[2025] SC (Bda) 4 app. (13 Jan 25)

In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2022: No. 8

BETWEEN:

FIONA MILLER
(Police Sergeant)

Appellant

-and-

KOREE BRITTON

Respondent

Before: **The Hon. Mr. Justice Juan P. Wolffe, Puisne Judge**

Appearances: Mr. Carrington Mahoney for the Appellant
Ms. Susan Mulligan for the Respondent

Dates of Hearing: 3rd October 2024
Date of Judgment: 6th December 2024
Date of Reasons: 20th December 2024

JUDGMENT

Appeal against Acquittal – Sexual Assault contrary to section 323 of the Criminal Code Act 1907 (the "Criminal Code")– Respondent found guilty of the lesser and included offence of Common Assault contrary to section 314 of the Criminal Code – Right of Appeal by Prosecution

WOLFFE J:

1. On the 28th February 2022 The Worshipful Tyrone Chin found the Respondent not guilty of the offence of Sexual Assault contrary to section 323 of the Criminal Code Act 1907 (the

"Criminal Code") but found him guilty of the lesser and included offence of Common Assault contrary to section 314 of the Criminal Code. I will say more about this later.

2. The Prosecution (the Appellant) has now appealed the Learned Magistrate's verdict and they do so on the following grounds:

> "*(a) That the Learned Magistrate erred in law in that he misdirected himself as to the sexual element of the offence of sexual assault;*
>
> *(b) That the Learned Magistrate erred in law in that he failed to take account of all relevant factors when evaluating objectively whether the assault he found proved on the evidence was sexual in nature; and*
>
> *(c) That the Learned Magistrate erred in law in that he failed to give adequate reasons for his decision not to find the assault he found proved on the evidence to be sexual in nature.*"

3. On the 6th December 2024 I ruled that each of the Appellant's grounds of appeal should be upheld and set out below are my reasons for doing so.

4. The Appellant did not seek any further order to be made or for there to be a retrial. I therefore did not order such.

The Evidence at Trial

5. The voluminous trial notes taken by the Learned Magistrate reflect that the Respondent was a visiting Bermuda as a professional rugby player who participated in the annual Rugby Classic. On the night of the 21st November 2021 he went to The Front Yard establishment on Front Street in the City of Hamilton to socialize with some of his teammates. The Complainant[1] was also there socializing and prior to this night the Complainant and the Respondent had not met each other. Further, there was no evidence to suggest that the Complainant was in anyway whatsoever associated with or attended the Rugby Classic.

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[1] In order to maintain the Complainant's anonymity I will not mention his name.

6. The Appellant's case was that at some point the Complainant went over to his friend who was having a conversation with Respondent. The Complainant greeted his friend and as he did so the Respondent suddenly reached down and grabbed ahold of the Complainant's genitals with his right hand. CCTV footage of the Front Yard captured an image of the Respondent's right arm moving in a way which was described by the Complainant but it did not capture the Respondent's right hand making actual contact with the Complainant's genitals. The CCTV footage also showed the Complainant slapping the Respondent's arm away immediately thereafter which the Prosecution argued was consistent with the Complainant reacting to having his genitals just grabbed by the Respondent.

7. The Respondent elected to give evidence in his own defence and he stated that at no time whatsoever did he grab or make any contact with the Complainant's genitals, whether accidental or otherwise.

8. At the end of the evidential portion of the trial it was accepted by both Prosecution and Defence Counsel (who at the time was Mr. Saul Froomkin QC (as he then was)) that in reaching his verdict that the Learned Magistrate had to adopt a two stage process. The first stage was to establish whether an assault occurred, and if so to then move on to the second stage of establishing whether the assault was of a sexual nature. Both Counsel were *ad idem* that if the Prosecution did not prove beyond a reasonable doubt that an assault took place then that would be the end of the matter and that the Respondent would therefore be found not guilty of sexual assault (the offence charged) and accordingly discharged.

