the complainant. On the other hand, Mr Parish did admit, in his record of interview, that he had rubbed his leg against girls on trains before. He said:

"I put my leg close to her and see if she doesn't mind. And if she kind of does then I won't do it anymore. She didn't seem - - I suppose at the time she didn't seem - - she probably didn't seem to mind"^[1].

11. He was then asked the question: "Did it ever occur to you that maybe she might have been frightened and not know what to do?", and he answered: "Err no at the time it didn't". He was further asked: "Why did you rub her leg with yours?" Answer: "It was kind of ... I'm not as you say

a very confident person, I'm more of a touchy feely sort of person and that was kind of my way of trying to get to know her a little bit". Question: "Is that a way ... is that a way that you ... does it excite you?" Answer: "It wasn't, it wasn't sexual. It wasn't for excitement or sexual. It was more a way of me trying to get to know her, to see if something would come out of it; a relationship or something".

12. Later on he was asked: "When you say that you don't remember it, and you say you have tried to meet women on the train before, how many times have you tried to do this? But you just don't remember this time". Answer: "I just don't remember the day it doesn't". Question: "How many women have you tried to meet by rubbing their legs?" Answer: "I don't know. Maybe four". Question: "Have you ever had any success?" Answer: "Err, once". Question: "Yeah? What, that turned into a relationship, did it?" Answer: "Not exactly, but ...". Question: "Did you see this woman to be scared, quite frightened as to a person she doesn't know by this sort of thing happening to her on the train?" Answer: "Yes, I can see that". Question: "Especially on the escalator as well, the same person gets off and rubs her on the bottom. Can you see she may be frightened and may be feeling a bit violated?" Answer: "Yeah".

13. As mentioned above, the learned Magistrate found that he accepted the complainant's evidence in its entirety as to the conduct of Mr Parish. The learned Magistrate said as follows:

"I can therefore be satisfied as to the following elements of the charge of indecent assault: firstly, that the defendant touched [the complainant] as she described in her evidence, including placing his hands on her lower back and rubbing that area together with her buttock area. I can be satisfied as to the touching as described by [the complainant] that occurred on the train. Secondly, I can be satisfied that the defendant intended to touch [the complainant] both on the train and at the station. Thirdly, that I can be satisfied that he had no lawful justification for touching her, or put another way, [the complainant] did not consent to the touching, that she did not do or say anything to indicate her agreement, is sufficient in the circumstances; that she did not protest or physically resist, apart from looking away from the defendant, moving her legs in the confined space, does not mean that she consented to the touching. Fourthly, and as to the fifth element of the offence, or alleged offence, I can be satisfied that the touching on the escalator at Box Hill was an indecent - - - was in indecent circumstances. To rub the bottom or the buttocks of a 15 year old female who was a stranger to the person doing the touching is, in my view, by community standards an act which is offensive to the modesty and decency of the community generally."

14. As to the fourth element, that is the defendant's state of mind, the learned Magistrate found that ultimately he could not be satisfied that Mr Parish was aware that the complainant was not consenting or might not have been consenting.

15. Mr Parish's defence arose out of his having been recently diagnosed with Asperger's Syndrome. Evidence was given by Dr Nicole Reinhardt, who had been treating Mr Parish, about the nature of Asperger's Syndrome, including that a person born with Asperger's is born without the brain capacity to understand, interpret and act in the social world – they have to be taught in a concrete way the rules of social behaviour. Further, she said people affected by Asperger's Syndrome are unable to pick up non-verbal cues – a subtle cue probably would not even register. Dr Reinhardt gave the opinion that Mr Parish would have been unlikely to have been aware that the complainant was not consenting to his actions.

16. During her evidence-in-chief, Dr Reinhardt said as follows:

Question: "Can you say what level of sexual understanding or development from your dealing with Mr Parish in the light of his condition, what level of understanding, appreciation, development he had in that area?" Answer: "At the time that I assessed Phillip and subsequent appointments I have had with Phillip, overseeing his treatment, Phillip had no understanding of how ... he has no understanding of how to make same sex friends, just in a friendship way. For example, he doesn't know how long it is you have to speak to somebody before they might be your friend. Or is that they have to offer their phone number to establish that they might be your friend. In terms of meeting a potential partner of the opposite sex, Phillip has no idea how that would happen or how he would come to have a sexual encounter with a person of the opposite sex. He had this idea that perhaps ... he's not good, he knows he's not good at expressing himself verbally. Pragmatics, part of the disorder, he was aware he's not good with words, so had an idea that perhaps the way that you do it is you might use your hands ... and that might be a way of ... and if somebody doesn't object, that might mean that they want to be your girlfriend. He didn't know, when he had discussions about this, that

you would interact with that person verbally, and that all the sophisticated steps that are involved in meeting a potential partner. He had no idea, so again, an early primary school aged concept.”

