PARTIES:	NEIL BRYCE STENNETT
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL (NT)
JURISDICTION:	APPEAL FROM SUPREME COURT (NT)
FILE NO:	No. CA 10 of 1993
DELIVERED:	Darwin, 11 March 1994
HEARING DATES:	7 March 1994
JUDGMENT OF:	Kearney, Angel and Priestley JJ

CATCHWORDS:

Appeal - 'no case' submission - evidence later adduced on behalf of accused - appeal on ground that 'no case' submission wrongly rejected - whether that ground available when verdict also attacked on unsafe and unsatisfactory basis

R v Wood [1974] VR 117, applied

Appeal - appeal against conviction - unsafe or unsatisfactory ground - question to be addressed

Chidiac (1990) 171 CLR 433, applied
Coumbe v The Queen (1990) 101 FLR 466, applied
Druett v The Queen (No.1) (unreported, Court of Criminal Appeal, 9 October 1992), applied

Criminal Law and Procedure - 'no case' submission - evidence later adduced on behalf of accused - appeal on ground that 'no case' submission wrongly rejected - whether that ground available when verdict also attacked on unsafe and unsatisfactory basis

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Druett v The Queen (No.1) (unreported, Court of Criminal Appeal, 9 October 1992), applied

Statutes - words and phrases - "thereby" - interpretation - Criminal Code (NT), s192(1) and (3)

REPRESENTATION:

Counsel:

Appellant:	Mr M David QC Mr I Sampson
Respondent:	Mr R Wild QC

Solicitors:

Appellant:	Ward Keller
Respondent:	DPP

Judgment category classification: CAT A

Judgment ID Number: kea94008.J

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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. CA 10 of 1993

BETWEEN:

NEIL BRYCE STENNETT
Appellant

AND:

THE QUEEN
Respondent

CORAM: KEARNEY, ANGEL and PRIESTLEY JJ

REASONS FOR JUDGMENT

(Delivered 11 March 1994)

THE COURT:

This is an appeal against a conviction. On 8 July 1993, the appellant was found guilty by a jury that on 27 August 1992 at Hayes Creek in the Northern Territory of Australia, he unlawfully assaulted Kerstin Maree Dennings with intent to have carnal knowledge of her and that the said sexual assault was accompanied by the following circumstance of aggravation, namely that the appellant "thereby committed an act of gross indecency."

The Notice of Appeal in its final amended form contained four grounds of appeal:

1. That the verdicts of the jury were unsafe or unsatisfactory in that having regard to the whole of the evidence it was not open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty.

2. That the learned trial Judge erred in not upholding a no case submission made at the conclusion of the Crown case and not directing a verdict of not guilty on both counts.

3. The Judge erred in that he did not adequately direct the jury concerning the effect of alcohol upon the victim and the appellant when considering her evidence and the totality of the Crown case.

4. The learned trial Judge erred in not making it clear to the jury whether the aggravating circumstance of gross indecency had to be in addition to or part of the unlawful assault.

Upon the conclusion of the Crown case at the trial, counsel for the appellant submitted that there was no case to answer. His Honour the learned trial Judge ruled against the submission and thereafter the appellant gave evidence as part of his case. In these circumstances, see *Wood* [1974] VR 117, ground 2 of the appeal is unavailable, being for practical purposes subsumed within ground 1 of the appeal. It is therefore appropriate to disregard ground 2 and proceed to consider whether the verdicts of the jury were unsafe or unsatisfactory. The question is whether the jury acting reasonably and considering the whole of the evidence should have entertained a reasonable doubt, *Chidiac* (1990) 171 CLR 433 at 443; and see *Coumbe v The Queen* (1990) 101 FLR 466 and

Druett v The Queen (No.1) (unreported, Court of Criminal Appeal, 9 October 1992) at pp27-8.

The victim worked at the Wayside Inn at Hayes Creek. The Wayside Inn is licensed premises and the bar area is some distance from the sleeping quarters where the victim had her room. The manager of the business was a Mr Bob Fisher, who gave evidence.

