12/11; [2011] VSCA 124

SUPREME COURT OF VICTORIA — COURT OF APPEAL

AHMED SABET v THE QUEEN

Ashley and Harper JJA and Lasry AJA

5 May 2011

CRIMINAL LAW – CONVICTION – INDECENT ASSAULT – KISS ON THE CHEEK – WHETHER ASSAULT – WHETHER INDECENT CIRCUMSTANCES – NO PRINCIPLE OF CONTINUING OFFENCE – *R v HARKIN* (1989) 38 A CRIM R 296 – CONVICTION UNSAFE OR UNSATISFACTORY – APPEAL ALLOWED.

S. a medical practitioner, was charged with indecent assault in relation to one of his patients. At the conclusion of the consultation, when the complainant stood up to leave the surgery, S. put his arm around the patient, placing his hand on her back and kissed her on the cheek. He was also charged with (and acquitted of) a number of offences of rape; however, the jury found the charge of indecent assault proved. Upon appeal—

HELD: Appeal allowed. Conviction and sentence set aside.
1. To constitute an indecent assault, the act must be 'indecent', as unbecoming or offensive to common propriety and an affront to modesty or offending the ordinary modesty of the average person.

2. A specific requirement of a charge of indecent assault is that the assault be accompanied by sexual connotations.
***R v Harkin* (1989) 38 A Crim R 296, applied.**

3. Even where an assault is not such as unequivocally to offer a sexual connotation, it may still constitute an indecent assault if accompanied by an intention of the part of the assailant thereby to obtain sexual gratification
***R v RL* [2009] VSCA 95, applied.**

4. On the evidence before the jury in respect of the charge of indecent assault, the jury could not have been satisfied beyond reasonable doubt that S. was guilty of indecent assault. The gist of the evidence of the complainant was that S.'s kiss was unwelcome. However, circumstances of indecency have not been made out in this instance, as would support a verdict that S. was guilty of indecent assault.

ASHLEY JA:
1. Lasry AJA will deliver the first judgment.

LASRY AJA:
2. Ahmed Sabet is a medical practitioner and on 23 November 2009, he was presented before the County Court, charged with five counts of indecent assault and seven counts of rape. These offences related to two alleged victims, both of whom presented as his patients. He pleaded not guilty to each offence and, at the conclusion of the trial, the jury found him not guilty of all but one count of indecent assault, which was Count 12 on the presentment.

3. On 11 December 2009, a sentence was imposed which involved adjourning the matter for six months without conviction on a signed undertaking to be of good behaviour during the period of the adjournment and to appear before the court during the adjournment if required by notice of the court to do so.

4. For the purposes of dealing with this appeal, it is only necessary to set out in broad terms the circumstances of this offending. The applicant conducted practice as a medical practitioner in the Berwick and Cranbourne areas. The offences with which he was charged were alleged to have occurred on 20 July 2006 at Berwick concerning the first woman and 20 October 2007 at Cranbourne concerning the second. The central allegation in each case was that the offences were committed by the applicant under the pretence of being medical procedures. Each of the two

complainants alleged that genital examinations were conducted by the applicant in circumstances where the offences of either indecent assault or rape were committed. The applicant was convicted of a single count of indecent assault in respect of the second complainant.

5. That last count on the presentment, Count 12, being a count of indecent assault, was said to have occurred in the following circumstances: the complainant attended at a clinic in Cranbourne on 20 October 2007 and sought medical advice in relation to a possible pregnancy. She alleged that the applicant did a number of things which the prosecution said represented sexual offences, including the insertion of his fingers into her vagina on several occasions, an unnecessary examination of her breasts, and a procedure where he suggested to her that he would 'crack her back' by wrapping his arms around her from behind and lifting her from the floor a number of times, during which she stated she could feel the applicant's penis pushing into her back and buttocks.

6. He was acquitted of each of the offences charged in relation to that conduct. At the conclusion of the consultation, when the complainant stood up to leave the surgery, she alleged – and that the applicant agreed – that he put his arm around her back and kissed her on the right cheek. She said in her evidence that she was 'really shocked' by that and that she had been feeling uncomfortable for the whole time.

