Neutral Citation Number: [2023] CA (Bda) 24 Crim

Criminal Appeal No. 1 of 2023

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS APPELLATE JURISDICTION
THE HON MRS JUSTICE SUBAIR WILLIAMS
CASE NUMBER 2021: No. 21

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL GEOFFREY BELL
and
JUSTICE OF APPEAL IAN KAWALEY

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Between:

RAYMOND CHARLTON

Appellant

-and-

THE KING

Respondent

Ms Elizabeth Christopher, Christopher's, for the Appellant

Mr Alan Richards, Office of Director of Public Prosecutions, for the Respondent

Hearing Date: 7 November 2023
Date of Judgment: 17 November 2023

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APPROVED JUDGMENT

BELL JA:

History

1. This appeal arises from proceedings in the Magistrates' Court, where Mr Charlton ("the Appellant") was originally charged with three offences. Two of these were charges of intrusion upon the privacy of a woman contrary to section 199(2) of the Criminal Code Act 1907 ("the Code") and the third was a charge of sexual assault contrary to section 323 of the Code. The incidents in question took place on 22 August 2018 (there is an error in the judgment in regard to the year). The case was heard between 18 March 2020 and 18 January 2021 and on 18 March 2020, the Wor. Craig Attridge ("the Magistrate") dismissed the first charge on the basis of the Crown's concession at the close of its case. Then, in his judgment dated 1 March 2021 the Magistrate found the second charge not proved and acquitted the Appellant of that charge, but convicted him on count 3, the sexual assault charge.

2. In relation to sentence, the Magistrate had submissions from both sides, a BARC report from the Department of Court Services dated 1 April 2021, a Social Inquiry Report dated 31 March 2021 and a Psychiatric Report from Dr Henagulph dated 25 May 2021 ("the First Report"). This last was a document of some 27 pages, with appendices. Finally, there were reports relating to the Appellant's attendance in August / September 2018 at the Mid-Atlantic Wellness Institute ("MWI"), and reports from Dr Hermann Thouet and Dr George Shaw. There were a number of appearances before the Magistrate, and on 14 June 2021, counsel for the Appellant, Ms Christopher, advised the Magistrate that she was considering an appeal based on the fresh evidence contained in the First Report, and the Magistrate agreed to adjourn sentencing while an appeal was pursued.

3. The Appellant duly pursued that appeal to the Supreme Court. The grounds of appeal referred firstly to the "fresh evidence" which it was asserted became apparent during the sentencing phase in the Magistrates' Court, via the First Report, in consequence of which it was contended that the conviction ought to be set aside.

4. One other feature of the case was that Ms Christopher had advised the Magistrate on the morning of 3 December 2020 that she needed a further brief adjournment within which to decide whether she would close her case or seek a further adjournment so that she could call additional expert evidence. At 2.30pm she advised the Magistrate that she was no longer calling expert evidence and accordingly closed her case. The evidence in question was in the form of a toxicology report dated 9 October 2019 from one Richard Brown, and although the defence decided against producing it before the Magistrate, Subair Williams J ("the Judge") who heard the appeal from the Magistrate, quoted from it extensively. Of the medications the Appellant was taking, Mr Brown took the view that only two, escitalopram and tramadol, could have had any appreciable effect on the Appellant's state of mind and recollection, and that they were likely to cause drowsiness, and could not account for the Appellant's actions. The Appellant's affidavit indicated that while he had informed Mr Brown of the various prescription drugs he was taking, he had not made any reference to his over-the-counter medications. Consequently, he contended that only limited assistance could be gained from Mr Brown's report. I pause to note that the Appellant could easily have taken the simple step of asking Mr Brown whether the additional information regarding the Appellant's use of over-the-counter medications affected any of the views he had expressed in his report.

5. Given the Appellant's use of cannabis in the period leading up to the commission of the offence, and Dr Henagulph's reference to his relatively small use, it should be noted that the Magistrate's notes of the trial record that the complainant referred to the fact that the Appellant had said that he had smoked weed that morning, and that she could tell he was high. The complainant's mother said that the Appellant had said that he hadn't been high before but was now. And the Appellant referred to suffering pain from a recent operation, for which he was using cannabis every two hours during the day.