9. However, it appeared that the Learned Magistrate, on his own motion, introduced the possibility of the Respondent being found guilty of the lesser and included offence of common assault if he found that the Respondent did in fact assault the Complainant but that the assault was not of a sexual nature. It also appeared that both trial Counsel agreed that such an option was open to the Learned Magistrate and Mr. Carrington Mahoney (for the Appellant) nor Ms. Susan Mulligan (for the Respondent) who appeared before me on this appeal (they were not trial counsel) did not depart from that position.

Whether the Prosecution had a Right of Appeal

10. Before dealing with the substantive grounds of appeal I am obliged to address the issue as to whether I should have even heard this appeal. Section 4 of the Criminal Appeal Act 1952 (the "CAA") provides that the Prosecution's right of appeal in respect of a matter heard and determined by a court of summary jurisdiction is limited to questions of law alone. To this, and with reference to the decision of Subair Williams J in *Safiyah Talbot v. Fiona Miller [2020] SC (Bda) 40 App.*, Ms. Mulligan submitted that since this appeal is largely a critique of how the Learned Magistrate assessed the witnesses who gave evidence and referable to the findings of fact which the Learned Magistrate arrived at then the appeal does not fall within section 4 of the CAA and therefore the appeal should not be heard.

11. I align myself with the words of Subair Williams J in *Talbot* that an appellate court should be slow to criticize a trial Magistrate who would have had the sole opportunity to observe the demeanour of a witness and therefore would have been in the best position to assess the truthfulness of the witness' evidence and reach findings of fact. Obviously, such observations and assessments inevitably would lead a trial Magistrate to make the ultimate finding of guilt or innocence. I would add though that determining questions of law alone does not mean that the appellate court should completely stay away from any consideration of the findings of fact which were made by the trial Magistrate. In order to establish whether or not the trial Magistrate properly applied the relevant law it would be necessary to look at the evidence which was available at trial and then determine whether the findings of fact which the Magistrate did make were properly applied to the relevant law. And *vice versa*, whether the relevant law was properly applied to the evidence and any findings of fact (which the Learned Magistrate appears to accept on page 16 of the Appeal Record).

12. But it should not stop there. It should also be within the appellate court's purview to consider whether the trial Magistrate, when applying the relevant law, did not take into consideration certain facts or evidence, particularly where such facts or evidence was undisputed. In doing so, the appellant court need not (and indeed should not) venture down the road of assessing the demeanour of any witnesses or making findings of fact of its own.

13. Having reviewed the Appellant's grounds of appeal, and having heard the Appellant's submissions on appeal, I conclude that this appeal against the Learned Magistrate's decision is purely on questions of law alone and therefore does not offend section 4 of the CAA. As I understand it, the Appellant is seeking for this appellate court to review whether the Learned Magistrate, having made findings of fact, properly directed himself on the elements of the offence of sexual assault when he acquitted the Respondent of the said offence and then went on to convict him of the lesser and included offence of common assault. Accordingly, I find that the Appellant has a right of appeal in respect of all of its grounds of appeal.

Decision

Grounds 1 and 2

14. The Appellant's complaint is that the Learned Magistrate misdirected himself as to the sexual element of the offence of sexual assault (Ground 1) and that he failed to take into consideration all factors when deciding whether the assault that he did find to occur was sexual in nature (Ground 2). I will deal with Grounds 1 and 2 together as there is significant overlap between them.

15. At trial both the Prosecution and the Defence referred the Learned Magistrate to the Canadian Supreme Court authority of *R v. Dalton Chase [1987] 2 S.C.R 293* in order to assist him in establishing whether any assault by the Respondent, if so found, was sexual in nature. In rendering his verdict the Learned Magistrate had due regard to *Chase*[2] (as well as other authorities) and so I will do likewise.

16. The respondent in *Chase* was convicted of sexual assault for entering into the home of a 15 year old girl and thereupon squeezing her shoulders and grabbing her breasts. At trial the girl stated that the respondent also tried to grab her "private" but that he did not succeed.