7. In cross-examination, the witness said the applicant put his hand around her, placing his hand on her back and kissed her on the cheek. It was put to her that it was not a lingering or passionate kiss but the sort of kiss you often see people giving each other when they greet or leave each other in the street. She observed in response that she did not think doctors usually gave kisses on the cheek. The distinction was again put and she said in answer to the proposition that it was a similar kind of kiss to a kiss of greeting "It is a bit hard to – it wasn't – it was a lean forward and it was a slow move forward and a kiss on the cheek." She said they – that is she and the applicant – were both standing at the time.

8. It is not in contention before us that, apart from the kiss itself, there was any other circumstance of immediate indecency and it was not suggested that the kiss in the way that it occurred was unequivocally indecent.

9. There is one ground of appeal, which asserts that the verdict was unsafe and unsatisfactory for the following related reasons:

> (a) the evidence was insufficient to establish an assault in circumstances of indecency and,
>
> (b) the alleged circumstances of indecency that the trial judge put to the jury as capable of being relied upon were the subject of counts in respect of which the applicant was acquitted.

10. To constitute an indecent assault, the act must be 'indecent', as unbecoming or offensive to common propriety,[1] an affront to modesty[2] or offending the ordinary modesty of the average person.[3]

11. The jury were given the following direction about what indecent circumstances are required generally:

> Now, indecent circumstances must have a sexual connotation. You apply your own community values, but indecent must have a sexual connotation.

12. The jury were also given directions specifically in the context of Count 12:

> So Count 12, the Crown says well, look at the end of these events. You have got him finally kissing her on the cheek and that has got an indecent (sic). It is in indecent circumstances given what has happened before and the comments about the tan, comments about the weight, touching her on the thigh or the knee, depending on where you find it happened, the mole on the tummy. So the Crown says that it all culminated then with a kiss on the cheek, which it says had a sexual connotation. So you have got to find that element of it to convict him of indecent assault.

13. In *R v Harkin*,[4] Lee J considered the nature of the circumstances that are necessary to

render an assault indecent and noted a specific requirement that the assault be accompanied by sexual connotations. His Honour said:

> It is, in my view, clear that if there be an indecent assault, it is necessary that the assault have a sexual connotation. The sexual connotation may derive directly from the area of the body of the girl to which the assault is directed or it may arise because the assailant uses the area of his body which would give rise to a sexual connotation in the carrying out of the assault. The purpose or motive of the appellant in behaving in that way is irrelevant. The very intentional doing of the indecent act is sufficient to put the matter before the jury.

14. In this case, in cross-examination on the circumstances surrounding the act in question, that being the applicant's kiss, the complainant did not identify any feature of the kiss that had a sexual connotation deriving either from the manner of the kiss itself or any associated touching of the complainant's body by the applicant. In cross-examination, the complainant noted that she and the applicant were both standing at the time and he kissed her on the cheek. The only other contact was his hand on her back and shoulder.

15. In the unreported judgment of *R v RL*,[5] Nettle JA approved the decision in *R v Harkin*, noting that:

> Even where an assault is not such as unequivocally to offer a sexual connotation, it may still constitute an indecent assault if accompanied by an intention on the part of the assailant thereby to obtain sexual gratification.

16. In view of the acquittals on the other counts, my opinion is that there was no evidence that could now properly support a finding that the applicant had the intention of obtaining sexual gratification in kissing the complainant. The applicant gave evidence of his understanding that the kiss was simply a goodbye kiss and his confusion about whether it was polite in the circumstances to kiss her on the cheek. The applicant strongly rejected the suggestion that he kissed the complainant because he thought she was attractive or that he was sexually attracted to her. Further, the Crown did not submit that the evidence was capable of showing that the applicant kissed the complainant for his sexual gratification.

17. I do not accept the respondent's written submissions that there is no requirement for immediacy in the indecent circumstances that would make the act an indecent assault. This Court has not been referred to authorities that support a concept of a continuing offence. On the contrary, authorities including *R v Harkin*, set out above, clearly support a requirement that the assault be directly accompanied either by a sexual connotation, with the assault itself of a sexual nature or associated touching of the complainant being of a sexual nature, or by a specific intention to obtain sexual gratification.

