In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2016: 16

STEFON SOMMERSALL

Appellant

-v-

THE QUEEN

Respondent

JUDGMENT

(in Court)[1]

Appeal against conviction-sexual assault-defence of honest belief in consent-need for primary factual findings to support conclusory finding that Prosecution disproved the defence

Date of hearing: April 13, 2016
Date of Reasons: April 18, 2016

Mr Rick Woolridge, Phoenix Law Chambers, for the Appellant
Ms Maria Sofianos, Office of the Director of Public Prosecutions, for the Respondent

Introductory

1. By a Notice of Appeal dated March 4, 2016, further to a Notice of Intention to Appeal dated December 9, 2015, the Appellant appealed against his conviction on December 9, 2015 before the Magistrates' Court (Wor. Archibald Warner) of sexually assaulting the Complainant ("C") on June 7, 2015. C was 18 at the time of the offence.

[1] The present judgment was circulated to the parties without a formal hearing in order to save costs.

2. The trial commenced on November 4, 2015, continued on November 6, 2015 and concluded on November 9, 2015 when the Crown case was closed and a submission of no case was made and rejected. Closing speeches were made and judgment was reserved to be delivered one month later. The Crown sought a date for sentencing and the Appellant appealed his conviction before that sentencing hearing took place. For reasons that are not clear from the Record, it seems that the Appellant was remanded in custody (having initially been granted bail) on November 5, 2015 and has been in custody since then. This was not an example of a premature appeal against conviction before sentence where an appellant on bail was seeking to put off the 'evil day' when he would inevitably be incarcerated.

3. Mr Woolridge elected to proceed in the absence of a transcript from the electronic record of the proceedings and accordingly was unable to pursue certain complaints, including the complaint that:

    (a) The Learned Magistrate prejudiced a fair trial by "*entering into the affray*" and asking questions from the Bench (Ground 2) ; and

    (b) the Learned Magistrate displayed "*extreme prejudice against the Appellant*" in the course of the hearing (Ground 7).

4. Grounds 1 and 3-6 can be distilled into one serious criticism of the judgment delivered at the end of the trial: the judge misdirected himself on the facts as to the defence of consent. This defence was raised solely through cross-examination as the Defendant elected not to give evidence in his own defence.

The Judgment of the Magistrates' Court

<u>The Complainant's evidence</u>

5. C's evidence which was not disputed was that the Appellant was a friend of his father who arranged to overnight at C's father's residence on the date of the incident. C and his father picked up the Appellant who was drunk as he was celebrating his birthday. Around midnight C's father went out leaving the Appellant and C alone. After a meal and while watching TV, C offered the Appellant some drinks. C, who claimed never to have drunk before, testified that he had around four drinks. After C got dozy and lay on the living room couch, he testified in his evidence-in-chief that the Appellant after asking him "*you know I am a man, right?*" started massaging C's neck and back. C got up, and went upstairs to his bedroom. The Appellant came into his bedroom and the Appellant followed him, sitting on the end of his bed. He asked C if he was okay, to which C responded "yes". He then continued massaging C's shoulders and back. He then asked C to turn over, asked him "*you know I am a man, right?*", before

pulling down C's shorts and fellating him for about 10 seconds. C felt paralyzed initially but then pushed him away and the Appellant said: "*I never should have done that.*" C then left the house and went to a neighbour's house where he called his father. C's father returned, the Police was called and the Appellant was arrested.

6. Under cross-examination, the judgment further recorded, C admitted an inconsistency with his Police Statement on the issue of who initiated the drinking. He insisted he never consented and denied sexual curiosity. He agreed responding to the question "*You know I am a man, right?*" with the answer "*ya cool*". The Learned Magistrate recorded the following question and answer:

> "*<u>Question</u>: Did you let your objection to defendant* [be] *known before he pulled pants down.*
>
> *<u>Answer</u>: I was under the influence of alcohol. I was not thinking right.*"

7. The judgment then proceeds to note that the statement of a neighbour, a Mr Pimental, was read into evidence. He deposed to C, whom he had never seen before, coming into the house, breathless, to call his father. C's father gave evidence that after confronting the Appellant with having breached his trust and slapping him, he called the Police. The Appellant then said: "*call the police, I deserve to be locked up.*" PC Shirlene Raynor's evidence of what happened at the residence is then recorded. She agreed under cross-examination that the Appellant repeatedly said that C had "*said it was O.K.*". She also agreed that C "*did not any time say that he told the defendant to stop.* [C] *did say he was afraid.*"

