In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2013: NO. 13

JASVIN JHUBOO

Appellant

-v-

THE QUEEN

Respondent

EX TEMPORE J U D G M E N T

(In Court)

Date of hearing: April 15, 2013

Mr. Kamal Worrell, Lions Chambers, for the Appellant
Ms. Karen King, Office of the Director of Public Prosecutions, for the Respondent

Introductory

1. In this case the Appellant appeals against his conviction in the Magistrates' Court (Worshipful Khamisi Tokunbo) on January 14, 2013 for an offence of burglary contrary to section 339(1)(b) of the Criminal Code. The central allegation was that on the 4th day of October 2012 in Smiths' Parish, having entered as a trespasser, he attempted to steal therein.

2. At trial the facts asserted by the Prosecution were not challenged by the Defence and at the end of the Prosecution case the Defendant gave evidence in support of a defence of intoxication. At the end of his evidence it appears that the Learned Magistrate put to the Defendant's counsel that intoxication was a defence relevant only to an offence under section 339 (1)(a) of the Criminal Code and not to an offence under section 339(1)(b) of the Criminal Code. The language that the Learned

Magistrate used suggests that he had in mind the common law distinction between offences of basic intent and specific intent.

3. I should also add that the Record does suggest that the Defendant conceded the defence; but Mr. Worrell has represented to the Court without any challenge from the Respondent (although Ms. King did not appear below) that he did not in fact make a formal concession. Be that as it may it is clear from the Record that a conviction was entered without the Learned Magistrate considering the defence of intoxication because he took the view that as a matter of law it did not apply.

4. The sole ground of appeal was that "*the Learned Magistrate misdirected himself in law when he ruled that the intoxication of the Defendant at the time of the alleged offence was not relevant to the offence pursuant to section 43 of the Criminal Code 1907*".

Legal findings on merits of appeal

5. The relevant offence is section 339(1)(b) of the Criminal Code which provides as follows:

> "*339 (1) A person is guilty of burglary if—*
>
> *(a) he enters any building or part of a building as a trespasser and with intent to commit any such offence as is mentioned in subsection (2);*
>
> *(b) or having entered any building or part of a building as a trespasser he steals or attempts to steal anything in the building or that part of it or inflicts or attempts to inflict on any person therein any actual bodily harm.*" [emphasis added]

6. Mr. Worrell's primary submission is that stealing or attempted stealing for the purposes of section 339(1)(b) is an offence which requires proof of an intention just as much as any offence under section 339(1(a). One only has to review the elements of the offence of stealing which appear in Part XIX of the Criminal Code[1] to see that there is considerable force in that submission.

7. The basic definition of theft in section 331(1) of the Criminal Code is that " [a] *person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and 'thief' and 'steal' shall be construed accordingly*". Section 336(1) provides:

[1] The title of Part XIX is: "*Theft, Burglary and Cognate Offences*".

> "*336(1) A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other's rights; and a borrowing or lending of it may amount to so treating it if but only if the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.*"

8. That element of the offence of stealing seems to me to clearly require proof of what might be called a "specific intent" although I would prefer to have regard to the wording of the provision dealing with the relevant defence. That is section 43 of the Criminal Code, which provides:

> "*43. Where an intention to cause a specific result is an element of an offence, then intoxication of any person charged with that offence shall be taken into account for the purpose of determining whether or not he had such an intention.*"

9. The wording of the defence signifies that intoxication if established is not an automatic defence, but is merely a factor which judges of fact are required to take into account in determining whether or not the Prosecution has proved to their satisfaction the requisite intent. I should also make reference to the provisions of section 31 of the Criminal Code because what was charged in the present case was an attempt. It seems to me that this adds a further layer of intention onto the bare offence of stealing. Section 31(1) of the Code provides:

> "*31(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is said to attempt to commit the offence.*"

10. Ms. King for the Respondent fairly pointed out that there was evidence before the Learned Magistrate which was capable of making out the elements of an attempt, depending on the view which he took of the evidence. However, she had some difficulty in extrapolating from that submission the proposition that, having regard to the Record, the Learned Magistrate had actually fairly considered the defence of intoxication and rejected it on its merits.

11. Mr. Worrell also relied upon two authorities which strongly supported his complaints about the legal analysis which formed the basis of his client's conviction. The most authoritative one was the Court of Appeal for Bermuda decision in *Robert Reginald Smith-v-The Queen,* Criminal Appeal No. 16 of 1995, Judgment dated April 17, 1996; [1996] Bda LR 9. In that case the trial judge instructed the jury on an intoxication

defence and the Court of Appeal held that this was a flawless direction. The judge in essence recited the provisions of section 43 and explained to the jury that the defence was relevant in their deliberations into whether or not they were satisfied that the defendant had the requisite intent. In giving their Judgment, the Court of Appeal made the following remarks which I think are instructive in the present case (Sir James Astwood, P, at page 4):

> "*We stated on Friday, April 12 1996 in the Judgment of this Court in the case of Daniel Anthony Jerome Cann [1994] CA 12 that Judges when dealing with a Code offence should direct juries by reference to the terms of the Code and not necessarily by reference to expositions of the Law of England.*"

12. Having referred to that authority, Mr. Worrell nevertheless relied upon a persuasive authority, '*Blackstone's Criminal Practice 2010*' and the following extract set out at paragraph A3.10:

> "*The principal restriction imposed on defences based on intoxication is that voluntary intoxication can only give rise to a defence to crimes of specific rather than the basic intent. The precise nature of the distinction between these two categories of offence has been shrouded in obscurity ever since Lord Birkenhead used the phrase 'specific intent' in DPP v Beard [1920] AC 479. Matters are little clearer today, especially in the light of the obiter comments of the Court of Appeal in Heard [2008] QB 43. Prior to this decision, in the view seemed to have emerged that any offence for which only intention will suffice as the mental element can be regarded as an offence of specific intent, whereas crimes satisfied by recklessness are to that extent crimes of basic intent. Thus murder, theft, robbery, wounding with intent, burglary under the Theft Act 1968, s. 9(1)(a), and any offence of attempt would also appear to be crimes requiring a specific intent and it is open to the accused to adduce evidence that he lacked the specific intent and it is open to the accused to adduce evidence that he lacked the specific intent required by these offences due to voluntary intoxication. There is no doubt that these offences remain offences which require a specific intent.*"

13. This authority is pertinent to the Bermuda Criminal Code position because our definition of stealing is now based on that found in the Theft Act 1968. And so the view of the Learned Editors of *Blackstone*[2], to the effect that offences of stealing and attempted stealing would require proof of specific intent, would apply with greater force to the defence of intoxication[3] under section 43 of the Criminal Code; because in my judgment section 43 is very broadly expressed. The crucial question is simply

[2] The General Editors are Hooper LJ and Professor David Ormerod.
[3] In relation to the offence charged in the present case.

whether there is a requirement of an intention to achieve a particular result as an element of a particular offence.

14. And it seems to me that such element existed beyond any serious argument in the offence with which the Appellant was charged in the present case.

Conclusion

15. In those circumstances it is clear that the appeal should be allowed and the conviction quashed.

Dated this 15th day of April 2013, _____

IAN R.C. KAWALEY CJ