R v SAVAGE & ORS (NO 2)

DISTRICT COURT – CRIMINAL CASE NO 626 OF 1996
JUDGE LUGAR-MAWSON
4 DECEMBER 1996

Criminal Law and Procedure – Indecent conduct with or towards child under 16 – Tape recording of child changing clothes – Gross indecency – Definition – Whether limited to acts involving genital contact – Not necessary to prove that defendant committed offence with object of deriving immediate sexual satisfaction

Words and Phrases – 'Gross indecency' – 'With or towards' – Crimes Ordinance (Cap 200) s 146(1)

刑法與刑事訴訟程序－與或向年齡在16歲以下之兒童作出猥褻行爲－兒童更衣之錄像記錄－嚴重猥褻行爲－定義－是否局限於涉及生殖器官之接觸之行爲－無需要證明被告人以取得即時之性慾滿足爲目標而犯罪

詞彙－「嚴重猥褻行爲」－「與或向」－《刑事罪行條例》（第200章）第146(1)條

The three defendants were jointly charged with one count of indecent conduct with or towards a child under 16, contrary to s 146(1) of the Crimes Ordinance (Cap 200). The charge related to events recorded on a Hi-8 videotape referred to as 'School Girl tape'. In the tape, the child victim was seen changing clothes in a bedroom. At the beginning of the tape, she was seen naked from the waist down while she was removing her clothing. The right flank of her buttocks was seen. The child victim changed into different clothing arranged by the second defendant under the first defendant's direction. She was encouraged by the first defendant and the second defendant to adopt different positions, such as to pull the clothing up towards her chest, revealing her PE knickers, to kneel on the bed in the room and raise her buttocks into the air.

The image on the tape mainly concentrated on her buttocks and crotch. At all times her buttocks and genitalia were covered by the PE knickers. At some stage, the child victim was encouraged by her mother, the third defendant, to try a white swimming costume. Apart from at the very initial stage of the tape, no part of the child's naked body was seen. Throughout, the child appeared to be bewildered by the requests made of her and as the tape continued, her distress became more evident. No person used any force upon the child or roughly ordered her to do anything.

Held, convicting the defendants as charged:

(1) The offence of indecent conduct with or towards a child under 16 was one of strict liability as to age. *R v Prince* (1875) LR 2 CCR 154 applied (at 84H).

(2) 'Gross indecency' should not be limited to acts involving genital contact. Whether an act was or was not one of gross indecency depended upon the nature of the act, the circumstances in which it was committed and the time and place in which it was committed. *R v Pinard and Maltais* (1982) 5 CCC (3d) 460 applied (at 87H-I).

(3) The word 'indecent' meant a contravention of ordinary standards of decent behaviour relating to sexual modesty or privacy. *R v Court* [1987] QB 156 applied (at 88A).

(4) The word 'gross' should be given the meaning of 'plain, evident, obvious'. In this case what the child did and was encouraged to do, in the School Girl tape was grossly indecent, and no right-thinking person could find otherwise. *R v Whitehouse* [1955] QWN 76 applied (at 88B).

(5) The phrase 'with or towards' created one offence. It was impossible in any particular case to say quite definitely that that was a case of gross indecency with, and not a case of gross indecency towards or vice versa. Therefore, the actus reus of the offence was the commission by the offender, or offenders, of an act, or acts, of gross indecency involving children. *R v Burgess* [1971] QB 432 and *R v Francis* (1989) 88 Cr App R 127 applied (at 88E-G).

(6) It was not necessary for the prosecution to prove that the defendants committed the offence with the object of deriving immediate sexual satisfaction. The only sexual requirement in the mental element was that the offenders knew that what the child was doing was indecent, in that the acts contravened the standards of decent behaviour relating to sexual modesty or privacy. *R v Francis* (1989) 88 Cr App R 127 and *R v R(J)* [1993] Crim LR 971 not followed (at 89E-90C).

(7) In this case, the child was encouraged to perform grossly indecent acts for the admitted future satisfaction of one of the defendants. It was only necessary for the prosecution to prove that the offenders played their respective parts knowing that the child was being encouraged to do acts that, to their knowledge, were grossly indecent and that she did, in fact, do them (at 89I-90A).