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[2] See page 16 of the Appeal Record

The conviction was appealed to the Canadian Court of Appeal which expressed the view that the word "sexual" in the offence of sexual assault *"should be taken to refer to parts of the body, particularly the genitalia"* and that *"Because there was no contact with the complainant's genitals"* then the conviction should be set aside[3]. The Court of Appeal then went on to substitute the conviction for sexual assault for a conviction for common assault.

17. The Supreme Court[4] in <u>*Chase*</u> was then tasked with the sole question of what is the definition of "sexual assault" and it arrived at the following *verbatim* principles[5]:

    (i) Sexual assault is an assault committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated.

    (ii) The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one.

    (iii) The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanying by force, will be relevant.

    (iv) The test for the recognition of sexual assault does not depend solely on contact with specific areas of the human anatomy.

    (v) That sexual assault need not involve an attack by a member of one sex upon a member of the other.

    (vi) The accused's intent or purpose as well as his motive, if such motive is sexual gratification, is a factor.

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[3] See Headnote of <u>*Chase*</u>.

[4] In Canada their Supreme Court is the superior Court over their Court of Appeal whereas in Bermuda the "Supreme Court of Bermuda" is subordinate to the "Bermuda Court of Appeal".

[5] See pages 297, 298 and 303 of the Appeal Record.

18. Employing these principles the Supreme Court of Cananda ruled that *"there was ample evidence before the trial judge upon which he could find that sexual assault was committed"* and that *"viewed objectively in light of all the circumstances, it is clear that the conduct of the respondent in grabbing the complainant's breast constituted an assault of a sexual nature"*.[6] With this the Court set aside the conviction for common assault and restored the conviction of sexual assault.

19. It should be said that it would be a nonsensical endeavor indeed to lay down an exhaustive list of circumstances which may constitute a sexual assault (whether through case law or statute). Primarily because it must be accepted that not all touching of a "private" part (such as the genitals, breast or buttocks) automatically constitutes a sexual assault. If we follow this logic then it must also be accepted that the touching of a "non-private" part (such as an arm, leg, or shoulder) can still constitute a sexual assault. It all of course depends on the circumstances (as illuminated in Chase).

20. Having said this, my task in the appeal at bar is no different from that which was before the Supreme Court in Chase. That is, to decide whether the Learned Magistrate properly applied Chase-like principles in determining (i) whether there was ample evidence to illustrate that the Respondent assaulted the Complainant by grabbing the Complainant's genitals; and if so (ii) whether in all of the circumstances the grabbing of the Complainant's genitals by the Respondent was an assault of a sexual nature.

21. It is vitally important to note at the outset that the Learned Magistrate was satisfied beyond a reasonable doubt that the Respondent did assault the Complainant by the grabbing of his genitals (there was no evidence of any of the Complainant's non-private parts being touched or grabbed by the Respondent). In conclusively finding that the Respondent assaulted the Complainant in the way in which the Complainant said that he did the Learned Magistrate must have (a) found the Complainant to be a credible and reliable witness, and (b) completely rejected the defence of the Respondent that he did not in any way whatsoever touch or make

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[6] See page 298 of the Appeal Record.

contact with any part of the Complainant's body. Having found that the Respondent assaulted the Complainant by grabbing his genitals the Learned Magistrate was then left with determining whether the said assault was sexual in nature such that the sexual integrity of the Complainant was violated.

22. Having reviewed all of the evidence in this case I am compelled to conclude that the Learned Magistrate's finding that the grabbing of the Complainant's genitals was not sexual in nature, and his subsequent finding that only a common assault was committed by the Respondent, do not accord with the principles set out in *Chase* nor with the Prosecution's evidence at trial which was mostly accepted by the Learned Magistrate. Equally noteworthy, the Learned Magistrate's findings are inconsistent with the evidence that was stated by the Respondent himself.

23. To compound matters, it would appear that in reaching his decision that the assault was not of a sexual nature the Learned Magistrate imported into the factual matrix circumstances which were not advanced evidentially by either the Prosecution or the Defence but seemed to have provided the primary basis upon which the Learned Magistrate rendered his verdicts of not guilty for sexual assault but guilty for common assault.

