Peter Lajciak v The Queen [1999] NTCCA 82

PARTIES:	PETER LAJCIAK
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY OF AUSTRALIA
JURISDICTION:	APPEAL FROM SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 26 of 1998
DELIVERED:	16 August 1999
HEARING DATES:	4 June 1998
JUDGMENT OF:	MARTIN CJ, GALLOP AND MILDREN JJ

REPRESENTATION:

Counsel:

Appellant:	C. Rozencwajg
Respondent:	R. Wild QC

Solicitors:

Appellant:	NTLAS
Respondent:	DPP

Judgment category classification:	C
Judgment ID Number:	mil99198
Number of pages:	7

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

Peter Lajciak v The Queen [1999] NTCCA 82

No. CA26 of 1998

BETWEEN:

PETER LAJCIAK
Appellant

AND:

THE QUEEN
Respondent

CORAM: Martin CJ, Gallop and Mildren JJ

REASONS FOR JUDGMENT

(Delivered 16 August 1999)

THE COURT:

[1] This is an appeal against conviction and sentence, leave to appeal and bail pending the determination of the appeal having been previously granted by Riley J on 10 February 1999.

[2] On 16 November 1998 the appellant was charged with one count of having sexual intercourse without consent (rape) and with one count of deprivation of liberty. Both offences were alleged to have arisen out of a single incident in the early hours of 25 April 1997. The appellant and prosecutrix were husband and wife. At about 4.00am the prosecutrix returned home, having been out with colleagues with whom she had attended a training course in her capacity as a prison officer. The appellant awoke. A discussion took

place in the bathroom, following which sexual intercourse took place in the bedroom, in the course of which, handcuffs, rope and a belt were used to restrain the prosecutrix, who gave evidence that she consented neither to the sexual intercourse nor to the restraints on her. At the conclusion of the trial, the jury by a majority returned a verdict of not guilty of the charge of rape, but unanimously convicted the appellant on the deprivation of liberty count. The sole ground of appeal to this Court was that the conviction for deprivation of liberty was inconsistent with the verdict of acquittal for rape, and should be quashed. After hearing the submissions of counsel for the appellant, Mr Rozencwajg, and Mr Wild QC and Mr Adams for the respondent, the Court unanimously allowed the appeal in respect of the conviction for deprivation of liberty, quashed that conviction and entered a verdict of acquittal, the reasons to be published at a later time. We now publish our reasons.

[3] The proposition that a verdict of guilty can be set aside by an appellate court because that verdict is inconsistent with a verdict of not guilty reached by the same jury in the same proceedings, is an example of the appellate court reaching the conclusion that the conviction must be set aside as unsafe and unsatisfactory: see *MacKenzie v The Queen* (1996) 190 CLR 348 at 351, 365. The inconsistency alleged in this case is a factual one, the test being one of logic and reasonableness. The appellant must show that the two verdicts cannot stand together, in the sense that no reasonable jury who had applied their minds properly to the facts in the case, could have reached the

conclusions so arrived at. There is reluctance on the part of appeal courts to accept this type of submission out of respect for the function which the law assigns to juries as the finders of fact. Consequently, if there is a proper way in which the verdicts may be reconciled, allowing the appellate court to conclude that the jury performed its function as required, that conclusion will generally be accepted. In this respect, appeal courts recognise that juries have an ameliorative role which is not necessarily strictly logical, and if the court considers that the jury merely took a merciful view of the facts on one count, the appeal court will not set the verdict aside as having been arrived at unreasonably. For these propositions see *MacKenzie v The Queen supra*, at 366-368.

[4] The evidence of the prosecutrix was that she and the appellant had agreed to separate on 19th April 1997. From that date on, the appellant slept in the main bedroom whilst the prosecutrix slept on blankets in the living room. On the evening of 24th April 1997, she went out with some colleagues with whom she had been attending training courses at the Police Training College. The appellant stayed home and looked after the children. When the prosecutrix arrived home at 4.00am on 25th April, the appellant was asleep in the living room in the place where she had been sleeping. She went to have a shower when the appellant came in and asked her where she had been and what she had been doing. An argument ensued, as the prosecutrix said it was none of his business any more. After she finished showering, the prosecutrix grabbed a towel to wrap around herself and got

