03/10; [2009] NSWSC 1352

SUPREME COURT OF NEW SOUTH WALES

DPP v EADES

James J

3, 17 December 2009

[2009] NSWSC 1352 (on appeal [2010] NSWCA 241; (2010) 77 NSWLR 173; (2010) 203 A Crim R 136)

CRIMINAL LAW – APPEAL FROM MAGISTRATE – INCITING TO AN ACT OF INDECENCY – TEXT MESSAGES EXCHANGED BETWEEN DEFENDANT AND 13-YR OLD FEMALE – REQUEST BY DEFENDANT FOR FEMALE TO SEND HIM A PHOTOGRAPH OF HER IN THE NUDE – WHETHER EVIDENCE OF SURROUNDING CIRCUMSTANCES CAN BE TAKEN INTO ACCOUNT IN DETERMINING WHETHER ACT WAS INDECENT – FINDING BY MAGISTRATE THAT SURROUNDING CIRCUMSTANCES COULD NOT BE TAKEN INTO ACCOUNT – WHETHER MAGISTRATE IN ERROR: *CRIMES ACT* 1900 (NSW), S61N(1).

E. aged 18 years, was charged with an offence of inciting a 13-yr old female to an act of indecency. E. and the female exchanged text messages on their mobile telephones in the course of which E. incited the female to send him a nude photograph of herself. In determining if the act of the female sending the photograph constituted an act of indecency, the Magistrate found that he should not have regard to the context in which that act took place including, the motivation and desires of E. the ages of E. and the female and the sexual inference contained in the text messages. He then dismissed the charge.

HELD: Dismissal set aside. Remitted to the Local Court to be dealt with according to law.
In determining whether an act which another person is incited by the defendant to perform is an act of indecency, it is permissible to take into account the surrounding circumstances, including the intent or purpose of the defendant, the ages of the defendant and the female and the sexual inferences that can be drawn from the messages. Accordingly, the Magistrate was in error in failing to enter into an assessment of the weight which should be given to the evidence of surrounding circumstances, which would have involved questions of fact.

JAMES J:

1. This is an appeal by the Director of Public Prosecutions pursuant to Pt 5 of the *Crimes (Appeal and Review) Act* against an order by a Local Court magistrate dismissing a charge against the defendant Damien Eades under s61N(1) of the *Crimes Act* of inciting a person under the age of 16 years to an act of indecency towards the defendant. The person allegedly incited was a girl aged 13 years, who I will refer to as "the complainant". The act of indecency allegedly incited was for the complainant to send to the defendant by means of a mobile telephone a photograph of herself in the nude.

2. Under s56 in Pt 5 of the *Crimes (Appeal and Review) Act* a prosecutor may appeal to the Supreme Court against an order made by the Local Court dismissing a matter the subject of summary proceedings but only on a ground that involves a question of law alone.

3. The defendant had also been charged in the Local Court with an offence under s91H(3) of the *Crimes Act*, as then in force, of having in his possession child pornography, the alleged pornography being the nude photograph of the complainant. The magistrate also dismissed this charge. No appeal was brought by the Director of Public Prosecutions against the dismissal of this charge.

4. In the summons instituting the appeal there is a statement of what is described as the "background" to the appeal. That statement, omitting parts of it which would identify the magistrate or the complainant, was as follows:-

> "(i) On 4 March 2009, the defendant appeared before (the magistrate) in relation to a charge under s61N(1) of the *Crimes Act* 1900 ("Crimes Act") that between 12:50pm 4/03/2008 and 4:20pm

> 5/03/2008 at Carnes Hill he did incite (the complainant) a person then under the age of 16 years, to wit, 13 years, to an act of indecency towards the said Damien Eades.
> (ii) From the evidence tendered at court the following facts were apparent:
> (a) That at the time of the alleged offence the accused was 18 years of age and the complainant was 13 years of age;
> (b) That on 4 March 2008 the accused and the complainant exchanged text messages on their mobile telephones, in the course of which the accused incited the complainant to send him a nude photograph of herself and that the complainant sent such a photograph.
> (iii) His Honour found that he was satisfied that the relevant act was carried out "towards" the accused.
> (iv) His Honour found that the actions of the accused incited the complainant in the relevant sense.
> (v) His Honour found on the evidence that there was a very clear inference to incite the complainant to send a photograph of herself, a clear inference of that to be naked, and a suggestion of that being of a sexual context.
> (vi) In determining if the act of the complainant of sending a nude photograph of herself to the accused constituted an act of indecency, his Honour found that he should not have regard to the context in which that act took place including, the motivation and desires of the accused, the ages of the accused and the complainant, and the sexual inference contained in the text messages. His Honour dismissed the charge."