24. I will now therefore turn to the Learned Magistrate's commentary and findings of fact from his Judgment which can be distilled as follows (the complete version of the Learned Magistrate's Judgment can be found from pages 6 to 18 of the Appeal Record):

    (i) The overall 'atmosphere or vibe" of the bar was *"convivial and loud"* by any reasonable person's standards.

    (ii) The Complainant's friend and the Respondent are seen "manly hugging" at the bar.

    (iii) Within one (1) second of the Complainant coming up to his friend the Respondent turns around and makes contact with the Complainant's genitals.

(iv) Both the Complainant and the Respondent are heterosexual men.

(v) The Complainant gave evidence that at the material time the Respondent said that the grabbing of his genitals was a "joke".

(vi) After the incident the Respondent offered to buy the Complainant drinks to which the Complainant said *"He better"*.

(vii) The Complainant stated on multiple occasions that he was concerned about his *"public status"* and that this *"played much on the complainant [sic] witness' mentally"*.

(viii) The Respondent admitted that "cuddling and kissing" on the facial cheeks is a celebration known to be done in rugby with teammates and is generally accepted in rugby circles.

(ix) The Court was surprised by the Respondent's answer that he had not known of other team mates touching each other in more sensitive areas, such as on the posterior for formality or on the genitals.

25. Further, under the subheading "Reasoning and Findings" found on page 17 of the Appeal Record, the Learned Magistrate wrote that he took into consideration the following before finding that the Respondent's touching of the Complainant's genitals was not of a sexual nature:

(i) That the Respondent did touch the Complainant's genitals and that this took place within one (1) to two (2) seconds of the Respondent seeing the Complainant (Ms. Mulligan is incorrect that the Learned Magistrate did not make a finding that the Respondent touched the Complainant's genitals).

(ii) The Respondent's reason for being in Bermuda i.e. as a member of a team in the annual Rugby Classic.

(iii) The overall surroundings, the scenario, the time and the location of the incident.

(iv) The element of "skylarking" as set out in the extract from section 271 of Martin's Criminal Code 2018 (which was handed to the Learned Magistrate by the Prosecution during closing submissions).

(v) The Complainant's evidence that after the incident the Respondent said that it was a "joke". The Learned Magistrate found that *"it was not a joke shared or embraced by the Complainant who felt otherwise"*.

26. It appears that the Learned Magistrate's decision that the assault on the Complainant by the Respondent was not of a sexual nature hinged on his findings that the grabbing of the Complainant's genitals by the Respondent was a 1 to 2 second encounter; that the assault was some form of skylarking; that the atmosphere at the Front Yard was convivial and loud; and, that the Complainant said that the Respondent said that the grabbing of his genitals was a joke. However, none of this, individually or collectively, should have taken the assault outside of the definition of sexual assault as contemplated by *Chase*.

27. I should this point more. The Learned Magistrate properly had in his mind that the Court should take into consideration all of the circumstances in determining whether an assault took place and then to determine whether the assault was of a sexual nature. So it is clear to me that the Learned Magistrate had due regard to *Chase*. However, in reaching his decision the Learned Magistrate:

(i) Does not adequately or at all address his mind or pen to the central elements of the definition of sexual assault as referred to in *Chase*. Such as: the part of the Complainant's body that was touched i.e. the Complainant's genitals, and, whether the sexual integrity of the Complainant had been violated.

(ii) Not only misapplied Chase to the facts which he did find but he also applied Chase and Martin's Criminal Code to facts which did not exist.

28. So contrary to Ms. Mulligan's submissions, this appeal does not boil down to whether the Learned Magistrate accepted the Complainant's evidence over that of the Respondent's evidence, and nor is it about carrying out a comparative assessment of the respective credibility of the Complainant and the Respondent. This Appeal is purely about how the Learned Magistrate used or did not use the applicable law to facts which he did hear and to facts which he did not hear.

