

A v The Queen [2010] NTCCA 14

PARTIES: A
v
THE QUEEN

TITLE OF COURT: COURT OF CRIMINAL APPEAL OF THE
NORTHERN TERRITORY

JURISDICTION: CRIMINAL APPEAL FROM THE
SUPREME COURT EXERCISING
TERRITORY JURISDICTION

FILE NO: CA 19 of 2009 (20818980)

DELIVERED: 19 October 2010

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JUDGMENT OF: MILDREN, SOUTHWOOD & BLOKLAND JJ

APPEAL FROM: MARTIN (BR) CJ

CATCHWORDS:

CRIMINAL LAW – Appeal against conviction – appeal against sentence –
miscarriage of justice – failure to direct jury – appeal allowed

REPRESENTATION:

Counsel:

Appellant: Self Represented
Respondent: R Coates

Amicus Curiae: M Johnson

Solicitors:

Respondent: The Office of the Director of Public
Prosecutions of the Northern Territory

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

A v The Queen [2010] NTCCA 14
No. CA 19 of 2009 (20818980)

BETWEEN:

A
Appellant

AND:

THE QUEEN
Respondent

CORAM: MILDREN, SOUTHWOOD and BLOKLAND JJ

REASONS FOR JUDGMENT

(Delivered 19 October 2010)

Mildren J

- [1] I agree with Southwood J's reasons for decision. I have nothing further to add.

Southwood J:

Introduction

- [2] Following a trial by jury the appellant was convicted of two counts of indecent assault, six counts of sexual intercourse with a child under the age of 16 years and one count of exposing a child to an indecent act.

- [3] The appellant has appealed against his convictions and sentence. The principal ground of appeal against the appellant's convictions was that there was a miscarriage of justice because the trial Judge failed to exclude the evidence about both the appellant and the complainant being infected with the sexually transmitted protozoa, trichomonas vaginalis, as the evidence did not establish that the appellant had such an infection when he last had penile/vaginal sexual intercourse with the complainant or, alternatively, because the trial Judge failed to direct the jury to disregard the evidence about trichomonas vaginalis.
- [4] In my opinion the appeal should be allowed because the trial Judge failed to direct the jury to disregard the evidence about trichomonas vaginalis and there should be a re-trial. Consequently, it is unnecessary to resolve the other grounds of appeal.

Count 7 on the indictment

- [5] The Crown alleged that the last occasion on which the appellant had penile vaginal sexual intercourse with the complainant was between 13 November 2006 and 14 November 2007. Count 7 on the indictment charged that between those dates, contrary to s 127(1)(a) & (2)(b) of the *Criminal Code*, the appellant had sexual intercourse with the complainant who was a child over the age of 10 years and under the age of 16 years and who was in his care.

The evidence of Dr Tracey Johns

- [6] Doctor Tracey Johns gave evidence that on 7 July 2008 she saw and examined the complainant. During the course of her consultation with the complainant she did a pap smear and took a high vaginal swab. Both the pap smear and the high vaginal swab tested positive for the presence of trichomonas vaginalis which is commonly regarded as a sexually transmitted infection.

The admitted facts

- [7] The accused admitted that a urethral swab was taken from his penis by Dr Mellor on 15 July 2008 and that the swab was tested by Anna Maria Costa for trichomonas vaginalis on 22 July 2008. The urethral swab from the appellant's penis was obtained at least eight months after the last occasion on which the Crown alleged the appellant had penile/vaginal sexual intercourse with the complainant.

The evidence of Anna Maria Costa

- [8] Anna Maria Costa gave evidence that she was employed at the Royal Children's Hospital Melbourne. She was a medical scientist in infectious diseases. She received two biohazard bags which contained samples obtained from the appellant. In one bag there was a urine sample. In the other bag there was a urethral swab. A urethral swab is a swab that has been inserted into the urethrae of the male penis. From the urethral swab Ms Costa was able to extract the DNA of trichomonas vaginalis. She

obtained a low positive result. The urine sample taken from the appellant did not reveal any evidence of trichomonas vaginalis. There was no evidence before the jury that a swab was taken from the head of the appellant's penis.

The evidence of Dr Catherine Pell

- [9] Doctor Pell gave the following evidence.
- [10] Trichomonas vaginalis is a small protozoan. It is a parasite that lives in human vaginas. It is not like a virus that must live inside a cell. It is more like bacteria that can survive independently.
- [11] The evidence about where trichomonas vaginalis can survive is debatable. It has not been established with one hundred percent certainty that trichomonas vaginalis can survive in environments outside the human vagina. Scientific tests have been done by scientists to try to determine if trichomonas vaginalis can survive in spas and chlorinated pool water. The evidence is conflicting. Some scientists find that it can, while in other experiments they have been unable to make it survive.
- [12] Trichomonas vaginalis is a notifiable disease within the Northern Territory. All cases of trichomonas vaginalis that are confirmed by pathology testing are sent to the Centre for Disease Control. The Northern Territory database shows that the protozoa tends to be found in females rather than males. It is much more common in women, but men do have positive tests.