5. The ground of appeal stated in the summons is that the magistrate erred in law in:-

> "Failing to consider the surrounding circumstances, including the sexual nature of the text messages, the intention and purpose of the accused and the age of the complainant and the accused, in determining whether the act of sending the nude photograph, was an act of indecency."

6. I comment that in an offence of incitement the relevant act is the act which the other person was incited by the defendant to perform and not any act which may have actually been performed by the other person. See *R v Chonka* [2000] NSWCCA 466 at par 75 per Smart AJ. However, in the present case the act which the complainant actually performed was the same as the act which, on the prosecution case, she had been incited to perform.

7. The defendant filed a notice of contention pursuant to Pt 51B r18 of the *Supreme Court Rules*, to which I will return later in this judgment.

8. Some of the evidence in the hearing before the magistrate is summarised in the "background" in the summons instituting the appeal, which I have already quoted. However, it is necessary to refer to some of the evidence in more detail.

9. The defendant and the complainant had become friends. On 4 March 2008 and 5 March 2008 the defendant and the complainant, using their mobile telephones, exchanged a series of text messages. In the messages the defendant and the complainant used abbreviations and simplified spellings of the kind customarily used in sending text messages. However, when I quote or summarise a message in this judgment I will use conventional spelling.

10. The text messages between the defendant and the complainant included the following, in the following order:-

> The defendant to the complainant — "when am I going to get a picture I send you one if you send me one a hot steamy one".
> The complainant to the defendant — "ok well when I get home I take one Hey did you get the one I sent the other day".
> The complainant to the defendant, saying that she was finally out of school and asking whether work had got any better for the defendant.
> The defendant to the complainant, answering "No, its still heaps dead but it's all good paid for nothing".
> The complainant to the defendant, saying that she was in the shower.
> The defendant to the complainant, sending a photograph of himself from the waist upwards, naked, and asking "you like?".
> The complainant to the defendant — "Yes, yes I do like so I only got to send one of top half sorry for the slow reply but I'm in the shower".
> The defendant to the complainant — "send whatever you want bottom even better".
> The complainant to the defendant — "but do I get one?".
> The defendant to the complainant — "Yes not while I'm at work though".
> The complainant to the defendant — "well I will take it now but none will be sexy after all it is a picture of me".
> The next message is indecipherable in the document in the court papers.

> The defendant to the complainant — "send both or the best your choice".
> The complainant to the defendant — "there's not two there's four and I don't know what one is the best".
> The complainant to the defendant — "ok I'm about to send one so don't laugh even though you probably want".

The complainant then sent a photograph of herself. The photograph was a full frontal photograph of the complainant standing, nude, from the top of her head to about her knees. She was holding a mobile telephone in one hand and her other arm was by her side.

11. In his judgment the magistrate first dealt with the charge under s91H of the *Crimes Act.*

12. In s91H(1) of the *Crimes Act* the expression "child pornography" was defined, so far as is relevant, as meaning

> "material that depicts…in a manner that would in all the circumstances cause offence to reasonable persons, a person under… the age of 16 years…(b) in a sexual context".

13. The magistrate held that under s91H "the sexual context" had to be determined from the photograph itself. The magistrate found that there was no sexual activity depicted in the photograph. The photograph was simply a photograph of the complainant standing naked in a bedroom "and there is no posing, no objects, no additional aspects of the photograph which are sexual in nature or suggestion".

14. When regard is had to the terms of s91H, which are quite different from the terms of s61N, the magistrate's view that the question of whether the photograph "depicted" the complainant in a sexual context was to be determined by an examination of the photograph itself, was clearly correct and the magistrate's decision is in accordance with the later decision of the Court of Appeal on s91H in *Director of Public Prosecutions v Annetts* [2009] NSWCCA 86. As I have already noted, no appeal was brought by the Director of Public Prosecutions against the magistrate's decision dismissing the charge under s91H.