The First Report

6. As appears from paragraph 2 above, this was a report produced after conviction for the purpose of speaking to sentence. In paragraph 2, Dr Henagulph referred to the Appellant's history of mild to moderate depressive episodes which had responded to treatment. He had been diagnosed as suffering from bipolar disorder but did not have self-harm or suicidal ideas. Further to those

episodes, the Appellant had experienced "a prolonged and moderately severe episode of mania without psychotic symptoms between February and August 2018". He continued in paragraph 3 to say that he was of the opinion that "it was this episode of mania that directly led to the offence and that the manic episode was likely the combination of prescription drugs and cannabis constituents".

7. Dr Henagulph referenced the Appellant's referral to MWI by Dr Shaw, noting that his referral letter stated that the Appellant was taking CBD oil for neck pain, and that he had been "smoking marijuana all day, every day". He had told Dr Shaw that he had been doing inappropriate things but didn't remember them. And he told the consultant psychiatrist that he had been using "so much cannabis".

8. Dr Henagulph detailed the over-the- counter and prescription medications the Appellant had been taking, basically an anti-depressant, and medication for acid reflux and pain relief. Regarding the Appellant's denial that he had committed the act of which he had been convicted, the doctor said it seemed to him that the act was so out of character that neither he nor his friends could countenance such a situation occurring. In his opinion the offence occurred while the Appellant was in the midst of a pathological manic state, and he believed that, but for his manic state, the offence would not have occurred.

9. Dr Henagulph detailed the Appellant's different medications. He then examined the impact that the main constituents of cannabis, THC and CBD, would have on the Appellant's medications. He opined that the Appellant was not taking any medications which would affect levels of THC, and likewise noted that THC would not have had a pharmacokinetic impact on any of his medications. He commented that the Appellant's use of cannabis appeared to have been central to both his explanation of events, and those of others. He noted the difference in the cognitive effects caused by intoxication with cannabis and those caused by alcohol. He commented that the Appellant was using relatively small, if frequent, amounts of cannabis in the weeks leading up to the offence, notwithstanding that the Appellant's use of cannabis had been sufficient for him to have become high on the day of the incident.

The appeal to the Supreme Court

10. The First Report had of course not been available before the Appellant's conviction by the Magistrate, but it was produced for the purpose of the sentencing hearing which was held before the Magistrate on 14 June 2021. During the course of that hearing Ms Christopher advised the Magistrate that she was considering an appeal based upon the fresh information contained in the First Report. The Magistrate granted a short adjournment so that Ms Christopher could consider that aspect further, and at 2.30pm, Ms Christopher undertook to file a notice of appeal against conviction on the basis of "the new information" contained in the First Report, and the Magistrate ordered a stay of the sentencing process pending the outcome of such appeal. In the event, the notice of appeal was filed on 22 June 2021, and was accompanied by an application for leave to adduce fresh evidence.

The Judge's judgment

11. The Judge's judgment is dated 22 December 2022. In it she summarised the material evidence at trial, and then referred to the unused toxicology report from Mr Brown, who is a forensic scientist with a degree in pharmacology specialising in, among other matters, the effects of alcohol, drugs and medications. He has been reporting on toxicology cases for twenty years. The Judge referred to the fact that although the Appellant's defence team had decided against producing Mr Brown's report at trial, it had been exhibited to an affidavit sworn by the Appellant. She reviewed the First Report which was the subject of the fresh evidence application, and then considered the judgment of the Magistrate and the grounds of appeal.