Cases referred to

R v Burgess [1971] QB 432
R v Court [1987] QB 156
R v Francis (1989) 88 Cr App R 127
R v Ghosh [1982] QB 1053, [1982] 2 All ER 689
R v Pinard & Anor (1982) 5 CCC (3d) 460
R v Prince (1875) LR 2 CCR 154
R v Quesnel & Anor (1979) 51 CCC (2d) 270
R v R (J) [1993] Crim LR 971
R v Roberts (1985) 84 Cr App R 117
R v Whitehouse [1955] QWN 76

Legislation referred to

Crimes Ordinance (Cap 200) ss 146(1), (2)
Criminal Procedure Ordinance (Cap 221) s 79C
Indecency with Children Act 1960 [Eng] s 1(1)

Other sources referred to

Allan, Michael J *Criminal Law* (2nd Ed) p 291
Cross & Jones *Criminal Law* (3rd Ed) para 12.21 p 246
Rook and Ward *Sexual Offences* (1st Ed, 1990, Criminal Law Library No 8) pp 129, 130 para 4.64
Oxford English Dictionary Vol VI p 870

[*Editorial note:* the first defendant sought leave to appeal against his conviction, which was refused.]

Trial

This was a trial at which the defendants were jointly charged with one count of indecent conduct with or towards a child under 16, contrary to s 146(1) of the Crimes Ordinance (Cap 200). The facts appear sufficiently in the following judgment. The part dealing with the fourth charge against the first defendant and the part dealing with the third defendant has been omitted. All three defendants were convicted.

Denise Chan (Crown Prosecutor) for the prosecution.
Christopher Morley (Haldanes) for the first defendant.
Munira Moosdeen (Cheung, Chan & Chung) for the second defendant.
David Tolliday-Wright (Knight & Ho) for the third defendant.

Judge Lugar-Mawson: The three defendants, Jeffrey Savage, Rita Manzano and Larraine Jeanne Da Silva, jointly face the first charge on the charge sheet, that of indecent conduct with or towards a child under 16, contrary to s 146(1) of the Crimes Ordinance (Cap 200).

[The judge then dealt with the evidence admitted and the fourth charge against the first defendant.]

The first charge relates to events recorded on another Hi-8 videotape, which, too, was found in the box in the wardrobe in the first defendant's flat. It is an agreed fact that this tape was found at the first defendant's flat in Whampoa Gardens during the police search of those premises on 1 May of this year. It is an agreed fact that it was made at that flat on an unknown day in October 1995.

Four persons are shown in that tape: a European male, a Filipina female, a Chinese female and a Chinese girl. The Chinese girl is Leung Ka Man. It is an agreed fact that she is a child, now aged 12, her date of birth being 12 December 1983. Therefore, at the time of making of the tape, she must have been 11. As I understand the law, the offence which the three defendants face is one of strict liability as to age. That certainly is the position with regard to offences of sexual intercourse with girls under age, see the now rather old case of *R v Prince* (1875) LR 2 CCR 154 and I apprehend that it must be the position with regard to the offence created by s 146 of the Crimes Ordinance.

It is agreed evidence that the European male shown on the tape is the first defendant, that the Filipina female is the second defendant and the

A Chinese female is the third defendant. It is an agreed fact that the third defendant is Leung Ka Man's natural mother.

The tape has on its spine the handwritten title, 'School Girl HK', at trial it was referred to as 'the School Girl tape'. The tape lasts for approximately 21 minutes; I have not timed it. In it, Ka Man is seen changing clothes in
B a bedroom. At the beginning of the tape she is seen naked from the waist down, this is while she is removing her clothing. The right flank of her buttocks is seen. She changes into a grey school uniform and a pair of blue PE knickers. The second defendant is seen to arrange her clothing under the first defendant's direction. She is encouraged by the first defendant
C and the second defendant to pull the skirt of the school uniform up towards her chest, revealing the knickers. The second defendant acts as the first defendant's Cantonese interpreter.

At one stage she is encouraged by the first defendant — the second defendant interpreting — to lift the skirt of the uniform herself. I quote
D from the soundtrack of the tape, the first defendant speaking:

> Okay, tell her to pull up. Carmen, pull up. No, she has to do it. Cut.

She is then encouraged to kneel on the bed in the room and raise her buttocks into the air. The first defendant instructs the second defendant to tell her to get her buttocks up into the air. I quote from the soundtrack of
E the tape, the first defendant speaking:

> Yeah, but tell her to. She has to get her butt up in the air.

The image on the tape concentrates on her buttocks for some time, they are still covered by the PE knickers. At another stage the image concentrates
F on her crotch. At all times her buttocks and genitalia are covered by the PE knickers.

She is then encouraged to change into a white swimming costume by the first defendant, the second defendant interpreting for him. Ka Man does so, putting the costume on over the blue PE knickers and her vest.
G She appears at this stage to be distressed. The first defendant, in English, calls her mother, the third defendant, into the room. It would appear that the third defendant is nearby in an adjacent room as she soon appears in the image. In fact, throughout the tape, background conversation can be heard.