After finishing work on the night of Tuesday, 25 August 1992, the victim went with a friend, Mr Puddey, to the Cosmo Howley mine, where Mr Puddey worked, and where, according to him, they slept together that night. The appellant was Mr Puddey's employer and they were on friendly terms. In the course of the afternoon of Wednesday, 26 August 1992, the victim met the appellant for the first time. The victim, Mr Puddey and the appellant went to the Wayside Inn that evening and drank with others at the bar into the night. At some time prior to about 11.30 pm, according to evidence open to the jury to accept although contested, he suggested to the victim that she might like to commit fellatio upon him and she told him to, "Fuck off."

At around 11.30 pm the victim, who by then was in an inebriated state, returned to her sleeping quarters to get some money for further drinks at the bar. The appellant left the bar and was seen by Mr Fisher heading towards the sleeping quarters. Mr Fisher told the appellant he was not permitted to go anywhere upon the

premises other than the bar area, whereupon the appellant returned to the bar. The victim subsequently returned to the bar and recommenced drinking with the appellant and others. She became increasingly intoxicated and during the early hours of the following morning - Mr Fisher's evidence was about 1.00 am or 1.30 am - the victim, in a semi-comatose state, was assisted to her room by Mr Fisher and Mr Puddey. There she was laid upon her bed in a fully clothed state. According to Mr Fisher's evidence "she was still awake when we put her on the bed, but it was only a couple of seconds and she was out". They left her to sleep. Mr Fisher locked the door and pocketed the key. Prior to this, at some unspecified time after the victim had resumed drinking at the bar the appellant had attempted to have the victim sit upon his lap and she had rejected this overture. The victim gave evidence that her last recollection of events that night was returning to the bar some time after 11.30 pm and having some drinks. She had no recollection of being taken to her room by Mr Fisher and Mr Puddey and could remember nothing of what took place in her room.

Having left the victim in her room, Mr Fisher - who was obviously suspicious of the appellant - stood watch. At some time after 2.00 am, or thereabouts, Mr Fisher saw the appellant come out of the victim's room working the fly of his trousers. Mr Fisher said to the appellant words to the effect, "If you've rooted her you'll

be behind bars", and the appellant immediately denied sexually interfering with her.

After this exchange with Mr Fisher, the appellant went to a vehicle and left the premises with Mr Puddey. Mr Fisher went to the victim's room and let himself in with the key. He observed disturbed louvres on the window. It was an admitted fact before the jury that the appellant's finger prints were on the disturbed louvres on the window of the victim's room. The victim was asleep on her bed in what was described as a foetal position with her jeans and panties pulled down displaying her bare buttocks. Mr Fisher and the two barmaids who came upon the scene said in evidence that they saw what appeared from both smell and appearance to be semen upon the buttocks of the victim. The barmaids removed the victim's jeans and panties and replaced them with clean panties. Throughout that episode the victim did not stir. The victim did not awake until the following morning. There was forensic evidence to the effect that human semen was found on the panties removed from the victim which was positively identified as not being that of the appellant. The fresh panties the barmaids put on the victim and swabs taken from the victim were tested but such tests were inconclusive, in the sense that human semen could not be positively identified but neither could it be discounted. With the exception of the finger prints on the louvres, which were admitted to be those of the appellant, forensic tests did not link the

appellant with any material found upon the victim or within her room.

After the trial judge rejected the appellant's "no case" submission, the appellant gave evidence. His account was that he entered the victim's room through the louvres when he heard spewing noises and thought she might be choking; and that she was awake at a time when she consented to his lowering her jeans and panties, which he did with the intention of having consensual sexual intercourse with her. He said she was handling his penis and he was rubbing her crotch. Then she fell asleep whereupon he changed his intentions and left her room. He gave evidence that he never became sexually aroused and never ejaculated.

It is clear the jury rejected at least so much of this account as supported the appellant's claim of consent.

Upon a consideration of the evidence, we have come to the view that it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty. The Crown case was a circumstantial one and no objection was taken to the learned trial Judge's charge to the jury on circumstantial evidence. It was open to the jury to infer that the victim was comatose throughout the events that occurred in her bedroom that night. She had been drinking heavily prior to being taken to her room and was at least semi-comatose at the time of being assisted to her room. She was asleep when Mr Fisher closed the door to

her room. She was asleep when found by Mr Fisher upon entering the room very shortly after the appellant left it. She did not stir when her clothes were changed and she remained asleep until she woke in the morning and she had no memory of events since before being assisted from the bar. From these circumstances an inference could safely be drawn by the jury that she was comatose throughout the events in her bedroom and thus incapable and unable to be seen to be capable of consenting to anything.