12. The gravamen of her finding in relation to the rejection of the application to adduce fresh evidence is contained in paragraphs 30 and 31 of her judgment, which are in the following terms:

> "*30. Having examined Dr. Henagulph's report, I am persuaded that his conclusions were drawn on a clear and express appreciation that the Appellant was incessantly smoking cannabis during a period covering 22 August 2018 when the offences were committed. So, it is evident that Dr. Henagulph would have kept the Appellant's cannabis-smoking at the forefront of his analysis when he opined that*

> *Mr. Charlton's episodes of mania directly resulted from the combination of the prescription medications and cannabis constituents.*
>
> *31. In my judgment, Dr. Henagulph's report does not give rise to a defence of involuntary intoxication. To the contrary, this is a clear case of voluntary intoxication, a principle which the learned magistrate properly considered. Dr. Henagulph's report outlines various examples in which the Appellant abused cannabis smoking during a period shortly prior to August 2018 when he suffered similar previous episodes which would also be described as manic. While the cannabis misuse is not reported to be the single cause of the offending behaviour, it was clearly a significant contributing factor. For those reasons, I deem it unnecessary to outline the reported effects of the prescription medications or the Ventra antacid"*

13. The Judge took the view that the First Report did not raise any reasonable doubt as to the Appellant's guilt, but rather provided an explanation as to the effects of the Appellant's voluntary intoxication. She took the view that voluntary intoxication was not capable of annulling the requisite *mens rea* on the part of the Appellant. And the Judge noted the conflicting positions advanced by the Appellant at trial and on appeal. Before the Magistrate the Appellant had denied performing the offending acts. On appeal he appeared to accept that he had committed the offending acts, leading to the offences with which he was charged, but that he had done so in an involuntary state of intoxication. She noted that the Magistrate had rejected the Appellant as a truthful witness (he said in terms that he did not find the Appellant to be an honest or credible witness) and saw no reason to interfere with his finding. Accordingly, the Judge refused the application to adduce fresh evidence.

This appeal

14. The Appellant filed his application for leave to appeal from the decision of the Supreme Court on 12 January 2023, appealing against both conviction and sentence. Although the application refers to 10 January 2022 as being the date of the Appellant's sentence, the correct date is 10 January 2023, as appears from Ms Christopher's sentencing submissions. The Magistrate's sentence was one of three months' imprisonment, suspended for two years, plus 12 months' probation, of which 10 months has now passed.

15. As canvassed during the course of argument, the problem in regard to an appeal against sentence is that an appeal from the Magistrates' Court can only be made to the Supreme Court, in accordance with the Criminal Appeal Act 1952. And as Mr Richards for the Crown pointed out, this court has no record in relation to the sentencing proceedings in Magistrates' Court, and the proper course is for Ms Christopher to apply out of time for an appeal against sentence to be heard in the Supreme Court. I would agree, and would therefore dismiss the appeal against sentence, subject to the comments I will make in regard to sentence later in this judgment.

Submissions

16. We were assisted by comprehensive written submissions on both sides, and also by an affidavit sworn by the Appellant dated 23 October 2023, which exhibited a further report from Dr Henagulph dated 30 April 2023 ("the Second Report"), as well as Mr Brown's report dated 9 October 2019, the report which had been secured prior to trial, but ultimately not used. I will turn first to the Second Report.

17. This report was in the form of questions posed by counsel to the doctor, and his responses. In paragraph 8, Dr Henagulph referred to the major interaction between esomeprazole, the acid reflux medication, and escitalopram, the anti-depressant. He then said that he had noted in his original report that tramadol, the medication for pain relief, and some cannabis (cannabidiol or CBD) "could have possibly contributed to this CYP inhibition". Perhaps it is the different use of language which causes the problem, but what was said in the First Report was that the Appellant's manic episode was "likely the direct result of a combination of prescription medications and cannabis constituents". The Second Report carried on to say that "the esomeprazole by itself would have likely been enough to cause levels high enough to trigger an episode of mania". During the course of argument, I expressed surprise to Ms Christopher that an over-the-counter medication by itself could lead to an episode of mania. But that is what the Second Report says.

18. The report next covered the Appellant's cannabis use. Dr Henagulph's view was that the presence of THC, the principal psychoactive constituent of cannabis which produces the "high" that recreational users seek, did not substantially contribute to the offending behaviour. His view was that the behaviours the Appellant engaged in were clear symptoms of a manic state of mind rather than a mind intoxicated by the THC of cannabis.