29. The examples are numerous. The Learned Magistrate accepted the Complainant's evidence and found that the Respondent reached out and "grabbed" the Complainant's "genitals" but it would appear that these significant findings did not make their way into the Learned Magistrate's final finding that the assault on the Complainant was not sexual in nature. Had the Learned Magistrate had reasonable regard to these findings it should have been extremely difficult for him to conclude that this assault was a case of simple "touching" (as was sometimes characterized by the Learned Magistrate) which would have placed it on the less serious end of the nature of the contact. The evidence shows, and the Learned Magistrate must have accepted, that this was a full-on groping of the Complainant's genitals by the Respondent which should have put the nature of the contact at a far higher level.

30. Moreover, it matters not that the contact took place over a period of 1 to 2 seconds. For some reason, the time over which the assault took place was unduly pressing on the Learned Magistrate's mind, and it appears that this was in the favour of the Respondent. It is correct that Chase provides that all of the circumstances should be looked at but the time over which a touching took place should not be majorly deciding factor. Chase is not an authority for the proposition that the shorter in time of the contact then the least likely the contact will be deemed to be of a sexual nature. If I am wrong and Chase is such an authority then I would respectfully depart from this reasoning. This because 1 or 2 seconds, or even a split second, are all that is often needed for a sexual assault to take place. A momentary grazing of a

private part can still constitute an assault of a sexual nature. It would be an unjust state of affairs indeed if an accused person can use as a defence that the touching of a victim's private parts was not sexual because it only occurred over a 1 second time frame. Therefore, I find that the Learned Magistrate's apparent heavy reliance on a 1 to 2 second time period to contribute to his finding that the assault on the Complainant by the Respondent was not of a sexual nature was unwarranted and was an error.

31. In respect of whether the Complainant's sexual integrity had been violated there was ample evidence from which the Learned Magistrate could have established that it was. On numerous occasions the Complainant spoke about how he experienced *"a million of emotions"* when the incident occurred, with the main one being a feeling of emasculation. He also spoke about feeling totally disgusted to the point that he asked to take a comfort break during the giving of his evidence. Yet, it would appear that the Learned Magistrate did not take any of this evidence into consideration when deciding whether the Complainant's sexual integrity was violated.

32. The Learned Magistrate also made note of the fact that both the Complainant and the Respondent were both heterosexual. It is unclear as to whether the Learned Magistrate used this evidence, consciously or subconsciously, to find that the assault was <u>not</u> sexual in nature but I suspect that he did. If I am correct then the Learned Magistrate erred in doing so. As *<u>Chase</u>* makes clear, a sexual assault need not involve an attack by a member of one sex upon a member of the other. So the fact that both the Complainant and the Respondent are heterosexual matters not as a sexual assault can occur between members of the same sex as it would with members of the opposite sex. Moreover, a sexual assault can occur whether the accused person or their victim is either heterosexual or homosexual, and, one's sexual integrity may be violated no matter one's sexual orientation.

33. It was therefore unnecessary for the Learned Magistrate to even ponder whether the Complainant would have felt that his sexual integrity had been violated if his genitals were grabbed by a woman rather than by a male (see page 13 of the Appeal Record). Clearly and undisputedly a male can feel violated if touched by a female in a sexual way without his

consent and such consideration should not have entered into the Learned Magistrate's thinking when deciding whether the grabbing of the Complainant's genitals by a male offender was sexual in nature.

34. The Learned Magistrate also appears to give attention to the fact that the incident took place in public, along with his finding that the atmosphere was convivial and loud, to help him decide that the grabbing of the Complainant's genitals by the Respondent was not of a sexual nature. He was entitled to do so, but I find that he did not give enough or any concurrent attention to how the conduct being carried out by the Respondent in a public place helped or did not help him decide whether the Complainant's sexual integrity had been violated. There was no dispute that at the time that the Respondent grabbed the Complainant's genitals that the Front Yard was packet with patrons, and most importantly, that the incident was done in the presence of others. The Complainant also said that he felt "emasculated". This is evidence upon which the Learned Magistrate could have and indeed should have used to conclude that the Complainant's sexual integrity had been violated when the Respondent grabbed his genitals in a packed bar. Instead, it would appear that the Learned Magistrate used the Complainant's evidence of him being a public figure and being worried about his image because of the incident to somehow diminish the Complainant's feelings that his sexual integrity was in fact violated. However, there was another perspective which the Learned Magistrate did not consider. That is, that it is because the incident was in a public place where others could have witnessed it that it is more reasonable to conclude that the Complainant's sexual integrity was violated. It does not appear that the Learned Magistrate considered this other more plausible possibility and in not doing so he was in error.