That an assault took place within the room could also, in our view, be safely inferred. The victim had been left asleep behind a closed, locked door. The appellant gained entry through the louvred window. He was seen leaving the room via the door and shortly thereafter working the fly of his pants. Whilst in the room the victim's jeans and panties had been lowered exposing her buttocks. Earlier in the night the appellant had displayed a sexual interest in the victim. After leaving the victim's room the appellant had denied any sexual interference and left in some haste. Mr Fisher and others said they saw and smelled semen in the room when they entered it shortly after the appellant left.

Given all these matters, it was open to the jury, acting reasonably, to have returned a verdict of guilty and there is nothing from which it could be said the jury, acting reasonably, should have entertained a reasonable doubt.

The first and second grounds of appeal can not be sustained.

The third ground of appeal is that the learned trial Judge ought to have given a specific direction regarding the mental elements of the offence having regard to the appellant's state of intoxication.

It was the evidence of some witnesses that the appellant was intoxicated in the course of the evening in question. His drinking and insobriety were never put as a basis of misunderstanding the victim's consent or lack thereof. The appellant never said he did not know what happened or that he could not remember the events in the victim's bedroom; nor was the learned trial Judge ever asked by the appellant's counsel to charge the jury by way of special direction on any such basis. This being so, we do not think it is open to the appellant on appeal now to take a point which was not taken by way of exception at the trial. In any event, in the circumstances of the appellant's giving the evidence he did it can not be said that there has been a miscarriage of justice or any risk that a miscarriage of justice has occurred. The third ground of appeal can not be made out.

The fourth ground of appeal was added to the Notice of Appeal by leave in the course of the hearing of the appeal.

It sought to raise questions concerning the interpretation of s 192(1) and (3) of the Criminal Code Act. Those subsections are as follows:

> "(1) Any person who unlawfully assaults another with intent to have carnal knowledge or to commit an act of gross indecency is guilty of a crime and is liable to imprisonment for 14 years.
>
> ...
>
> (3) If he thereby causes bodily harm to the person assaulted or commits any act of gross indecency, he is liable to imprisonment for 14 years."

The question of construction sought to be argued was whether the "thereby" in subs (3) refers only to the causing of bodily harm to the person assaulted mentioned in the first part of the subsection or refers not only to that but also to the committing of any act of gross indecency referred to in the second part of the subsection.

For the appellant it was submitted that the latter construction was the correct one, so that it was clear that the act of gross indecency had to be part of the assault.

The same view seems to have been taken by the draftsman of the indictment. The count on which the appellant was found guilty charged that the appellant:

> "On 27 August 1992 at Hayes Creek ... unlawfully assaulted [the victim] with intent to have carnal knowledge of her.
>
> AND THAT the said sexual assault was accompanied by the following circumstance of aggravation:

(i) that [the appellant] thereby committed an act of gross indecency.

Section 192(1) and (3) of the Criminal Code."

The submission for the appellant then turned to the directions given by the trial judge in the relevant part of his summing-up. The summing-up had dealt with the elements of which the jury had to be satisfied beyond reasonable doubt under s 192(1). The judge had made it clear that the elements concerning unlawful assault and intent to have carnal knowledge referred to in the first part of the count (before the words "AND THAT") also involved that in addition to the assault and the intent to assault there had to be an intent to have carnal knowledge. He made this quite clear, saying:

"It's the intent to have the sexual intercourse that's the element, not having had intercourse itself."

There has never been any complaint, either at the trial or in the appeal concerning the instructions to the jury on this part of the count. Nor, in regard to the second part was any complaint made at the trial along the lines now reflected in Ground 4 in the Notice of Appeal. The question arose during the argument of the appeal.

