

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN
[SQUARE BRACKETS]

**NOTE: PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR
IDENTIFYING PARTICULARS, OF COMPLAINANT(S) PROHIBITED BY S
203 OF THE CRIMINAL PROCEDURE ACT 2011.**

**IN THE DISTRICT COURT
AT PALMERSTON NORTH**

**CRI-2017-054-002222
[2018] NZDC 7206**

NEW ZEALAND POLICE
Prosecutor

v

LINTO THOMAS
Defendant

Hearing: 13 April 2018

Appearances: Sergeant S Bartlett for the Police
Mr P Murray for the Defendant

Judgment: 16 April 2018

DECISION OF JUDGE L C ROWE
[As to application to make the prosecution adduce defendant's police interview]

[1] [In 2016] Linto Thomas was working as a nurse at Palmerston North Hospital.

[2] One of his patients during his shift that day was [the complainant]. [The complainant] was in hospital due to complications from [a medical procedure].

[3] [The complainant] complains that Mr Linto indecently assaulted her on two separate occasions, that afternoon and evening.

[4] On the first occasion, [the complainant] said Mr Thomas cut a hospital bracelet from her arm that was too tight, rubbed her arm where the band had been, but then

started to rub her tummy under her gown. He had not announced in advance that he was going to do this nor sought permission to do so. He then asked [the complainant] if she had any vaginal bleeding and at the same time lifted the front of her underwear up and touched the top of her vagina as if checking her vagina. Once again, he did not seek permission to do this or announce in advance that he was going to do so. [The complainant] told Mr Thomas immediately that she had no vaginal bleeding but he held her underwear up, with his hand placed just above her genitalia, for a prolonged period. He then pulled her underwear back into position and briefly rubbed her stomach again before leaving the room.

[5] On the second occasion [the complainant] woke up during the night in pain and buzzed for a nurse so she could get pain relief. Mr Thomas responded and helped her sit up to take some tablets. [The complainant] said Mr Thomas rubbed her back while giving her the medication and then, when she lay down and groaned due to the pain, he started to rub her tummy over the top of her clothing and asked to see if there was any vaginal bleeding. [The complainant] replied “No” and he said “Ok”. She said Mr Thomas was standing on her right-hand side but leaned across her and stroked her left arm, complimenting her for the nightgown she was wearing. He then repeatedly brushed his hands underneath her breasts with the back of his hand then brought his hand back over the top of her breasts touching the bare skin along the top of her breasts as he did so. She described this as lasting for a period that to her seemed “an eternity”.

[6] Mr Thomas was arrested by [the Detective Constable] on [date deleted]. Mr Thomas obtained advice from a solicitor while at the Palmerston North Police Station before agreeing to give an evidential video interview.

[7] The prosecution has given notice to Mr Thomas’ counsel that it does not intend to play Mr Thomas’ interview as part of the prosecution case on the basis that it is exculpatory and does not form any part of the proof of the charges against Mr Thomas.

[8] Mr Murray, on Mr Thomas’ behalf, has applied under s 113(3) of the Criminal Procedure Act 2011 for an order requiring the prosecution to adduce Mr Thomas’ police interview as part of the prosecution case. The police oppose that application.

Principles

[9] While s 113(3) ostensibly relates to the Court's ability to require the prosecution to call a witness, this can be extended to require the prosecution to lead evidence of a defendant's statement.¹

[10] A defendant who does not give evidence may not offer their own hearsay statement in evidence. This includes eliciting the hearsay statement through cross-examination of prosecution witnesses such as the interviewing officer.²

[11] If the prosecution chooses to lead evidence of the defendant's hearsay statement then that is admissible against the defendant, meaning it is admissible as part of the case against the defendant whether it is inculpatory or exculpatory.³

[12] When deciding whether to require the prosecution to adduce the defendant's statement, the Court should bear in mind the respective functions of the prosecutor and the Judge. It is not the Judge's function to take part in the dispute or require the prosecution to proceed in a particular way, provided the prosecutor is acting consistent with their duty to be fair towards the defendant, and is not motivated by considerations that are not relevant to their task.⁴

[13] The prosecutor's duty of fairness involves putting the prosecution case fairly and fully, including calling all credible witnesses who can give admissible evidence about matters in issue. This includes evidence essential to the unfolding of the Crown narrative.⁵ It follows that it is not unfair for a prosecutor to elect not to call evidence that would not otherwise be admissible, eg through s 21.

[14] The touchstone is the interest of justice which includes considerations of fairness to the defendant.⁶

¹ *R v King* [2009] NZCA 607 at [19].

² Evidence Act 2006, s 21, and the definition of "offer evidence" in s 4 which includes eliciting evidence by cross-examination.

³ Evidence Act, s 27 and *R v Green* [2009] NZCA 400 at [12].

