IN THE SUPREME COURT OF BERMUDA

APPELLANT JURISDICTION

2009: No. 31

DENIS WINSLOW DEVENT WHITE **Appellant**

and

ANGELA COX (POLICE CONSTABLE) **Respondent**

JUDGMENT

Date of Hearing: 26th November, 2009

Date of Judgment: 4th February, 2010

Mr. Saul M. Froomkin, Mello, Jones & Martin for Appellant

Ms. Auralee H. Cassidy and Mr. M. McColm, Director of Public Prosecutions for Respondent

1. On the 6th August 2009 the Appellant was tried, convicted and sentenced to four years imprisonment before an acting magistrate on a charge that he on a date unknown between the 1st January and 31st December 2006, in Sandy's Parish, did commit a sexual assault on the complainant contrary to Section 323 of The Criminal Code.

On 26th November 2009 this Court allowed his appeal, set aside the conviction and sentence and reserved its reasons.

2. The evidence before the magistrate was essentially based upon the testimony of the complainant and the Appellant. The complainant testified that at the time the Appellant had been the boyfriend of her mother. She along with her mother, her brother and the defendant were watching movies in the living area that night, while lying on a pull out couch. Eventually the mother and brother retired to bed leaving her and the Appellant. She had dozed off to sleep. During that sleep, she felt the Appellant's hands touch her on her leg, then entered her pants and under her underwear and rubbed her vagina for a long time. She did not move because she was uncomfortable and didn't know what to do. He then got up and left the house. She complained to her mother. About fifteen minutes later, he returned and her mother confronted him. That night she slept with her mother in the bedroom with the door locked and he slept in the living room. She went to school the next day after her mother got her to promise not to tell anybody. He moved out and the whole matter affected her relationship with her mother and brother. Much of the cross examination centered around whether she had been in trouble before for lying or whether the defendant was not living at the house at the time and whether she had given other family members wedgies (squeezes on the but); including the appellant.

3. The Appellant denied the allegations and suggested that there had been deterioration in the relationship between him and the complainant because of his complaint that she tried to look at him in the bathroom, made wedgies to her brother and was displeased by his running down of her father who had objected to his supporting her.

He voluntary put in evidence, his previous convictions of a sexual nature and admitted that there had been a dispute about the events of the night in question.

4. Counsel for the Appellant attacked the reasoning's of the magistrate on several grounds;

The first being the following passage:

> *Defence submitted that the court should take note of the delay of the complaint: I refer to Section 328 of the Criminal Code whereby evidence of recent complaints are abrogated with respect to sexual offences. Therefore no issue can be taken with complaint being made in 2008 when the incident took place in 2006. These were the only two legal issues.*

5. This court must accept the submission, that the learned magistrate completely misdirected himself on this issue. The issue of delay did not relate to whether or not there had been a recent complaint or the import of Section 328 but it related to the fact that this event was alleged to have occurred sometime in 2006 but was not reported to the police until January 2008 and was not tried until August 2009. Therefore the effect of the delay upon her memory and that of the defendant was a relevant factor to be taken into account when determining whether he was satisfied with the quality of the evidence before him and whether the prosecution had satisfied it's duty. There is no evidence that the learned magistrate properly directed his mind to this issue at all.

6. Another issue argued, related to the impact of the Appellants previous convictions for like offences.

> The learned magistrate said: *The defendant voluntarily revealed his previous convictions consisting of several sexual offences and serving two different prison terms of six years for rape, the latest being in 1998.*

Prior to that the learned magistrate had recited various reasons why he said he believed the complainant and not the Appellant after he had said it depends on whom he believes.