8. Having carefully reviewed the evidence, the Learned Magistrate then recorded the following findings:

> "*It is my duty to examine all the evidence in this case and satisfy myself that the Crown have proved the charge against the defendant. In the circumstances the Court must be sure that there was no belief in consent by the defendant.*
>
> *I have carefully considered all the evidence in this case. I find that there is nothing in the evidence to show that the victim did consent to the sexual assault by the defendant.*
>
> *I have considered Mr Woolridge's submissions that the victim's responses/behaviours/ acquiescences amounted to reasons for the defendant to believe that the victim had consented to the sexual acts.*
>
> *Moreover, I find that that the victim's responses to the defendant's sexual acts both downstairs on the couch and upstairs clearly shows that the victim objected to the defendant's behaviour.*

I accept the victim's father's evidence as evidence that when confronted the defendant responded 'go ahead call the police' 'I deserve to be locked up'.

I accept the victim's evidence as evidence of truth. In the circumstances I am satisfied so that I feel sure that the Crown has discharged their burden of proving that there was no belief in consent by the defendant."

The defence of consent

9. The Appellant was charged with sexual assault contrary to section 323 of the Criminal Code. The issue of consent in relation to assaults is governed under Bermudian law by section 233 of the Code:

> "(1)*A person who—*
>
> *(a) strikes, touches, or moves, or otherwise applies force of any kind to, the person of another, either directly or indirectly, without that other's consent; or*
>
> *(b) by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without that other's consent, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect his purpose,*
>
> *is said to assault that other, and the act is called an assault.*
>
> *(2)'applies force' includes the case of applying heat, light, electrical energy, gas, odour, or any other substance or thing whatsoever, if applied in such a degree as to cause injury or personal discomfort.*
>
> *(3)For the purposes of subsection (1), there is no consent—*
>
> *(a) where the complainant submits to conduct alleged to be an assault or does not resist that conduct by reason of—*
>
> *(i) the application of force to the complainant or to a person other than the complainant; or*
> *(ii) threats or fear of the application of force to the complainant or to a person other than the complainant; or*
> *(iii) fraud; or*
>
> *(b)where—*

(i) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

(ii) the complainant, having consented to engage in the activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity; or

(iii) any agreement is expressed by the words or conduct of a person other than the complainant; or

(iv) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority; or

(v) the complainant is incapable of consenting to the activity.

(4)Nothing in subsection (3) shall be construed as limiting the circumstances in which no consent is obtained.

(5)In relation to an assault, where an accused alleges that he believed that the complainant consented to the conduct alleged to be the assault, the judge, if satisfied—

(a) that there is sufficient evidence; and

(b) that the evidence, if believed by the jury, would constitute a defence,

shall instruct the jury that they must, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, consider the presence or absence of reasonable grounds for that belief.

(6)The expression "assault" in this section applies to—

(a) a sexual assault…" [Emphasis added]

10. No complaint was made that the Learned Magistrate misdirected himself in law. The Appellant's counsel did not refer to section 233 at all. However, Ms Sofianos rightly submitted that section 233(5) governed the limb of the Appellant's defence which I indicated I considered most arguable. It is clear from subsection (4) of the same section that the question of whether the assault complained of was in fact consented to or not is ultimately a question of fact. It may be sufficient for a victim to say: "I did not consent". Depending on the witness' credibility, taking into account the surrounding circumstances proved to have existed, that may be sufficient to prove an absence of actual consent.

11. Section 233 (5) makes it a defence to an assault where there is evidence that the accused honestly believes that the complainant consented, taking into account

whether or not there are reasonable grounds for that belief. There is no mandatory requirement that reasonable grounds for the honest belief must exist. This provision is slightly more generous to an accused person than the freestanding defence of mistake, which is only available where reasonable grounds for the mistaken belief do exist:

> "*38. Without prejudice to any provision of law to the contrary, any person who does any act or makes any omission under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.*"[Emphasis added]

12. Based on an analysis of the applicable provisions of section 233(5), the legal principle Mr Woolridge relied upon (based on an extremely indirect authority[2]) as to the scope of this limb of the Appellant was actually correct:

> "*The courts have construed this provision as meaning that a defendant has a defence if, in fact, he believes that the other person consented, even though such a belief was mistaken and even though he had no reasonable grounds for so believing.*"