19. Ms Christopher's reliance on the Second Report was, as I understand it, intended to support the submission that a defence based on section 36 of the Code was available to the Appellant. Section 36 (1) is in the following terms:

> "*36 (1) Subject to the express provisions of this Act relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident"*

20. Ms Christopher stressed during her submissions that the Appellant had no recollection of what happened on the day in question. I am unable to accept that submission, as was the Judge. She made the comments identified in paragraph 13 above. And while the Appellant's evidence before the Magistrate referred to his memory being jogged; he was able to and did provide a detailed account covering the entirety of the time that he was with the complainant. Apart from the initial reference to his memory being jogged, repeated in cross-examination, he made no reference to any difficulty with his recollection of events.

21. Ms Christopher then returned to the section 36 argument. She referred to those sections of the First Report detailing the nature of the manic state said to have been suffered by the Appellant, in support of that argument. The problem she faces with that argument is that Dr Henagulph does not speak to the Appellant's state of mind in language which mirrors the wording of section 36. And for my part, I am not clear as to how the Appellant's behaviour could be described as "manic", a word which to the layman requires some manifestation of hyperactivity or excitement. Presumably Dr Henagulph was using the word in a medical context, but I would have found it helpful if he had

identified which aspects of the Appellant's behaviour while interacting with the complainant could be described as manic.

22. Ms Christopher also referred to section 41 of the Code, which deals with insanity, and the effect of section 42(1)(a)(ii), which concerns intoxication where the person whose mind is disordered by intoxication is unaware of the administering of the drug causing the intoxication. Again, Dr Henagulph's wording does not cover the relevant statutory provisions.

23. I will not at this stage address Mr Brown's report, simply because I do not think it helps the Appellant (something which seems to have been recognised in relation to the Appellant's sentencing).

24. Mr Richards approached the Second Report with reference to the Privy Council authority of *Lundy v R* [2013] UKPC 28. The judgment of Lord Kerr in that case deals with the admission of fresh evidence at paragraph 120, which is in the following terms:

> "*120. The Board considers that the proper basis on which admission of fresh evidence should be decided is by the application of a sequential series of tests. If the evidence is not credible, it should not be admitted. If it is credible, the question then arises whether it is fresh in the sense that it is evidence which could not have been obtained for the trial with reasonable diligence. If the evidence is both credible and fresh, it should generally be admitted unless the court is satisfied at that stage that, if admitted, it would have no effect on the safety of the conviction. If the evidence is credible but not fresh, the court should assess its strength and its potential impact on the safety of the conviction. If it considers that there is a risk of a miscarriage of justice if the evidence is excluded, it should be admitted, notwithstanding that the evidence is not fresh."*

25. In my view, the Second Report may be regarded as credible, but it is certainly not fresh. It could easily have been obtained in time for the trial before the Magistrate if those advising the Appellant had focussed on the issues covered in the report and had so chosen. In those circumstances, the court must assess its strength and potential impact on the safety of a conviction, and then go on to consider whether there is a risk of a miscarriage of justice if the evidence is excluded.

26. When one does that exercise, it becomes apparent that the problem for the Appellant is that identified in paragraphs 21 and 22 above. The report properly considered is not sufficient to establish a defence under either section 36 or 41/42 of the Code. It follows that I do not regard it as appropriate to admit the Second Report as fresh evidence, and I would refuse that application.