35. This leads me to the Learned Magistrate's unmerited weight that he placed on the Complainant and the Respondent being engaged in some form of skylarking at the material time, and the evidence of the Complainant saying that the Respondent said that the grabbing of his genitals was a joke.

36. It cannot be put any simpler, there was no evidence whatsoever, from either the Prosecution or the Defence, that the Complainant and the Respondent were engaged in some form of

skylarking. It appears that the Learned Magistrate, on his own, invoked section 271 of Martin's Criminal Code and imported into the factual matrix evidence of skylarking between the Complainant and the Respondent which did not exist. For the Learned Magistrate to have relied on Martin's Criminal Code he would have had to first find that skylarking was a part of the regular life between the Complainant and the Respondent for many years without there being any sexual connotation (using the words set out in section 271 of Martin's Criminal Code). Such a finding would inevitably have faltered at the starting blocks because there was no evidence of any history of skylarking between the Complainant and the Respondent. There was no evidence that they even knew each other before the incident. To further and conclusively hammer home this point, the Respondent gave evidence in his own defence and not only did he not speak about any skylarking he was adamant that there was no contact whatsoever between him and the Complainant.

37. The same can be said of whether the Respondent was joking when he grabbed the Complainant's genitals. Again, when the Respondent gave evidence his position was that he made no contact whatsoever with the Complainant and so no evidence of the grabbing of the Complainant's genitals as being a joke was ever uttered by Respondent. It would appear that the Learned Magistrate used the evidence of the Complainant that the Respondent said that he was joking to make a finding of fact that the Respondent was joking when he grabbed the Complainant's genitals. The Learned Magistrate erred in making such a finding given the paucity of evidence of any joking. The Learned Magistrate then compounded this error by using the evidence as to joking to conclusively find that the assault of the Complainant by the Respondent was not sexual in nature.

38. The upshot is that there was no justification whatsoever for any act of skylarking or joking to have even entered into the psyche of the Learned Magistrate when he was deciding whether the assault on the Complainant by the Respondent was sexual in nature. Indeed, if he did find that the two were skylarking or that the Respondent was in fact joking then it stands to reason that he would not have found the Respondent even guilty of common assault.

39. Related to this is the apparent manner in which the Learned Magistrate elevated the atmosphere at the Front Yard on the night of the incident. There is no dispute that the Front Yard was pulsating with activity which was likely heightened by the consumption of alcohol. There is also no dispute that the Front Yard had other rugby players celebrating the Rugby Classic. However, and I am sure that it was not the Learned Magistrate's intention, implicitly and unintentionally woven into the trial evidence and the Learned Magistrate's reasoning is that certain frivolity or innocent mischief is expected of rugby players. Let me be clear. I am certainly not saying that any rugby player or rugby organization condones or encourages any untoward behaviour towards others but we must be careful not to diminish such which may take place at an event or place because the players and/or fans may be known to go overboard in their celebrations. This point is bolstered by two pieces of evidence. Firstly, it is undisputed that the Complainant had nothing whatsoever to do with rugby or the Rugby Classic. So it could not have been said that the Complainant should have expected some level of rowdiness at the Front Yard by rugby players.

