In The Supreme Court of Bermuda

APPELLATE JURISDICTION
CRIMINAL APPEAL 2012: NO. 38

FIONA MILLER
(Police Sergeant)

Appellant

-v-

PS
(a Child)

Respondent

EX TEMPORE JUDGMENT

(In Court)

Date of Hearing: October 31, 2012

Mr Geoffrey H Faiella, Office of the Director of Public Prosecutions, for the Appellant
Mr Saul Dismont, Christopher's, for the Respondent

Introductory

1. The Informant appeals the decision of the Magistrates' Court sitting as the Juvenile Court (Worshipful Tyrone Chin and Panel) on June 17, 2012 to acquit the Respondent on two counts on an Information which charged that on January 13, 2012 and January 18, 2012, respectively, he (1) uttered threatening words, and (2) behaved in a threatening manner, to a Corrections Officer. Both offences are governed by section 12 of the Summary Offences Act 1926.

2. The grounds of appeal are threefold:

   (1) The Learned Magistrate misdirected himself as to whether the trier of fact was entitled to acquit the Respondent in the circumstances of this case;

   (2) The Learned Magistrate failed to consider properly or at all the evidence placed before the court by the Appellant before acquitting the Respondent;

(3) The Learned Magistrate erred in finding that justification was a valid defence in the circumstances of this case.

3. Both offences were alleged to have occurred in the Senior Training School where the Respondent, a child was detained (it was subsequently determined, unlawfully[1]).

4. The case came to be dismissed in this way. After the commencement of the trial counsel for the Defence, Mr Dismont, made a submission of no case to answer which was rejected. Before the Defence opened its case, counsel advised the Magistrates' Court that this Court had allowed an appeal in another matter on the grounds that the Defendant as a child could not lawfully be detained in a prison facility. Counsel invited the Court to dismiss the charges on the grounds that due to the Defendant's unlawful incarceration, the offences were not made out.

5. The Ruling from the Juvenile Court read as follows:

> "*The Court has heard from Mr Dismont and Mr Faiella. The Court had anticipated that Mr Dismont's appeal for* [PS] *would have been heard sooner than the 6 ½ month waiting period.*
>
> *The Court was of the opinion that Mr Faiella had some knowledge of Mr Dismont's application from February 2012 and yesterday and therefore should have anticipated such an application. The Court does not support Mr Faiella's request for an adjournment to 2.30pm Friday.*
>
> *The Court is also of the opinion that the now 6 ½ month unlawful imprisonment was much longer than anticipated.*
>
> *The Court supports Mr Dismont's application and acquits the Defendant of both charges…*"

6. Mr Faiella submitted a Skeleton Argument which attacked the decision of the Juvenile Court on two main grounds. Firstly he submitted that the Learned Magistrate misdirected himself as to whether the trier of fact was entitled to acquit the Respondent in all the circumstances of this case. He submitted that the proper course would have been for the Learned Magistrate to consider the evidence of submissions of both counsel before delivering a verdict.

7. Counsel then submitted that the Learned Magistrate failed to consider properly or at all the evidence placed before the Court by the Appellant before acquitting the Respondent. In essence the complaint is that, having ruled in favour of the Crown that there was a case to answer, there was no new material before the Court which

[1] *JS-v-F Miller* [2012] SC (Bda) 32 App (13 June, 2012).

justified the decision to acquit without either hearing from counsel for the Crown or indeed without requiring the Defence to present their response to the Crown case.

8. Mr Dismont for the Respondent sought to justify the decision of the Magistrates' Court based on his submissions by reference to the case of *Cumberbatch-v- Crown Prosecution Service* [2009]EWHC 3353(Admin). This was a case where the appellant was charged with three counts of resisting the police in the execution of their duty and the question of the lawfulness of the defendant's detention was an essential element of the offence charged. In the instant case the mere fact that the detention was unlawful does not in and of itself constitute an absolute defence to the offences charged and certainly did not constitute grounds, without more, for revisiting the previous no case ruling.

9. For these reasons I am satisfied that the Magistrates' Court did err in law in proceeding to acquit in the manner which they did on the basis of submissions from defence counsel, raising a point of law which did not in fact support the conclusion that there was no case to answer. The proper approach for the Court to have taken was:

    (1) to allow Crown Counsel to address the panel; and

    (2) to afford the Defence an opportunity to either advance closing submissions or to adduce their own evidence with a view to raising a doubt about the Prosecution case.

10. The real question in this appeal is whether or not the matter should be remitted to the Magistrates' Court for rehearing or not. Mr Faiella points out that matters of prison discipline are serious matters, especially in present times. Mr Dismont counters that when one has regard to all of the circumstances of the present case, including the fact that this young man should not have been in prison at all, there is no public interest which justifies remitting this matter back for trial.

11. On balance I find that this is a case where the appeal should be allowed and the matter should rest there. The Respondent should not have been in prison and these offences were at the lower end of the scale. Indeed, it seems to me that but for evidence elicited accidentally in cross-examination, the no case submission might well have succeeded. I also take into account the fact that the Respondent did receive some form of internal prison punishment for his misconduct which appeared to me to be admitted even though it was denied that the offences charged were made out. The Respondent continues to be in care. As a child, having him reconnected to the criminal justice system in all the circumstances of the present case would neither serve his best interests nor the wider public interest.

12. For those reasons I allow the appeal but make no other order.

Dated this 31st day of October, 2012 _____

IAN RC KAWALEY CJ