15. In his judgment the magistrate then dealt with the charge under s61N. There was no issue about the age of the complainant. The magistrate held that the element of the offence, that the complainant had been incited to an act "towards" the defendant had been established. I will return to this matter later in this judgment when considering the defendant's notice of contention.

16. The magistrate then held that the element of the offence that the defendant should have "incited" the complainant to send a nude photograph of herself had been established.

17. The magistrate then proceeded to consider whether it had been established that the act the defendant had incited the complainant to perform of sending a nude photograph of herself was an act of indecency. In his judgment the magistrate said *inter alia*:-

> "The significant question then arises that I have raised during submissions. It goes to whether the act itself is an act of indecency, the act of sending a nude photograph of herself.
>
> Well certainly I have already indicated that the photograph of itself does not disclose a clear sexual component.
>
> The issue is to what extent the context…can be relied upon by the prosecution to colour the interpretation of that act by (the complainant)".

18. A little later in the judgment the magistrate said:-

> "Here we certainly have a number of aspects of the context that may or may not be taken into account. The individuals concerned. There are the age differences, one 18 and one 13. Friends. The evidence does not show the relationship developing beyond that point. There was an overall slightly sexual context when one takes into account the overall inferences that I have referred to in the conversations which took place. Certainly there is no issue of artistic or political nature. There is certainly an inference that arises from the exchange of communications that from the accused's point of view that there was a sexual aspect behind his request and interest.

> It is not clear to from the submissions that I have and the case law that has been put before me the extent to which these additional contextual matters can be taken into account in assessing the relied upon act of indecency, the extent to which the motivation and desires of the accused can be taken into account in deciding whether or not the acts done by (the complainant) constitute an act of indecency."

19. The magistrate concluded:-

> "In the absence of clear case law that points to the entitlement of the prosecution to rely on that broader context in determining whether or not the act by (the complainant) can be seen as becoming changed in its nature and being seen to be of a more culpable kind, whilst one can well see the inappropriateness of the action of Mr Eades and the inappropriateness of his underlying intentions, particularly given the context of the age of (the complainant), I am not persuaded that it has been clear enough to me that the prosecution can rely upon those additional matters to change the nature of the incident or the act itself being carried out by (the complainant)".

20. On this appeal counsel for the Director of Public Prosecutions submitted that the magistrate had erred in law in not taking into account matters outside the photograph itself, including the terms of the text messages, the purpose of the defendant and the ages of the defendant and the complainant, in determining whether the act the defendant had incited the complainant to perform of sending a photograph of herself was an act of indecency.

21. On the appeal the Crown relied particularly on the decision of the Court of Criminal Appeal in *R v McIntosh* (unreported 26 September 1994), a case which had not been drawn to the attention of the magistrate.

22. Counsel for the defendant submitted that no error had been made by the magistrate or, at least, no error of law had been made. It was submitted that the magistrate's use on two occasions of the expression "the extent to which" in a part of the magistrate's judgment which I have quoted showed that the magistrate was considering "the extent" to which the contextual matters should be taken into account, that is a question of fact and not a question of law.

23. In *R v McIntosh* the defendant had been charged with two offences under s61N(1) of the *Crimes Act* of inciting a person under the age of 16 years to commit an act of indecency with him. The two offences were alleged to have been committed at the same time, with two different complainants both of whom were girls aged 11. At a swimming pool the defendant had asked the two girls, who were wearing swimming costumes, to pose for him with their legs apart, so that he could take photographs of them. When later questioned by police, the defendant gave answers which showed that he had been acting for his own sexual gratification.

24. The proceedings came before the Court of Criminal Appeal by way of a case stated by a District Court judge, after an appeal to the District Court had been brought by the defendant against his convictions in the Local Court. The Court of Criminal Appeal gave an immediate decision on the same day as the case was argued. The principal judgment was an *ex tempore* judgment given by Loveday AJ, with whom the other members of the Court agreed.

25. In his judgment Loveday AJ said:-

> "On the basis of the facts found by him his Honour found that the appellant incited (the two girls) to the act of posing for two photographs which were taken by him from a distance of between two to three feet from them while they were seated on a towel facing him, each wearing only a swimming costume and seated in a pose directed by him which required them to spread their legs apart so the covered area of their crotch was in view and thus able to be photographed."