17. Under cross-examination, Dr Reinhardt was asked a question in relation to the fact that the complainant moved away from Mr Parish and there was a break before she had gone up the escalator. Dr Reinhardt said:

“The interpretation of that behaviour for a person with Asperger’s disorder ... might be: M’hm, she might be interested, she might have enjoyed sitting next to me, em, I’ll follow her and see if I can get any more data to enter into my information about that social interaction ... em ... again unless there was this pronounced verbal and non-verbal communication that this isn’t OK in concert ... would he have understood that this wasn’t OK for that person. Remembering at the same time that a person with Asperger’s disorder cannot interpret and understand other subtle cues that we would have. So, for example, tense body posture that the person, the victim, would have been no doubt showing ... where her eyes were looking ... all of that would have just been ... it wouldn’t have even gone into Phillip’s thinking, ... (indistinct) (long pause). I might just add, I’m giving you clinical anecdotes and observations, but em there are hard empirical data to show that people with Asperger’s disorder cannot pick up cues.”

18. The learned Magistrate found there was no case to answer on charge 1, the indecent assault on the train, in that the prosecution had not established a sexual connotation to the assault or that Mr Parish’s intent was sexual.

19. The nub of the defence on charges 2, 3 and 4 were that Mr Parish, by reason of his Asperger’s Syndrome, was not aware that the complainant was not consenting or might not have been consenting to his actions. Counsel for Mr Parish submitted that to make out the offence of indecent assault and common assault in the circumstances of this case the prosecution had to prove beyond reasonable doubt that the contact that was made was not consented to and was something that the defendant believed was not consented to or he thought might not have been consented to.

20. The learned Magistrate, after reviewing the evidence, held that he could not be satisfied that the defendant was aware that the complainant was not consenting or might not have been consenting. In those circumstances he dismissed the remaining indecent assault charge, charge 4, (that is the charge relating to the escalator incident). He went on to say, as to Charges; 2 (the incident on the train) and 3 (the incident on the escalator), the common assault charges, that he believed them to be an entirely different matter, saying that the defences to common assault are seldom the same and whilst consent can be a defence to assault, it has been confined to instances of, “say, sporting contact or perhaps restraint of liberty”. He said that on the evidence before him, clearly there was contact. He was satisfied that there was no consent with respect to that and that those charges had been made out.

21. Accordingly, it is his rejection of counsel’s submission that in the circumstances of this case the prosecution had to establish beyond a reasonable doubt that the defendant was aware the complainant was not consenting to Mr Parish’s contact with the complainant on the train and on the escalator or might not be which is said to be an error of law.

22. Section 23 of the *Summary Offences Act 1966* provides, under the heading of “Common Assault”:

“any person who unlawfully assaults or beats another person shall be guilty of an offence”.

23. Section 39 of the *Crimes Act 1958* provides:

“(1) A person must not commit indecent assault.

(2) A person commits an indecent assault if he or she assaults another person in indecent circumstances while being aware that the person is not consenting or might not be consenting.”

24. As indicated above, the defence of Mr Parish to the common assault charge was similar to the indecent assault charge: the prosecution must prove that the defendant was aware that the person was not consenting or might not be consenting.

History of the legislation on indecent assault [*His Honour then examined this subject in detail, together with the submissions of the parties, relevant case law, and continued*] ...

Conclusion

116. The above discussion establishes that in the case of common assault a distinction should be drawn between contact of such a nature that if done to another person consent is no answer and those where the prosecution bears the burden of negating consent. It is the latter category that I am dealing with. In such a case where assault is being used to include battery, the definition of the offence is the actual intended use of unlawful force to another person without his consent or any other lawful excuse^[117]. As such, from first principles one would expect the prosecution of having the onus of establishing that the defendant intended to use force on another without that person's consent to establish the necessary *mens rea*. The authorities in *mens rea* cited above, would tend to suggest that this is the case^[118].

117. Further, the DPP has cited no cases where any court has expressly decided that where the prosecution must negative consent by the complainant that the prosecution does not bear the onus of proving beyond reasonable doubt that the defendant was aware the complainant was not consenting or might not be. The appellant on the other hand has referred to many cases, which I have discussed above, where the courts have expressly said as much.^[119]

118. As indicated above, the authorities treat the offence of indecent assault as a common assault in indecent circumstances. The amendment made to the *Crimes Act* provision in 1991 to add the requirement that the prosecution must establish the defendant was aware the complainant was not consenting or might not be was not intended to change the law but to merely identify the elements of the existing offence.

119. The DPP has rightly contended that *R v Kimber*^[120] has extended the *R v Morgan*^[121] principle to indecent assault. I can see no reason in logic or principle why it should not extend to common assault or any other form of assault in which the prosecution must negative consent by the complainant.