H The third defendant, Ka Man's mother, encourages her to try on the swimming costume. I quote from the soundtrack, the third defendant speaking:

> Oh! Ah Mui To, just try on the clothes for Ah Jeff to see. No, uncle to see. See if it fits you or not. Fits you or not. Try it on. Try it on for him to see. Afraid
I she will buy that one. Afraid that it might be too narrow. You try it.

Ka Man's discomfiture continues and after a few minutes, the third defendant tells her to take off the swimming costume and leave. Ka Man

is seen to remove the swimming costume and change back into her ordinary clothes. A

Apart from at the very initial stage of the tape, no part of the child's naked body is seen. Throughout, Ka Man appears to be bewildered by the requests made of her and as the tape continues, her distress becomes more evident. No person uses any force upon the child or roughly orders her to do anything. Indeed, in her evidence-in-chief — which was introduced by way of videotapes of two interviews with her conducted under the provisions of s 79C of the Criminal Procedure Ordinance — Ka Man makes no complaint of force against anyone. At the end of the tape, Ka Man leaves the room and the first defendant is heard, speaking in English, offering her pizza, and a drink. B C

From the tape, it is clear that it was being made under the first defendant's direction, and that the second defendant was acting as his interpreter and as the dresser — the clothing arranger.

Although, I have said, on only one occasion is the child seen naked from the waist down — and it may be that that part was not deliberately filmed — and on no occasion are her genitalia or buttocks exposed, neither is she encouraged or requested to expose them, it is self-evident that the tape was not made as an innocent record of the appearance of a pre-pubescent child, but was made for a sexual purpose. The concentration on the child's covered crotch, the very deliberate encouragement of her to rear her buttocks towards the camera lens: D E

> Yeah, tell her to. She has to get her butt up into the air.

— and the injunction that she has herself to pull up her clothing, can admit of no other interpretation. F

I ask myself: is what is shown on the tape an act, or acts, of gross indecency? There is no statutory definition of what an act of 'gross indecency' is and little help is found in the commentary on the English equivalent of the offence in the current editions of *Archbold* and *Blackstone*. G

Cross and Jones, in the third edition of their work *Criminal Law*, at p 246, para 12.21, say this:

> 'Gross indecency' must be distinguished from the mere indecency required for indecent assault and it is probably limited to activities involving indecent conduct with the genitalia, including contact through clothing. A person commits an act of gross indecency with or towards a child if he cooperates with something grossly indecent by the child, or if he does something grossly indecent directed towards the child for purposes of sexual gratification. H

Another textbook writer, Michael J Allan, in his work, *Textbook of Criminal Law* (2nd Ed, Blackstone Press) at p 291, para 10.242, is also of the view that gross indecency is probably limited to acts involving genital contact. I

Both textbook writers cite no authority for the proposition that the offence is 'probably' limited to acts involving genital contact. Rook and

A Ward, in their work, *Rook and Ward on Sexual Offences* (1st Ed, 1990, Criminal Law Library No 8), do not so limit themselves. At pp 129 to 130, para 4.64, where they deal with the offence of gross indecency between men, they say this:

> English courts have so far declined to define the concept of 'gross indecency' and indeed, a comprehensive definition would be very difficult to formulate. Similar reluctance, more openly expressed, can be found in Commonwealth decisions on comparable provisions. So in *Whitehouse* [1955] QWN 76, the Queensland Court of Criminal Appeal upheld a direction in which the trial judge said that both 'indecency' and 'gross' were ordinary English words which he would not define, although Philp J did say that the intention of the legislature in using the word 'gross' had been to indicate that 'slight' cases of indecency were not covered. Again, in *Pinard and Maltais* (1982) 5 CCC (3d) 460, the Quebec Court of Appeal said that the term 'an act of gross indecency' was not easy to define. According to Malouf JA, 'Whether an act is or is not an act of gross indecency depends upon the nature of the act, the circumstances in which it was committed and the time and place in which it was committed'. In *Quesnel and Quesnel* (1979) 51 CCC (2d) 270, the Ontario Court of Appeal ventured that: '... the offence of gross indecency ... may be defined as a marked departure from decent conduct expected of the average Canadian in the circumstances that existed'.

Rook and Ward, rather magisterially, conclude:

> Those statements represent the standard judicial approach throughout the Commonwealth to the concept of 'indecency'.

The passage I have just read appears in *Rook and Ward's* discussion of the offence of gross indecency between men. However, when they discuss the English offence of gross indecency towards a child — at p 171, para 6.56 of their work — they opine that the same considerations apply.