⁴ *Rapana v R* [2015] NZHC 2286 at [14] (d) and (f).

⁵ *Rapana* at [14] (c).

⁶ *Rapana* at [14] (b).

[15] The authorities suggest that unfairness is more likely to arise to a defendant if the prosecution decides not to adduce evidence of a defendant's statement that is both inculpatory and exculpatory (referred to as a "mixed statement"). In those circumstances, the prosecutor's obligation to provide evidence relevant to the prosecution narrative may not be fairly or fully met if the inculpatory parts of a statement are not adduced in evidence. This however would necessarily also require that the exculpatory parts of the statement be adduced for completeness and fairness.

[16] Whether a prosecutor can be required to adduce a mixed statement depends on the extent to which the statement is inculpatory. A statement may be sufficiently inculpatory if the statement contains admissions of facts which are significant to any issue in the case and are capable of adding some degree of weight to the prosecution case on an issue which is relevant to guilt.⁷

[17] It may also depend on whether an accused is merely trying to adduce their hearsay exculpatory statements or explanations as matters of direct evidence without having to give them on oath or be subject to cross-examination.⁸ Having said that, this is likely to always be part of a defendant's motivation in applying under s 113(3) for their statement to be adduced by the prosecution. This motivation ought therefore not be determinative. The authorities suggest the Court must assess the degree or extent to which a statement is inculpatory before requiring the prosecutor to adduce that statement as a matter of fairness.

The issue

[18] The question therefore is whether Mr Thomas, in his police interview, makes admissions of facts which are capable of adding some degree of weight to the prosecution case on an issue which is relevant to guilt.

⁷ *Garrod* [1996] EWCA Crim 1149 at para 68, adopted in *R v Tozer* (2001) 19 CRNZ 269 at [28].

⁸ *Harwood v R* [2010] NZCA 545.

Does Mr Thomas make inculpatory statements in his interview?

[19] There are some matters which will not be in issue at Mr Thomas' trial. These include his identity and that he was in [the complainant]'s room at various times on [date deleted] during his nursing shift. The issues for trial will therefore be:

- (a) Did Mr Thomas touch [the complainant]'s stomach, underwear and genital area (in relation to Charge 1), and her breasts (in relation to Charge 2)?
- (b) In each instance, was the touching deliberate?
- (c) In each instance was the touching indecent?
- (d) In each instance did Mr Thomas intend the touching to be indecent?

First alleged incident – Mr Thomas' account

[20] Mr Thomas said he cut a hospital bracelet from [the complainant]'s arm that was too tight and rubbed her arm where the bracelet had left an indent in her skin.⁹

[21] [The complainant] told him she had abdominal pain and when he asked where it was, she pulled her blanket down and showed him her stomach area which was partly exposed.¹⁰

[22] Mr Thomas asked [the complainant] if she had any bleeding and she said "No". [The complainant] was wearing hospital issue underpants made of a type of gauze or netting and, because the blanket was pulled down, he could see the underpants and there was no bleeding showing through, as would be the case if there had been vaginal bleeding.¹¹

[23] Mr Thomas had not asked permission before rubbing [the complainant]'s arm. While there is apparently some evidence for the prosecution that it is standard

⁹ Transcript pp 64 and 82-83.

¹⁰ Transcript p 66.

¹¹ Transcript pp 71-72.

procedure for patients to be asked before making physical contact, it is not clear that this extends to touching that is not intimate in nature, and it would be odd if touching of any kind, such as rubbing [the complainant]'s arm in these circumstances, offended standard procedure.

[24] Mr Thomas denied rubbing [the complainant]'s stomach area.¹²

[25] Mr Thomas denied touching [the complainant]'s underwear or genital area.¹³

Second alleged incident – Mr Thomas' account

[26] Mr Thomas agreed that he answered [the complainant]'s call for assistance around 10.00 pm that night.

[27] He gave [the complainant] pain relief in the form of a Sevredol tablet.¹⁴

[28] Mr Thomas said [the complainant] wanted more IV morphine but he told her he could not give her IV morphine then, and this would need to be administered by a doctor.

[29] Mr Thomas said he tried to reassure [the complainant] and patted her on the shoulder,¹⁵ and this may have extended to rubbing her arm and shoulder.¹⁶

[30] Mr Thomas agreed that the door to the room was closed but said that a light was on.¹⁷

[31] Mr Thomas said he rubbed [the complainant]'s arm or shoulder for less than a minute.¹⁸

¹² Transcript pp 87-91.

¹³ Transcript pp 91-96.

¹⁴ A type of morphine.

¹⁵ Transcript p 104.

¹⁶ Transcript p 106.

¹⁷ Transcript pp 107-108.

¹⁸ Transcript p 109.