- [13] *Trichomonas vaginalis* is considered to be a sexually transmitted infection. It is transmitted through penile/vaginal intercourse. It can, however, be transferred from a mother to a child. There is some evidence that in Africa the protozoa has been transferred from a mother to a child as a result of the mother and child bathing together. The infection tends to only last for up to a year. It is a relatively short lived infection. It does not stay or survive indefinitely.
- [14] If a male is infected with *trichomonas vaginalis* and he has penile vaginal sexual intercourse with a female and there is no deposit of semen the protozoa can still be transferred from the male to the female. However, there is no data which categorically establishes that this occurs. Logically, however, if a male has got the protozoa underneath the foreskin area of the head of his penis the protozoa could be transferred. Likewise, it could be transferred if the protozoa were in the male urethra.
- [15] The established information is that *trichomonas vaginalis* tends to clear very quickly from a male because there is no warm moist place for the protozoa to live. Men do get infected with *trichomonas vaginalis*, but the infection is very short lived, probably weeks to months. In women the infection may last longer and may not be cured until a woman receives treatment.
- [16] A male may become infected with the protozoa if he has sexual intercourse with a female who has the infection. There is not a lot of scientific evidence about how long an infection will remain in a male. It tends to be short lived

because urine flushes out the urethra and most males clean the area at the head of their penis. However, if the head of the penis is not kept clean, the infection may remain longer than otherwise.

- [17] Significantly, in cross-examination Dr Pell conceded that normally speaking trichomonas vaginalis would resolve in a male within days to weeks. She also conceded that the jury was still out on whether the disease could be transmitted non-sexually. She noted that if somebody did not shower or wash themselves properly the infection in the area of the foreskin of the penis may last longer. However, she acknowledged that such a situation was a special circumstance.

The use which the Crown sought to make of the evidence about trichomonas vaginalis

- [18] The Crown sought to rely on the evidence about trichomonas vaginalis as circumstantial evidence which independently supported the complainant's allegations that on a number of occasions over a number of years the accused had penile/vaginal sexual intercourse with her. It was the Crown case that the probability of both the accused and the complainant having trichomonas vaginalis at the same time was so slight that it could not be a coincidence. The complainant must have contracted the infection from the appellant as a result of him having penile/vaginal sexual intercourse with her.

[19] The problem with presenting the Crown case in this way is that there was, in truth, no evidence that the accused was infected with trichomonas vaginalis at the relevant times. On appeal, the Director of Public Prosecutions all but conceded that the evidence did not establish the necessary nexus.

The direction of the Trial Judge about trichomonas vaginalis

[20] Counsel for the appellant did not object to the evidence about trichomonas vaginalis being led. Nor was the trial Judge asked to exclude the evidence after it was led by the Crown.

[21] The trial Judge gave the following direction to the jury about the evidence of trichomonas vaginalis:

“The third piece of evidence upon which the Crown relies as supporting M is the presence of trichomonas vaginalis. Now, there is no dispute that the urethral swab of the accused contained the organism as did the high vaginal swab from M.

And you heard the evidence of Dr Pell. And if I remember rightly Mr Elliott did not dispute this, but overwhelmingly the view is in favour of this infection being sexually transmitted. Dr Pell told you the only exception recorded in the literature is transmission by means of a mother and daughter in Africa who bathed together in a small tub.

Mr Elliott pointed out to you that as to whether it can be transmitted by other means, the jury is still out. Because experiments have successfully kept the organism alive for a short time in localities other than the human body.

So, Ladies and Gentlemen, on the other side, the Crown put to you that you should be satisfied that it is no coincidence that both the accused and Lisa were infected with this organism. And here is another pointer, says the Crown, to sexual contact between them.

Mr Elliott posed a question as to why the police did not investigate whether M's mother had this infection. You would be entitled to ask yourselves whether that would have been of any assistance anyway. There is no suggestion in the evidence for example, that M and her mother bathed together in a bathtub.

Mr Elliott posed the question as to why the infection would be present six months after the last occasion of sexual activity between them. You might recall that Dr Pell told you that this organism can last almost indefinitely in the warm moist environs of the vagina. And you will appreciate that it was the high vaginal swab that resulted in the positive analysis. Secondly Dr Pell told you that the time over which this organism will survive on the male body depends on the health practices of the male.

Finally, he did not know what the source of the infection in the case of the accused. He did not know whether that source was an ongoing source of infection or not. There is simply no evidence about that whatsoever.”

[22] He erred in doing so.

Consideration

[23] In my opinion the direction of the trial Judge about trichomonas vaginalis was inadequate and it resulted in a miscarriage of justice. While it is fair to say that the evidence established that the complainant may have had trichomonas vaginalis for an extended period of time and the appellant had the infection when the urethral swab was obtained from him, there was no evidence to establish anything other than the appellant's infection was one of recent origin. There was no evidence to establish that the appellant had trichomonas vaginalis when he was last alleged to be having penile/vaginal sexual intercourse with the complainant or at anytime before the last occasion.

- [24] The evidence about trichomonas vaginalis was highly prejudicial and it had very little or no probative value. The jury should have been directed to disregard the evidence as the evidence did not establish that the appellant had trichomonas vaginalis at the times he was alleged to have been having penile vaginal sexual intercourse with the complainant. Indeed, the evidence established that it was most likely the appellant acquired the infection from a person other than the complainant.
- [25] The import of the evidence about trichomonas vaginalis, in a case where there was little supporting evidence for the complainant's version of events, cannot be under estimated. The jury is likely to have considered if there was any evidence which supported the complainant's story and, if the jury accepted the evidence about trichomonas vaginalis, it is likely to have been given considerable weight. Particularly, as this was a case in which the sole issue was whether the appellant had sexual intercourse with the complainant. There was no issue that the complainant did have sex with somebody. The appellant was in no position to prove a positive case that the complainant had sex with somebody else and who that other person might be. In the circumstances the evidence about trichomonas vaginalis assumed a particular significance and needed to be dealt with very carefully.
- [26] While it is arguable that the evidence about trichomonas vaginalis had no bearing on the jury's verdicts on counts 1, 2, 8 and 9 on the indictment, it is my opinion that there is a real risk that the complainant's evidence about

those matters was unfairly bolstered by that evidence and the appellant's convictions on those counts should also be set aside.

Blokland J

[27] I agree with the orders proposed by Southwood J and the reasons given by his Honour.
