The Queen v Steven John Eldridge
[2005] NTSC 59

PARTIES:	THE QUEEN
	v
	STEVEN JOHN ELDRIDGE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	SCC/20510710
DELIVERED:	30 September 2005
HEARING DATES:	26 September 2005
JUDGMENT OF:	MILDREN J

CATCHWORDS:

CRIMINAL LAW – INDECENT DEALING –whether words without an act constitute an "indecent dealing" – Indictment quashed

Criminal Code ss 132, 132(2)(a) & (4), 132(2)(b)(d)(e)&(f), 187, 188

Followed
Drago v R (1992) 8 WAR 488; *R v P* (2002) Qd R 401

REPRESENTATION:

Counsel:

D.P.P.:	R. Brebner
Accused:	J. Franz

Solicitors:

Prosecutor:	Director of Public Prosecutions
Accused:	Northern Territory Legal Aid Commission

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN
No. SCC/20510710

The Queen v Steven John Eldridge
[2005] NTSC 59

BETWEEN:

THE QUEEN
Plaintiff

AND:

STEVEN JOHN ELDRIDGE
First Defendant

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 30 September 2005)

[1] In this matter, the accused was charged with indecently dealing with a child under the age of 16 years and that the indecent dealing involved the circumstance of aggravation that the child was under the age of 10 years, contrary to section 132(2)(a) and (4) of the Criminal Code.

[2] Upon his arraignment the accused pleaded guilty.

[3] The facts relied upon by the Crown in support of the charge were as follows:

On Tuesday 26 April 2005 the victim H, then aged 6 years, attended the Pint Club netball facilities with his mother. They arrived about 5pm. The child's mother was coaching netball and the child went to the nearby playground area to play.

The accused approached the child who was having trouble reaching the bar of a piece of equipment called a flying fox. The accused got the flying fox bar and gave it to the child. The accused then said to the child: "How big is your dick?" The child responded by showing a length between his two hands. The accused then said: "Come behind the circles and pull down your shorts so I can see how big your dick is". The circles are enclosed pipes in the playground.

The child became frightened and said that he had to go back to his mother. He then went to the netball courts where he spoke with his mother. He then repeated the conversation he had with the accused. The child's mother then comforted her son for a short time. Together they then returned to the playground to look for the accused but did not see him.

The child's mother then went back into the club and reported the incident to a bar tender. As a result enquiries were made and subsequently identified the accused as the alleged offender.

[4] After hearing those facts I expressed some doubt as to whether I should accept the plea.

[5] After hearing submissions I reached the conclusion that the facts did not support the charge, that I should reject the plea of guilty and quash the indictment. I said that I would provide reasons for my decision. I now do so.

[6] The offence of indecent dealing is a creature of statute. Only two other jurisdictions have such an offence, namely Queensland and Western Australia.

[7] Section 132 of the Criminal Code provides as follows:

"132 Indecent dealing with child under 16 years

(1) In this section, "deals with" includes the doing of any act which, if done without consent, would constitute an assault within the meaning of sections 187 and 188.

(2) Any person –

(a) indecently deals with a child under the age of 16 years;

(b) exposes a child under the age of 16 years to an indecent act by the offender or any other person;

(c) permits himself to be indecently dealt with by a child under the age of 16 years;

(d) procures a child under the age of 16 years to perform an indecent act;

(e) without legitimate reason, intentionally exposes a child under the age of 16 years to an indecent object or indecent film, video tape, audio tape, photograph or book; or

(f) without legitimate reason, intentionally takes or records, by means of any device, an indecent visual image of a child under the age of 16 years, is guilty of a crime and is liable to imprisonment for ten years.

(4) If the child is under the age of 10 years, the offender is liable to imprisonment for 14 years.

(5) It is a defence to a charge of a crime defined by this section to prove –

(a) the child was of or above the age of 14 years; and

(b) the accused person believed on reasonable grounds that the child was of or above the age of 16 years."

[8] On the facts of this case the accused did not have any bodily contact at all with the child. The conduct which is alleged to amount to indecent dealing with the child consisted only of words. The question then is whether such conduct can amount to an indecent dealing.

[9] Section 132(2) in my opinion creates six separate offences. It was submitted by Ms Brebner, counsel for the Crown that section 132(2)(a) is a "catch all" offence and that the offences created by subsections (b) to (f) are merely examples, albeit specific examples, of what amounts to an indecent dealing with a child. I reject that construction of section 132(2). Clearly the subsection sets out a series of separate offences each constituted by the particular sub-paragraph of section 132(2) of the Code.

[10] It is noteworthy that the offences created by subsections 132(2)(b)(d)(e) and (f) are all offences which could be committed without any touching of a child whatsoever. This tends to suggest that despite the width of the words "indecently deals" section 132(2)(a) does not cover activities in which there has not been a touching of some kind.

[11] I note also that section 132(1) makes it plain that "deals with" includes the doing of any act "which if done without consent, would constitute an assault within the meanings of sections 187 and 188." This subsection makes it plain that an indecent dealing includes a touching which would not amount

to an assault, perhaps because there was consent. It is to be noted that the definition of assault in section 187 means “the direct or indirect application of force to a person” in certain circumstances or (b) the attempted or threatened application of such force in certain circumstances. In the instant case there was no application of force either directly or indirectly and no threatened application of force either.

[12] Therefore, unaided by authority, I would have reached the conclusion that the offence was not made out in the case. However, there are two authorities to which I have been referred, which are of assistance. The first is a decision of the Western Australian Full Court in *Drago v R* (1992) 8 WAR 488 which held that in order to amount to an indecent dealing the conduct must involve the human body, bodily actions, or bodily functions in a sexual way and that it is not intended to target conduct which is simply outrageous or offensive to common propriety.

[13] The second is the decision of the Queensland Court of Appeal in *R v P* (2002) Qd R 401 where it was held that in circumstances very similar to the present there was no evidence of an indecent dealing. In that case the accused faced seven counts of sexual offences including one count of indecently dealing with his daughter on 25 December 1997 (count 6). In relation to that count the only evidence was that the appellant went into his daughter’s bedroom intending to have sexual intercourse with her and said to her that he wanted her to take off her clothes. The daughter said no, and “Why go to Church five times in one day and then come home and do this to

your own daughter? It's not right". The accused then left her alone that night.

[14] At p 406 Thomas JA and Chesterman J said:

> "…the complainant does not even make a bare assertion about the occurrence of some act which might be recognised as indecent dealing. She says no more than the appellant came to her room intending some sexual misconduct but went away when he was told the awfulness of what he intended."

[15] At p 407 their Honours went on to say that as a matter of law that evidence was incapable of establishing the offence of indecently dealing with a child under 16.

[16] These authorities support the conclusion I have reached, that, there being nothing more in this case than words spoken requesting the child to expose himself, the offence is not made out.