13. The Learned Magistrate, subject to one minor *caveat*, accurately stated the relevant legal test as follows:

> "*It is settled law that a defendant has a defence of consent if, in fact, he believes that the other person consented even though such belief was mistaken and even though he had no reasonable grounds for so believing…*
>
> *The prosecution bears the burden of making the trier of fact sure that there was no belief in consent. Thus in this case it is for the Crown to make the trier of fact sure that there was no belief in consent.*
>
> *However, it is open to the trier of fact to consider whether a man may have believed that a victim was consenting to sexual offence; the presence or absence of reasonable grounds for such a belief is a matter to which the trier of fact is to have regard in conjunction with any other relevant matters, in considering whether he so believed.* " [Emphasis added]

[2] Paragraph 7.4 of the UK Law Commission Report, 'Consent in Sex Offences', considering the defence to rape under section 1(2)(b) of the sexual Offences Act 1956 (UK), the language of which bears little obvious similarity to the applicable Bermudian provision. The substantive effect of the two provisions appears to be the same.

14. The Learned Magistrate in using the phrase "*open to*" can only have intended to indicate that the need to consider a belief in consent defence is optional depending on whether or not it properly arises for consideration at all. In the present case that was the primary defence which was raised and so the Court had a positive duty to determine whether or not the defence had been disproved. The crucial question to be determined in the present appeal is whether or not the Learned Magistrate properly determined that the Prosecution had proved that the Appellant did not honestly belief that C consented to the sexual contact which occurred.

Appellate Court's jurisdiction to challenge factual findings made by trial judge

15. Last week in *Stowe-v- The Queen* [2016] SC (Bda) 40 App (11 April 2016), I identified two bases on which a decision of the Magistrates' Court could be set aside based on challenges to the factual findings made at trial. Firstly, I stated:

> "11.*Express reliance was placed by Mr Quallo on the following passage in the judgment of Lord Scott in Mon Tresor and Mon Desert Limited-v- Ministry of Housing and Lands [2008] UKPC 31 where, after approving Benmax, he stated:*
>
> > *'2… An appellate tribunal ought to be slow to reject a finding of specific fact by a lower court or tribunal, especially one founded on the credibility or bearing of a witness. It can, however, form an independent opinion on the inferences to be drawn from or evaluation to be made of specific or primary facts so found, though it will naturally attach importance to the judgment of the trial judge or tribunal…*"

16. Secondly, I cited the following provisions of the Summary Jurisdiction Act 1930:

> "*21. When the case on both sides is closed the magistrate composing the court shall record his judgment in writing; and every such judgment shall contain the point or points for determination, the decision therein and the reasons for the decision, and shall be dated and signed by the magistrate at the time of pronouncing it.*"

17. These two potential legal bases for challenging factual findings made by a trier of fact are engaged by the present appeal.

Merits of challenge to rejection of defence of belief that C consented

The need for an objective approach to the evidence in cases involving distasteful conduct

18. Reviewing the evidence objectively in cases such as the present is made difficult by two considerations which could subliminally cloud the analytical process. The circumstances of the offence, even accepting the Appellant's version of the events, provoke an instinctive response of outrage from a parental point of view. Any reasonable parent would be outraged at the spectre of a mature adult seducing the intoxicated teenage son or daughter of a friend. The sense of distaste is potentially only made more unpalatable, in terms of an instinctive male heterosexual response, when the element of a same sex interaction between an older and a younger man is added to the picture.

19. The former consideration, the fact that C was only just an adult at the time of the incident while the Appellant was a contemporary and friend of C's father, is potentially relevant to the issue of consent: power relations typically are relevant in the sexual offences context in terms of potentially explaining why the victim felt unable to resist unwanted advances more vigorously than they did. Section 233(3)(b)(iv) makes abuse of a position of trust, power or authority a factor which may vitiate consent.

20. The latter consideration, the fact that the alleged sexual assault is a same-sex encounter, will in my judgment in most cases be wholly irrelevant and (as I observed in the course of the hearing) a potential distraction to an objective analysis of the question of whether the accused honestly believed (or may have honestly believed) that the complainant consented. Sexual assault is an offence which is entirely gender and sexual-orientation neutral.