26. Loveday AJ noted that the test of whether an act is an act of indecency is an "objective" one. His Honour then recorded a submission by counsel for the appellant that "the act which the girls were invited (*semble* incited) to commit was merely to sit with their legs open for the purpose of being photographed and that this act was incapable of being an act of indecency". His Honour dealt with this submission by saying:-

> "The act of indecency relied upon in the present case is the photographing of the girls, the alleged incitement being the requests made by the appellant to participate. The circumstances of the

> photographing, the clothing of the girls, the pose they were asked to assume, the position of the photographer, the direction the camera was pointed and the purpose of the photographing are all relevant in considering whether or not the photographing was an act of indecency.
>
> I have no hesitation in concluding that as a matter of law the answers given by the appellant in his interview with the police officer were relevant and admissible as evidence and that the photographing in the circumstances described was capable of being held to be an act of indecency."

27. I note that in the part of Loveday AJ's judgment which I have just quoted his Honour referred to the alleged act of indecency as being "the photographing of the girls". If this expression were read literally, it would refer to the act of photographing performed by the appellant and not the act performed by each of the girls in posing for photographs. As each of the offences charged was an offence under s61N(1) of inciting another person to an act of indecency, the relevant act for the purpose of determining whether there was an act of indecency was the act of each of the girls and not the act of the appellant.

28. However, Loveday AJ's judgment was an *ex tempore* one; earlier in his judgment his Honour has referred to the District Court judge's finding that the appellant had incited each of the girls to an act of posing for photographs and I consider that his Honour should be taken as having used the expression "the photographing of the girls" as a convenient shorthand expression for referring to the acts of the girls in posing so as to be photographed. When Loveday AJ's judgment is read in this way, it establishes conclusively that, in determining whether an act which another person is incited by the defendant to perform is an act of indecency, it is permissible to take into account the surrounding circumstances, including the intent or purpose of the defendant and in the present case the ages of the defendant and the complainant and the sexual inferences that can be drawn from the text messages.

29. Accordingly, the magistrate did err in holding that, in determining whether the act which the complainant was incited by the defendant to perform, was an act of indecency, he should not have regard to the context of the act, that is the surrounding circumstances. As I have already noted, the decision of the Court of Criminal Appeal in *McIntosh* was not brought to the magistrate's attention.

30. I am further satisfied that the magistrate's error was an error of law. The magistrate held that, in a prosecution for an offence under s61N(1) of inciting another person to an act of indecency, the prosecutor, in seeking to establish that the act which the other person was incited to perform was an act of indecency, is not entitled to rely on evidence of the context, that is the surrounding circumstances, in which the other person was incited to perform the act. This holding was a legal proposition, logically anterior to its application to the facts of the particular case. See *R v PL* [2009] NSWCCA 256 at 27; (2009) 261 ALR 365; (2009) 199 A Crim R 199 per Spigelman CJ. Contrary to a submission made by counsel for the defendant, the magistrate did not enter into an assessment of the weight which should be given to the evidence of surrounding circumstances, which would have involved questions of fact. The magistrate held that, as a matter of principle, evidence of surrounding circumstances could not be taken into account by him in determining whether an act was an act of indecency.

Notice of Contention

31. I turn now to the notice of contention filed on behalf of the defendant.

32. In the notice of contention it was contended that the decision of the Local Court magistrate dismissing the charge under s61N(1) of the *Crimes Act* should be affirmed on the ground that the magistrate should have found, as a matter of law, that the prosecution had not established that the act of indecency relied on was an act of decency "towards" the defendant. It was asserted in the notice of contention that for an act of indecency to be "towards" a person it has to be conduct committed in the presence of that other person.

33. There was some discussion at the hearing about the scope of the grounds that can be relied on in a notice of contention under Pt 51B r18 of the *Supreme Court Rules*. However, counsel for the Director of Public Prosecutions raised no objection to the defendant being permitted to rely on the ground stated in the notice of contention. As is apparent from the terms of the ground, it involves a question of law alone, whether the magistrate should have found, as a matter of law,

that the prosecution had not established that the act of indecency relied on was an act "towards" the defendant.