Much of the argument in the final submissions at trial, was concentrated on the meaning of the wood 'gross', it being submitted that indecent conduct is not enough and that there must be some aggravating factor, or factors, accompanying it.

On this issue, I disagree with both Cross and Jones and with Michael Allan, that the acts must be limited to ones involving genital contact; there is just no authority for that proposition. It appears to be based on no more than that the facts of most of the reported cases involving the offence involve genital contact in some form. The Canadian and Australian approach is, to my mind, the correct one to take. The position, to my mind, is very well expressed by Malouf JA in the passage in *R v Pinard and Maltais* (1983) 5 CCC (3d) 460 where he said, and I repeat:

> ... whether an act is or is not an act of gross indecency depends upon the nature of the act, the circumstances in which it was committed and the time and place in which it was committed.

In the English case of *R v Court* [1987] QB 156, the House of Lords held that the word 'indecent' meant a contravention of standards of decent behaviour relating to sexual modesty or privacy.

As to the meaning of the word 'gross', Philp J of the Queensland Court of Appeal opined in *R v Whitehouse* [1955] QWN 76 that the word should be given the *Oxford English Dictionary* meaning of 'plain, evident, obvious' (see p 870 of Vol VI of the second edition of the Oxford English Dictionary, definition 3). What Ka Man does and is encouraged to do, in the School Girl tape is grossly indecent, no right-thinking person could find otherwise.

The offence charged is one of gross indecency with, or towards, Ka Man. Apart from the first defendant directing what he wants Ka Man to do, the second defendant translating for him, assisting with the arrangement of Ka Man's clothing, and on occasions positioning her, neither the first defendant nor the second defendant commit any overt indecent act 'with' Ka Man. Neither do they themselves, either singly or together, commit any indecent act in her presence. Does this therefore mean that there was no gross indecency committed with, or directed towards, Ka Man?

It was held in *R v Francis* (1989) 88 Cr App R 127, that the phrase 'with or towards' creates one offence. In *Francis,* the Court of Appeal in England followed the decision of the Court of Appeal in *R v Burgess* [1971] QB 432. In *Burgess,* Lord Parker, the Lord Chief Justice, said this at 269 lines A to B:

> In my judgment, there are not two offences of gross indecency in s 1(1) of the Indecency with Children Act 1960, but one, namely, the committing of an act of gross indecency involving a child, that is to say, one reads 'with or towards a child' as a phrase 'with or towards'; that, as it seems to me, is the natural meaning because it is impossible in any particular case to say quite definitely that this is a case of gross indecency with, and not a case of gross indecency towards or vice versa.

Burgess, therefore, makes it clear that the actus reus of the offence is the commission by the offender, or offenders, of an act, or acts, of gross indecency involving children. It is clear that is what is depicted on the School Girl tape. Ka Man is directed and positioned, to assume grossly indecent postures at the direction, and at times the manipulation, of the first defendant and the second defendant. Taken altogether, what is shown on the tapes amounts to a series of acts of gross indecency involving a child. The consent of the child is an immaterial matter, as s 146(2) of the Crimes Ordinance expressly provides that the child's consent is not a defence to the charge.

As to the mental element of the offence; it was advanced to me — principally by Mr Morley, the first defendant's counsel — relying on the headnote in *Francis*, which reads:

> Held, allowing the appeal, that the trial judge had failed to make it clear to the jury that for an offence against s 1(1) of the Indecency with Children Act 1960

A to be made out, the grossly indecent behaviour had to be directed towards the children, with the appellant deriving satisfaction from knowing that the children were watching him.

— that the prosecution had to prove that the defendants committed the offence with the object of deriving immediate sexual satisfaction. In the B first defendant's case, he, in his second videotaped interview, the one conducted in the evening of 7 May 1996, said this — it is at p 12 of the transcript of the soundtrack, the interviewer, Chief Inspector Chambers, is speaking:

C So getting back to the question I asked you originally about the tape, was your reason for making the tapes similar to that? That you wanted something that you could use for your own ...

Savage butts in:	Yes.
Chambers:	... erotic...,
Savage:	Yes.
Chambers:	... stimulation?
Savage:	I did, yes, I did.

I have no direct evidence of the second defendant's purpose in taking part. I will shortly be dealing with the third defendant's role and say no more at E this stage about that.

