SC 459

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IN THE SUPREME COURT)
)
OF THE TERRITORY OF)
)
PAPUA AND NEW GUINEA)

CORAM : MINOGUE, J.

ROY NORMAN McKAIN

Appellant

AND

JAMES WILLIAM GOULD

Respondent

1967
December 5,
RABAUL.

1968
February 27,
PORT MORESBY

APPEAL

This is an appeal against the conviction of the appellant by the District Court of Rabaul on a charge that on the 18th June, 1967 at Rabaul he unlawfully laid hold of another person - Freda Mapua - contrary to the provisions of Section 30(a) of the Police Offences (New Guinea) Ordinance 1925-1966.

The evidence given at the hearing disclosed a shabby and cheap plan to entice two young native nurses to a house or quarters in Rabaul where the appellant and a male companion were. Apparently it was customary at the Nonga Base Hospital for nurses to act on occasion as baby-sitters when requested to do so by the doctors in Rabaul. On Sunday, 18th June, either the appellant or his companion telephoned the hospital pretending to be a doctor and requested the services of two nurses as baby-sitters. In consequence, Freda Mapua who is about 17 years of age and a companion, Anna Makela who is about 18, went by taxi to a residence in Kombui Street and were there met by the appellant's companion who paid the taxi driver and escorted the girls into the house. It is obvious from the evidence that the girls had been tricked into going to the house and I suspect that the possibility or perhaps probability of ultimate sexual intercourse was in the mind of whoever it was who telephoned. It appears from the evidence that this was probably the appellant's companion (whose only description was "the fat man") and the Magistrate made no finding nor am I able to say what part the appellant had in the initial plan.

On being taken inside the two girls were offered a drink of beer which they refused and a record player was started. According to the girl Anna the appellant took Freda for a dance and asked her to give him a kiss which she refused to do. According to Freda the appellant put a record on the player, came over to her caught her by both arms pulled her up and on to the floor and began to dance with her. She said to him that she had never danced before whereupon he said "just try it". The appellant then asked her to give him a kiss and she replied that she did not like this kind of

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business. He then tried to drag her into another small room whereupon she began to cry and finally pulled herself away from him. There was no further touching by him or physical contact between the two.

In cross-examination of the girl Freda the following questions were put and answers given:-

Q: On this particular night, whilst you were in the house, although you have stated that you didn't like what was going on, this man was quite friendly?

A: Yes.

Q: And you have told us that you did not know how to dance?

A: Yes.

Q: I suppose when this man asked you to dance that you were shy and embarrassed?

A: Yes.

Q: You told him you didn't know how to dance?

A: Yes.

Q: And he said to you come on just try?

A: Yes.

Q: And when he said that to you and helped you to your feet?

A: Yes.

Q: Then you proceeded to attempt to dance around?

A: Yes.

Q: Freda, did you notice that the tall man was a little unsteady on his feet?

A: Yes.

Q: I suppose that made it even harder to dance?

A: Yes.

Q: Will you agree with me Freda, that as soon as you made it clear to the defendant, he let you go and you went back and sat down?

A: Yes.

Q: He sat down too?

A: Yes.

Q: Freda, the defendant didn't hurt you that night did he?

A:

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Q: You didn't feel he was going to hurt you?

A: Yes.

Q: You did.

A: Yes.

Q: Freda, you have agreed with me, that as soon as you made it clear to the defendant that you didn't wish to go on with the dance he let you go?

A: Yes.

Q: And he didn't come near you again, whilst you were at the house?

A: No.

In re-examination she stated that the appellant did not let go his hold of her voluntarily but that she pulled herself away from him. She further stated that at the time she was frightened. After this episode both girls left the house without molestation, went back to the hospital and complained to a Tutor Sister of the behaviour to which they had been subjected.

The appellant did not give evidence but submitted through his Counsel that there was no case to answer. The Resident Magistrate rejected this submission. Apparently no evidence was led on behalf of the appellant and he was convicted and fined thirty dollars and in default of payment he was ordered to be imprisoned for one month. The argument both before the Resident Magistrate and before me turned on the meaning of the words "unlawfully lays hold of" in Section 30(a).