The Prosecution submissions in rebuttal of the defence of honest belief

21. The Judgment of the Learned Magistrate can only fairly be assessed in the context of an appreciation of not only the evidence led at trial but also in light of the way the prosecution advanced its case. The Prosecution had no basis for anticipating a defence which was only advanced at trial through cross-examination, the Appellant having made no comment when interviewed by the Police. The Prosecution opened its case (Appeal Record, pages 14-15) on the straightforward basis that a sexual assault occurred based on the evidence which would be led. Namely, a sexual act was committed without C's consent.

22. The Prosecution appears to have closed its case by making similar submissions (Appeal Record, pages 25-26). These submissions, as recorded by the Learned Magistrate in his notes, appear to have focussed solely on the actual consent issue and ignored altogether the most important limb of the Appellant's defence: that he honestly believed C consented, even if C did not actually consent. This was certainly the way the Crown's submissions appear to have been understood. The first sentence of the Prosecution's closing was recorded in terms which diluted almost to vanishing point the Appellant's main defence:

> "*Defendant says that any sexual act between he and the victim was consensual.*"

23. Regretfully, the Record suggests that the Learned Magistrate was not assisted by the Prosecution in terms of being informed on what view of the evidence it was contended the defence of honest belief should be found to have been disproved. It is possible the defence was addressed by the Crown in the context of the no case submission which shortly preceded the closing submissions; the Record does not reveal what those submissions were. However the Prosecution's apparent failure to deal with the honest belief defence at the end of the trial as the main issue in controversy in the case may have unintentionally encouraged the Learned Magistrate to feel that no real significance attached to the honest belief issue. In fact this issue was the most important controversy in the case.

The Defence submissions on honest belief

24. The Appellant's own case did not make entirely easy for the Learned Magistrate because it advanced not just the honest belief defence, but garnished this bare defence with the unnecessary and perhaps somewhat unattractive suggestion that C had been sexually curious. Initiators of unwelcome but non-violent sexual advances typically convince themselves that their overtures are welcome; this suggestion was merely a logical extension of the honest belief defence. It is true that C's unambiguously negative reaction to the only explicitly sexual contact which occurred was wholly inconsistent with this suggestion as far as C's state of mind is concerned. However, this belatedly clear rebuff did not in and of itself disprove the main thrust of the defence, which centred on the Appellant's subjective belief. Moreover, Mr Woolridge is recorded as concluding his closing submissions (Appeal Record page 27) with the following unambiguously clear, and potentially winning, proposition:

> "*There was nothing to make defendant aware that victim was not consenting.*"

The findings on honest belief

25. It is unfortunately impossible to identify any express primary factual findings in the Judgment of the Magistrates' Court as to the state of the Appellant's belief on the issue of consent. Only a conclusory finding explicitly addresses this issue:

> "*In the circumstances I am satisfied so that I feel sure that the Crown has discharged their burden of proving that there was no belief in consent by the defendant.*"

26. The preceding sentences in the Judgment do not support this finding in express terms:

    (a) the fact that the victim's responses to the massaging downstairs and upstairs "*clearly shows that the victim objected to the defendant's behaviour*" (if a valid finding) speaks directly to the actual consent issue, and only indirectly to the central honest belief issue;

    (b) the fact that the Appellant said to C's father after the Police had been called "*I deserve to be locked up*", without any explanation as to how that statement was interpreted by the Court, did not speak directly to the honest belief issue (although it was clearly potentially indicative of the Appellant's guilt liked with the evidence that the Appellant apologized to C's father shortly thereafter);

    (c) accepting the victim's evidence as "*evidence of truth*" did not, without further elaboration, amount to an inferential finding on the state of the Appellant's belief at the time of the incident.

27. Two pivotal sentences in the Judgment clearly demonstrate that the Learned Magistrate misdirected himself as to the evidence in approaching the honest belief defence. Firstly, the assertion that C's response to being massaged "*clearly shows that the victim objected to the defendant's behaviour*". On any objective analysis, C's response to the preliminary overtures of the Appellant could not be further from "clear" in terms communicating an objection on his part. Secondly, earlier in the Judgment (Appeal Record page 7), the assertion that "*Mr Woolridge for the defendant has forcefully but with no evidential support* [submitted] *that the defendant had reasonable grounds for believing the victim consented.*" This misstated the purport of the defence and may have contributed to a failure to properly analyse the evidence.