34. In written submissions on behalf of the defendant it was submitted that what the complainant had been incited to do was to send a photograph of herself "to" the defendant as an attachment to a text message. The complainant had not been incited to commit an act of indecency "towards" the defendant. The present case, where the defendant had not been in the presence of the complainant, in either a physical or audible capacity, was to be distinguished from a case where a complainant is incited to commit an act of indecency in the course of a telephone conversation with a defendant.

35. In written and oral submissions reference was made to the decision of the High Court in *Crampton v R* [2000] HCA 60; (2000) 206 CLR 161; 176 ALR 369; 75 ALJR 133 and to the decisions of the Court of Criminal Appeal in *R v Chonka* [2000] NSWCCA 466 and *R v Barrass* [2005] NSWCCA 131.

36. In *Crampton* the appellant had been convicted of an offence under s81A of the *Crimes Act* (since repealed) of committing an act of indecency with the complainant. In their joint judgment Gaudron, Gummow and Callinan JJ at par 63 adopted English and New South Wales authorities which they had summarised in pars 59 to 63 (the New South Wales authorities were *R v Page* (Court of Criminal Appeal 25 November 1991 and *R v Orsos* (1997) 95 A Crim R 457), in which it had been held that there is a distinction between the word "with" and the word "towards" in statutory provisions like s81A, that "with" does not include "towards" and for an offence to have been committed under a provision like s81A, it is necessary that the defendant and the other person should have acted in concert with each other.

37. In *Chonka* the appellant had been convicted on eight charges under either s61O(2) or s61N(1) or s61N(2) of the *Crimes Act*. Charges 1, 4 and 8 were charges of inciting a person to commit an act of indecency "with" the appellant, whereas charge 3 was a charge of inciting a person to commit an act of indecency "towards" the appellant. All the acts of incitement were committed by the appellant in telephone conversations with the persons incited.

38. Two judgments were delivered in *Chonka*, a joint judgment by Fitzgerald JA and Ireland AJ and a judgment by Smart AJ.

39. In their joint judgment Fitzgerald JA and Ireland AJ said that the prosecution had offered no explanation of the difference between the language in charges 1, 4, and 8, all of which alleged that the appellant had incited an act of indecency "with" the appellant, and charge 3 which alleged that the appellant had incited an act of indecency "towards" the appellant. The judgments of the High Court in *Crampton* had not yet been delivered but Fitzgerald JA and Ireland AJ, following the earlier New South Wales authorities which were adopted in the joint judgment in *Crampton*, held that there was a difference between "with" and "towards", and "broadly speaking, 'with' another requires two participants in the indecent act, while an act of indecency 'towards' another is committed by a person who acts indecently towards a non-participant".

40. Their Honours proceeded to hold that, on the facts, the acts which the appellant was alleged to have incited in charges 1, 4, and 8 could not be described as acts of indecency "with" the appellant.

41. As to charge 3, their Honours said that it was unnecessary to decide whether the appellant's suggestion to the complainant, made in the course of a telephone conversation with the complainant, that she engage in auto-erotic behaviour, could constitute an indecent act "towards" him. If that was possible, careful directions would have been required and the directions the trial judge had given were deficient.

42. The third member of the court Smart AJ took a different approach. His Honour would have dismissed the appeal against conviction on all but one of the charges.

43. For the purposes of the present appeal, it is necessary to refer only to certain parts of Smart AJ's judgment in *Chonka*, where his Honour dealt with the charge 3.

44. His Honour held that the conduct of the appellant could properly be found to have been an inciting of the complainant to commit an act of indecency "towards" the appellant. His Honour said at par 73:-

> "The request came from the accused by telephone and the response was to him. The accused does not have to be physically present to see the response. Telephone and electronic methods of communication must be taken into account. With inciting, it is the urging to do the indecent act which is important and, as in the present case, the urging is to do it towards or for the accused."

45. After referring to part of the closing defence address at the trial in which counsel had distinguished between "with" and "towards" in the charges, Smart AJ said at par 74:-

> "I do not accept that the accused had to be present in either case. There is no good reason why the participation should not be by telephone."

46. Later in his judgment, in determining whether there was sufficient evidence to support charge 3, Smart AJ said at par 92:-

> "As mentioned earlier, this is the count which alleges that the appellant incited KP to an act of indecency towards the appellant. The appellant by both his urging and his checking as to the results was a person for whom the acts were to be performed. He was to obtain sexual pleasure and gratification. The acts were to be performed towards the appellant. There was ample material to sustain the count and for the reasons earlier given the direction was sufficient."

