In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2017: 14

X

Appellant

-v-

THE QUEEN

Respondent

JUDGMENT

(in Court)[1]

Appeal against conviction-sexual exploitation of a young person-intruding on the privacy of a female-sufficiency of evidence of date of commission of alleged offences-adequacy of reasons

Date of hearing: June 11, 2018
Date of Judgment: June 19, 2018

Mr Kamal Worrell, Martin L Johnson Barrister & Attorney, for the Appellant
Ms Nicole Smith, Office of the Director of Public Prosecutions, for the Respondent

[1] The present judgment was circulated without a hearing.

Background

1. On January 22, 2014, the Appellant was convicted in the Magistrates' Court (Wor. Khamisi Tokunbo) of sexually assaulting a young person (Criminal Code, section 182A) and intruding on the privacy of a girl (Criminal Code, section 199(2). He appealed against his conviction on January 27, 2014 before sentence, with the unsatisfactory automatic legal consequence that the sentencing hearing was automatically stayed by virtue of section 11(1) of the Criminal Appeal Act 1952.

2. The appeal record was promptly prepared and the matter was listed before me on June 18, 2014 when a full transcript was ordered of the evidence of the Complainant ("C") and her Mother ("M"). However the present appeal would soon be overshadowed by even more serious charges involving sexual assaults on a minor of which the Appellant was convicted in the Supreme Court. On July 25, 2014, the Appellant was sentenced to a total of 10 years imprisonment by Greaves J, and his appeal against conviction was dismissed by the Court of Appeal on March 18, 2015.

3. The present appeal came back to life when the Appellant's current counsel (who did not appear at trial below) obtained a Legal Aid Certificate on January 21, 2017. The Transcript was filed on June 8, 2017 and an Amended Notice of Appeal was filed on August 31, 2017. Ground 4 complained that Defence Counsel had failed to properly conduct X's Defence at trial. This resulted in Affidavits being sworn and filed by both the Appellant and his former attorney Mr Bailey. The appeal was listed for hearing on October 24, 2017 when the matter was adjourned to a date to be fixed, in part to enable Mr Bailey to attend for cross-examination.

4. The matter was listed for substantive hearing on June 11, 2018, but seemingly without reference to the availability of Mr Bailey who was unable to attend because he was overseas. Mr Worrell sensibly elected to proceed with the appeal in the hope that the need to rely upon the misconduct of the Defence ground of appeal would not arise.

5. Having heard counsel, I allowed the appeal and quashed the two impugned convictions on other grounds and now give reasons for that decision.

Overview of the trial in the Magistrates' Court

6. X was initially charged in the Magistrates' Court on April 8, 2013 with committing the following three offences:

    (1) between January 1, 2010 and December 31 2011, touching C, a young person under the age of 16, for a sexual purpose contrary to section 182A of the Criminal Code;

(2) between January 1, 2010 and December 31, 2011, touching C, a young person under the age of 16, for a sexual purpose contrary to section 182A of the Criminal Code;

(3) between October 1, 2012 and December 31, 2012, intruded on the privacy of a girl, C, in way which was likely to and did alarm her.

7. The trial commenced on July 13, 2013 with C, extensively cross-examined, on the witness stand for most of the day. The matter was adjourned to 2.30pm on July 30, 2013 when M (who at one time was in a relationship with the Appellant) gave evidence and was on the witness stand for the entire afternoon. The matter was adjourned for the Defence case to September 20, 2013 when the Defendant gave evidence. The trial concluded on December 18, 2013 when the Appellant's witness was called and closing speeches were delivered. Judgment was fixed for January 22, 2014 when it was duly delivered, some six months after C gave her evidence.

8. C's complaint was that on dates unknown during calendar years 2010 and 2011, but in two incidents each no more than two-three weeks apart, she was assaulted by X on a boat and in a hotel pool (Counts 1 and 2, the first and second incidents). Count 3 (the third incident) was alleged to have occurred at home in the last three months of 2012, shortly before complaint was made to the Police. The Defence case was that C's evidence was unreliable because her account of Count 1 was improbable and the alleged incident was first reported a year later, X's witness proved that the pool the second incident had supposedly occurred in was empty at the date of Count 2, and the evidence on Count 3 was tenuous. Broadly, it was submitted that the evidence was insufficient and that it would be dangerous to convict.

Grounds of Appeal

9. The Amended Grounds of Appeal set out the following complaints:

(1) erroneous findings of fact were made against the appellant;

(2) it was wrong to find that C was mistaken about the date of the second offence rather than that she was an unreliable witness;

(3) the age of C was not sufficiently proved;

(4) Defence counsel failed to properly represent the Appellant at trial by:

(a) failing to call C's brother; and

(b) failing to rely on inconsistencies between the Prosecution witnesses and failing to draw C's previous inconsistent statements to the attention of the Court.