out of the bath. The appellant was angry, and pulled the towel from off her, saying that if she could 'screw everybody around, he could have it too'. The prosecutrix wanted to get dressed and ran into the bedroom, followed by the appellant, who pushed her onto the bed. The appellant grabbed her hands and started spreading her legs apart. She tried to fight him off by kicking him, biting his thumb, and scratching him, and by calling out, 'Please don't'. After a while, the appellant stopped what he was doing and left the room only to return shortly afterwards with a pair of handcuffs issued to the prosecutrix on her prison officer's training course. She said that he then handcuffed her arms behind her back, whilst she was resisting and screaming, and using a belt, tied first her left leg to the bed, and then, using some other object, tied her right leg to the bed as well. After that, the appellant put baby oil over her vagina, anus and bottom, and had vaginal and anal sexual intercourse with her. During this, the prosecutrix was screaming out for help and for the appellant to stop. After ejaculation, the appellant retrieved the keys to the handcuffs and released the prosecutrix. After showering, the prosecutrix went straight to the police where she made a complaint of sexual assault.

[5] The appellant did not give evidence, but in a videotaped record of interview, he admitted to having sexual intercourse with the prosecutrix and applying the handcuffs and restraints to the prosecutrix's legs. He claimed that both the sexual intercourse and the use of the restraints were consensual, he and the prosecutrix having used handcuffs and constraints in the course of sexual

intercourse previously, as part of the sex play. He denied having anal intercourse, but admitted he attempted it, but ceased when the prosecutrix complained. He maintained that there was minimal resistance from the prosecutrix, and although she did bite him, it was not a serious bite.

[6] The learned trial judge instructed the jury as to mistake in relation to both charges.

[7] Mr Rozencwajg submitted that the count of deprivation of liberty was an integral part of the Crown's case that the appellant raped the prosecutrix – it was the evidence in support of that charge upon which the Crown relied to demonstrate that the intercourse was non-consensual. The fact that the jury acquitted on the count of rape meant that either the jury must not have been satisfied that the appellant intended to have had sexual intercourse without the prosecutrix's consent because of a mistaken belief by him that she was consenting, or that the jury was not satisfied that the prosecutrix did not in fact consent. In either case, consent, or the lack of it, or the mistaken state of the appellant's mind as to the presence of consent, must have gone to both counts, there being no logical basis to differentiate between the two factually. It was also submitted that the inconsistency could not be explained away on the basis that the acquittal on the count of rape was a "merciful verdict".

[8] Counsel for the respondent submitted that on the account given by the appellant to the police in the record of interview it was open to the jury to

have concluded that the accused knew that the prosecutrix was not consenting to being handcuffed or tied up, even if he may have thought she was consenting to sexual intercourse with him. There is some evidence in the record of interview that at one stage the appellant may have thought that his wife was not consenting to being handcuffed, but the overall impression of his evidence is that this lasted with him only for a brief moment, that bondage was part of normal sex-play between them and that he did not think he had done anything wrong to her by the use of handcuffs, rope or strap.

[9] We agree with the submission of counsel for the appellant that the evidence relating to the bondage was, in the way this case was presented to the jury, an integral part of the evidence relied upon by the Crown to prove both lack of consent by the prosecutrix and proof that the appellant was aware that she did not consent. It is difficult to see how, if the jury were satisfied that the appellant knew that his wife was not consenting to the bondage, he could be mistaken about her consenting to have sexual intercourse with him. The two conclusions are logically inconsistent, and incapable of rational explanation on the basis suggested by the Crown. We accept also that the result is not explicable on the basis of a "merciful verdict"; it may have been otherwise if the verdict had been one of guilty of rape, but not guilty of deprivation of liberty. The most likely explanation is that the jury failed to turn its mind to the question of mistake as it related to the deprivation of liberty charge. The written aide-memoire prepared by the learned trial judge dealt with mistake as it related to the charge of rape, but not with the deprivation of

liberty count. If the jury followed the judge's aide-memoire, it is possible to see how the two verdicts could be arrived at. Whilst the learned trial judge did tell the jury that mistake applied equally to the deprivation of liberty count as it applied to rape, it is reasonably possible that, when the jury came to consider the second count on the indictment (having deliberated in all for in excess of 8 hours), this instruction may have been forgotten, and the aide-memoire was followed literally. As this is the most likely explanation, it follows that the verdict is unsafe and unsatisfactory, that the verdict in relation to the deprivation of liberty charge cannot stand, and that there ought instead be entered a verdict of acquittal.

[10] Appropriate orders disposing of the appeal have already been made. It remains only to record that the appellant is discharged from his bail undertaking

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