In The Supreme Court of Bermuda

APPELLATE JURISDICTION
CRIMINAL APPEAL 2012: NO. 22

GLEN BRANGMAN

Appellant

-v-

LYNDON D. RAYNOR
(Police Sergeant)

Respondent

JUDGMENT
(In Court)

Date of Hearing: September 13, October 29, 2012
Date of Judgment: October 29, 2012

Ms. Shade Subair, Mussenden Subair, for the Appellant
Ms. Nicole Smith, Office of the Director of Public Prosecutions, for the Respondent

Introductory

1. The Appellant was charged by the Magistrates' Court (Worshipful Khamisi Tokunbo) with ten counts of sexual assault. Following a no case submission at the end of the Prosecution's case, counts 4 and 5 were dismissed with the concurrence of the Crown on the grounds that there was no case to answer. At the end of the trial, at which the Appellant, a then 59 year-old man of previous good character, gave evidence, counts 2, 6, 7 and 9 were dismissed. The Appellant appeals against his conviction, recorded in a 35 page long Judgment dated February 6, 2012, on counts 1, 3, 8 and 10. The offences found to have been proved were accepted as being committed between January and June 2009.

2. The Complainant (C) was 19 years old at the beginning of the period covered by the charges and went 20 in May 2009. The Appellant was 56 in January and went 57

years old in February 2009. It is also not in dispute that the Appellant was at all material times General Manager of the Bermuda Housing Corporation which provided C, who had been convicted of offences of dishonesty and was on probation, with both employment and accommodation. C was also a junior member of the Bermuda Regiment where the Appellant was an officer[1]. The Appellant accepted that C regarded him as a father figure. The Appellant denied that the incidents alleged occurred.

3. The principal grounds of appeal set out in Ms Subair's careful Skeleton Argument may be summarised as follows:

    (1) The Learned Magistrate failed to adequately consider C's motives for giving concocted evidence and generally was wrong to find that C was a credible witness;

    (2) The Learned Magistrate failed to adequately consider gross inconsistencies in C's evidence, as to collateral issues and as to material issues;

    (3) The Learned Magistrate erred in finding that there was *prima facie* proof of the absence of consent on Counts 1 and 3;

    (4) The Learned Magistrate erred in failing to properly direct himself on the significance of the Appellant's good character.

The factual findings reached by the Learned Magistrate

1. (Ground, J). as I recently noted in *Crockwell-v-Fiona Miller (Police Sergeant)* [2012] SC (Bda) 47 App (7 September 2012) at paragraph 23:

    > "*Needless to say, the cases when an appellate court interferes with primary findings of fact on issues such as credibility made at first instance will be rare. This will only occur when, in the words of Ground J (as he then was) in Robinson (at page 3), "that court goes demonstrably astray". That case was a rare instance of the conclusions made not being supported by the evidence in the context of a protracted trial the fairness of which was compromised by delay.*"[2]

4. The Appellant's attempts to challenge the factual findings reached by the Learned Magistrate in the present case were made doubly difficult by the fact that this was not a case where the trial court could be accused of having mechanistically accepted the prosecution case. The Appellant was initially charged with 10 related counts and was acquitted of six. The Learned Magistrate could not have handed down a more comprehensive explanation for the findings that he reached.

[1] However, the Appellant had retired from the Regiment before C joined and before the date of the offences.

[2] *Robinson-v-Commissioner of Police* [1995] Bda LR 64

5. Having carefully reviewed the findings criticised by counsel, I find no or no sufficient basis for disturbing them. It was open to the Learned Magistrate find that the charges upon which the Appellant was convicted were proved to his satisfaction. The "evidential" grounds of appeal are dismissed.

Absence of prima facie proof of consent in relation to counts 1 and 3

6. Ms. Subair rightly submitted in reliance upon the Court of Appeal for Bermuda decision in Graham-v- the Queen [1995] Bda LR 24, that the prosecution had to prove (a) that C did not consent to the sexual assaults, and (b) that the Appellant intended to commit the assaults without C's consent.

7. This point was not developed in any way in the no case submissions considered in the Court below. Perhaps this was simply because, as Ms. Smith submitted, it was obvious that the requisite intent had been proved having regard to the circumstances of the present case in which consent was not raised as a defence.

8. Section 233 (1) of the Criminal Code defines "assault" and section 233(3)-(4) non-exhaustively defines consent for the purposes of the offence of which the Appellant was convicted. Section 233(3) provides that "*there is no consent…(b) where…(iv) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority*". On the facts of the present case it was sufficient for the Crown to prove directly or circumstantially;

    (a) that C did not consent; and

    (b) that the Appellant either knew or was reckless to the fact that C's initial lack of resistance was induced by the position of trust, power or authority held by the Appellant in relation to C.

9. C expressly testified in relation to Count 1 (as regarded at page 5 of the Judgment):

> "*I felt violated-felt like reacting…I didn't react because I was still on probation and I might have been kicked out from where I was staying. I might have lost my job…*"

10. The power relations had not changed when the offence charged under Count 3 was committed. C expressly testified in relation to this offence: "*He once again touched me without my permission or approval*". In my judgment it was open to the Learned Magistrate to find as a matter of inevitable inference that if the Appellant sexually assaulted C without his consent the Appellant knew or was reckless as to the fact that any initial lack of resistance was induced by his superior resistance.

11. However the issue of consent can in both cases be analysed in far more simple and common sense way. On C's account of what happened the Appellant on any sensible view of the evidence had no conceivable basis for believing that C would consent to the sexual touching which he said occurred. The Appellant clearly intended to commit the relevant acts at the very least being reckless as to whether C consented because he acted without having any conceivable basis for believing that C would consent.

12. This ground of appeal must also be rejected as there is no basis for disturbing the finding of the learned Magistrate that the Appellant's acts were "*uninvited and unwelcome and therefore without his consent and unlawful*" (Judgment, page 33).

The Appellant's good character

13. The Learned Magistrate clearly took into account the Appellant's previous good character but simply disbelieved him. There is no legal requirement for a jury-style direction on good character to be set out in a judgment delivered by a legally qualified Magistrate. This ground of appeal is also unmeritorious.

Conclusion

14. For the above reasons, the appeal against conviction is dismissed.

Dated this 29th day of October, 2012 _____

IAN RC KAWALEY CJ