> Then he followed that passage by saying: *In summary the court having reviewed the evidence of the Complainant, finds the complainants evidence to be credible and accepts in its entirety and on the other hand evidence of the defendant was defensive and self serving. In taking account all the evidence and applying the law particularly Section 327 and Section 328 of the Criminal Code, the Court finds the Defendant guilty as charged.*

7. It is not sufficiently clear, that the learned magistrate properly directed himself to the appropriate test relating to previous convictions of a defendant. There appears to be a risk demonstrated on the face of the record that such convictions may have gone towards either a consideration of guilt rather than credibility or may have gone towards both.
That either error may have occurred, would be unfortunate indeed.

Further, it is not clearly evident, what test the learned magistrate applied once he rejected the defendant's evidence as defensive and self serving. Of course it would not be correct to automatically jump to a conclusion of guilt. It would be necessary to demonstrate after such rejection that he returned to the prosecutions evidence and was satisfied beyond a reasonable doubt that the crown had proved its case.

8. The final and most important ground is to be found in the following passage of the magistrates reasons. *This now takes the court to consider the facts or the evidence. As only evidence from the crown was that of the victim…and DC …As the defense the Defendant's evidence and his landlord…*
In this case, it is whether the Court believes the evidence of the Complainant/victim…a child of fourteen (14) years, the time of the offence or the Defendant…
The Court is cognizant that the Crown bears the burden of proof with the test being evidence beyond the doubt of a reasonable man.

The learned magistrate then recited a number of reasons why he believed the Complainant and disbelieved the defendant.

9. Now it maybe argued that the language of the magistrate may appear to be somewhat convoluted. However, it appears clear that he was there applying two tests, both it must be accepted, were fatal in error. The first one, *whom to believe*, evidenced in the magistrates own words, *In this case, it is whether the Court believes the complainant /victim……or the Defendant,* constituted a contest between the complainant and the defendant, resulting in a shifting or sharing of the legal burden. This court must hold that test to be wholly incorrect.

The second test expressed as, *the crown bears the burden of proof with the test being evidence beyond the doubt of a reasonable man,* has not been found by this court to be known to any law. The correct test is proof beyond a reasonable doubt.

10. In *Antoine William Bean v the Queen.* Crim. App No.14 of 2001, the Bermuda Court of Appeal at pages 2 to 3 cited several passages pertaining to that identical *who to believe* misdirection and upheld the appeal on the ground of a miscarriage of justice.

At page 3 the court acknowledged that even though the learned judge had correctly directed the jury about the burden of proof in her earlier general direction (as the magistrate did in the instant case), she later proceeded to derogate from it when she directed in the manner she did.

> The court said. *This seems to have come about because she lost sight of the fact that the Appellant did not have to prove any thing. He did not have to make the jury sure that he did not commit these offences. The directions should have been that if his explanations were accepted by them, and if his explanation satisfied them that he did not commit theses offences, or if the explanation created doubt, they should acquit. But if his explanations were rejected by them, then they could*

only convict if they were satisfied and felt sure that the girl had told the truth concerning her sexual connection with the Appellant.

And at page 5 the Court in adopting dicta from *Michael Edward Bone (1968)* 52CR APP R, 546 said, *The manner in which the judge gave her directions must have convinced the jury that this was a contest between the girl and the Appellant as to who was telling the truth. That is not the manner in which directions are to be given in a criminal prosecution. Proper directions are those she gave at the beginning…and nothing short of that is acceptable.*

11. The instant case clearly demonstrates the necessity for magistrates to clearly state the legal principles upon which they have directed or ought to have directed their minds when reaching their conclusions. It may not be necessary to spell out those principles in cumbersome technical language but their language ought to be clear enough when setting out the principles at least in a general form. In short, they should clearly say what they mean and mean what they say. This should be so whether they are purporting to reject or to accept a particular matter. Failure to do so can sometimes raise serious issues of misdirection or non direction and may sometimes prove to be fatal. It cannot be said that these basic requirements were properly met in the instant case.

For these reasons, this court was unable to hold the conviction safe. The appeal was therefore allowed.

Dated this day of February 2010.

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Hon. Carlisle Greaves
Puisne Judge