120. For those reasons, I find that in the prosecution of Mr Parish for assault, the prosecution had the onus of establishing beyond reasonable doubt that Mr Parish was not aware the complainant was not consenting or might not be.

121. As indicated above, Mr Parish did not raise a defence of honest and reasonable mistake of fact and I do not need to discuss that defence^[122].

122. The DPP has argued that the issue of consent was not raised. As indicated above, in my examination of the evidence the issue of Mr Parish's belief about consent was raised. If I am wrong, however, in my view that the issue of consent was raised, I find that the prosecution still bears the onus of establishing that Mr Parish was aware that the complainant was not consenting or might not be just as it bore the onus of establishing that the complainant did not consent.

123. I therefore find that the learned magistrate did make an error of law in his decision in finding the assault charges made out and in rejecting the submission of the accused's counsel that the prosecution should be required to establish beyond reasonable doubt that the defendant was aware that the complainant was not consenting to his actions or might not be. I therefore allow the appeal.

124. The consequential orders following the finding that charge 2 and charge 3 were made out will be set aside. As to the contact on the escalator (charge 3), the learned Magistrate has already made a finding that the prosecution failed to establish beyond reasonable doubt that Mr Parish was aware that the complainant was not consenting to his touching or might not be. Accordingly, charge 3 is dismissed.

125. As to the common assault charge relating to Mr Parish's contact with the complainant on the train (charge 2), the learned Magistrate has made no finding relating to Mr Parish's awareness. Accordingly, I will hear counsel on that issue.

126. I should add a note of caution about my decision. In this case, the learned Magistrate found that the prosecution had not proved beyond reasonable doubt that Mr Parish was aware his touching of the complainant whilst on the escalator, including touching her on the behind, was without her consent or might not be. As the learned Magistrate made clear, this finding only arose from the evidence of Mr Parish's disability, his being a sufferer of Asperger's syndrome and the unfortunate impact that has on Mr Parish's ability to deal with other people. I would expect that in the case of a person who was not suffering from Asperger's syndrome or having a similar disability, that the prosecution would be able to easily establish the necessary awareness on the part of any person who did what Mr Parish did – that the complainant was not consenting or might not be.

127. It is difficult to conceive of a person not beset by a similar affliction who would not know, in the circumstances of this case where the complainant said nothing, that she nevertheless was not consenting or might not be.

128. This case, however, was a most unusual one and should be treated as such. Be that as it may, the onus on the prosecution I have found will have general application in the circumstances I have described.

^[1] Transcript 40.

^[117] *AG Reference (No. 6 of 1980)* [1981] EWCA Crim 1; [1981] QB 715 at 718; [1981] 2 All ER 1057; [1981] 3 WLR 125, CA.

^[118] *Gammon Ltd v Attorney General (Hong Kong)* [1984] 2 All ER 503; [1984] 3 WLR 437; [1984] Crim LR 479; (1984) 80 Cr App R 194; [1985] LRC (Crim) 439; *He Kaw The v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203;

^[119] *R v Whelan* [1973] VicRp 26; [1973] VR 268; *Albert v Lavin* [1982] AC 546; [1981] 3 All ER 878; (1981) 74 Cr App R 150; [1981] 3 WLR 955; (1981) 146 JP 78; (1981) 72 Cr App R 178; *R v Kimber* [1983] 3 All ER 316; [1983] 1 WLR 1118; (1983) 77 Cr App R 225; *R v Jones* (1986) 83 Cr App R 375; *R v Aitken* [1992] 1 WLR 1006; (1992) 95 Cr App R 304; *R v Nazif* [1987] 2 NZLR 122; *R v Bonora* (1994) 35 NSWLR 74; *Fitzgerald v Kennard* (1995) 38 NSWLR 184; (1995) 84 A Crim R 333; *R v DMC* [2002] NSWCCA 513; (2002) 137 A Crim R 246.

^[120] [1983] 3 All ER 316; [1983] 1 WLR 1118; (1983) 77 Cr App R 225.

^[121] [1975] UKHL 3; [1976] AC 182; [1975] 2 All ER 347; (1975) 61 Cr App R 136.

^[122] See *Thomas v R* [1937] HCA 83; (1937) 59 CLR 279; [1938] ALR 37; *Proudman v Dayman* [1941] HCA 28; (1943) 67 CLR 536; *R v Reynhardt* [1962] HCA 23; (1962) 107 CLR 381; [1962] ALR 483; 36 ALJR 26.

APPEARANCES: For the appellant Parish: Mr T Kassimatis, counsel. Tony Hargreaves & Partners, solicitors. For the respondent DPP: Mr CJ Ryan SC, counsel. Office of Public Prosecutions.