18. However, even if the circumstances prior to the act of kissing the complainant's cheek, which were the subject of counts 6-11, were considered sufficiently immediate to the kiss to render it indecent, the jury reached a verdict of not guilty on each of those counts. To reach its verdict on each count, the jury must not have been willing to reject the applicant's defence that the acts the subject of those counts were of a medical or hygienic nature and not of a sexual nature, beyond reasonable doubt. With the jury having reached a verdict of not guilty on each of those acts, I do not accept the respondent's submissions that this Court can consider them in the context of the remaining charge of indecent assault. It seems to me that would be effectively undermining the effect of the applicant's acquittals.

19. Whilst it is important to give great weight to the jury's findings on matters of fact, there are occasions where those findings may not be sufficiently supported by the evidence, correctly applied. In such circumstances, an appellate Court may consider that the jury ought also to have had a reasonable doubt about the evidence. The question is whether 'upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty'.[6]

20. For reasons set out above, and on the evidence before the jury in respect of Count 12, I do not consider the jury could have been satisfied beyond reasonable doubt that the applicant was guilty of indecent assault.

21. The gist of the evidence of the complainant was that the applicant's kiss was unwelcome. However, circumstances of indecency have not been made out in this instance, as would support a verdict that the applicant was guilty of indecent assault. Having regard to the other verdicts, the jury must have had a reasonable doubt as to the applicant's guilt on this particular count.

22. I would allow the appeal. I set aside the conviction[7] on Count 12 and direct that a judgment and verdict of acquittal be entered.

ASHLEY JA:

23. I agree with my brother Lasry, for the reasons which he has given, that the applicant's conviction – such it was for the purposes of s567 of the *Crimes Act* 1958 - should be set aside and that there should be judgment and verdict of acquittal.

24. I add only this: the Crown's argument at trial in respect of Count 12 had a bootstraps flavour. On the one hand, the Crown argued that the allegedly criminal conduct embraced by Counts 5-11 was given the character for which the Crown contended because of the kiss which was the subject of Count 12. On the other hand, the Crown relied upon the conduct the subject of Counts 5-11 as evidence which supported a conclusion that the kiss, innocuous in itself, was attended by indecent circumstances. The jury evidently rejected the first form of reasoning. Yet, having done so, it apparently accepted the second form of reasoning. It is very difficult to see, quite apart from the matters to which my brother Lasry has referred, how this could logically have been done.

HARPER JA:

25. I agree with both the learned presiding judge and with Lasry AJA.

ASHLEY JA:

26. The formal order of the Court is that the applicant be granted leave to appeal against his conviction on Count 12, that the appeal be allowed and the conviction and sentence passed thereon be set aside, and that entry of judgment and verdict of acquittal be directed.

27. Not as part of its order, the Court will grant the applicant a certificate under the *Appeal Costs Act*.

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[1] *R v Harkin* (1989) 38 A Crim R 296.
[2] *Crowe v Graham* [1968] HCA 6; (1968) 121 CLR 375; [1968] ALR 524; (1968) 41 ALJR 402.
[3] *Moloney v Mercer* [1971] 2 NSWLR 207.
[4] *R v Harkin* (1989) 38 A Crim R 296 at 301, per Lee J, with whom Wood and Matthews JJ agreed.
[5] *R v RL* [2009] VSCA 95 at [9], per Nettle JA, with whom Dodds-Streeton JA and Coghlan AJA agreed, approving *R v Harkin* (1989) 38 A Crim R 296.
[6] *M v R* [1994] HCA 63; [1994] 181 CLR 487 at [14]; (1994) 126 ALR 325; (1994) 69 ALJR 83; 76 A Crim R 213, approved in *MFA v R* [2002] HCA 53; (2002) 213 CLR 606.
[7] *R v Celep* (1998) 4 VR 811; (1998) 100 A Crim R 310.

APPEARANCES: For the applicant Ahmed Sabet: Mr M Tovey QC with Mr C Winneke, counsel. John W Ball & Sons, solicitors. For The Queen: Mr P Rose SC, counsel. Solicitor for Public Prosecutions.