Ground 1

10. Mr Worrell in his Skeleton Argument complained about a single erroneous finding relating to the Appellant conceding being at the hotel pool with C at a time when the pool was open. As the Appellant was acquitted on Count 2 (the sole offence alleged to have occurred at the pool), it was impossible to see how any such error supported an appeal against his convictions on counts 1 and 3. This ground of appeal failed.

Ground 2

11. This ground of appeal was relied upon in support of the appeal against the conviction on Count 1, which fell within the same date range (2010-2011) as Count 2 on which the Appellant was acquitted. The basis of the acquittal was that there was a reasonable doubt as to whether the incident occurred within the date range which was an essential element of the particular charge. Mr Worrell submitted:

> "*6. There was independent and undisputed evidence that the pool in question was drained and out of service as of December 2009.*
>
> *7. Thus, if an 'incident' happened in the swimming pool it 'must' have taken place before December 2009. And if the second alleged offence took place 2-3 weeks after the first then the first alleged offence* <u>*must*</u> *also have taken place before December 2009.*
>
> *8. However, the Information alleges that both offences were committed between 2010 and 2011. Therefore, once the magistrate concluded that the second charge had to be dismissed, it should have followed that the first charge also had to be dismissed.*
>
> *9. Further, although the magistrate rightly acquitted the Appellant of the second count on the Information, he ought to have concluded that the testimony of the complainant on this point adversely and fatally affected her credibility generally so that the third count should likewise have been dismissed.*"

12. Ms Smith in response rightly submitted that it did not follow automatically that if C was wrong on when the second incident happened that she was also wrong on when the first incident happened. Each count falls to be analysed separately. But when a witness links two separate incidents alleged to have occurred within the same time-frame and places them in close proximity to each other, doubt about when one incident occurs necessarily raises doubt about when the other incident occurred. Some explanation is required from the trial judge who is not sure when one incident occurred as to why he is sure that the connected incident did in fact occur within the period alleged in the charge.

13. C's evidence was that the first incident took place 2-3 weeks before the second incident. Independent evidence established that the second incident (if it occurred at all) must have taken place before December 2009. If C was right about the first incident taking place 2-3 weeks before the second incident, then the first incident must have taken place in or about early November 2009, outside of the date-range which formed the subject of Count 1. The Court could only have been sure that the Appellant was guilty on Count 1 unless the Court was satisfied that although C was clearly wrong about when the second incident occurred, she was:

    (a) right in testifying that the first incident occurred in the alleged time-period (2010-2011); <u>despite the fact that</u>

    (b) she was also clearly wrong about believing that the first incident occurred before the second incident.

14. Ms Smith valiantly attempted to persuade me that it was obvious that the Learned Magistrate had implicitly undertaken this analysis. In my judgment this was an important point for determination which needed to be <u>expressly</u> recorded. Section 83 of the Criminal Jurisdiction and Procedure Act 2015 provides:

    "*(5) The record of proceedings must include the magistrates' court's final judgment in writing, which will include—*

    (a) the point or points for determination;

    (b) the decision made on such points; and

    (c) the reasons for the decisions."

15. This Court should interpret these provisions in a common sense manner designed to ensure that substantial justice is achieved. Where it is obvious as matter of inference that a central factual finding expressly recorded in a judgment includes subsidiary factual findings, no breach of section 83(5) will (ordinarily) be found to have occurred. It will often be possible to establish what the trial judge consciously considered by analysing whether or not a submission was made by counsel and clearly rejected. When this happens, the absence of an express finding on an issue addressed by counsel may involve a technical breach of section 83(5) which not undermine the safeness of a conviction. This is not such a case. The way Defence Counsel's submissions on Counts 1 and 2 were recorded by the Learned Magistrate in his notes were as follows:

> "*Count 1-Assault on boat was supposed to happen when brother was between them. Victim never complained about it. It was over a year later when she did.*
>
> *Count 2-No water in pool…*"

16. The Learned Magistrate's findings on the credibility of C were that he rejected the suggestion that she had fabricated the allegations and concluded: "*In my judgment she gave an honest and consistent account of her recollection of what transpired between her and the Defendant.*" He then recorded a summary of the Defendant's evidence. This was followed by the following findings on Count 2:

> "*In my view an incident did occur in the swimming pool, as told by the Complainant, but she is clearly quite off/mistaken as to when it happened. For this reason there is real doubt as to when the offence occurred and that doubt must be exercised in favour of the Defendant.*"

17. The findings on when the first incident occurred were simply recorded as follows:

> "*1) That the Complainant… is and was a young person under the age of 16 when the alleged offence in Count 1 was committed between 1st January 2010 and 31st December 2011…*"

18. There was no explanation at all as to how the inconsistency between C's assertion that the first and second incident took place no more than three weeks apart and the finding that the second incident must have happened before December 2009 was resolved. Why did the Court find that the inconsistency about when the pool incident occurred raised a doubt as to whether the Count 2 offence occurred within the period covered by that charge, but raised no doubt about whether the Count 1 incident took place within the same time period? If the Court found that C was mistaken about which incident occurred first (the only basis upon which the findings on Count 1 and

2 could properly have been made), why did that mistake not impact the reliability of her evidence in relation to when Count 1 occurred? These questions were left unanswered and, taking into account the unsatisfactory way in which the evidence on the issue of time in relation to Count 3 was dealt with (see below), the absence of reasons for the decision to convict on Count 1 clearly required the conviction to be set aside.