27. Ms Christopher puts her case on appeal in two ways, which I will consider notwithstanding my rejection of the application to adduce fresh evidence. First, she submitted that the Appellant did not have the *mens rea* to commit the offence, citing in support the English case of *R v Hardie* (1985) 80 Cr App R 157. In that case a defendant had consumed a quantity of Valium, and other tablets. He had agreed to leave the flat in which he was cohabiting with a woman, whose daughter also lived there. Having consumed the tablets he fell into a deep sleep, and a fire started. There was no dispute that he had started it, and he was charged with damaging property with an intent to endanger life. His defence was that he was so affected by the Valium that he could remember nothing about the fire and did not have the necessary *mens rea*. The judge directed the jury that because the Valium was administered by the defendant it was irrelevant as a defence. He was convicted and appealed. On appeal, it was held firstly that self-induced intoxication could be a defence where the charge was one of specific intention. Equally clearly, it could not be a defence where the charge included recklessness. Secondly, it was held that where the drug was merely soporific, the taking of it could not in the ordinary way raise a conclusive presumption of intoxication for the purpose of disproving *mens rea*. It was held that the jury should not have been directed to regard any incapacity which resulted or may have resulted from the consumption of Valium. They should have been directed that if they came to the conclusion that as a result of the Valium the appellant was, at the time, unable to appreciate the risks to property and persons from his actions they should consider whether the taking of the Valium was itself reckless.

28. The case was finely nuanced, but it can readily be seen that it can be distinguished from the case before us, which was not concerned with intoxication, but a manic state which did not involve the complete lack of recollection experienced in *Hardie*. I have already referred (paragraph 20 above) to the Appellant's very clear recollection of events given at trial. In short, *Hardie* does not assist the Appellant.

29. The second way Ms Christopher's case was put was that automatism arose, in accordance with section 36 of the Code. I have already indicated that even if admissible, the First and Second Reports do not support such a defence. Ms Christopher relied upon the Australian case of *R v Falconer* [1990] HCA 49. In that case a wife had killed her husband with a shotgun blast at short range. The husband had sexually abused the couple's two daughters, something the wife had only recently learned, and the husband had taunted the wife in regard to another case of sexual abuse. The wife called two psychiatrists who gave evidence of the wife's "full-blown dissociative state". So the medical evidence in *Falconer* was of a very different nature than that identified by Dr Henagulph in relation to the Appellant, even if that were to be ruled admissible.

30. It follows that this ground of appeal must fail, and I so find and dismiss the appeal against conviction.

Sentence

31. I have already referred to the fact that an appeal against sentence cannot be taken directly to this court from the Magistrates' Court. An application must be made to appeal out of time to the Supreme Court. Ms Christopher's submissions to this court had invited us to consider that an absolute or conditional discharge pursuant to section 69 of the Code would be appropriate.

32. No doubt on any appeal to the Supreme Court, counsel for the Appellant can make application for the First and Second Reports to be prayed in aid in mitigation and invite the Supreme Court to follow the course Ms Christopher urged before us. For my part I do not think it appropriate that I

should comment on the submissions on sentence, or seek to influence whichever judge of the Supreme Court decides sentence. I would not therefore comment further on the subject.

KAWALEY JA:

33. I agree that the application to admit fresh evidence should be refused and that the appeal against conviction and sentence should be dismissed for the reasons set out in the Judgment of Bell JA above. Two additional points warrant brief mention.

34. At the end of her oral submissions, Ms Christopher invited the Court to make it clear that, contrary to the findings recorded by Subair Williams J when dismissing the Supreme Court appeal, the Second Report does not indicate that the offence was committed while the Appellant was in a state of self-induced intoxication. In my judgment the Judge was clearly right to refuse to admit Dr Henagulph's Second Report as fresh evidence in support of an appeal against conviction on the fundamental ground that it did not support any legal defence. She was also right to conclude that the evidence before the Supreme Court was more consistent with self-induced intoxication than it was with any involuntary intoxication form of defence. When Subair Williams J (at paragraph 34 of her Judgment) referred to self-induced intoxication, she was not commenting on the Second Report.

35. In fairness to the Appellant, however, it ought to be made crystal clear that the Reports do support a potential finding that the offence was committed while the Appellant was in a manic state induced primarily by the interaction between two medications, with the impact of cannabis inconsequential. I say "potential finding" because it is not open to this Court to make findings on Report which is not properly admissible at this stage. For the same reason, I endorse Bell JA's view that it would be wrong in principle for this Court to express a view on the merits of an appeal against sentence which has yet been made to the Court below.