Mr. Hickey, for the appellant, submitted that the offence must import some element of assault and of assault as it is understood at common law. He relied on the definition contained in Halsbury, Third Edition, Volume 10, tit. Criminal Law, Page 740, paragraph 1423, where it is said that assault is an offer or attempt to apply force or violence to the person of another in an angry or hostile manner, and also that there must be some act indicating an intention of assaulting or which an ordinary person might reasonably construe as indicating such an intention or some act amounting to an attempt. He argued that an intent to do some harm was inherent in this offence. I do not think that at common law it is essential that the force applied or threatened to be applied has to be applied or threatened in an angry rude revengeful or hostile manner although in the majority of cases these indicia would be present. In Russell on Crime, 10th Edition, page 724, assault is defined as being a threat by one man to inflict unlawful force (whether light or heavy)

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upon another and the text goes on to state that the anticipated contact need not be dangerous; a threat to kiss or strike a person unlawfully would be enough. The passage in Halsbury to which I was referred does not make this clear but in my opinion Russell correctly states the position.

In the light of Mr. Hickey's argument it is not without relevance to note that by Section 245 of the Criminal Code a person who (inter alia) strikes touches or moves or otherwise applies force of any kind to the person of another, either directly or indirectly, without his consent is said to assault that other person and Section 246 makes an assault unlawful and an offence unless it is authorized or justified or excused by law. The definition of assault contained in Section 245 combines the common law offences of both assault and battery. Usually both offences are committed in rapid succession and in common parlance the word "assault" is frequently used as including a battery. And charges of assault under the Police Offences Acts of the States of Australia are usually charges in respect of batteries. The framer of the Criminal Code, Sir Samuel Griffiths, probably thought the necessity for the legal distinction between the two offences had passed by 1899, but I do not think that in defining assault as he did in Section 245 he intended to expand or alter the common law.

In this case the actions of the appellant constitute an assault as defined by the Criminal Code and in my opinion he could have been so charged. The inclusion of Section 30(a) in the Police Offences (New Guinea) Ordinance seems unnecessary as the offences therein set out of unlawfully laying hold of, striking, or using violence towards any other person are all forms of assault. Its presence is probably explained by a hasty importation in that Ordinance of provisions of the repealed Native Administration Regulations which it was thought necessary to retain. Be that as it may, the Section is in the Ordinance, the appellant was convicted under it and I must pronounce upon its effect. The learned Magistrate took the view that there was clearly a laying hold of the girl - a view which in my opinion was correct. The ordinary and natural meaning of "to lay hold of" is "to grasp" or "to seize" or "to take into one's grasp" and it is clear enough that the appellant by his action in catching the girl by both arms and pulling her up and on to the floor laid hold of her. The only real question at issue was whether his conduct constituted an unlawful laying hold. In the Magistrate's view if the girl had agreed to his dancing with her or had not objected to his holding her then his conduct would have been lawful, but in his judgment Freda objected

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to his actions by word and manner and consequently did not consent to them. This lack of consent he held made the appellant's actions unlawful. I have not had the advantage of seeing and hearing the girl give evidence but even without that advantage the whole of the circumstances disclosed lead me to the same conclusion as that to which he came. In my view there was no real consent to the appellant's dancing with her.

The appellant did not give evidence and there is no room as I see it for consideration of a defence of an honest and reasonable but mistaken belief that the girl gave her consent which may have been available under Section 24 of the Criminal Code had there been any evidence to raise the possibility of such a belief in the mind of the Court. "Unlawful" in my opinion in its context means no more than without lawful excuse. In Lyons v. Smart (1) Griffith C.J. in considering the meaning of the words "unlawfully imported" in the Customs Act 1901 said "Now the word 'unlawfully' is a word commonly used in Statutes creating crimes misdemeanours and minor offences and in such Acts it is used in two shades of meaning, one when referring to an act which is wrong or wicked in itself - recognized by everybody as wicked - as, for instance, when it is used with reference to certain sexual offences, or with reference to acts which are absolutely prohibited in all circumstances; the other when referring to some prohibition of positive law". The act of seizing a girl for the purpose of dancing with her against her will is in my view one of those acts which is "wrong or wicked in itself". So also would be the act of an officious stranger grasping a householder's arm to prevent his entry into his home. And this is consonant with our long-held ideas of the individual's right to freedom from molestation. At common law the appellant's action would be sufficient to constitute both an assault and a battery and I can find nothing to support Mr. Hickey's submission either that there must be some intent to do harm to enable a conviction for assault or that such an intent should be imported into the provisions of Section 30(a), and so I would affirm the conviction in this case.

No appeal has been made against the sentence of the Magistrate. For myself on the material before me it does not seem to be open to criticism.

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(1) (1908) 6 CLR 143 at p.147.