[32] Mr Thomas said he had told other staff and a doctor of [the complainant]'s request for IV morphine but he did not write this down. He said he told the night house officer and that he paged the doctor. Apparently there is no record of any page activations that correspond with this for the staff who would have been consulted.

[33] Mr Thomas denied rubbing [the complainant]'s back.¹⁹

[34] Mr Thomas denied that it was “completely dark” and that a light needed to be on to be able to see that [the complainant] took the Sevredol.²⁰

[35] Mr Thomas agreed he asked [the complainant] if she had vaginal bleeding, that she said “No” and, as her abdomen was covered with a blanket, he did not look.²¹

[36] Mr Thomas noted that [the complainant] had changed her nightgown but did not compliment it in the way [the complainant] alleged.²²

[37] Mr Thomas agreed he was standing on [the complainant]'s right-hand side but leaning across and patting or rubbing her left arm.²³

[38] Mr Thomas denied touching [the complainant]'s breasts in any way.²⁴

[39] Mr Thomas confirmed that he agreed with the surrounding circumstances as described by [the complainant] but denied the inappropriate touching as alleged.²⁵

[40] Mr Thomas denied that rubbing [the complainant]'s bare arm to comfort her was inappropriate.²⁶

¹⁹ Transcript pp 118-119.

²⁰ Transcript p 121.

²¹ Transcript pp 125-126.

²² Transcript p 129.

²³ Transcript pp 130-131.

²⁴ Transcript pp 131-133.

²⁵ Transcript pp 139-143.

²⁶ Transcript pp 144-146.

[41] Mr Thomas suggested a few times during his interview that [the complainant] was possibly upset with him for not getting her IV morphine, suggesting this may have been a motive for her to make up allegations against him.²⁷

Discussion

[42] In the context of the matters at issue in this trial, none of Mr Thomas' explanations are inculpatory either as to the acts he is alleged to have committed, or any indecent intent.

[43] The nearest Mr Thomas comes to admitting any act which might correspond with the alleged indecent touching is when he said he was standing on [the complainant]'s right-hand side and reaching across and rubbing or patting her left arm to comfort her. He does not however agree that he touched [the complainant]'s breast area, accidentally or otherwise, when doing this.

[44] Further, while this act might possibly infringe a standard procedure in the circumstances – late at night, a male nurse alone with a female patient, in a room with a closed door, dimly lit – the act admitted is qualitatively different to the indecent act that founds the second charge.

[45] Mr Thomas' suggestion that [the complainant] might have been upset with him for not obtaining IV morphine is speculative and of course Mr Thomas is not required to explain why [the complainant] might make up allegations against him. He has no burden of proof.

[46] In the context of this case therefore, Mr Thomas makes no statements in his interview that are inculpatory in that they add no weight to the prosecution case on the issues at his trial relevant to his guilt.

[47] That being the case, the statement is not a mixed statement containing both inculpatory and exculpatory comments. It is wholly exculpatory.

²⁷ For example at p 148.

[48] It follows that, with the exceptions discussed below, it would not be unfair for the prosecution to not lead evidence of Mr Thomas' statement at his trial. The application to make prosecution do so is dismissed.

Ancillary matters

[49] When a statement is not adduced in evidence, it is often considered to at least be fair to require the prosecution to confirm that a defendant was interviewed and denied committing the offences as alleged.²⁸ It would therefore be permissible, as a matter of fairness, for this to be confirmed in cross examination of the officer in charge to demonstrate consistency with Mr Thomas' plea. In this way, Mr Thomas will also be able to place before the trial Judge the gist of his response when confronted with these allegations, ie. that he denied them.

[50] It is alleged that police did not investigate Mr Thomas' statement that he informed a doctor and other staff about [the complainant]'s request for IV morphine, and he ought therefore be permitted to raise that in cross-examination as a matter of fairness. It emerged in argument that the police had made inquiries but there is still some question in defence counsel's mind about the sufficiency of those inquiries. This issue seems to be related to Mr Thomas' theory that [the complainant] was upset at him for not having secured IV morphine, or perhaps to corroborate a part of Mr Thomas' version of events that [the complainant] sought IV morphine. That short part of the interview may be referred to for that purpose, as a matter of fairness, although how far that line of inquiry will assist the Court will be a matter for the trial Judge. It seems of peripheral relevance and, as I have said, Mr Thomas has no burden of proof.

[51] The charges themselves contain no particulars of the indecent assaults alleged. [The Sergeant] confirmed that the prosecution case is that the indecent assaults comprise touching [the complainant]'s stomach, underpants and genital area on the first occasion and her stomach and breasts on the second occasion. The prosecution does not assert guilt on the basis Mr Thomas rubbed, patted or touched [the complainant]'s arms or shoulders.

²⁸ *R v Boynton* (No 2) [2013] NZHC 2419 at [16].

LC Rowe
District Court Judge