28. The crux of the defence was that the Appellant had, rightly or wrongly, honestly believed that he had C's consent, it being unnecessary for him to establish reasonable grounds for that belief. There was, as Mr Woolridge pointed out with equal force in the course of the present appeal, considerable potential support for a finding (or at least reasonable doubt in the absence of a positive finding) that the Appellant honestly believed C consented to the sexual act which occurred:

    (a) after the arguably massaging commenced on the couch downstairs, C admitted that the Appellant whispered "*you know I'm a man, right*?" to which C admitted he replied "*yes*";

    (b) after the Appellant assisted C up to his bedroom, and sat on the end of the bed, C admits the Appellant further asked "*are you OK?*". It was only after C said "*yes*", that the Appellant continued the massaging;

    (c) before asking C to turn over, C admitted that the Appellant again asked him "*you know I'm a man, right?*", to which C testified (in cross-examination he responded "*ya cool*";

    (d) the sexual act which formed the subject of the charge was performed, by C's own account in the witness box, after the foregoing verbal exchanges;

    (e) PC Raynor agreed under cross-examination that the Appellant at the scene repeatedly said to her that he did not do anything and that C had "*said it was OK*" and that C had reported to the Officer that he had not told the Appellant to stop at any point before the act complained of occurred;

    (f) the apparent admissions made by the Appellant to C's father were as consistent with statements of regret and admissions of moral culpability as they were consistent with an admission that the Appellant did not at the relevant time honestly believe that C was consenting to the Appellant's sexual advances.

29. It is easy to identify potentially obvious reasons why the Learned Magistrate would have found that it was not <u>reasonable</u> for the Appellant to believe that C consented to the sexual assault that his tentative actions culminated in. Firstly and most significantly, as a friend of C's father, a reasonable man would have appreciated that C's ability to resist the older man's advances would be significantly impaired. Secondly, a reasonable man in the Appellant's position would also have realised that C's ability to consent was seriously compromised by the influence of alcohol. However, it is impossible to identify (in the absence of express findings) on what

basis the Learned Magistrate, in the face of the various items of evidence potentially supporting the Appellant's defence, was satisfied that the Prosecution had disproved the relevant defence.

30. It is often obvious from the way in which cases are argued, without any detailed express findings by the trial judge, what version of the facts has been accepted and what version of the evidence has been rejected. This usually only applies to cases where each side relies on two clear-cut and contrasting versions of an event based on direct eyewitness testimony. In such cases a conviction makes it obvious that the Prosecution version of the disputed testimony was preferred. The evidence relied upon by the Appellant in the present case was not only not explicitly addressed in the Judgment. It was circumstantial evidence relying upon inferences drawn from primary facts which were substantially not in dispute. In addition, the matter of what inferences should be drawn as to the Appellant's belief was seemingly not expressly addressed by the Prosecution in its closing submissions either. In these circumstances it is impossible for this Court to discern the basis on which his defence has been rejected in the absence of express findings as to what inferences were drawn as to the Appellant's belief recorded by the trier of fact.

31. In summary:

(a) the finding that there was no evidential support for the defence of honest belief that C consented to the sexual act was a misdirection as to the evidence; and

(b) the Learned Magistrate failed to record any or any sufficient primary findings to support the conclusion that he was satisfied that the defence had been disproved and that the Appellant had no honest belief that consent was present.

Disposition of appeal

32. The end result is similar to the position in *Stowe-v- The Queen* [2016] SC (Bda) 40 App (11 April 2016) where I stated:

> "*23…the key finding made was merely a conclusory one. No primary findings were recorded on the central issues in controversy…*
>
> *26. It is impossible for this Court to properly be satisfied that no substantial miscarriage of justice occurred in circumstances where the*

basis on which the Defence case was rejected by the trial judge is neither self-evident nor sufficiently explained."

33. Ms Sofianos had no instructions as to whether or not this Court should order a retrial if the conviction was liable to be set aside as I now find that it is. The Crown should be afforded an opportunity to consider what the public interest requires.

34. The Respondent shall be at liberty to apply within 28 by letter to the Registrar for the appeal to be relisted for the hearing of an application for an Order that the matter should also be remitted to the Magistrates' Court for retrial. Unless such application is made, the appeal shall be allowed and the Information dismissed.

35. The Appellant, who has been in custody for over five months, shall be released from custody forthwith, in any event.

Dated this 18th day of April, 2016 _____

IAN RC KAWALEY CJ