47. *Chonka* was referred to in *Barrass*. In *Barrass* the appellant had been charged with offences under s61O(2) of the *Crimes Act* of committing an act of indecency towards a person under the age of 10 years.

48. The charges in *Barrass* arose out of conduct by the appellant in manipulating his exposed penis while sitting in a motor vehicle adjacent to a school bus in which the complainants were passengers, at a time when the motor vehicle and the bus were both stationary. The case stated for the Court of Criminal Appeal stated:-

> "The appellant committed these acts when at a distance of between 3 and 6 metres from the complainants. They were able to see him and he was able to see them. He intended that his actions should be seen by them. The evidence of the appellant smiling established that the appellant achieved, or sought to achieve, some form of sexual gratification from his conduct."

49. A question of law submitted to the Court of Criminal Appeal was whether s61O(2) of the *Crimes Act* required that the act of indecency be committed in the immediate physical presence of the victim (complainant). The Court of Criminal Appeal held that it was not necessary that the act of indecency be committed in the immediate physical presence of the complainant.

50. Hidden J, who delivered the principal judgment in the Court of Criminal Appeal, referred to *Chonka*, including parts of Smart AJ's judgment, and said at par 29:-

> "As the Crown prosecutor before us pointed out, whether an act of indecency can be directed towards a person over the telephone need not be determined for present purposes. However, I respectfully agree with Smart AJ's observation to the extent that it conveys that immediate presence is not required. In most cases the offence will have been committed in such proximity to the complainant as to amount to immediate presence. This is not such a case but, in my view, the appellant's act of indecency could fairly be said to have been committed "towards" the complainant for the reasons identified by Judge Norrish: he exposed and manipulated his penis in circumstances where he was within view of the girls and intended that they should see what he was doing."

51. It is clearly established by *Barrass* that an act of indecency can be "towards" a defendant, without it being necessary that the person committing, or incited to commit, the act of indecency and the defendant should be in the immediate physical presence of each other.

52. In *Chonka* Smart AJ held that an act of indecency could be "towards" a defendant, even though the person incited to commit the act of indecency and the defendant are not in the physical presence of each other at all.

53. I accept that it is a further step to say that an act of indecency incited by the defendant can be "towards" the defendant, even though the act of indecency incited would not be performed by the person incited in either the physical or audible presence of the defendant. However, I see no reason in either the ordinary meaning of the word "towards" or in the case law for not taking this further step.

54. As to the meaning of "towards", I was referred to one of the meanings given to "towards" in the *Oxford English Dictionary*, namely "to (with implication of reaching)".

55. As Smart AJ said in *Chonka*, modern electronic methods of communication should be taken into account and not disregarded.

56. In my opinion, in the present case the Local Court magistrate was not required, as a matter of law, to hold that the prosecution had not established that the act of indecency relied on, the sending by the complainant of a nude photograph of herself, was an act of indecency "towards" the defendant.

57. As the Local Court magistrate held in his judgment, there was evidence on which the magistrate could find that the act of indecency incited was an act of indecency "towards" the defendant. The defendant had requested that the photograph be sent to him by the use of mobile telephones and the defendant desired the photograph to be sent to him for his own gratification.

Orders

58. I make orders and a declaration in accordance with pars 2, 3 and 4 of the summons, namely:-

> 2. An order pursuant to section 59(2) of the *Crimes (Appeal and Review) Act* 2001 that the order of the magistrate made on 4 March 2009 at Penrith Local Court dismissing proceedings against the defendant for the offence of inciting a person under 16 years to an act of indecency towards Damien Eades, section 61N(1) *Crimes Act* 1900, be set aside.
>
> 3. A declaration that the magistrate erred in law in failing to consider the surrounding circumstances, including the sexual nature of the text messages, the intention and purpose of the defendant and the ages of the complainant and the defendant in determining whether the act of sending the nude photograph, was an act of indecency.
>
> 4. An order that the matter be remitted to the Local Court to be dealt with according to law.

59. I will not as yet make any order for costs.

APPEARANCES: For the Crown: CA Webster, counsel. S Cavanough, Solicitor for Public Prosecutions. For the defendant Eades: B Vasic/D Petrushnko, counsel. Marando Solicitors.