40. Secondly and most tellingly is the evidence of the Respondent himself that he has never known other teammates to touch each other in more sensitive areas such as on the posterior (i.e. buttocks) for formality or on the genitals. To this evidence, on page 13 of the Appeal Record the Learned Magistrate stated that he was surprised by this answer. The Learned Magistrate does not go on to state why he was surprised by the Respondent's answer but his surprise gives the impression that he expected a different answer. That is, that rugby players do get up to such hijinks. It also leaves the impression that this was operating on the Learned Magistrates' mind, along with his apparent reliance on there being skylarking and joking, when he concluded that the grabbing of the Complainant's genitals by the Respondent was not sexual in nature. If I am correct, and I strongly suspect that I am, then the Learned Magistrate erred in doing so.

41. In the circumstances, I allow Grounds 1 and 2 of the Appellant's Appeal.

Ground 3

42. This Appeal succeeds on Grounds 1 and 2 for the reasons set out in the preceding paragraphs and so there may be no need to address Ground 3. However, I am inclined to give Ground 3 some attention.

43. The Appellant argues that the Learned Magistrate failed to give adequate reasons for his decision not to find that the assault was sexual in nature. There is no doubt that the Learned Magistrate made copious accurate notes of the evidence heard at trial and of the submissions made by Counsel (for which he probably should be commended). Indeed, the first eight (8) pages of his thirteen (13) page Judgment is an exact recitation of large swaths of the evidence heard by the Learned Magistrate (replete with the actual verbatim questions asked and answers given by the Complainant and the Respondent). While this coverage is useful for evidential and contextual purposes it did not shed light on any foundational reasons as to why or to what extent the Learned Magistrate came to the decisions which he did, including his decision that the assault was not sexual in nature.

44. It was not until page 9 of the Judgment that the Learned Magistrate listed his findings of fact and not until page 11 that he set out the applicable law. From this there can be no criticism that the Learned Magistrate did not fully turn his mind to what facts he found to be established on the evidence or to what the applicable law was in the case. The issue which the Appellant has, as I see it to be, is that the Learned Magistrate did not give any or any adequate reasons as to why he arrived at or did not arrive at certain consequential conclusions and findings of fact which were the epicenter of his final decision that the proven assault on the Complainant by the Respondent was not sexual in nature.

45. Having reviewed the Learned Magistrate's Judgment, particularly the contents under the headings "Reasoning and Findings" and "Conclusion", I am compelled to accept the Appellant's submissions in this regard. I mentioned or alluded to some examples of this in earlier paragraphs. Such as, a lack of reasons as to why he:

(i) Considered that the grabbing of the Complainant's genitals by the Respondent within two (2) seconds was important to his decision that the grabbing was not sexual in nature.

(ii) Considered that the Complainant and Respondent were "skylarking" when there was no evidence of such.

(iii) Considered that the Respondent was joking when he grabbed the Complainant's genitals even though the Respondent's evidence was that he never made any contact whatsoever with the Complainant's body.

(iv) Considered that the atmosphere at the Front Yard at the material time was a factor in determining that the assault was not sexual in nature.

(v) Considered that the grabbing of the Complainant's genitals by the Respondent did not violate the Complainant's sexual integrity.

(vi) Considered whether the Complainant would have felt that his sexual integrity would have been violated if the Respondent were a female, and to what extent did the fact that both the Complainant and the Respondent were heterosexual factor into his decision.

(vii) Did not consider the Complainant's evidence as to his feelings after having his genitals grabbed by the Respondent as being evidence going towards the Complainant's sexual integrity being violated.

(viii) Found surprising the Respondent's evidence that rugby teammates do not touch each other in sensitive areas and to what extent his surprise factored into his decision that the Respondent grabbing the Complainant's genitals was not sexual in nature.

46. The Learned Magistrate's failure to provide adequate reasons for the above lead to his failure to provide adequate reasons for his decision to find that the assault on the Complainant by the Respondent was not sexual in nature.

47. In the circumstances, I allow Ground 3 of the Appellant's Appeal.

Conclusion

48. In consideration of the above paragraphs I allow Grounds 1, 2 and 3 of the Appellant's Appeal.

49. The Appellant does not seek any retrial of the matter and therefore I do not make any further order.

Dated the 20th day of December 2024

The Hon. Mr. Justice Juan P. Wolffe
Puisne Judge