36. In fairness to Dr Henagulph, whose Reports were referred to in unflattering terms in the course of argument, some brief observations on the general approach to psychiatric reports to the Court

should be made. Psychiatric reports are most commonly prepared at the post-conviction/pre-sentencing stage. In that context, their purpose is self-evident. They are designed to assist the Court to evaluate the bearing an offender's mental state may have on their culpability for the offence and identify any need for treatment. In short, such reports are intended to assist the Court to impose an appropriate sentence. It is unusual in my experience for psychiatric evidence to be advanced in support of a potential defence. I am unaware of any rules of practice prescribing the approach to expert evidence being deployed in criminal cases.

37. In my judgment a psychiatric report in support of a defence will only clearly assist a court if it is prepared in the standard form used for expert reports in civil cases. The writer of an expert report will set out their qualifications, confirm that they understand that their duties as an expert witness are owed to the Court and set out the matters which they have been asked to address. A report supporting a legal defence should always set out the expert's understanding of what the elements of the defence are and (without usurping the Court's function by answering the question of guilt or innocence directly) explain clearly what factual elements of the defence the expert believes apply to the defendant's case. Was the defendant unable to control their actions? Did the defendant not understand the nature or quality of their acts? A 'medico-legal' report should always be relatively easy for judges and lawyers to make sense of in the context of each case. Had that approach been adopted in this case, it is difficult to avoid the suspicion that the appeal against conviction might not have been pursued. But the report produced would on any view have been far more accessible to the non-medical reader than were the First and Second Reports. I also concur with the guidance set out by the President in paragraph 42 below.

CLARKE P:

38. I agree with both judgments. This case is an illustration of the problems that arise from using material produced for one purpose for a different one. At the original hearing before the Magistrate no case was advanced that the assault was one for which the Appellant was not criminally responsible. His case was that the assault had not occurred. The First Report was produced to assist the Court in the sentencing exercise. Following conviction, the Appellant then sought to deploy

the First, and then the Second, Report to establish a defence under either section 36 or sections 41 and 42 of the Criminal Code. The First Report had not been written for that purpose and, not surprisingly, we decline to admit it on this appeal against conviction because it does not address the question whether the facts of this case fall within any of those sections, let alone establish that they do.

39. The First Report is, however, potentially relevant to the question of sentence. But, as Justice Bell has already pointed out, the question of sentence is not, and cannot be, before us because there is no right of appeal from the Magistrates' Court direct to the Court of Appeal in relation to sentence, as a result of which we do not even have the sentencing decision before us. If, therefore, the appeal against sentence is to be pursued, there will have to be an application to appeal out of time to the Supreme Court.

40. In those circumstances it is inappropriate for me to consider the First Report in any detail or to repeat the queries that I raised in respect of it in the course of the hearing. I would, however, wish to observe that, to the layman, it is, as Ms Christopher observed, not an easy read. This is not surprising since the potential effects of escitalopram, an anti-depressant, esomeprazole, an over-the-counter medication for acid reflux, and cannabis, by themselves or in combination is a recondite subject. The Second Report was, as I understand it intended to clarify the First; but it appears to depart somewhat from the First and, on one view, to create additional obscurity.

41. Such difficulty of understanding as I had was not resolved in the course of the hearing. Further study thereafter suggests to me that the point that was being made in the Second Report was that escitalopram, ingested in the quantities which the appellant appears to have ingested, could have triggered a manic episode; and that esomeprazole would or could have caused escitalopram to remain in the body and not be eliminated because esomeprazole can act as an inhibitor of the enzyme which would otherwise alter escitalopram in such a way as to facilitate its elimination from the body.

42. I mean no disrespect to Dr Henagulph when I say that I remain unsure as to whether I have correctly understood the import of the Second Report. And the question whether or not Dr Henagulph's analysis is correct is not for us to decide. I make these observations because (a) the difficulties of understanding that I have had may be shared by any member of the Supreme Court who has to consider these two reports; and (b) those advising the Appellant may wish to consider, whether, if leave is granted to appeal the sentence out of time and such an appeal is heard, it would be wise to arrange for Dr Henagulph to produce a further report and to attend to give evidence.