RP v THE QUEEN (S193/2016)

Court appealed from: New South Wales Court of Criminal Appeal
[2015] NSWCCA 215

Date of judgment: 26 August 2015

Special leave granted: 21 July 2016

On 27 August 2014 RP was tried by a judge without a jury, on charges which relevantly included two counts of sexual intercourse with a child aged under 10 years (counts 2 and 3 on the indictment). The offences allegedly occurred between October 2004 and June 2005 (the count 3 incident a few weeks after the count 2 incident), when the complainant was aged 6 or 7 years and RP was aged 11 or 12.

After the prosecution evidence was admitted without objection, the sole issue at trial was whether the prosecution could rebut the presumption of *doli incapax* ("the Presumption"). The Presumption was that, since he was aged between 10 and 14 years at the relevant times, RP would not have known that his actions were seriously wrong. The evidence included a 2012 psychologist's report ("the Report"), which stated that RP's level of intelligence was very low, that he had been exposed to violence as a child and that he had possibly been molested.

RP's counsel accepted that if the Presumption were rebutted in relation to count 2 then it would necessarily be rebutted in relation to count 3, as that incident occurred later in time. RP's counsel also conceded that if count 2 were found proved then it would flow from that decision that a verdict of guilty would be entered in respect of count 3 ("the Concession").

Judge Letherbarrow found RP guilty on count 2. This was after assuming, on the basis of the Report, that RP's low intelligence meant that he had a lesser appreciation of the seriousness of his conduct. His Honour also expressly ignored the fact that RP had used a condom, after the parties both submitted that no conclusion could be drawn from that fact. Judge Letherbarrow found that in view of the circumstances the Presumption had been rebutted. Those circumstances included that RP had used force, he stifled the complainant's cries by putting his hand over the complainant's mouth, he ceased the assault only when he heard an adult arrive outside and he told the complainant not to say anything. Judge Letherbarrow proceeded to find RP guilty also on count 3, on the basis of the Concession "*and as a matter of logic*". His Honour then sentenced RP to imprisonment for two years and five months, with a non-parole period of 11 months.

RP appealed against his conviction, contending that the verdicts were unreasonable. In relation to count 2, this was on bases including that the evidence indicated that RP was highly sexualised and that it was consistent with his knowing that his behaviour was wrong but falling short of "seriously wrong". RP also submitted that the Concession should not have been made and that the circumstances of count 3 should have been considered separately from those of count 2.

The Court of Criminal Appeal ("CCA") (Johnson, Davies & Hamill JJ) unanimously dismissed RP's appeal in relation to count 2. The CCA held that the evidence did not support a finding that RP was highly sexualised. The Report did not detail the violence to which RP had been exposed or its effect on him, nor did it contain any basis for suggesting that RP might have been molested (other than his having symptoms of post-traumatic stress disorder). In respect of RP's use of a condom, their Honours held that evidence which was expressly disregarded by a trial judge should similarly be ignored by the CCA on appeal. The CCA held that the evidence did suffice for the Presumption to be rebutted and for Judge Letherbarrow to have found RP guilty.

In respect of count 3, the appeal was dismissed upon a majority decision (Johnson & Davies JJ; Hamill J dissenting). The majority held it could not be inferred, on the basis that the later assault was carried out less forcefully and with less resistance from the complainant, that RP could have believed that his behaviour was not seriously wrong. This was in light of count 3 involving essentially the same act as that in count 2, on which RP had been found to have the requisite level of knowledge. Hamill J however would have quashed the guilty verdict and acquitted RP of the count 3 charge. His Honour held that Judge Letherbarrow should have separately assessed the circumstances in relation to count 3, rather than finding RP guilty on the basis of the count 2 finding coupled with the Concession. Separate assessment was particularly important in this case, as the only circumstances which count 3 had in common with count 2 were the act of sexual intercourse and RP stopping when an adult arrived. Judge Hamill held that a knowledge of serious wrongdoing in respect of count 3 did not necessarily follow from RP having had such knowledge in respect of count 2. There was also no forensic reason for the Concession, which should not have been made.

The grounds of appeal are:

- The CCA erred in failing to find that the verdicts with respect to counts 2 and 3 were not unreasonable on the basis that the evidence at trial did not establish to the criminal standard that the presumption that RP was *doli incapax* had been rebutted.

- The CCA erred in failing to quash RP's conviction on count 3 on the basis that he had been denied a fair trial.