I do not agree with that proposition. *Francis* is peculiar to its own facts. In that case, the central issue was whether Francis' conduct had been directed at his victims. Francis was accused of masturbating himself at a public swimming baths where boys were watching. He did not touch them, F or get them to touch him and it was not established whether he was looking at them. The Court of Appeal did not decide that it was necessary for actual satisfaction on the part of the accused to be proved, but they held that the act had to be directed at a person — in that case, the boys — with the intention of deriving satisfaction from that person's observation of G him.

In *Francis*, the jury clearly had to be satisfied that Francis was aware that the boys were watching him masturbating and that his knowledge of their presence and interest in his act in some way gave him satisfaction, before a jury could say that his conduct was addressed towards those H children. Similarly, the case of *R v R (J)* [1993] Crim LR 971, also cited in argument in support of this proposition, is yet another case where the offender's acts amounting to grossly indecent conduct — there, sexual intercourse between a man and woman — were deliberately committed in the knowing presence of a child.

Those are not the facts in this case. Here it is the child who is encouraged I to perform grossly indecent acts for the future satisfaction — and I stress, the admitted future satisfaction — of one of the defendants, the first defendant, Savage. In the factual situation we have in this case, it is, in my

view, only necessary for the prosecution to prove that the offenders played their respective parts knowing that Ka Man was being encouraged to do acts that, to their knowledge, were grossly indecent and that she did, in fact, do them. It is, to my mind, not necessary for the prosecution to go further and prove that all, or any, of the defendants themselves derived satisfaction from what Ka Man did, or what they encouraged her to do. Though in the case of the first defendant, I do know from his answers, which I have read out, that his motive was his future sexual satisfaction. The only sexual requirement in the mental element is that the offenders know that what the child is doing is indecent, in the *Court* sense, in that the acts Ka Man does, and is encouraged, and directed to do, contravene standards of decent behaviour relating to sexual modesty or privacy.

In the first defendant's case, there can be no doubt that he was aware of this. He was the one commissioning and directing Ka Man's acts. He admits in his videotaped interview, in the passage I have read out, that the tape was being made for his future erotic stimulation — his future sexual satisfaction. The prosecution have very clearly established their case against the first defendant beyond reasonable doubt and he must be convicted of the first charge.

In the second defendant's case, as there are no admissions of hers in evidence, I do not know why she says she was assisting the first defendant. She, as was her undoubted right, elected not to give evidence, so I do not have her explanation for her observable acts. What she does, however, is clearly seen on the videotape and I have briefly described that. From the tape, in no way can it be said that she was acting under the first defendant's duress. She in no way appears to be concerned, worried, or ashamed about what is going on, or what she is doing. She may truly be termed to be a willing participant in all that is depicted on the videotape.

As I have already said, on the *Court* test, what is going on contravenes the ordinary standards of decent behaviour relating to sexual modesty or privacy and, as I have already held, amounts to an act of gross indecency. I do not see how the second defendant could have failed to have been aware of it.

Miss Moosdeen, the second defendant's counsel, raised the ingenious argument that the second defendant may herself not have realised that what was going on contravened those objective standards; she, being the first defendant's domestic helper and a native of the Philippines, where — on Miss Moosdeen's submission — laxer standards apply.

There are two short answers to that argument: firstly, I see no warrant in the authorities for holding that there is a defence to this offence of a belief that ordinary people would not find indecent, acts and activity which objectively are indecent. Secondly, even if such a defence were available, it would be for the defendant to raise it, or at least draw the jury's attention — or in this case, my attention — to some evidence in the

prosecution case which shows that she could have held that belief. As I have said, the second defendant elected not to testify and there is no evidence in the prosecution's case that in any way hints at the possibility of such a defence. I am not here, in any way, attempting to reverse the burden of proof as Ms Moosdeen suggested in our colloquy in the course of her closing address. For example, in the case law on the mental element of dishonesty in the law of theft — the twofold *Ghosh* [1982] QB 1053 direction — the Court of Appeal in England in *R v Roberts* (1985) 84 Cr App R 117, made it clear that the second limb of the *Ghosh* direction need only be given where the defendant has himself raised the issue.

I have, myself, only anecdotal evidence about the ordinary standards of decency in the Philippines and I certainly cannot accept Ms Moosdeen's ex cathedra submission that laxer standards apply generally in that country. To do so would, no doubt, be offensive to the vast majority of the inhabitants of the country. The prosecution have established its case against the second defendant beyond reasonable doubt and she must be convicted on the first charge.

[The judge went on to deal with the third defendant.]

Defendants stand up — Jeffrey Savage, ... you are convicted of the first charge.... Rita Manzano, you are convicted of the first charge. Larraine Jeanne Da Silva, you are convicted of the first charge.

Reported by Denise Chan