The part of the trial judge's summing-up which is now subject to criticism is that which immediately followed his directions concerning the first part of the count. He said:

"If you find all those elements of the offence of unlawful assault with intent

> to have sex with Ms Dennings proved beyond reasonable doubt then you'll find him guilty of that substantive offence and then turn to consider whether the circumstances of aggravation have been made out. That is, that he committed an act of gross indecency upon her.
>
> That will call for you to consider the nature of the assault which you've found to have been perpetrated upon her and to consider whether or not it amounted to gross indecency and that's a matter peculiarly within your function. They're ordinary English words and I don't think I need say anything further about them. What you simply do, is look at the assault as you've found it to be and then ask yourself the question, 'Was it a gross indecent assault?' Of it, you must be satisfied beyond reasonable doubt as with every other element of the offence and you'll be asked about that after my Associate firstly asks you, Mr Spokesman, whether you find the accused guilty or not guilty of the substantive offence. If your answer to that is that he's guilty, you'll then be asked whether or not you find the assault was accompanied by an act of gross indecency. To that, you'll also respond either guilty or not guilty."

As we understood the argument for the appellant on the new ground it had two branches. The first was that his Honour's direction concerning circumstances of aggravation was unclear, and did not tell the jury that the allegation in the second part of the count that the appellant thereby committed an act of gross indecency could be made out only if the jury concluded beyond reasonable doubt that the unlawful assault included the act of gross indecency. The second branch of the submission was that the claimed lack of clarity in the direction, even if not itself sufficient to warrant the setting aside of the

verdict, added force to the unsafe and unsatisfactory ground of appeal.

In regard to the first branch of the submission, we acknowledge that there is more than one way of reading the effect of "thereby" in s 192(3). It does not seem to us to be necessary to resolve this ambiguity in the present case. The indictment was framed on the assumption that the construction which the appellant submitted was the correct one was in fact the correct one. That is, the indictment proceeded on the footing now asserted by the appellant to be correct.

It may be that had the present point been present to anyone's mind at the trial and had the matter been called to the attention of the trial judge, he might have put the direction in question in more precise words than he did. However, it seems to us that the direction he gave was in substance in accordance with the way the count was expressed in the indictment and with the way the appellant now submits it should be read. This seems to us to appear clearly enough from the sentences in the direction:

> "That will call for you to consider the nature of the assault which you found to have been perpetrated upon her and to consider whether or not it amounted to gross indecency ..."

and

> "If your answer [on the substantive offence] is that he is guilty, you will then be asked whether or not you find the assault was accompanied by an act of gross indecency. To that you will

> also respond either guilty or not guilty."

When the jury returned the transcript records the following:

> "THE ASSOCIATE: Ladies and gentlemen of the jury, are you unanimously agreed upon your verdict?
>
> THE FOREMAN: We are.
>
> THE ASSOCIATE: In relation to the charge that on 27 August 1992 at Hayes Creek in the Northern Territory of Australia, Neil Bryce Stennett unlawfully assaulted Kerstin Maree Dennings with the intent to have carnal knowledge with her, do you find the accused, Neil Bryce Stennett, guilty or not guilty?
>
> THE FOREMAN: We find him guilty.
>
> THE ASSOCIATE: And is that the verdict of you all?
>
> THE FOREMAN: Yes, it is.
>
> THE ASSOCIATE: In relation to the circumstances of aggravation that Neil Bryce Stennett thereby committed an act of gross indecency, do you find the accused, Neil Bryce Stennett, guilty or not guilty?
>
> THE FOREMAN: We find him guilty.
>
> THE ASSOCIATE: And is that the verdict of you all?
>
> THE FOREMAN: It is."

From all this, it is our view that the trial judge's direction to the jury was substantially in accordance with what counsel for the appellant submits is the proper interpretation of s 192(3). This aspect of the new ground of appeal therefore fails.

As to the other branch of the argument under the fourth ground of appeal, we can not see that any confusion was caused to the jury by the part of the trial judge's

summing-up that we have been discussing. It did not cause counsel at the trial to think so either. The circumstances of the case were such that in our view it was properly open to the jury to be satisfied beyond reasonable doubt that the elements of the count based on subss (1) and (3) of s 192 were proved.

We are of opinion that the appeal should be dismissed.

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