19. According to the record, Prosecution counsel made no closing submissions at all. The Prosecution is not recorded as having invited the Court to convict on Count 1 even if in doubt on Count 2 on the basis that C was simply mistaken about which incident happened first.. The record suggests that either Defence Counsel did not address the issue of the extent to which doubt on when the incident which formed the subject of Count 2 impacted on Count 1, or the Learned Magistrate did not record any such submission which was made. Had either counsel clearly expressly addressed the issue of how Count 1 would be impacted by doubt about when the second incident occurred, it might have been possible to infer that the Court clearly considered this important issue and the absence of an express finding might not have been fatal.

Ground 3

20. The sufficiency of the evidence of C's age, confirmed by her mother, was not challenged at trial. This ground of appeal had no merit and was summarily refused.

Ground 4 (b)

21. Mr Worrell sensibly conceded that without cross-examining Mr Bailey, he could not pursue ground 4(a). Ground 4(b) complained of a failure to rely upon various inconsistencies which were set out in the Appellant's '*Particulars of Ground 4(b) of Amended Notice of Appeal*', filed in Court on September 7, 2017. It was not necessary for the Court to consider more than the first of eight paragraphs:

> "*In her statement at page 14 line 45, the complainant says that the third offence 'had to be a year ago.' However she also stated that the 3rd offence took place a few months ago. Then in her evidence she stated that she did not remember when in 2012 the 3rd offence took place.*"

22. A review of the record revealed a problem more fundamental than a failure by trial counsel to deal with an inconsistency: there was a serious gap in the evidence in relation to when the third incident occurred. In this regard, the request for a full transcript of the evidence of C and her mother was fully vindicated. Remembering that Count 3 was alleged to have occurred between October 1 and December 31, 2012, the critical portion of her examination-in-chief (in which she testified that the third incident happened in 2012) went as follows:

Q: "*2012. Do you remember whether it was the early part, or middle part, or the later part of that year?*"

A: "*No I don't remember….*"

Q: "*Was that after your birthday in March or before, or you not say?*"

A: "*I don't remember.*"

23. C was cross-examined extensively on when the third incident occurred and relatedly said that she could not remember what part of 2012 the incident took place in. C's mother was not at home when the third incident was said to have occurred. She explained that C first accused the Appellant of molesting her at a family meeting convened in January 2013 to investigate suspected sexual activity between C and a boy in the neighbourhood. A complaint was made to the Police on January 24, 2013, but C's mother shed no light on when Count 3 occurred. The report to the Police in early 2013 was not linked to C reporting that the third incident had recently occurred.

24. In short, there was no evidence to prove an essential element of the offence, namely whether or not Count 3 was committed between October 1, 2012 and December 31, 2012. Ms Smith reluctantly but sensibly conceded that the conviction on Count 3 could not be supported. This was not because of a failure to properly present the Defence case, but on the more fundamental ground that there was no evidence at all adduced by the Crown to prove that the offence occurred within the last three months of 2012. Since neither Crown Counsel nor Defence Counsel seems to have spotted this evidential gap and drawn it to the Court's attention, it is unsurprising that the Learned Magistrate was content to convict based the evidence of C whom he believed.

Ground 5

25. The complaint that the convictions were against the weight of the evidence did not, in the event, have to be pursued. It might be viewed as supporting setting aside the conviction on Count 3 because no reasonable Court properly directing itself could have found that the relevant offence had been proved.

Conclusion

26. Trial judges have a duty to ensure that prosecutions of offences relating to vulnerable witnesses are conducted fairly with due account being given of the difficulties inherent in giving evidence in Court in relation to distressing events. The Learned Magistrate in this case discharged this duty by carefully assessing C's credibility, acquitting the Appellant of the offence which he could not possibly have committed (when it was alleged to have occurred) and entering convictions for those offences which he believed C's evidence had proved. However, he failed to explain why his doubt on Count 2 did not infect Count 1 and appears to have received no assistance from either counsel on the matter. Nor was it drawn to his attention that the date of

offence on Count 3 was not proved. The conviction on Count 1 was unsafe. The conviction on Count 3 was unsupportable. The function of an appellate court is to ensure that minimum standards of fairness have been met, based on a detached assessment unconstrained by the human emotions of a trial. Strong suspicion that the Appellant may well in fact have committed the offences could not justify upholding these convictions in all the circumstances of the present case. The practical result is that the Appellant remains in custody serving a sentence for other offences which is far longer than those which would likely have been imposed in the Magistrates' Court in relation to the present charges.

27. For these reasons on June 11, 2018, I allowed the Appellant's appeal against his conviction on January 22, 2014 of two sexual offences involving a minor.

Dated this 19th day of June, 2018 ______________________

IAN RC KAWALEY CJ